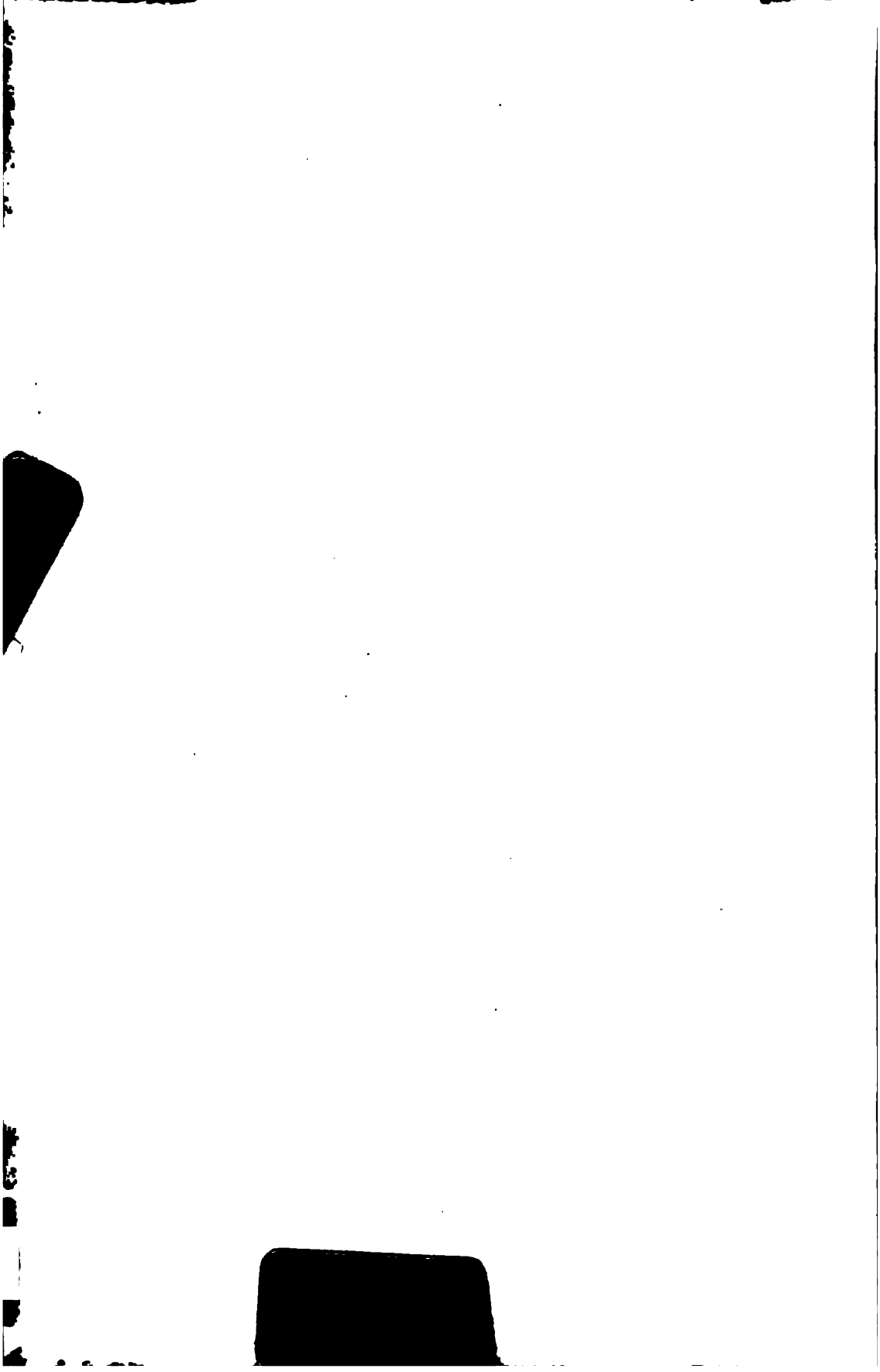

THE

LAW REPORTS.

Court of Common Pleas.

REPORTED BY

JOHN SCOTT AND HENRY BOMPAS,

BARRISTERS-AT-LAW.

EDITED BY

JAMES REDFOORD BULWER, Q.C.

VOL. IV.

FROM MICHAELMAS TERM, 1868, TO TRINITY TERM, 1869,

BOTH INCLUSIVE.

XXXII VICTORIA.

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1869.

JUDGES

OF

THE COURT OF COMMON P

XXXII VICTORIA.

The Right Hon. Sir WILLIAM BOVILL, C.J.
Sir JAMES SHAW WILLES, Knt.
Sir JOHN BARNARD BYLES, Knt.
Sir HENRY SINGER KEATING, Knt.
Sir MONTAGUE EDWARD SMITH, Knt.
Sir WILLIAM BALIOL BRETT, Knt.

ATTORNEYS GENERAL.

Sir JOHN BURGESS KARSLAKE, Knt.
Sir ROBERT PORRETT COLLIER, Knt.

SOLICITORS GENERAL.

Sir RICHARD BAGGALLAY, Knt.
Sir JOHN DUKE COLERIDGE, Knt.

LELAND

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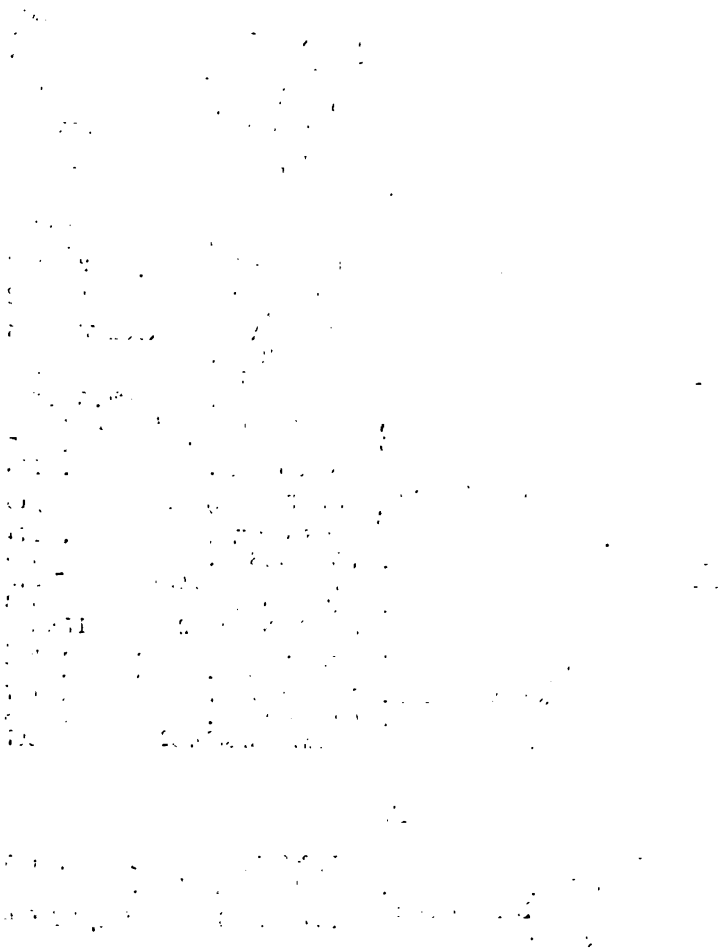
IN THIS VOLUME.



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IN AND AFTER

MICHAELMAS TERM, XXXII VICTORIA.

BOAST *v.* FIRTH.

1868
Nov. 9.

Apprenticeship Deed—Pleading—Excuse of Performance—Act of God.

Incapacity, by reason of the intervention of an act of God, to perform personal service, is an excuse for its non-performance, notwithstanding a covenant to serve absolute and unconditional in its terms; because the parties at the time of entering into the covenant must be supposed to have contemplated the continuance of the covenantor's ability to perform the service, as one of the conditions of the contract.

To an action for breach of an apprenticeship-deed, the defendant (the father) pleaded that the apprentice "was and is prevented by the act of God, to wit, by permanent illness, happening and arising after the making of the indenture, from remaining with or serving the plaintiff during all the said term:"—

Held, on demurrer, a good plea in excuse of performance, without any averment that the plaintiff had notice of the illness before the commencement of the action.

THE declaration stated that, by an indenture of apprenticeship under seal, dated the 20th of January, 1865, and made between Joseph Firth of the first part, William Firth (therein described as the son of Joseph Firth) of the second part, and the plaintiff of the third part, W. Firth, with the consent of J. Firth, put and bound himself apprentice to and with the plaintiff, to be taught and

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instructed in the art and trade of a chemist and druggist, &c., for the term of five years from the date of the indenture; that, by the said indenture, J. Firth, for himself and his administrators, covenanted with the plaintiff that W. Firth should and would honestly remain with and serve the plaintiff as his apprentice during all the term; that, although after the making of the indenture the plaintiff received W. Firth into his service as such apprentice for the term aforesaid, and although the plaintiff had always performed and been ready and willing to perform all things in the indenture on his part to be performed, and although before action all conditions had been performed, &c., to entitle the plaintiff to a performance of the said covenant, and to maintain the action for the breach thereof thereinafter alleged,—yet the said W. Firth, after the making of the indenture and during the term, did not nor would honestly remain with or serve the plaintiff as his apprentice during all the said term; whereby the plaintiff lost the work, labour, and services of W. Firth, and was prevented from conveniently and agreeably carrying on his trade of a chemist, &c., and incurred expense in procuring the services of other persons in his stead.

Second plea,—that W. Firth was and is prevented by the act of God, to wit, by permanent illness [happening and arising after the making of the said indenture], from remaining with or serving the plaintiff during all the said term. Demurrer. Joinder.

Tapping (*Waddy* with him), in support of the demurrer. The covenant being absolute and unconditional, the covenantor is bound to perform it, notwithstanding the illness of the apprentice. In *Rex* v. *Hales Owen* (1), it was held that the fact of the apprentice being lame and having the King's evil, and being in the opinion of surgeons incurable, was no ground for discharging the master from his obligation; "for, the master takes him for better and worse, and is to provide for him in sickness and in health." The law is similarly stated in Com. Dig. *Justices* (B. 57), add. 4 (ed. 1822); 5 Bac. Abr. *Master and Servant* (C.) p. 345, ed. 1832; 1 Wms. Saund. 313, n. (2). If the master could not be discharged, there can be no reason why the apprentice and those who covenant for him

(1) 1 Str. 99.

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should be absolved from performance. There cannot be one law for the master and another for the apprentice. The plea relies upon an illness which may be of a temporary character only as a discharge of the apprentice's service for the whole term.

[MONTAGUE SMITH, J. The plea traverses the breach in terms, and must be understood as merely setting up an excuse for the non-performance of the covenant so long as the incapacity to serve through illness continues.]

Then, it is not alleged that the inability to perform the contract arose after the date of the indenture: if it existed at that time, it is no excuse, for it was the fault of the covenantor if he covenanted with knowledge of the inability.

[MONTAGUE SMITH, J. That objection may be obviated by an amendment, alleging that the illness arose after the making of the indenture. (1)]

The allegation in the plea is, that the apprentice was prevented from giving his services by the act of God, to wit, by permanent illness. That is ambiguous. It is not every illness, though it be permanent, which can be said to be the act of God. It may have arisen from the wilful carelessness or imprudence or misconduct of the apprentice: and then it would be no excuse. All the precedents define the particular act of God which causes the incapacity to perform the contract. In the New York Civil Code, p. 215, s. 727, the act of God is described as "an irresistible superhuman cause." In Story on Contracts, s. 752, as "inevitable accident without the intervention of man." In Broom's Maxims, 3rd ed. 211 (2), it is said: "The act of God signifies, in legal phraseology, any inscrutable accident occurring without the intervention of man, and may, indeed, be considered to mean anything in opposition to the act of man, as storms, tempests, and lightning." The plea should have alleged the particular act of God relied on; as, if the incapacity arose from lightning, or from sudden paralysis, or some other disaster wholly beyond human control.

This is a general and unconditional covenant that the apprentice shall serve his master during the stipulated term of five years. If a party, by his covenant creates a duty or charge upon himself, he

(1) The plea was amended by introducing the words printed within brackets.

(2) 4th ed. p. 227.

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is bound to perform it, notwithstanding any accident by inevitable necessity, or pay damages for its non-performance: *Paradine* v. *Jane*. (1) If the parties here meant to excuse themselves from the performance of the covenant, in the event of illness of the apprentice, that should have been introduced as an exception. It cannot be implied. The principle laid down in *Paradine* v. *Jane* (1), is strongly illustrated by the case of *Hall* v. *Wright*. (2) There the defendant, in an action for breach of promise of marriage, pleaded that, after the agreement and before any breach thereof, the defendant became and was, and thenceforth hitherto had been and still was, afflicted with dangerous bodily disease, which had occasioned frequent and severe bleeding from his lungs, and by reason of which disease the defendant then became and was, and from thence hitherto had been and still was, incapable of marriage without great danger of his life, and therefore unfit for the marriage state, *whereof the plaintiff had notice before the commencement of the action*. At the trial the jury found all the averments in the plea in favour of the defendant, except the averment of notice, which they negatived, the Court of Queen's Bench were equally divided as to whether the plea was sufficient: but the Court of Error, by a majority of four judges to three, held the plea bad. The plea in this case contains no allegation that the plaintiff had notice of the illness before the commencement of the action; nor is the nature of the illness set forth.

[MONTAGUE SMITH, J. In *Hall* v. *Wright* (3), there was no impossibility on the defendant's part to perform his promise to marry the plaintiff. It was for the latter,—as was observed by Willes, J. (3),—to determine whether she would absolve him from it or not.]

In *Cuckson* v. *Stones* (4), the plaintiff agreed to serve the defendant for ten years in the capacity of brewer; and the defendant agreed to pay the plaintiff 20*l.* on the execution of the agreement, to furnish him with a house and coals, and to pay him the weekly sum of 2*l.* 10*s.* during the ten years. During the term the plaintiff

(1) Aleyn, 27.

(2) E. B. & E. 746; 27 L. J. (Q.B.) 345; in error, E. B. & E. 765; 29 L. J (Q.B.) 43.

(3) E. B. & E. 765, 786; 29 L. J. (Q.B.) 43, 48.

(4) 1 E. & E. 248; 28 L. J. (Q.B. 25.

fell ill, and the defendant refused to pay him his wages for the period during which he remained ill, but the service was not determined. In an action to recover the wages for the period during which the plaintiff had been ill, the defendant pleaded that the plaintiff was not during any part of the time for which such wages were claimed ready and willing or able to render, and did not in fact during any part of such time render, the agreed or any service. It was held that the averment that the plaintiff was not ready and willing, &c., was not supported by his physical inability for a time only, *and not through his own default*, to attend personally to the business; and that, the contract not having been rescinded, the defendant was not entitled to suspend the weekly payments during that time. Lord Campbell, in delivering the judgment of the Court, says (1): "Looking to the nature of the contract sued upon in this action, we think that want of ability to serve for a week would not of necessity be an answer to a claim for a week's wages, if in truth the plaintiff was ready and willing to serve had he been able to do so, and was only prevented from serving during the week by the visitation of God, the contract to serve never having been determined. . . . We concur in the observation of Willes, J., in *Harmer* v. *Cornelius* (2); and, if the plaintiff, from unskilfulness, had been wholly incompetent to brew, or by the visitation of God he had become, from paralysis or any other bodily illness, permanently incompetent to act in the capacity of brewer for the defendant, we think that the defendant might have determined the contract. He could not be considered incompetent by illness of a temporary nature."

[MONTAGUE SMITH, J. Lord Campbell there treats the illness as the act of God.]

At all events, the plea should have averred that the plaintiff had notice of the illness before the commencement of the action.

Thrupp, contrà. The Court of Error, in *Hall* v. *Wright* (3), did not hold notice to be necessary; and both Wightman, J., and Erle, J., in the Court below (4), expressly say that the want of notice is not material.

(1) 1 E. & E. at p. 256; 28 L. J. (Q.B.) at p. 28.

(2) 5 C. B. (N.S.) 236; 28 L. J. (C.P.) 85.

(3) E. B. & E. 765; 29 L. J. (Q.B.) 43.

(4) E. B. & E. at pp. 756, 758: 27 L. J. (Q.B.) at pp. 352, 353.

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[MONTAGUE SMITH, J. The defendant may if he chooses amend by adding to the amendment already agreed to the words "whereof the plaintiff had notice before the commencement of this action;" and this, we think, he ought to be allowed to do without costs, if he elects to amend at once.]

The plea amounts only to an excuse for non-performance of services by the apprentice during the time alleged in the declaration. The act of God has always been held to be a sufficient excuse for non-performance of a covenant: Shep. Touchst. 173; *Williams* v. *Lloyd.* (1) *Hall* v. *Wright* (2) was a totally different case from this. There was no averment there that the defendant's promise was impossible of performance, but merely that he could not perform it without great danger to his life. The Court of Error decided that that was no answer. Wightman, J., in his judgment in the Court below (3), expressly says: "If the performance of the promise had become impossible by the act of God, it would have been an excuse for non-performance; but, in the present case, the performance of the promise is not alleged to be, nor is it, impossible, but only highly dangerous to the life of the person promising." *Taylor* v. *Caldwell* (4) is expressly in point to shew that an incapacity, by reason of the intervention of the act of God, to perform personal service affords an excuse for its non-performance. In that case, A. agreed with B. to give him the use of a music hall on certain specified days, for the purpose of holding concerts, without any express stipulation for the event of the destruction of the music hall by fire; and the hall having been totally destroyed by an accidental fire, it was held that both parties were excused from performance of the contract. Blackburn, J., delivering the judgment of the Court (5), puts the case of an apprenticeship-deed, and says that "it is undeniable that if the apprentice dies within the seven years, the covenant of the father that he shall perform his covenant to serve for seven years is not fulfilled, yet surely it cannot be that an action would lie against the father. Yet the only reason why it would not is, that he is

(1) Sir W. Jones, 179.

(2) E. B. & E. 746; 27 L. J. (Q.B.) 345; in error, E. B. & E. 765; 29 L. J. (Q.B.) 43.

(3) E. B. & E. 757.

(4) 3 B. & S. 826; 32 L. J. (Q.B.) 164.

(5) 3 B. & S. at p. 838; 32 L. J. (Q.B.) at p. 167.

excused because of the apprentice's death." There is no difference in principle between that case and the present; and it was recognized in *Appleby* v. *Meyers*. (1) Whether the act of God produces death or permanent disability, the result is the same, so far as concerns the covenant.

Tapping in reply.

MONTAGUE SMITH, J. I am of opinion that the defendant is entitled to judgment. The action is brought upon a covenant contained in an indenture of apprenticeship by which the intestate, the father of the apprentice, covenanted that the apprentice should and would honestly remain with and serve the plaintiff as his apprentice during all the term; and the breach alleged is that the apprentice after the making of the indenture and during the term did not nor would honestly remain with or serve the plaintiff as his apprentice during all the said term, whereby the plaintiff lost the benefit of his service, and was put to expense. The plea, which is pleaded to the whole of the breach, alleges that the apprentice was and is prevented by the act of God, to wit, by permanent illness, from remaining with or serving the plaintiff during all the said term. To this plea the plaintiff has demurred; and several objections were taken to the plea, none of which we think ought to prevail. The substance of the plea is, that the apprentice was prevented from performing the service covenanted for by permanent illness which was the act of God; and the main question argued was whether such illness so caused is an answer to an absolute and unconditional covenant for personal service. I think it is. The covenant is of a personal character, depending on the personal service and attendance of the apprentice. Such service might be prevented by the permanent illness or death of the apprentice, both of which would be the act of God. It seems to me that it must be taken to have been in the contemplation of the parties when they entered into this covenant that the prevention of performance by the act of God should be an excuse for its non-performance. If the matter had been quite barren of authorities, I should have come to that conclusion.

The service stipulated for was something which the party con-

(1) Law Rep. 1 C. P. 615; in error, Law Rep. 2 C. P. 651.

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tracting to render it only could perform, and that provided he should live and continue in a state of health to enable him to do so. It must, therefore, necessarily be implied from the nature of the contract that the continued existence of the apprentice in a state to perform his part of it, was understood by the parties; and that, if prevented by the act of God, the performance was to be excused. The case, however, is not without authority. The case of *Taylor* v. *Caldwell* (1) seems to me to have decided in principle that, in such a case as this, where the parties are contracting for personal services, it is an implied condition that the performance of the contract shall not be rendered impossible by the act of God. Mr. Tapping, for the plaintiff, relied as to this part of the case, upon *Hall* v. *Wright*. (2) It seems to me, however, that that case is clearly distinguishable. In the case of a contract to marry, the man, though he may be in a bad state of health, may nevertheless perform his contract to marry the woman, and so give her the benefit of social position so far as in his power, though he may be unable to fulfil all the obligations of the marriage state; and it rests with the woman to say whether she will enforce or renounce the contract. Here, however, the state of things is totally different. I construe the plea to mean that the plaintiff was permanently disabled from the performance of the service covenanted for. That view of the case renders the proposed amendment unnecessary. It appears to me to afford a good defence without any averment of notice. Our judgment will therefore be for the defendant on the plea as it stands, with the introduction of the averment that the illness accrued after the date of the contract.

BRETT, J. In support of the demurrer in this case, it has been argued with much force that the covenant is absolute and unconditional, and therefore that, though the apprentice was prevented by the act of God from performing the stipulated services, still the defendant is bound to pay damages. If the first proposition could be sustained, the second, I apprehend, would follow. But the first is denied on the part of the defendant. It is said that, where the

(1) 3 B. & S. 826; 32 L. J. (Q.B.) 164; in error, E. B. & E. 765; 29 L. J. (Q.B.) 43.
(2) E. B. & E. 746; 27 L. J. (Q.B.) 345;

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contract is for personal services, and both parties must have known and contemplated at the time of entering into it that the performance of the services was dependent on the servant's continuing in a condition of health to make it possible for him to render them, and a disability arises from the act of God, the non-performance of the contract is excused; and that this is a contract of that nature. I agree with both those propositions. I think permanent illness by the act of God is an exception by way of excuse out of the contract. And I further agree that the allegation that the plaintiff had notice that the illness accrued after the making of the contract, is immaterial. The other amendment, however, I think was necessary. *Taylor* v. *Caldwell* (1) seems to me to be an authority for the principle on which we decide this case.

Judgment for the defendant.

Attorney for plaintiff: *W. K. Braund.*

Attorney for defendant: *W. Flower, for Wood & Killick, Bradford.*

GUEST *v.* THE WORCESTER, BROMYARD, AND LEOMINSTER RAILWAY COMPANY.

Nov. 25.

Railway Company—Scire facias against a Shareholder—Paid-up Shares.

A railway company deposited with a bank 1500 shares as security for an advance of 5000*l.*, the certificate on the face of it purporting that the shares were "registered as fully paid up in the books of the company." In the Register of Shareholders the names of the chairman and manager of the bank were inserted simply as holders of the shares; but in the Call Book was this memorandum, "Deposited at bank as security for overdraft." Upon a rule for a sci. fa. against the persons in whose names the shares were registered:—

Held, that they were not liable; but, the plaintiff being desirous of raising the question upon the record, the Court allowed the sci. fa. to go, subject to a special case.

Bridge obtained a rule nisi for a sci. fa. against Richard Padmore and Martin Abell, alleged shareholders in the Worcester, Bromyard, and Leominster Railway Company, on a judgment obtained by the plaintiff against the company on the 17th of July, 1868, for 1249*l.* 10*s.* 4*d.* The company's railway was partly in

(1) 3 B. & S. 826; 32 L. J. (Q.B.) 164.

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Herefordshire and partly in Worcestershire, their chief office being in Worcester. Writs had been duly issued into both those counties, and returned nulla bona: and it was sworn that the company had neither lands nor goods, save lands of small value which had been handed over to the creditors. It was sworn that it appeared from an inspection of the register that Padmore and Abell were the holders of 1500 shares of 10*l.* each in the company, no part of which had been paid up.

From the affidavit in answer it appeared how Padmore and Abell became shareholders in this company. The railway company, in the year 1864, being in want of money, applied to the Worcester City and County Banking Company (with whom they kept an account) to allow them an overdraft of 5000*l.* Their request was after some negotiation acceded to, on the terms of their depositing with the bank, by way of security, fully paid-up shares in their company to the nominal value of 15,000*l.* Accordingly, on the 7th of September, 1864, a resolution of the directors was agreed to for the purpose of carrying out the arrangement; and a certificate for 1500 shares of 10*l.* each was issued to Messrs. Padmore and Abell (the former of whom was chairman and the latter manager of the bank) as trustees for the bank, in the following form:—

"Reg. No. 197. Certificate of one thousand five hundred 10*l.* shares.

"These are to certify that Richard Padmore and Martin Abell, of Worcester, bankers, are the registered proprietors of 1500 shares No. 4308 to 5807 of the Worcester, Bromyard, and Leominster Railway Company, subject to the rules and regulations and orders of the said company," &c.

Across this certificate was written by the secretary of the company,—"These shares are registered as fully paid up in the books of the company." Since proceedings against them were threatened, Padmore and Abell inspected the Register of Shareholders and the Call Book of the company, and found that their names appeared in the former as the holders of 1500 shares, numbered 4308 to 5807, and that opposite to their names in the Call Book was the following memorandum,—"Deposited at bank as security for overdraft." The affidavit further stated that Padmore and

Abell had not given the company authority to place their names in the register of shareholders, otherwise than as above; and that the company obtained the 5000*l.*, which still remained unpaid. No calls had ever been made on them, though the whole 10*l.* per share had been called up against the others.

Mellish, Q.C., and *A. Wills*, shewed cause. It may be doubted whether the transaction was valid at all, the company's borrowing powers being confined to borrowing money on debentures. But, be that as it may, these gentlemen never incurred any liability to the company as shareholders. An entry in the register made without their consent or knowledge cannot bind them. There are several cases in equity which clearly negative their liability. In *Ex parte Currie, In re Great Northern and Midland Coal Company* (1), shares in a projected company were allotted in payment of the purchase-money of property on which the intended company was about to carry on its business, and were accepted and treated by the vendor of such property as paid-up shares, and he afterwards transferred to each of the directors of the company 100 of them. A commissioner of bankruptcy, in winding up the company, placed the names of each of these directors on the list of contributories, and made a call upon them. The Lords Justices, on appeal, held that, as the shares had been allotted to a stranger as paid-up shares, they must be so considered, and the directors' names be removed from the list in respect of them. "Contribution," says Lord Justice Turner, "must be made according to the liability of the parties at law or in equity. These shares have not been issued to the directors, but have been allotted to Butcher as part of the agreement with him, as paid-up shares. If the agreement was valid, then neither Butcher himself nor any alienee from him can be called upon to contribute in respect of those shares." A similar question arose in *Re British and Foreign Cork Company; Leifchild's Case.* (2) There, the articles of association of a joint-stock company stated that certain shares subscribed for by C. should be considered as paid up. By deed of even date with the articles, C. assigned a patent to the company for a nominal consideration of 10*s.*; there being

(1) 32 L. J. (Ch.) 57. (2) 13 L. T. (N.S.) 267.

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GUEST v. WORCESTER, &c., RAILWAY CO.

also a parol agreement that the delivery of the paid-up shares was the consideration for the assignment. C. afterwards transferred a portion of these shares to Leifchild; and it was held that Leifchild was not liable to be placed upon the list of contributories, on the winding up of the company. Again, in *Ashworth* v. *Bristol and North Somerset Railway Company* (1), by a written agreement, the directors of a company agreed to transfer to the plaintiff 675 fully paid-up shares in the company as a security for moneys advanced by him on their promissory notes. They subsequently registered the plaintiff as the holder of 675 partly paid-up shares. The plaintiff being threatened with proceedings by judgment-creditors of the company, applied to the Court to rectify the register and restrain the judgment-creditors from proceeding against him at law: and Wood, V.C., held that the company had no authority to place the plaintiff on the register in any other capacity than as the holder of fully paid-up shares, and granted an injunction to restrain the company from allowing his name to remain there otherwise than as the holder of fully paid-up shares. A creditor cannot stand in a better position than the company itself. If the company could not enforce the calls against these gentlemen by action, a judgment-creditor cannot have a scire facias against them.

Bridge, in support of the rule. In Lindley on Partnership, p. 618, it is said that "the issue of paid-up shares otherwise than for full value received, is primâ facie a breach of trust on the part of the directors, and the company and its creditors are entitled to have such shares treated as not paid up." For this the author cites *Re Electric Telegraph Company of Ireland* (2), and *Wood's Claim* and *Brown's Claim*. (3) Upon the register of shareholders, the only book to which the judgment-creditor could look for information, these two gentlemen appear to be shareholders, and the full amount of 10*l*. per share appears to be due from them.

[BOVILL, C.J. The register is only primâ facie evidence: and the very form of the entry, when calls appeared to have been made upon all the other shareholders, ought to have provoked inquiry.]

If they have, for an illegal purpose, allowed themselves to be held out as shareholders, they are bound. *Oakes* v. *Turquand* (4)

(1) 15 L. T. (N.S.) 561.
(2) 2 D. F. & J. 275, 295.
(3) 9 W. R. 366.
(4) Law Rep. 2 H. L. C. 325.

shews that there may be a difference between the rights of a creditor and the rights of the company as against a shareholder. It was there held that though, as between the company and the member, the member may have a good legal or equitable defence to a call upon himself, he may be liable to contribute to the assets of the company required for the payment of the company's creditors. There is no direct authority against the plaintiff: and in *Ashworth* v. *Bristol and North Somerset Railway Company* (1), the injunction was not granted as to the scire facias; the order was to be "without prejudice to any question at law between the plaintiff and the judgment-creditors." At all events, the plaintiff ought to have an opportunity of placing the question upon the record.

BOVILL, C.J. Mr. Bridge does not desire to contest the facts; and very properly, for, upon the affidavits it is clear that the bank never undertook any liability to the company in respect of these shares. They never contemplated paying calls; but accepted the certificate as a security for their advance, on the faith of the statement written thereon that the shares were registered in the books of the company as fully paid-up shares. Mr. Bridge, however, suggests that he ought not to be precluded from placing the question of law upon the record, so that the opinion of a court of error may be had upon it. In a case of this sort,—though I must confess I do not entertain a shadow of doubt,—I do not think the plaintiff ought to be prevented from trying the question in the form of a special case. The authorities referred to are very strong: but, independently of them, I should be prepared to hold that these gentlemen are not liable. The plaintiff must give notice within a fortnight whether or not he elects to have a special case; and the case must be prepared within a month; otherwise, the rule will be discharged. The question of costs may be reserved.

BYLES and KEATING, JJ., concurred.

Rule accordingly.

Attorneys for plaintiff: *Bircham & Co.*

Attorneys for defendants: *Church, Son, and Clarke, for Southall Worcester.*

(1) 15 L. T. (N.S.) 561.

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refused to issue a summons under the Bills of Exchange Act, 1855 (18 & 19 Vict. c. 67), although ready to issue an ordinary summons,—secondly, on the suggestion of greater expense and delay in the county court.

It was suggested at the bar that the county court refused the summons under the Bills of Exchange Act, on the ground that the jurisdiction to do so was taken away by s. 4 of the 19 & 20 Vict. c. 108. That section, however, does not seem to us to take away any jurisdiction possessed by the county court under the Bills of Exchange Act: and the learned counsel did not contend before us that the construction of the act attributed to the judge of the county court was correct. That being so, we think the alleged refusal of the summons is not a ground for placing the costs of the action in the superior court upon the defendant. The proper course would have been for the plaintiff to apply for an order on the judge, under s. 43.

We also think that the suggested greater expense and delay is not a ground for allowing the costs. The legislature clearly intended by the enactment in s. 5 of the 30 & 31 Vict. c. 142, that actions for small amounts which are defined by the act should be brought in the county courts; and that, if brought in the superior courts, the plaintiffs, as the rule, should not be entitled to costs. And we think the expense and delay, if they really are greater in the county court, do not form in cases like the present a sufficient exceptional ground for an order for costs. If the costs are really unduly heavy, or the delays unduly long, in the county courts, no doubt their practice in these respects will be reformed.

In conformity with this view of the act, the Court of Queen's Bench has already decided that the distance at which the plaintiff and defendant reside from each other, and the expense occasioned thereby, is no ground for allowing costs: *Re Thompson* v. *Dallas.* (1) The rule, therefore, must be refused.

Rule refused.

Attorney for plaintiff: *C. Robertson.*

(1) Law Rep. 3 Q. B. 358.

INGS *v.* THE LONDON AND SOUTH WESTERN RAILWAY COMPANY.

1868
Nov. 25.

Costs—County Courts Act, 1867 (30 & 31 *Vict. c.* 142), *s.* 5—*Verdict in Tort for less than* 10*l.*

On the 5th of October, 1867, the plaintiff commenced an action for a tort, and on the 29th of November obtained a verdict for 5*l.*; the judge reserved leave to the defendants to move to enter a nonsuit, and declined to certify for the plaintiff's costs. A rule was obtained in Hilary Term, 1868, but at the suggestion of the Court it was suspended until it was ascertained whether the plaintiff could get an order for his costs under section 5 of the County Courts Act, 1867, and the plaintiff having failed to get an order the rule was abandoned:—

Held, that although the verdict was obtained before, it was not an absolute verdict until after, the 1st of January, 1868, when the County Courts Act, 1867, came into operation, and that the case fell within the express words of section 5, and the plaintiff was not entitled to costs.

AN action of trespass was commenced on the 5th of October, 1867, and tried on the 29th of November, when a verdict was found for the plaintiff with 5*l.* damages, subject to a motion for a nonsuit, upon a point reserved. The judge declined at the trial to certify for the plaintiff's costs. In Hilary Term, 1868, the defendants obtained a rule to enter a nonsuit pursuant to the leave reserved; but, at the suggestion of the Court, the drawing up of the rule was suspended, in order to ascertain whether the plaintiff obtained an order for costs under s. 5 of 30 & 31 Vict. c. 142. (1) The rule for a nonsuit was ultimately abandoned in Easter Term, 1868.

Wright, in Trinity Term, on the authority of *Wood* v. *Riley* (2), *Restall* v. *London and South Western Railway Company* (3), and *Butcher* v. *Henderson* (4), after an unsuccessful application at chambers, obtained a rule nisi for costs, on the ground that s. 5

(1) 30 & 31 Vict. c. 142, s. 5:—"If in any action commenced after the passing of this act in any of her Majesty's superior Courts of record, the plaintiff shall recover a sum not exceeding 20*l.* if the action is founded on contract, or 10*l.* if founded on tort, whether by verdict, judgment by default, or on demurrer, or otherwise, he shall not be entitled to any costs of suit, unless the judge certify on the record that there was sufficient reason for bringing such action in such superior Court, or unless the Court or a judge at chambers shall by rule or order allow such costs."

(2) Law Rep. 3 C. P. 26.

(3) Law Rep. 3 Ex. 141.

(4) Law Rep. 3 Q. B. 335.

1868
Nov. 9.

HOLBOROW *v.* JONES.

Costs—County Courts Act, 1867 (30 & 31 *Vict. c.* 142), *s.* 5—*Bills of Exchange Act*, 1855 (18 & 19 *Vict. c.* 67)—*Practice.*

Where a plaintiff recovers in a superior court a sum not exceeding 20*l.* in an action of contract, it is not a ground for the exercise of the discretion to allow costs, given to the Court or a judge by the County Courts Act, 1867, s. 5, that he did not sue in the county court for the reason that he was misled by the registrar as to the jurisdiction of that court; nor that the expense and delay of the proceedings in the county court would have greatly exceeded those of the proceedings in the superior court.

ACTION for 15*l.* 15*s.*, the balance due upon a bill of exchange for 21*l.* 5*s.* accepted by the defendant. The plaintiff being desirous of proceeding against the defendant under the Bills of Exchange Act, 1855 (18 & 19 Vict. c. 67), applied to the registrar of the Lambeth county court, within the jurisdiction of which court both parties resided, for a specially indorsed summons,—the Bills of Exchange Act, 1855, having, by an order in council of the 30th of January, 1856, pursuant to s. 9 of that act, been applied to county courts. He was informed, however, by the officer of the court that he could only have an ordinary summons, the effect of the 19 & 20 Vict. c. 108, s. 4 (1), being to limit the jurisdiction of the county court under the Bills of Exchange Act, 1855, to cases where the sum sought to be recovered exceeds 20*l.* and does not exceed 50*l.* Finding that an ordinary summons could not come on for hearing for about twenty-one days, and that the ordinary practice of the county court was to direct payment in fourteen days, and that the costs of the summons and hearing, and of the attendance of attorney and witnesses would be at least 3*l.* 10*s.*, whereas the costs of a judgment and execution in the superior court (which might be obtained at the expiration of twelve days after service of the writ) would be 2*l.* 14*s.* only, the plaintiff issued his writ in this court.

(1) Which enacts that the provisions of this act and of the recited acts (9 & 10 Vict. c. 95; 12 & 13 Vict. c. 101; 13 & 14 Vict. c. 61; 15 & 16 Vict. c. 54) which apply to any debt not exceeding 20*l.*, shall apply to such debt or any part thereof, although the same shall be secured by or claimed upon bill of exchange or promissory note, and notwithstanding the statute of 18 & 19 Vict. c. 67."

A similar application having been made to Martin, B., at chambers, and the applicant having been referred to the Court,

Willis, upon an affidavit disclosing the above facts, moved for a rule that the master be at liberty to tax the plaintiff's costs of the action, under s. 5 of 30 & 31 Vict. c. 142. (1) The provision relied on by the officer of the county court was not intended to take away from the Court any jurisdiction which it already possessed; but was meant to be cumulative, and to enable the Court to order payment by instalments if it thought fit.

[MONTAGUE SMITH, J. If your contention is right, the officer of the county court was wrong. But is that any ground for asking us to impose costs upon the defendant? The plaintiff might have applied for a rule under s. 43 of the 19 & 20 Vict. c. 108, to compel the county court judge to hear the matter.]

Seeing the great delay and the increased expense of proceeding by an ordinary summons in the county court, it is submitted that this is a fit case for the exercise of the discretion of the Court.

[MONTAGUE SMITH, J. The question is whether the fact of the plaintiff choosing to resort to the superior court in order that he might have speedy judgment, is any ground for asking us to visit the defendant with costs. We will look at the affidavit and at the acts of parliament before we grant a rule.]

Cur. adv. vult.

Nov. 9. The judgment of the Court (Montague Smith and Brett, JJ.), was delivered by

MONTAGUE SMITH, J. In this case, in which Mr. Willis moved for a rule to allow the plaintiff his costs, we think there should be no rule. The action was brought to recover a balance of 15*l.* 15*s.* due on a bill of exchange. The application was made on two grounds,—first, on the ground that the officer of the county court

(1) 30 & 31 Vict. c. 142, s. 5:—"If in any action commenced after the passing of this act in any of her Majesty's superior courts of record the plaintiff shall recover a sum not exceeding 20*l.* if the action is founded on contract, or 10*l.* if founded on tort, whether by verdict, judgment by default, or on demurrer, or otherwise, he shall not be entitled to any costs of suit, unless the judge certify on the record that there was sufficient reason for bringing such action in the superior court, or unless the Court or a judge at chambers shall by rule or order allow such costs."

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it before or after the 1st of January, 1868? He recovered a verdict before that day, but, with his consent, leave was reserved to the defendants to move to enter a nonsuit. That motion could not be made until after the 1st of January, 1868. The rule was suspended at the suggestion of the Court, and ultimately abandoned. Until the abandonment of the rule, the plaintiff had no right to recover the 5*l*. It seems to me, therefore, that the case is precisely one in which the plaintiff has after the commencement of the act recovered a verdict in respect of which s. 5 in terms deprives him of costs. It is unnecessary to notice any of the cases referred to, because the precise point which arises here was not determined in any of them.

Keating, J. I am of the same opinion. The question is when did the recovery take place. Mr. Wright insists that it was on the 29th of November, when the verdict was taken. That undoubtedly would have been so if it had been an absolute verdict. But it was not an absolute verdict: it was conditional on the plaintiff maintaining it. He did maintain it, but not until after the 1st of January, 1868. That distinguishes the case from *Wood* v. *Riley*. (1) Mr. Wright insists that, on the abandonment of the rule to enter a nonsuit, the plaintiff is remitted to the position he stood in when the verdict was pronounced. But I think that would be a violation of the plain words of s. 5.

Brett, J. I am of the same opinion. It seems to me that there was no recovery until the plaintiff was in a position to sign judgment. This he could not do upon a conditional verdict. The case therefore falls clearly within s. 5. The plaintiff has after the 1st of January, 1868, recovered, in an action commenced after the passing of the act, a verdict which disentitles him to costs. *Wood* v. *Hunt* (2) expressly decided that, although the act did not come into operation until the 1st of January, 1868, yet it then spoke from the time of its passing.

Rule discharged, with costs.

Attorney for plaintiff: *H. R. Jones.*
Attorney for defendants: *L. Crombie.*

(1) Law Rep. 3 C. P. 26. (2) See note (2) antè, p. 18.

BAXTER *v.* LANGLEY.

1868
Nov. 19.

Public Entertainment or Amusement—Sunday—Religious Service—21 Geo. 3, c. 49, s. 1.

By 21 Geo. 3, c. 49, s. 1, it is enacted that any house, room, or other place which shall be opened or used for public entertainment or amusement, or for publicly debating on any subject whatsoever upon any part of the Lord's Day, called Sunday, and to which persons shall be admitted by the payment of money or by tickets sold for money, shall be deemed a disorderly house or place.

Meetings were held on Sunday evenings in a hall duly registered for that purpose as a place of religious worship. The proceedings at the meetings consisted of the performance of sacred music and the delivery of an address, which was sometimes of a religious tendency, sometimes neutral, but never profane. Admission to the body of the hall was gratuitous, but tickets were sold and money taken for admission to reserved seats. The object of the persons who held the meetings was not pecuniary gain, and they honestly intended to introduce religious worship, though not according to any established or usual form:—

Held, that the proceedings at the meetings were not an entertainment or amusement within the act.

THIS was a case stated for the opinion of the Court without pleadings, and it set out at length the proceedings at certain meetings held at St. Martin's Hall. The substance of the statements contained in it sufficiently appears from the judgment of the Court.

The question for the Court was whether on all or any, and which of the occasions, when the respective meetings were held, the room called St. Martin's Hall was opened or used for public entertainments or amusements, or for public debating on any subject whatever, on any part of the Lord's Day, contrary to 21 Geo. 3, c. 49, s. 1.

Denman, Q.C. (*Rochfort Clarke* with him), appeared for the plaintiff.

The defendant appeared in person.

Cur. adv. vult.

Nov. 19. The judgment of the Court (Willes and Byles, J.J.) was delivered by

BYLES, J. This case was argued at the sitting of the Court after last Trinity Term, before my Brother Willes and myself. Its novelty and great and general importance induced us to take time for deliberation.

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It is an action brought to recover the sum of 800*l.* as penalties incurred by the defendant under the act 21 Geo 3, c. 49, for having opened a house of public entertainment or amusement on the Lord's Day, to which the public were admitted on payment of money. The case depends on the construction of the act, which is intituled "An act for preventing certain abuses and profanations on the Lord's Day, called Sunday." The recital of the act is as follows:—"Whereas certain houses, rooms, or places within the cities of London or Westminster, or in the neighbourhood thereof, have of late frequently been opened for public entertainment or amusement upon the evening of the Lord's Day, commonly called Sunday; and at other houses, rooms, or places within the said cities, or the neighbourhood thereof, under pretence of inquiring into religious doctrines and explaining texts of Holy Scripture, debates have frequently been held on the evening of the Lord's Day, concerning divers texts of Holy Scripture, by persons unlearned and incompetent to explain the same, to the corruption of good morals, and to the great encouragement of irreligion and profaneness." Then follows the enacting clause (s. 1), upon which the question arises:—"That, from and after this present act, any house, room, or other place which shall be opened or used for public entertainment or amusement, or for publicly debating on any subject whatsoever, upon any part of the Lord's Day, called Sunday, and to which persons shall be admitted by the payment of money, or by tickets sold for money, shall be deemed a disorderly house or place, and the keeper of such house, room, or place shall forfeit the sum of 200*l.* for every day that such house, room, or place shall be opened or used as aforesaid on the Lord's Day, to such person as will sue for the same, and be otherwise punishable as the law directs in cases of disorderly houses." The only other part of the act of parliament to which it is necessary to call attention is the proviso in s. 8, "that nothing in this act contained shall be construed to extend to take away, alter, or abridge any of the liberties or immunities to which the Protestant subjects of this kingdom are entitled by an act made in the 1 Wm. & Mary (c. 18), intituled 'An Act for exempting their Majesties' Protestant subjects dissenting from the Church of England, from the penalties of certain laws.'"

The case states that a number of gentlemen, in December, 1866,

formed an association calling itself an association for the development of religious feeling, by the elevation and instruction of all persons who should either join the association, or attend at the services hereafter described. The defendant was president of the association; and he duly registered a place called St. Martin's Hall as the place of meeting intended to be used for religious worship by the association, under the title of Recreative Religionists. This designation was explained at the Bar to refer, not to recreation in its ordinary sense, but to the creation of a new form of religious worship, by which it was hoped to remedy the alleged indifference of the people at large to ordinary religious services.

The services in question, at St. Martin's Hall, were held on Sunday evenings; which hall for this purpose was registered as a place of religious worship. These services consisted of pieces of sacred music, such as the Stabat Mater, performed on the organ, accompanied by other instruments and by a gratuitous choir; but there were some paid singers. An address was delivered, always instructive, sometimes of a religious tendency, sometimes neutral rather than religious, but never aggressively irreligious, and never profane. There seems to have been a desire to introduce the singing of hymns; and to this end certain hymns were printed and circulated among the audience, but they were never sung. Some of the hymns could scarcely be called devotional compositions; but, among the hymns was to be found Addison's metrical paraphrase of the 19th psalm. In most of them were expressed sentiments of adoration towards the Supreme Being; and in all of them exhortations to moral duty. There was no public prayer or address to the Deity, other than was contained in the musical compositions. There was no debating or discussion; nothing dramatic or comic, or tending to the corruption of morals, or to the encouragement of irreligion or profanity.

Admission to the body of the hall was gratuitous; but tickets were sold, and money taken for admission to reserved seats. The object of the promoters of the association was not pecuniary gain: on the contrary, the services were carried on at a pecuniary loss to themselves, although attended by considerable numbers of the public.

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Few litigants present themselves under circumstances which entitle them to greater respect. The plaintiff is honestly endeavouring to stop by this action what he deems a public desecration of the Lord's Day, and only asks judgment for a single penalty. The defendant is expending his time and money, as he conceives, for the public benefit. The plaintiff, however, contends that the registration of the place of meeting as a place for religious worship was a mere colourable attempt to evade the effect of the statute 21 Geo. 3, c. 49. But this is a question of fact; and we are by the terms of the special case to draw inferences of fact: and we think this imputation on the defendant is not well founded, but that the defendant honestly did intend to introduce religious worship, though not according to any established or usual form.

We have now to determine whether the services at St. Martin's Hall, so registered, constituted a disorderly house, within the true meaning of the statute 21 Geo. 3, c. 49. The precise question therefore is, whether the services above described constituted a public "entertainment or amusement" within the meaning of the statute.

It is not easy, nor indeed necessary, to define the exact meaning of the word "entertainment" in this connection: but perhaps the two words "entertainment or amusement" reflect light on each other. Some assistance may possibly be derived from the original act 25 Geo. 2, c. 36, which statute speaks of "public dancing, music, or other public entertainment of the like kind," as constituting a disorderly house. It is not, however, necessary to express any opinion on many questions which might arise, e.g. whether meetings for mere instruction be within the statute; whether, for instance, a lecture on the higher branches of the pure mathematics would be an "entertainment" within the statute. But, whatever the true definition of the expression "entertainment or amusement" may be, we think it quite clear that meetings for religious worship are not within the act. It is not essential to such protected religious worship that it should be in accordance with the religion of the State, or even with the general religion of the nation. The worship of Jews, who deny the Christian Revelation entirely, and of Mahomedans, who supersede it (some millions of whom are now

our fellow-subjects), would not be within the statute, if any of their festivals happened to fall on the Lord's Day, and persons were admitted partly gratuitously and partly by tickets, as in the case under consideration. Indeed, Jews are now placed on the footing of Protestant Dissenters.

The plaintiff may consider the worship to be of a dangerous tendency, or the religious element introduced to be so scanty and shadowy as to be altogether inadequate to meet the urgent necessities or satisfy the religious instincts of human nature: but these are inquiries into which we, it is plain, cannot enter.

Some stress was laid on the fact that the words sung were often in the Latin language only, and that the principal attraction was the music. But, if this objection prevailed, it is easy to see that it would have a more extensive application than the plaintiff contemplated.

The discourses delivered were intended to be instructive. It is true that occasionally a diverting incident or passage was introduced. But it must be remembered that the greatest preachers of the English Church, such as Bishop Latimer or Dr. South, have not hesitated to do the same, when the subject required it, or perhaps when it became necessary to sustain attention.

It is sufficient to say that in our opinion a place duly and honestly registered as a place of public worship, in which no music but sacred music is performed or sung, where nothing dramatic is introduced, where the discourses delivered are intended to be instructive, and contain nothing hostile to religion, where the objects of the promoters may be either to advance their own views of religion, or, as they allege, "to make science the handmaid of religion," is not "used for public entertainment or amusement" within the statute.

Our opinion being that the case does not fall within the enacting clause, it is only necessary to observe on the proviso in s. 8, that the fact of payment being made for the reserved seats, the doors being open, does not deprive the defendant of the protection of the Toleration Act: see 1 Wm. & Mary, sess. 1, c. 18.

We are duly sensible of the inestimable value and importance to the whole nation of the statutes passed to prevent the desecration of the Lord's Day: but we think we should unduly stretch

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a penal enactment, if we applied the statute of 21 Geo. 3, c. 49, to the case now under consideration.

Judgment for the defendant.

Attorneys for plaintiff: *Baxter, Rose, & Norton.*
The defendant in person.

Nov. 19.

VISCOUNT TORRINGTON *v.* LOWE.

Sale of Shares—Regulations of the Stock-Exchange—Indemnity against Calls.

The plaintiff, the registered holder of shares in a joint-stock company, on the 10th of May, 1866, through his broker, sold on the Stock-Exchange twenty of them to one Paine (a jobber) for the settling-day, the 15th of May. The defendant, on the 2nd of May, through his broker, bought of Paine twenty shares in the same company for the same account; and, on the day before the settling-day, his broker, having learnt from Paine that the plaintiff's broker was to supply the twenty shares so purchased by him, instructed Paine to give the name of Cotton as the transferee. A transfer into the name of Cotton was prepared according to the custom of the Stock-Exchange, and duly executed by the plaintiff and by Cotton. Cotton neither paid nor agreed to pay the defendant any sum in respect of the shares; and, although there was no agreement as to the terms on which the defendant was to make use of the name of Cotton, the former had authority to have the shares transferred into the name of Cotton as his nominee.

A petition for winding up the company having been afterwards presented, the liquidators refused to register the transfer, and placed the plaintiff on the list of contributories, and he was consequently obliged to pay certain calls:—

Held, that the plaintiff was not entitled to be indemnified by the defendant against such calls.

SPECIAL case in an action brought by the plaintiff to recover from the defendant 100*l.* and interest, for a call made by the liquidators of the Imperial Mercantile Credit Association, Limited, on shares in the association alleged to have been sold by the plaintiff to the defendant.

1. The Imperial Mercantile Association, Limited, was incorporated under The Companies Act, 1862 (25 & 26 Vict. c. 89), and registered on the 24th of June, 1864.

2. In the months of February and March, 1866, the plaintiff purchased and had transferred to him 120 shares in the association, on which 5*l.* each had been paid. After he became such owner,

a call of 5*l.* per share was made; and the plaintiff paid that sum on each of his 120 shares.

3. On the 10th of May, 1866, the plaintiff, being desirous of disposing of his shares, instructed his stock-brokers, Lawrence, Son, & Pearce, to sell them on the London Stock-Exchange, in the ordinary way, at the current price of the day. Accordingly, the brokers sold the plaintiff's 120 shares on that day to different jobbers on the Stock-Exchange. The following is a copy of the sold-note handed to the plaintiff by his brokers:—

"7, Angel Court, London, 10th May, 1866.

"Sold for Right Hon. Viscount Torrington 120 Imperial Mercantile Credit shares, 10*l.* paid,

viz. 20 to L. Paine.
50 to J. Paine.
50 to W. Morris.

"For 15th instant, @ 8¾ dis. 150*l.*

"Lawrence, Son, & Pearce."

Such sales were made in the ordinary course of business, for the next settling-day, May 15. The names of L. Paine and J. Paine and W. Morris in the sold-note are the names of the jobbers above referred to. Although the names of the jobbers are there inserted, this is not in pursuance of any invariable practice.

4. On the 2nd of May, the defendant instructed his brokers, Spencer & Norton, to purchase on the Stock-Exchange, for the same account, viz. the 15th of May, twenty shares in the same association; and they did accordingly on that day purchase from L. Paine twenty shares, and forwarded to the defendant a bought-note, of which the following is a copy:—

"22, Throgmorton Street, May 2nd, 1866.

"Bought for and on account of John Lowe 20 Imperial Mercantile Credit, @ 5⅛ dis. 10*l.* paid £97 10 0

Commission 15 0

. £98 5 0

"Spencer & Norton, brokers."

The defendant never had any transaction with the plaintiff except as appears by this case; nor was he aware at the time of

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the above purchase who would be the real seller of the shares to him. Spencer & Norton on the 2nd of May purchased for the defendant and other persons, in manner aforesaid, but from other jobbers, other shares in the same association, for the same account, viz. 15th of May, 1866.

5. In the regular course of business, and according to the rules and established custom of the Stock-Exchange, it would be the duty of the jobbers on the Stock-Exchange, some day before the settling-day, to settle accounts with the purchasing and selling brokers, and then the purchasing broker on the day before the settling-day gives to the selling broker, through the jobber, the name and description of the transferee, to fill into the transfer; and, accordingly, Spencer & Norton, on the 14th of May, having ascertained then for the first time from L. Paine that Lawrence, Son, & Pearce were to supply twenty of the shares purchased by them, instructed him to give to Lawrence, Son, & Pearce the name of one Charles Cotton as the transferee of twenty of the shares so purchased by them.

6. A transfer into the name of Cotton was then prepared, in pursuance of the aforesaid instructions, in fulfilment of one of the contracts so entered into, by Spencer & Norton, on behalf of the defendant, as stated in paragraph 4: but the fact of the plaintiff being a transferor of twenty shares, in fulfilment of one of these contracts, was the act of the brokers and jobbers only, without the previous knowledge of either of the parties to the action, and was done in accordance with the established custom of the Stock-Exchange.

7. The transfer was duly executed *by both parties*, in the proper form prescribed by the articles of association. The following is a copy of the transfer:—

"I, the Right Hon. George Byng, Viscount Torrington, of &c., in consideration of 50*l.* paid to me by Charles Cotton, of &c., do hereby bargain, sell, assign, and transfer to the said Charles Cotton 20 shares, numbered 59336 @ 59345, 12161 @ 12170, of and in the undertaking called the Imperial Mercantile Credit Association, Limited, to hold unto the said Charles Cotton, his executors, &c., subject to the several conditions on which I held the same immediately before the execution hereof: And I the said Charles Cotton

do hereby agree to accept and take the said shares, subject to the conditions aforesaid."

8. In exchange for the certificates of the twenty shares and the transfer which was duly executed by the plaintiff and Cotton, Spencer & Norton paid to the plaintiff's brokers the price at which the shares had been sold by the plaintiff's brokers, who duly accounted to the plaintiff for the same. There was a rapid fall in the value of the shares between the 2nd and 14th days of May. The price on the 14th of May was 10½ to 9½ discount.

11. Cotton has neither paid nor agreed to pay to the defendant any sum of money in respect of the said shares; and, although there was no agreement or undertaking as to the terms on which the defendant was to make use of the name of Cotton, yet the defendant had authority to have the shares transferred into the name of Cotton as the nominee of the defendant.

12. On the 12th of May, 1866, a petition was presented to the court of Chancery praying that the association might be wound up compulsorily.

On the 14th of May, another like petition was presented. On the 15th of May, both these petitions were advertised in the London Gazette. A third similar petition was presented on May 23rd; and on the 28th of May, the association, by resolution duly confirmed at a meeting held on the 14th of June, resolved to wind up voluntarily. On the 25th of June, his honour V.C. Wood made an order that the voluntary winding-up should be continued under the supervision of the Court; and such winding-up has since continued.

13. The transfer and certificates of the plaintiff's twenty shares were duly carried by Spencer & Norton on the 22nd of June, 1866, into the office of the association, where they still remain. The liquidators declined to register the transfer; and consequently the plaintiff's name was included in the list of contributories in respect of the said twenty shares. The plaintiff's solicitors thereupon gave notice to Cotton that steps would be taken to place him upon the list of contributories. At this time neither the plaintiff nor his solicitors had any knowledge of the defendant.

14. The plaintiff failing to have the name of Cotton substituted for his own, was finally settled upon the list of contributories in

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respect of the said shares; and he became liable to pay such calls as were made thereon.

15. On the 31st of August, 1866, the liquidators made a call of 5*l.* per share on each of the said twenty shares; and the plaintiff on the 6th of December, 1866, paid 100*l.*, the amount of the call, and 2*l.* 0*s.* 4*d.* for interest thereon, according to the articles of association.

16. Cotton has not repaid the plaintiff the said call or interest; and the defendant has refused to pay the said amount, or any part thereof, or to indemnify the plaintiff against the same.

17. The pleadings were not appended to the case, the parties having agreed that the Court should decide the question of liability, and might draw inferences of fact.

The question for the opinion of the Court was, whether, on the above state of facts, the plaintiff was entitled to be indemnified by the defendant against the amount of the said call and interest so paid by him as aforesaid.

Philbrick (*Sir J. B. Karslake, A. G.*, with him), for the plaintiff. The facts disclose a contract between the plaintiff and the defendant through Cotton his agent, according to *Grissell* v. *Bristowe*. (1)

[BRETT, J. Can you apply the doctrine of undisclosed principal to the case of a deed?]

There is no direct authority on the point: but it is difficult to see why the principle of *Higgins* v. *Senior* (2) should not be applied to the case of a deed.

The contract as described in par. 9 of the special case, and explained by the usage of the Stock-Exchange, was a contract for the sale by the plaintiff to the defendant of these twenty shares, and the execution of the transfer by Cotton was only a mode of carrying it out. It may be that the defendant could not be sued on the deed executed by Cotton: but it is not necessary to rely on that as the contract between these parties: nor is it any answer to say that the defendant's nominee has also entered into a contract which, according to *Sheppard* v. *Murphy* (3), before the Irish Court

(1) Law Rep. 3 C. P. 112. Reversed in Ex. Ch., post, p. 36.

(2) 8 M. & W. 834.

(3) 16 W. R. 948; overruling the decree of the Vice-Chancellor, Irish Rep. 1 Eq. 490.

of Appeal in Equity, might be enforced against him in equity even though he had not executed the transfer. The 11th paragraph of the case shews that Cotton was in reality not a substantial party to the transaction.

Arundel Rogers (*M'Kellar* with him), contrà. This case is not governed by *Grissell* v. *Bristowe*. (1) There, the action was brought by the original seller of the shares against the jobber, his immediate vendee, and no transfer had been executed by the ultimate nominee. Here, the action is by the seller against an intermediate buyer, the transfer to his nominee having been duly executed by both transferor and transferee. There never was any contract in fact between the plaintiff and the defendant. All that the defendant did was, to buy shares in the ordinary way, of a jobber on the Stock-Exchange,—not specific shares,—and to sell them again, giving the name of a transferee, which was accepted by the transferor. Upon the authority of all the cases, therefore, as soon as he had complied with the usages of the Stock-Exchange, his liability, if any ever existed, ceased: *Shaw* v. *Fisher* (2); *Cruse* v. *Paine*. (3) If the plaintiff could shew fraud or mistake in the transfer to Cotton, possibly he might have a remedy in equity. But there clearly is no such privity of contract between these parties as will enable the plaintiff to sustain this action.

Philbrick, in reply. There is abundant evidence on the face of the case to shew a privity between the plaintiff and the defendant, according to the usages of the Stock-Exchange. Cotton was in equity a mere trustee for the defendant; and the execution of the transfer by Cotton did not absolve the defendant, as the real principal in the transaction, from his liability to indemnify the plaintiff against calls. He referred to *Paine* v. *Hutchinson* (4); *Cruse* v. *Paine* (3); *Hawkins* v. *Maltby* (5); and *Evans* v. *Wood*. (6)

BOVILL, C.J. The original contract of Lord Torrington was one which he made through his brokers to sell twenty shares on the 10th of May, 1866, to be completed on the account day, viz.

(1) Law Rep. 3 C. P. 112. Reversed in Ex. Ch., post, p. 36.
(2) 5 D. M. & G. 596.
(3) Law Rep. 6 Eq. 641.
(4) Law Rep. 3 Eq. 257; on appeal, Law Rep. 3 Ch. App. 388.
(5) Law Rep. 4 Eq. 572.
(6) Law Rep. 5 Eq. 9.

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the 15th. The price at which Lord Torrington sold to Paine was 8¾ discount, which would be 25s. per share. The contract had to be performed by Paine; and he carried it out according to the usages of the Stock-Exchange, which are not dissimilar to the practices of other branches of commerce. The usages of the Stock-Exchange have not been found to lead to any practical inconvenience. The buyer may sell again before the account-day, and require the person from whom he has bought the shares to transfer them to his vendee. In the present case, Paine had contracted to sell twenty shares to the defendant, Lowe, on the 2nd of May, for the same account, but not the identical shares which he had bought from Lord Torrington, and at a different price. Paine was the only person responsible to Lord Torrington; and, in order to perform his contract with him, by arrangement with Lowe's brokers, when it became necessary to give the name of a transferee, the name of Cotton was given. Lord Torrington, through his brokers, accepted the name so given, and according to the ordinary course of business a transfer of the shares to Cotton was duly prepared and was executed both by Lord Torrington and by Cotton. All this was done for the purpose of carrying out the contract entered into by Paine with Lord Torrington; and thus Paine's liability to Lord Torrington, and his authority to bind Lowe, were equally at an end. It was insisted that there arose out of these transactions a contract between Lord Torrington and Lowe. But it seems to me to be quite clear that these two contracts between Lord Torrington and Paine on the one hand, and between Paine and Lowe on the other, made at different times and at different prices, cannot be connected together merely because one of the parties was a party to both contracts. Having executed a deed inter partes, whereby he transferred the shares to Cotton, Lord Torrington discharged Paine, and beyond all dispute Cotton became liable to accept the shares and to perform all the obligations of the original contract in respect of them. And if Paine was discharged, Lowe was equally discharged, even if there ever was a contract between him and Lord Torrington, which I think there was not. It is said that the transfer was executed by Cotton as agent for Lowe. But, even if that had been so, you cannot sue a principal on a deed to which he is no party. That is the rule at law; and

the case of *Cox* v. *Bishop* (1) seems to shew that Lowe, even if equitably interested, would not be liable. There, a mining lease contained a covenant by the lessee not to assign without the consent of the lessor. The lessee made an agreement with three other persons to give up his right in the term to them, and to execute all necessary deeds to carry the arrangement into effect, and that in the meantime the agreement should be of the same force as if such deeds had been executed. No consent of the lessor had been obtained, nor were any such deeds executed. The three entered into possession and worked the mines, and after a time the three assigned all their interest in the mines and other property comprised in the lease to a man of straw. It was held by the Lords Justices, overruling the decision of the Master of the Rolls (Sir J. Romilly), that the three, being mere equitable assignees of the lease, were not liable to the lessor for the rents and covenants in the original lease for the time they were in possession of the property demised. That seems to be an authority that Lord Torrington would have no remedy even in equity against Lowe. The cases which were referred to in the course of the argument are all plainly distinguishable. The case most pressed on the part of the plaintiff was *Sheppard* v. *Murphy*. (2) At first, I was under the impression that that case arose between the original buyer and the original seller; but, upon examination, it appears to be in substance this:—Sheppard had sold shares in Overend, Gurney, & Co., to one Kennedy, a share-dealer and member of the Stock-Exchange, and Kennedy sold an equal number of the same description of shares to Murphy, the respective sales being on different days and at different prices. Murphy's name was passed to Sheppard as that of the person to whom the shares were to be transferred; and accordingly Sheppard executed a transfer deed which, with the share certificates, was handed to Murphy's brokers, who paid the price. Murphy having failed to execute or register the transfer, Sheppard was compelled to pay a call on the shares. In a suit for specific performance and indemnity by Sheppard against Murphy, the Lords Justices, overruling the decision of Chatterton, V.C., held that Murphy was liable, although he had not executed the

(1) 26 L. J. (Ch.) 389.

(2) Irish Rep. 1 Eq. 490; on appeal, 16 W. R. 948.

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transfer. The ground upon which Murphy was held liable was, that he had caused his name to be given as the purchaser, and had accepted the transfer and paid for the shares, and so agreed to execute the deed, and therefore came within that principle of equity which assumes that to be done which ought to be done. If Murphy had executed the transfer, there could have been no doubt. But, what obligation was there upon Lowe to accept and execute a transfer from Lord Torrington? If any obligation, either at law or in equity, could be imposed on Lowe, with equal justice Paine might be said to be liable. But I have failed to discover any contract between Lord Torrington and Lowe, either by the rules of law or the usages of the Stock-Exchange. A name has been given in the ordinary course, and a transfer has been made to and executed by the person named. The transaction is therefore closed. Our judgment must be for the defendant.

BYLES, J. I am of the same opinion. It seems to me to be quite plain that there was no contract even by Paine, the jobber, upon which an action would lie against him. He enters into a contract to find a man who will consent to be the transferee of the shares and to take upon himself all the responsibilities which attach to that character. Here, Cotton was that man. Both parties to that contract have executed the deed. The seller clearly can have no recourse after that to the jobber. But, here, it is sought to go behind the jobber and affect his principal. That cannot be done. There is no identification either of the parties or the shares.

KEATING, J. I am of the same opinion. There is no privity of contract between Lord Torrington and Lowe. The original contract of sale by Lord Torrington was to Paine. In pursuance of the usage of the Stock-Exchange, Paine at the proper time gave the name of Cotton as the purchaser of the shares. It is unnecessary to stop to consider whether or not Lord Torrington was bound to accept Cotton as transferee. He did accept him; and executed under seal a transfer to him, which transfer Cotton also executed. Mr. Philbrick felt the difficulty which that imposed upon him; and he sought to evade it by endeavouring to shew that Cotton

was a mere agent, Lowe being the real principal. But, the instrument being under seal, he was precluded from that argument. There seems to me to be no ground for the suggestion that Cotton's execution of the deed was an execution by Lowe. Cotton did not profess to execute the transfer as Lowe's agent; but on his own behalf, as principal. All that Lowe undertook by his contract with Paine was, to give a name. He gave a name; and that name was accepted. I cannot help seeing that the result is oppressive to Lord Torrington, who finds himself to have transferred his shares to a person who is not a desirable shareholder. But it seems to me to be quite clear that there was no contract between Lord Torrington and Lowe upon which an action can be sustained.

BRETT, J. The only action, as it seems to me, if any, which Lord Torrington could have against Lowe would be on the implied contract of indemnity arising out of a contract of bargain and sale. The question is when and with whom such a contract was made. Now, the first contract was by Lord Torrington with Paine, the jobber. By that contract Lord Torrington probably undertook to accept a name to whom the shares were to be transferred. The only name which was given to Lord Torrington was that of Cotton. To fix Lowe with any privity, Lord Torrington would have to shew that Cotton's name was given by his procurement or consent. Ultimately, however, the contract, whatever it was, resulted in the execution of a transfer under seal by Lord Torrington to Cotton, —under the seal of both. So far, therefore, as concerns Lord Torrington, the transaction results in a contract of bargain and sale with Cotton. He now undertakes to shew that that contract was in reality made with Lowe, by shewing that Cotton was Lowe's agent. But I think that, where a contract has been made by a deed inter partes, one of the parties to that deed is not at liberty to shew that the other executed it for an undisclosed principal. But I doubt whether Lowe ever was the principal of Cotton in this transaction. The contract which Lowe entered into with Paine was, to accept the shares and pay the price on the settling-day, or in the interim to give him the name of a competent transferee. Within the proper time Lowe did give the name of Cotton, with Cotton's consent, not as representing himself, but as one who

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would take upon himself all the obligations of Lowe's contract with Paine. And, when Cotton accepted and executed the transfer tendered to him on the part of Lord Torrington, he did so on his own behalf, and not on behalf of Lowe.

Judgment for the defendant.

Attorneys for plaintiff: *Fearon, Clabon, & Fearon.*
Attorney for defendant: *C. F. Mayhew.*

Dec. 3.

[IN THE EXCHEQUER CHAMBER.]

GRISSELL *v.* BRISTOWE AND ANOTHER.

Usage of the Stock-Exchange—Persons employing Brokers to buy and sell thereon—Principal and Agent.

The usage of the Stock-Exchange is that in transactions between members of it there is an implied understanding that, on the purchase of stock or shares, the buying jobber shall be at liberty by a given day, called the "name day," to substitute another person as buyer, and so relieve himself from further liability on the contract, provided such substituted person be one to whom the original seller cannot reasonably except, and that such person accept a transfer of the stock or shares, and pay to the original seller the price:—

Held,—reversing the judgment of the Court of Common Pleas—a reasonable usage; as a usage founded on the general convenience of all persons engaged in a particular department of business, cannot, as regards such persons, be said to be unreasonable.

The plaintiff, the holder of shares in a company called Overend, Gurney, & Co., through a broker, sold them to the defendants, jobbers on the Stock-Exchange. After various sub-sales, the names of four persons were given to the plaintiff's broker as the persons to whom the shares were to be transferred. The plaintiff's broker thereupon prepared four transfers to those persons, and the plaintiff executed them, and the broker delivered them with the shares to the brokers of the proposed transferees, who thereupon accepted the shares, and paid the price to the plaintiff's broker. The transferees not having executed the transfers, or caused them to be registered, the plaintiff remained the registered holder of the shares, and was compelled to pay calls thereon. In an action against the defendants, claiming an indemnity against calls:—

Held,—reversing the judgment of the Court of Common Pleas,—that the contract, as interpreted by the usage of the Stock-Exchange, was, that the defendants, the first buyers, were to be at liberty to transfer the contract, with all its rights and obligations, to any sufficient buyers who would take it upon them with all its incidents; and that as the plaintiff had transferred the shares to the

defendants' nominees, and the latter had accepted and paid for them, though they had not executed or registered the transfers, the defendants were released from all further liability on their contract to the plaintiff.

ERROR from a decision of the Court of Common Pleas. (1)

Mellish, Q.C. (*Sir J. B. Karslake, A. G.*, and *Macnamara* with him), for the plaintiffs in error (defendants below). The question is whether a jobber on the Stock-Exchange who in the ordinary course of business has purchased shares in a joint-stock company, and has duly procured a nominee who has taken and paid for the shares, and to whom the original seller has transferred them, but who has not registered himself as the holder of them, is under any implied liability to indemnify the seller against the payment of subsequent calls upon such shares. The business of a jobber is defined in the judgment of Byles, J., in the Court below. (2) On being applied to by the broker, being ignorant whether the latter is a buyer or a seller, the jobber gives two prices, one at which he is prepared to buy, the other at which he is prepared to sell; the difference between them being usually very small. There are two settling days in each month, which are called "account days," the day preceding the account day being called the "name day." Within the fortnight many persons may have entered into contracts with the jobber for the same description of stock or shares, some to buy, others to sell, and others again both to buy and to sell, and it may be all at different prices: and with all these the jobber has to settle on the account day, receiving differences from some, and paying them to others, according to the fluctuations of the market. In the case of shares in a joint-stock company, the broker of the buyer who is bound to take delivery of the shares,—the ultimate nominee,—issues a ticket on the name day, containing the name and description of his client, and the price, and his own name and address; and, before 12 o'clock on that day, he hands it to the jobber from whom he has purchased, and he passes it on to some one from whom he has bought similar shares; and so it goes on through the whole series of transactions, until the jobber who has bought from the first seller hands it over to the broker of that seller. The broker then draws the contract of transfer in a printed

(1) Law Rep. 3 C. P. 112. (2) Law Rep. 3 C. P. at p. 137.

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form, inserting therein the name of the transferor and the price which the transferee is to pay, settling the differences with the other parties; his clients then execute it, and the broker then hands over the transfer and the certificates for the shares to the transferee, in exchange for the price. By the rules of the Stock-Exchange, ten days are allowed to the original seller for inquiry as to the bona fides of the transaction and the solvency of the nominee; after which the business is closed.

In this particular case, during the current account Barry & Co., the plaintiff's brokers, had bought of Messrs. Bristowe more Overend Gurney shares than they had sold to them, and therefore, instead of each going through the ceremony of issuing or passing tickets, the purchases and sales were, according to the usage of the Stock-Exchange, set off against each other, and the balance only passed; and so the brokers of the plaintiff were the persons who nominated the ultimate purchaser of the shares in question: but that makes no substantial distinction in the legal result. The real question is, at what stage of this process is the jobber discharged from the liability arising out of his contract? The result of the judgment of the majority of the Court of Common Pleas is, that, until the transfer is executed by the transferee, there is no privity between him and the transferor, the original seller. But they seem to have overlooked the fact that the transferee is the person who issues the ticket. The transferee says, in effect, if you (the seller) will transfer and deliver the shares to me, I will pay the price, and accept all the obligations of a holder in respect of them. When the first seller has acted upon that by inserting his name in the transfer, and delivering it with the shares to the ultimate buyer's agent, how can it be said that no privity of contract is established between those two persons? It cannot be contended that the jobber is released before the transferee becomes liable; but, the moment the liability of the latter is ascertained, the former must of necessity be discharged. Both cannot be liable at the same time.

If A. sells to B., and B. to C., there is nothing unreasonable or illegal in an agreement between them that the transfer shall be made immediately from A. to C.? That is the substance of the custom as stated in this special case. It was part of the original bargain that the settlement should so take place. The Court

below seem to assume (1) that, until the transfers were executed by the transferees, there could be no complete contract between them and the plaintiff. That, however, is a fallacy. The first count of the declaration admits that the transfers were executed by the plaintiff, and delivered to the defendants' nominees; and the breach alleged is that they did not cause them to be registered. It is true, the Court is to decide this case irrespectively of the pleadings. But, if there be any ambiguity in the facts, the statements or admissions in the pleadings are not unimportant.

Where a plaintiff sues upon a contract made by his agent, he must take it with all its conditions. If it be a contract subject to the usages of a particular market, he is bound by those usages, whether he was aware of them or not, and whether they are reasonable or not. Here, the parties making the bargain were both members of the Stock-Exchange: consequently, the bargain must be assumed to have been made subject to all the usages which regulate the transactions of that body. Its rules are made part of the case. [He referred particularly to the following rules,—49, 61, 81, 87, 96, 98.]

There are numerous cases to shew that a Court of Equity would compel specific performance of a contract such as this in reality is, viz. a contract for a sale to A., with a superadded contract to convey to a person who should be named by A. according to the usages of the Stock-Exchange: see *Walker* v. *Bartlett* (2); *Shaw* v. *Fisher* (3); *Hawkins* v. *Maltby* (4); *Evans* v. *Wood* (5); *Paine* v. *Hutchinson* (6); *Sheppard* v. *Murphy* (7); *Hodgkinson* v. *Kelly* (8), and especially the judgment of Lord Justice Christian in *Sheppard* v. *Murphy*. (9)

Brown, Q.C. (*Lanyon* with him), for the plaintiff below. Throughout the argument in the Court below, and in the judgment pronounced by the majority of the Court, not a word appears to indi-

(1) Law Rep. 3 C. P. at p. 133.

(2) 17 C. B. 446; 25 L. J. (C.P.) 156; 18 C. B. 845; 25 L. J. (C.P.) 263.

(3) 1 Jur. (N.S.) 971; on appeal, 5 D. M. & G. 596.

(4) Law Rep. 4 Eq. 572; on appeal, Law Rep. 3 Ch. App. 188.

(5) Law Rep. 5 Eq. 9.

(6) Law Rep. 3 Eq. 257; on appeal, Law Rep. 3 Ch. App. 388.

(7) Irish Rep. 1 Eq. 490; on appeal, 16 W. R. 948.

(8) 16 W. R. 1078.

(9) 16 W. R. at p. 955.

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cate the point which has now been urged on behalf of the defendants. The argument proceeded entirely upon the reasonableness of the alleged usage of the Stock-Exchange to discharge the jobber on his giving the name of a transferee, whether the transfer is executed or not. One can well understand that the jobber is not bound personally, provided he produces a bonâ fide nominee, who executes the transfer, and so takes upon himself the obligations which attach upon a holder of shares. But it lies on the defendants to shew that they have substituted some one else who has taken upon himself the duty which they contracted to perform. In the judgment of the Court below, at p. 133, they say: "Unless the transfers were executed or accepted by the transferees, there would, in our opinion, be no liability on their part to indemnify the plaintiff. Where transfers of this description have been executed or accepted by the transferees, they are, no doubt, responsible, and liable to indemnify the vendor or transferor, as was decided by the Master of the Rolls in the case of *Evans* v. *Wood* (1), and by the Lord Chancellor in *Hawkins* v. *Maltby*. (2) But, in the present case, although one transfer of five shares was accepted, and the transferee has repaid the plaintiff the amount of the call upon those five shares, yet the other transfers of the seventy-five shares do not appear to have been either executed or accepted by the transferees; and, under those circumstances, there would be no liability on their part to indemnify the plaintiff against the call on those shares."

[At this stage of the argument, the Court desired to be informed whether they were to assume that the four persons to whom the transfers were executed (whose names did not appear in the special case,) were persons who had bonâ fide entered into binding contracts with the plaintiff, or were merely names given to the plaintiff's brokers; and whether they were to assume that, in paying the price of the shares, the brokers who paid it were acting for and dealing with the money of their clients, the transferees.

On the following morning it was stated that, as to forty of the shares, they had been purchased by Messrs. Mullens & Co., the government brokers, for certain brokers in Dublin, who had for-

(1) Law Rep. 5 Eq. 9.

(2) Law Rep. 4 Eq. 572; on appeal, Law Rep. 3 Ch. App. 188.

warded them the price and the name and address of their buyer; that, as to other twenty of them, they had been purchased for one Partridge, who had paid the money under protest, his brokers having (as he alleged) bought for the wrong account; and that, as to the remaining fifteen, there had not been time to obtain the desired information.]

Assuming that what the brokers did was done with the authority of the transferees, and that that amounted to an acceptance of the transfers, still it did not put an end to the original contract between the plaintiff and his immediate vendees. The liability of the latter to indemnify the plaintiff continued, upon the rules and the decided cases, until the transfers were executed by the transferees. It may be conceded that the usage does not extend beyond that.

[COCKBURN, C.J. The plaintiff might have objected to the nominees, if he had any ground for so doing. But, having adopted the transaction, and executed the transfers, handed over the certificates, and received the money, can he afterwards resort to the original vendees?]

The handing over the shares was merely a performance of the original contract; there was no new implied contract arising from that. An action at law cannot be maintained by the original seller against the ultimate transferee: *Sayles* v. *Blane.* (1) It is not reasonable that the seller of shares should be deprived of his remedy against his immediate buyer, and turned over to a supposed remedy either at law or in equity against persons of whom he never heard before, and of whom he knows nothing? The sub-purchasers could not by the articles of association of the company register the transfers until they had executed them: and the rules of the Stock-Exchange (79, 84 90) shew that the liability of the original purchaser continues where the ultimate transferees make default, or until some new contract is entered into between the original seller and the ultimate purchaser.

The following cases were referred to and commented upon:— *Hawkins* v. *Maltby* (2); *Evans* v. *Wood* (3); *Coles* v. *Bristow* (4);

(1) 14 Q. B. 205.

(2) Law Rep. 4 Eq. 572; on appeal, Law Rep. 3 Ch. App. 188.

(3) Law Rep. 5 Eq. 9.

(4) Law Rep. 6 Eq. 149; reversed on appeal, Law Rep. 4 Ch. App. 3.

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Sheppard v. *Murphy* (1); *Hodgkinson* v. *Kelly* (2); *Viscount Torrington* v. *Lowe*. (3)

Mellish, Q.C., was not called upon to reply.

Cur. adv. vult.

COCKBURN, C.J. This is an action founded on an implied agreement by the defendants that, on the sale by the plaintiff to them, or to such other person or persons as they should name, of certain shares in the incorporated joint-stock company of Overend, Gurney, & Co., Limited, and the transfer of such shares to them or their nominees, they or such nominees would accept the same, and cause them to be registered in the names of the defendants or of such nominees, as the owner or owners of the shares. The shares having been transferred to the nominees of the defendants, but such nominees having omitted to execute the transfers or to cause themselves to be registered as the owners, and the plaintiff, thus remaining the registered holder of the shares, having been compelled to pay a call since made, he now brings his action against the defendants to be indemnified in respect of the payment so made. The defendants deny having entered into any such implied agreement, and deny their liability in respect of it.

The case is of considerable importance as regards dealings on the Stock-Exchange on the sale of stocks and shares: but, when the facts are duly appreciated and seen in their true light, the case does not appear to us to present any serious difficulty.

The facts essential to the decision of the case may be briefly stated. The plaintiff, being the owner of eighty shares in the incorporated company of Overend, Gurney, & Co., Limited, employed Barry & Co., stock-brokers on the Stock-Exchange, to effect a sale of the shares. Barry & Co. sold the shares on the Stock-Exchange to the defendants, who are what are there called jobbers, that is to say, persons who buy stock and shares on the Stock-Exchange, not for the purpose of investment or of speculation, but for that of immediate sale at a slight advance of price to persons wanting to buy, making a profit by what is termed the turn of the market. It is the practice of the Stock-Exchange for jobbers, on

(1) Irish Rep. 1 Eq. 490; on appeal, 16 W. R. 948.

(2) 16 W. R. 1078.

(3) Antè, p. 26.

the re-sale of stock or shares bought by them, to give the name of the party from whom, together with the price at which, they have bought, to the brokers of the parties buying from them, on a ticket used for that purpose. When the time for completing the purchase with the original seller arrives, the broker of any sub-vendee hands the ticket, on which he has inserted the name of such sub-vendee, together with the quantity of stock bought, and the price, to the broker of the original seller, who thereupon makes out a transfer of the stock or shares from his principal, the seller, to the sub-vendee named on the ticket, and, having procured the execution by his principal, hands over the transfer to the broker of the sub-vendee, on receiving the price due to the original vendor,—any difference in the price being accounted for on settlement between the jobber and the brokers. By this means, the last purchaser obtains the shares at the price he has agreed to pay, and the seller, who parts with his shares, receives the price at which he has sold. The transaction is frequently multiplied by intermediate sales, often at varying prices, of all which the particulars are entered on the ticket: but the result is the same; in the end the transaction becomes one which is to be carried out between the last vendee and the original seller, as though such vendee had purchased immediately of such seller.

Thus far both parties appear to be agreed. The plaintiff admits that the defendants had a right to substitute their vendees for themselves as the parties to whom the shares were to be transferred: but the question between them is as to how far a jobber under such circumstances becomes released from the obligation of his contract with the seller,—a question which becomes all important when the further facts connected with the case are detailed. These facts are as follows:—

The defendants having re-sold the shares, the brokers of the ultimate vendees, in conformity with the usual practice, transmitted to Barry & Co., as brokers for the seller, the accustomed tickets, with the names of the buyers; whereupon the plaintiff's brokers prepared transfers to such buyers, and procured them to be executed by the plaintiff; after which, acting on behalf of the plaintiff, and, as we must in the absence of anything to the contrary assume, with the authority of the plaintiff, delivered the

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transfers to the brokers of the transferees, and received from them the price of the shares; while, on the other hand, the brokers of the buyers received and accepted the transfers on behalf of their clients.

There is nothing to lead us to suppose that the transaction, as regards the nomination of the proposed transferees by the defendants, or the acceptance of the transfers and payment of the price by the brokers, was not in all respects bonâ fide and regular, or that all that was done by the latter was not done in the ordinary course of their business as brokers acting for real and responsible parties.

The transferees did not, however, execute the transfers or register themselves as shareholders. Indeed, they were precluded from the possibility of registering, inasmuch as almost immediately after the transfer of the shares a petition was presented for winding up the company, and, an order to that effect having been made, the further registration of new shareholders became impossible. The plaintiff, thus remaining the registered holder of the shares, has been compelled to pay a call made subsequently to the transfer; and it is to be indemnified in respect of such payment that he brings this action. That he is entitled to be indemnified in respect of such payment, is undoubted: the question is, whether he is entitled to be thus indemnified by the defendants. We are of opinion that he is not.

It appears plain that the question as to how far the defendants are absolved from their contract by the substitution of the parties to whom the shares have actually been transferred, must depend on the usage and its effect on the contract between the plaintiff and the defendants for the purchase of these shares. It is admitted that, at least to some extent, the usage must be taken as having been imported into and governing the contract. The action is not brought against the defendants for a breach of contract in not accepting and paying for the shares. It is based on the admission that the defendants were at liberty to substitute other parties in their place as buyers, and on the assumption that it was an implied condition of the right to substitute others as buyers, that the defendants should guarantee that the parties thus substituted should, even after they had been accepted by the plaintiff, the seller,

fulfil all the obligations and liabilities incidental to the original contract. We have, consequently, an admitted departure from the ordinary incidents of a contract of sale such as would have attached on a contract for the sale of shares if effected outside the walls of the Stock-Exchange. The contract is therefore based on the contract of sale, as qualified by the usage of the Stock-Exchange; and we can, therefore, deal with it only according to the usage, as it is to be collected from the case before us, and as it is applicable to and incorporated with the contract.

Admitting this to a certain extent, the plaintiff, however, contends that the right of the defendants as arising from the usage is simply to have the shares transferred, under the original contract, to their nominees instead of to themselves, leaving them still liable to all the obligations of the original contract till these should have been discharged by those to whom by any sub-contract they may have transferred their rights. The defendants, on the other hand, contend that by the usage they, as jobbers, are not only entitled, on nominating at the appointed time substitutes prepared and willing to accept the transfers and pay the price, to have the shares transferred to those substitutes, but that, on such acceptance and payment by the latter, they, the jobbers, become entirely released from all further liability on their contract to the seller.

Such being the conflict between the parties, it becomes necessary to see what the usage is, as it is to be gathered from the statement of the case before us.

Now, on turning to the evidence as to the usage, we find no trace of any such limited or qualified usage as that for which the plaintiff contends, or of any such indemnity as that on which he insists. On the contrary, the evidence is that, when the nominee of the jobber has paid the price of the shares, all further liability on the part of the jobber, the original buyer, is at an end.

The sum and substance of the usage, as we collect it, after a careful consideration of the statement in the case, may be thus stated:—It appears that, in transactions between members of the Stock-Exchange, there is an implied understanding that, on the purchase of stock, the jobber shall be at liberty by a given day, commonly called the "name day," to substitute, if he is able to do so, another party or parties as buyers, and so relieve himself from

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further liability on the contract, provided that such party or parties be persons to whom the seller cannot reasonably except, and that such party or parties accept the transfer of the shares and pay the price agreed on between the seller and the jobber; in other words, become the buyers of the shares at the price originally agreed on.

This appears to us to be the true statement of the usage. It was, indeed, contended by Mr. Brown, with a view to shew that the usage was an unreasonable one, and therefore not binding in the absence of express agreement, or on any one not being a member of the Stock-Exchange, and not being aware of the usage, that the alleged usage was that the jobber was to be at liberty to recede from the contract and be exonerated from all further liability in respect of it, on giving the name or names of any proposed transferee or transferees prepared to pay the price, though such transferees might be of insufficient ability to insure to the seller the performance of all the obligations of the contract. But we are of opinion that the statement of the usage in the case must receive a reasonable intendment, and be understood as claiming for the jobber a right to transfer the contract, and claim exemption from liability in respect of it, only on his giving the name of a buyer to whom the seller has no reasonable ground to object. And we are further of opinion, from the particulars of the usage as stated in the case, that it is only when the nominee or nominees of the jobber have paid for the shares,—in other words, have accepted the transfer, and placed themselves in the position of buyers, and taken upon themselves the obligations of the contract,—that the jobber is held to be released.

The usage being thus ascertained, the result appears to us to be fatal to the plaintiff's case. On the part of the plaintiff, it is assumed that the right of a jobber purchasing shares under the usage is limited to the right of having the shares transferred to his nominees; and, starting from this assumption, it is contended, as matter of law, that the execution of the transfer to such nominees is merely a fulfilment of the contract with the jobber, and creates no privity of contract with the transferee, and no discharge of the jobber from the obligations of the contract. But, this mode of dealing with the question is to convert into matter of law that

which is properly matter of fact. If it turns out in point of fact that, by virtue of the usage, the defendants were entitled, on producing a competent buyer, to withdraw from all the obligations of the contract, it follows that, the contract having been founded on the usage, as the defendants have produced buyers who have paid the price and accepted the shares, the case of the plaintiff fails.

It is, however, said, as a reason why the plaintiff should not be bound by the usage,—first, that the usage is unreasonable, inasmuch as it deprives the seller of his hold on the first buyer, the jobber, a known and responsible person, and substitutes for the latter a party who may be unknown, and possibly insufficient,—and, secondly, that the plaintiff was not aware of its existence.

As regards the latter position,—independently of the question as to how far the knowledge of the plaintiff's agents, the brokers, would in point of law be the knowledge of the plaintiff,—we should be prepared to draw the inference, as one of fact, looking to the circumstance of the plaintiff having accepted the nominees of the defendants, having received the price from them, and having executed the transfers to them, without any reference to the defendants, that he either knew of the usage beforehand, or at all events was made aware of it afterwards, and, having become aware of it, ratified the contract as made by his agents. It is, however, unnecessary, in the view we take of the case, to enter further into this question.

As regards the alleged unreasonableness of the usage, the ground suggested by the counsel for the plaintiff appears to us altogether untenable. There can be nothing unreasonable, any more than unlawful, in a person to whom it is proposed to purchase a particular thing saying, "I will agree to buy, provided that, if, when the time for completing the contract arrives, it should suit me to substitute another buyer, able and willing to take my place and perform the contract, I shall be at liberty to do so." What would not be unreasonable in a single buyer, would not be so in a class of persons dealing in a particular commodity; and if, from a long series of dealings, a habit or usage of always dealing on such an understanding, even when not expressed, should become established, such a usage would no more be unreasonable than such a stipula-

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tion would be if introduced expressly into each particular contract. Besides, a usage founded on the general convenience of all parties engaged in a particular department of business, can never be said to be unreasonable.

Now, the intervention of jobbers in these transactions is obviously for the advantage both of sellers and buyers, who are thus brought readily into contact. And there is no hardship or injustice on the seller in the substitution of another buyer. All that the seller desires is, to find a customer who will pay the price, accept the shares, and relieve him from all further liability in respect of them. If a buyer is found as to whom the seller's broker is satisfied, the seller has all that he has sought for. In practice, no seller employing a broker to sell stock or shares for him thinks of limiting the authority of the broker to selling exclusively to a jobber. He is satisfied with the buyer whom the broker finds for him; and for the obvious reason that he has it in his own power, by reasonable diligence on the part of himself or his broker, to protect himself against loss. He need not part with his shares till the price is paid and the instrument of transfer is executed by the buyer. He may insist on the registration of the shares being made in the name of the new buyer, as part of the transaction. On the other hand, it would certainly be a considerable hardship on the jobber, if, for the small profit realized on the re-sale of stock or shares, he were to be held responsible in respect of any non-fulfilment of any part of the contract, when the matter had passed out of his hands by the seller assenting to complete the transaction with the substituted buyer, or for loss occasioned, as in the present instance, by the laches of the seller in parting with the shares without insisting on the execution of the transfer by the party to whom he transfers them. Far, therefore, from being unreasonable, the usage appears to us to be fair and equitable with reference to the interests of all parties concerned.

But there is another and a more conclusive answer to the objection thus urged against the usage. As has been already pointed out, the plaintiff, in taking his present ground of action, admits that the contract on which he sues was based on the usage, of which, as he alleges, the right of indemnity claimed constitutes a part. But, the plaintiff, if he adopts the usage as forming part

of the contract, must take it in its entirety,—for better or worse: he cannot claim the benefit of it so far as it suits his purpose, and reject the rest. He is in this dilemma: either he must take his stand on the contract of sale independently of the usage,—in which case, having parted with the shares for a price, he would be unable to perform his part of the contract in transferring them to the defendants; or he must take the contract as incorporating the usage,—in which case, by the effect of the usage, having accepted the price of the shares from the transferees, he has released the defendants.

There is another view of the case, to which it seems to us sufficient prominence has scarcely been given, and which is equally fatal to the plaintiff's claim. It is necessary to consider, as lying at the very foundation of the case, what was the contract to which the defendant assented to become bound; for, however unreasonable the terms on which a contracting party may insist, he cannot be bound by a contract except so far as he has assented and agreed to its terms. The plaintiff may have known nothing of the usage of the Stock-Exchange; his broker may have acted contrary to or exceeded his authority; the contract may have been one which the plaintiff, if so minded, might have been justified in repudiating: but, when the contract is sought to be enforced against the defendants, their liability can only be carried to the extent to which they consented to be bound. Now, it is not denied, and must be taken as an admitted fact, that the plaintiff's brokers and the defendants dealt with one another and entered into this contract on the footing of the usage in force on the Stock-Exchange. The defendants can therefore only be bound by the contract as qualified by the usage: they are entitled to any immunity which the usage affords; and the extent of their liability must be determined by reference to the usage.

Now, according to the usage, as stated in the case, the defendants were only bound to find a party or parties able and willing to stand in their place and discharge the obligations of their contract, or, in the alternative, to fulfil the contract themselves. But the first of these alternatives the defendants have in fact performed. They have found parties able to perform the contract, and who, by accepting the transfers, have assented to stand in the position of

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buyers, and have bound themselves to the performance of all the remaining obligations of the contract. While, therefore, we agree that the defendants would not have satisfied the exigency of the contract, as qualified by the usage, by merely giving the names of parties able to carry out the contract, unless those parties had placed themselves under the same obligations as they themselves were under; yet, as soon as they produced persons who paid the price and accepted the transfers, and thereby took upon themselves the ulterior liabilities of the contract, they had done all which according to the contract they undertook to do.

If, then, the case had rested here, and all that appeared had been that the defendants had tendered parties able and willing to pay for and accept the shares, we should have been prepared to hold that the defendants had satisfied the contract they had entered into, and were exonerated from further liability. But, in the present instance, the case is infinitely stronger in their favour: for, it appears that, on receiving the names of the proposed subvendees, according to the accustomed course, the plaintiff's brokers prepared transfers to the proposed nominees, got those transfers so filled up executed by the plaintiff, received the price from the brokers of the transferees, and thereupon handed over the transfers.

Now, by so doing, it is obvious that the plaintiff has for ever deprived himself of the power of transferring the shares to the defendants: yet it was in consideration of having the property in the shares, which must always be assumed to have some value, conveyed to them, in the event of their nominees not fulfilling their obligations as buyers, that the defendants assented to be bound to the obligations of the contract. When, therefore, the plaintiff has by his own act put it out of his power to give to the defendants the consideration which formed the basis of the contract, and has transferred that benefit to another, it would obviously be unreasonable and unjust that he should be at liberty to enforce the obligations the consideration for which entirely fails.

It is said, indeed, on behalf of the plaintiff, that, in transferring the shares to the nominees of the defendants, the plaintiff has only acted on the original contract with the defendants, to transfer the

shares to such persons as they should appoint; leaving them responsible for the performance by the transferees of all the obligations of the buyers. In this view we are unable to concur. In our opinion, the contract, as interpreted by the usage, was, that the defendants, the first buyers, were to be at liberty to transfer the contract, with all its rights and obligations, to any sufficient buyers who would take it upon them with all its incidents. When, therefore, the seller adopted the substituted parties as the buyers, and the price was paid by the one and the property transferred by the other, a contract and the relation of vendor and vendees immediately arose between them. In this view alone could the seller be entitled to a specific performance of the contract by the transferees, in the execution of the transfers, and a registration of the shares, or an indemnity in respect of calls,—a right which was held to exist by the Court of Appeal in Equity, in Ireland, in the case of *Sheppard* v. *Murphy* (1), the circumstances of which were precisely similar to the present,—a right which it seems impossible to doubt the seller would have against the transferees under the circumstances, and as to which it is only necessary to say that we entirely concur in the reasoning and conclusion of Lord Justice Christian in the case referred to, to which it seems to us impossible to add anything with advantage.

But, assuming even that the view of the original contract contended for on the part of the plaintiff is correct, and that the defendants, the intermediate buyers, were bound to indemnify the seller against any loss by reason of the non-performance by the ultimate buyers of any part of the contract, still this, like any other contract of indemnity, can only attach where the position of the party against whom it is sought to be enforced has not been unnecessarily deteriorated by the acts or laches of the party who seeks to enforce it.

Now, here, the plaintiff, by parting with the property in the shares, has obviously deprived the defendants of the alternative to which they were undoubtedly entitled, of themselves taking the shares and performing the contract. He has by his own laches, in parting with the transfers without insisting on the execution of them by the transferees, enabled the latter to obtain an advantage

(1) 16 W. R. 948.

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to which they were not entitled, by enabling them to acquire a property in the shares without fulfilling the obligations which ought in the ordinary course of dealing to have accompanied the transfer,—an undue advantage as against the defendants as well as against the seller, inasmuch as it took from the transferees the motives for fulfilling the ulterior obligations of the contract. It is by the act of the plaintiff himself that the state of circumstances of which he complains has been brought about,—a state of circumstances to which, as it seems to us, the implied indemnity relied on can by no reasonable intendment be held to apply.

In no point of view, therefore, in which the case can be looked at, can, in our opinion, the decision of the Court below be upheld; and our judgment, therefore, reversing that of the Court of Common Pleas, must be for the defendants.

KELLY, C.B. I am desirous of adding a few words to the judgment of the Lord Chief Justice, in every part of which I entirely concur. The observation I wish to make is, that, when the practical effect of this usage or mode of dealing on the Stock-Exchange comes to be considered, it will be found that there is no hardship or injustice in it as regards the interests of the public, but the contrary. In the great majority of transactions which occur, the solvency or responsibility of the nominee or ultimate buyer is a matter of indifference to the seller; for, when the settling-day arrives, the seller transfers, and the buyer pays the price, or, if he make default, it is at once paid by the jobber or the purchaser's broker, and the transaction is closed. It is only upon a sale of shares in a joint-stock company with an unpaid-up capital, and of which the solvency is doubtful, or which (as was the case with Overend, Gurney, & Co., at the time of the contract in question,) has actually stopped payment, that it concerns the seller to ascertain that the ultimate buyer is a responsible man. This he has an opportunity of doing, under the regulations of the Stock-Exchange; and surely there is nothing unreasonable or unjust in subjecting to whatever degree of trouble and risk may attend such a transaction the seller of shares which are often worse than valueless, which he is glad to part with at an almost nominal price, or at a premium paid to the buyer for

taking them, and which have become the symbols, not of a title to profits and dividends, but of a liability to losses and calls.

On the other hand, this practice affords to the public the very great advantage of being enabled, by means of a stock-broker and a jobber, to buy or to sell at any moment any quantity of stock or any number of any description of shares at the market-price of the day, and concluding the transaction, at the latest, on the settling-day: whereas, without such a practice, every one having any given amount of stock, English, foreign, or colonial, or of debentures or shares in railways or other joint-stock companies, to buy or to sell, must wait until a seller or a buyer could be found to sell or to buy the exact quantity of stock or of shares which is to be parted with or acquired,—a state of things which in this country, where some hundreds of these purchases and sales are effected every day, would be found intolerable, and would speedily demand a remedy, than which no better could be devised than this practice so long established, and which has never until now been called in question.

BRAMWELL, CHANNELL, and PIGOTT, BB., and LUSH, J., concurred.

Judgment for the defendants. (1)

Attorneys for plaintiff: *Hopgood & Son.*

Attorneys for defendants: *Lewis, Munns, Nunn, & Longden.*

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(1) The rules of the Stock-Exchange material to the case, are as follows:—

Fulfilment of Bargains—Legal Proceedings.

49. The Stock-Exchange does not recognize in its dealings any other parties than its own members; every bargain, therefore, whether for account of the member effecting it, or for account of a principal, must be fulfilled according to the regulations and usages of the house; and should a principal, without the consent of the Committee, attempt to enforce by law a claim against a member of the Stock-Exchange, the Committee will decide as to the liability of the broker or agent of such principal for any cost or damages incurred in consequence of legal proceedings.

61. No member shall attempt to enforce by law a claim arising out of Stock-Exchange transactions against a member or defaulter, or against the principal of a member or defaulter, without the consent of such member, of the trustees of the defaulter, or of the Committee.

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Rules applicable to English Stock, and Shares of Public Companies.

79. A member having sold stock, or other securities, and transferred or delivered the same according to the tickets or directions given him by the buyer, has a right to demand payment of such buyer; and in case the seller apply to the member whose name is on the ticket, and is either refused payment, or receives a cheque which is dishonoured, the buyer shall make immediate payment.

81. Bargains in shares or stock, when no time is specified, and bargains made before twelve o'clock on name days, shall be considered to be made for the existing account.

82. The Committee will not take cognizance of any bargain in stocks or shares effected for a period beyond the end of the ensuing two accounts.

83. An offer to buy or sell an amount of shares or stock at a price named is binding as to any part thereof that may be a marketable quantity; and an offer to buy or sell shares or stock, when no amount is named, is binding to the amount of ten shares, if in value under 500*l*., or a number not exceeding in value that sum, or to the amount of 1000*l*. stock.

84. The seller of registered shares or stock is responsible for the genuineness and regularity of all documents delivered, and for such dividends as may be received, until reasonable time has been allowed to the buyer to execute and duly lodge such documents for verification and registration. When the buyer shall have obtained an official certificate of the registration of such stock or shares, the Committee will not (unless bad faith is alleged against the seller) take cognizance of any subsequent dispute as to title until the legal issue has been decided between the buyer and the company, the reasonable expenses of which legal proceedings shall be borne by the seller.

85. The Committee will not (except under special circumstances) interfere in any question arising from the delivery of shares, stock, bonds, or debentures in blank transfer.

86. When shares of railway or other companies have been converted into consolidated stock, and are so quoted in the authorized list, buyers are required to pass names for stock, and not for shares.

87. The buyer of stock, shares, bonds, or debentures shall pass a ticket for the same at a marketable price, containing the names and address of the buyer in full, before twelve o'clock on the name-day, either in the Stock-Exchange or at the office of the seller; and in the event of his not doing so, should the stock, shares, bonds, or debentures be sold out, the loss (if any) shall fall upon him; it is therefore required, if the ticket should not be passed before twelve o'clock, that the person taking it should certify the same on the back thereof. The time for selling out shall be from half-past two to three o'clock. If the ticket be regularly passed before twelve o'clock, the person holding it at two o'clock shall be responsible for the loss occasioned by selling out on that day; but should the stock or shares not be sold out until the following day, then the person who held the ticket at three o'clock on the preceding day shall be liable. When the name day is fixed for a Saturday, the time of selling out shall be from half-past twelve to one o'clock, and the person holding the ticket at half-past twelve o'clock shall be liable. Every person passing a ticket is required to write on the back of the ticket the name of the member to whom it is passed. A member dividing a ticket shall retain the original ticket, that access may be had to it should any

portion of the shares have been sold out; and the member who has passed on the original ticket shall be required to trace it, in the event of any portion of the stock or shares having been sold out. Tickets may be left at the office of the seller up to one o'clock on name-days. Every person who receives a ticket "after two o'clock, or after three," on the same day, shall notify the name on the back of the ticket, by drawing a line, or otherwise, in order to facilitate the tracing, when shares are sold out; and any person neglecting to do so will be held responsible for any loss that may be incurred.

88. A member who makes an alteration in a transfer ticket for stock or shares, or improperly detains the same, shall make good any loss that may occur thereby.

89. The seller of shares or stock shall cause the same to be transferred at the price marked upon the ticket given him by the buyer; but the seller shall not be compelled to take a ticket at a price not quoted in the authorized list during the account, unless the bargain represented by such ticket shall have been made within the two preceding accounts.

90. The seller may, previous to delivery, pay any call made on registered shares, although not due, and claim the same of the buyer.

91. The buyer of transferable shares or stock shall pay the ad valorem duty, and all expenses attending the conveyance of the same; and shall state on the ticket the amounts in which he may desire to have the shares or stock transferred (provided no such amounts require a higher stamp than 9*l.* 15*s.*), and the seller shall pay any increased expense caused by the sub-division of a ticket. Split tickets must bear the name of the original buyer.

92. The buyer of shares or stock shall, in the event of his ticket being divided, pay for any portion which may be presented, provided the number be not less than ten shares, or the value less than 200*l.*

93. The buyer of stock or shares may refuse to pay for a transfer unaccompanied by coupons or certificates, unless it be certified thereon officially that the coupons or certificates are at the office of the company. But if the transfer presented be perfect in all other respects, the stock or shares must not be bought in until reasonable time has been allowed to the seller to obtain the verification required. If the seller have a larger coupon than the amount of stock conveyed, or only one coupon, representing stock conveyed by two or more transfers, the coupon may be deposited with the secretary of the share and loan department of the Stock-Exchange, who shall forward it to the office of the company, and certify to that effect on the transfers, which shall then be a valid delivery. No person is to look to the Managers or Committee of the Stock-Exchange as being liable for the due or accurate performance of those duties, the Managers and Committee holding themselves, and being held, entirely irresponsible in respect of the execution, or of any mis-execution, or non-execution, of the duties in question.

94. The buyer is entitled to new stock or shares issued in right of old, provided that, within reasonable time, he specially claim the same, in writing, from the seller. Claims should be entered as bargains, and as such be checked in the usual manner. When practicable, claims are required to be settled by letters of renunciation, but if not practicable, and there be sufficient time for registration, the seller may, after due notice, require the buyer to complete the bargain in old stock or shares. If the new stock or shares cannot be obtained by letters of renunciation, or by the transfer of the old, the Committee will fix a price at which the same shall be temporarily settled, and which amount may be deducted by the buyer from the

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purchase-money of the old stock or shares, until the special settlement. The Committee will not entertain any dispute relating to unchecked claims, unless brought before them within ten days after the special settling day.

95. A member not refusing an antedated ticket, when tendered as such, takes it with all its liabilities; but if it be passed as an ordinary ticket, the liabilities remain with the member putting such ticket again into circulation; and any person holding an undated ticket shall not be liable for any loss arising from the shares or stock having been bought in, if such ticket had not been ten days in his possession.

96. A member who shall allow two clear days to elapse, without availing himself of his right to sell out shares or stock, shall release the buyer from all loss caused by the failure of any person, through whose default the ticket was not passed; and if the stock or shares be not delivered within fifteen clear days, the issuer of the ticket shall alone remain responsible.

97. When stock or shares are sold out, if a ticket be not given within half an hour after the time of sale, the transfer may be made into the name of the buyer, and if a name is guaranteed, the rule shall apply as if the stock or shares had been actually sold out.

98. Registered shares, or stock, if not delivered within ten days, may be bought in against the seller, at or after twelve o'clock on the eleventh day after the date of the ticket, and all loss incurred thereby shall be paid by him. The broker employed to buy in the shares is required to give one hour's public notice before proceeding to make such purchase, and if the purchase be not made or attempted within half an hour after the expiration of the time fixed, the notice shall be cancelled. Shares or stock thus bought in, and not delivered by one o'clock on the following day, may be repurchased for immediate delivery without further notice, and the loss, if any, shall be paid by the member causing such repurchase.

99. A member, who shall allow fifteen clear days from the date of the ticket to elapse, without buying in, or attempting to buy in, registered shares or stock, shall release the seller from all loss, caused by the failure of any member, through whose default the shares or stock were not delivered, unless such right has been waived at the request, or with the consent of the seller. The right to buy in shares or stock is limited to the original buyer, whether the name of the first buyer or that of any other member is placed on the ticket to pay; but in order to identify the original ticket, the name into which the stock or shares are to be transferred must be stated on the order given to the broker employed to buy in, to whom holders of over-due tickets may apply.

100. On the day previous to, and on the name-day of every settling-day in securities deliverable by transfer, the clerk of the house shall, at twelve o'clock, fix the making-up prices for such securities at the actual market prices, and no making up shall be binding unless at such fixed prices. On name-days the clerk of the stock and share market shall (with the concurrence, if necessary, of a member of the Committee) fix the prices of shares at three o'clock (or on Saturdays at one o'clock), at which prices unsettled accounts shall be temporarily made up, and the differences paid in the usual way.

101. No person shall be required to pay for registered shares or stock presented after half-past two o'clock; or after one o'clock on Saturdays.

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Nov. 5.

Landlord and Tenant—Underlease of the whole Term—Assignment.

An underlease of the whole term amounts to an assignment.

Action by A., the assignee of the reversion of a lease on a covenant to repair. The defendant was the representative of W., who was an assignee of the lease, and had made an underlease ending at the same date as the original term:—

Held, that the underlease amounted to an assignment, and that A. was not entitled to recover.

Pollock v. *Stacy* (9 Q. B. 1033), considered.

THIS was an action by the assignee of the reversion of a lease on a covenant to repair.

At the trial before Byles, J., at the sittings in London after Trinity Term, the plaintiff proved his title and the making of the lease, and that in 1829 the legal owners of the term were two brothers named Wilson, and that the defendant was their representative. The defendant proved that in 1829 the Wilsons executed a deed which was in form an underlease of the property, but which was for a term expiring at the same date as the original term. A verdict was thereupon entered for the defendant, with leave to move to enter it for the plaintiff.

Pollock, Q.C., moved accordingly. The question in this case is whether an underlease for the whole of the residue of the original term necessarily amounts to an assignment. In 1 Smith's Leading Cases, p. 86, 6th ed., it is said that this question cannot be considered settled; and in *Pollock* v. *Stacy* (1), which is the last decision on the subject, it was held, upholding *Poultney* v. *Holmes* (2), that the relation of landlord and tenant may be created by a lease of all the lessor's interest.

[BYLES J. In that case the estate was one which could only pass by deed, and therefore the transaction between the parties could only operate as a demise, or not at all.]

In *Barrett* v. *Rolph* (3), though a different opinion was expressed, there was no decision.

(1) 9 Q. B. 1033. (2) 1 Str. 405. (3) 14 M. & W. 348.

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BOVILL, C.J. I am of opinion that there ought to be no rule. As far back as the year 1818, it was held in *Parmenter* v. *Webber* (1) that where a lessee underlets for the whole residue of the term, it amounts to an assignment, and it was there treated as established law. In a note to Shepherd's Touchstone, p. 266, 8th edition, the law is stated in the same way, and it is in accordance with the usual practice of conveyancers. In *Wollaston* v. *Hakewill* (2) the same question again arose, the underlease in that case being for a term exceeding that of the original lease; and after taking time to consider, Tindal, C.J., delivering the judgment of the court, said "the only question therefore is whether, if a lessee for ninety-nine years demises for a longer term, such demise operates in law as an assignment; and we entertain no doubt but that for a very long period the law has been held that it has such operation, and may be so treated in pleading." I think, therefore, the matter must be considered to be settled. No doubt the question was sought to be in some degree raised in *Pollock* v. *Stacy* (3), but there the action was brought for use and occupation, and it was not necessary that there should have been any actual demise or assignment. The only question was whether the person in occupation was liable to pay rent. There was no deed in that case which could act as an assignment, and the court say "The parties intended to contract the relation of landlord and tenant. This they were at liberty to do by law; and we therefore carry their lawful intentions into effect." The case was decided on its special circumstances, and is no authority in support of Mr. Pollock's contention.

BYLES, J. I am of the same opinion. I have always understood that an underlease of the whole term, though in form a lease, acts as an assignment, at least in the case where it can act as an assignment. The question what its effect is where it cannot, does not arise in this case; when it does, it may be necessary to consider further the case of *Pollock* v. *Stacy*. (3)

KEATING, J. I am of the same opinion. The facts in *Pollock* v. *Stacy* (3) were very peculiar, and it is not necessary therefore

(1) 8 Taunt. 593. (2) 3 Man. & G. 297. (3) 9 Q. B. 1033.

to overrule it in arriving at our judgment in this case. If, however, it really decided what Mr. Pollock contends that it does, I should not be prepared to follow it.

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Rule refused.

Attorneys for plaintiff: *Sutton & Ommanney.*

THE CONSERVATORS OF THE RIVER THAMES *v.* THE VICTORIA STATION AND PIMLICO RAILWAY COMPANY.

Nov. 14.

Railway Company: Compensation for Lands taken under the Lands Clauses Consolidation Act, 1845 (8 & 9 *Vict. c.* 18), *s.* 68—*Conservators of the Thames: Ownership of the Soil of the Bed and Foreshore.*

A railway company were impowered by their special act, which incorporated the Lands Clauses Consolidation Act, 1845, to build a bridge for carrying their railway across the Thames, but were not to commence the work until they had submitted plans to, and obtained the consent in writing of, the conservators of the Thames, in whom by a prior act of parliament the bed of the river and foreshore were vested; and who were impowered to grant licenses for making embankments, docks, or jetties, on payment of a reasonable consideration, to be settled by a competent person, one-third of which was to be paid over to the Crown. In the plans and books of reference deposited by the company pursuant to the Standing Orders, the portions of the bed of the river and foreshore on which it was proposed to build the piers and abutments of the bridge were marked out, and the conservators were described as being the owners thereof. The company having obtained the consent of the conservators, and built their bridge:—

Held, that the conservators, as owners of the soil, were, notwithstanding their consent to the building of the bridge, entitled to compensation for the land taken; and that the proper mode of proceeding for the recovery thereof was under s. 68 of the Lands Clauses Consolidation Act, 1845.

THE declaration stated that theretofore and after the passing of the Victoria Station and Pimlico Railway Act, 1858 (1), the plaintiffs were possessed of an estate greater than as tenants from year to year, to wit, in fee-simple, of certain lands and hereditaments, with their appurtenances, being the lands and hereditaments in the award thereinafter set forth mentioned, which the defendants, in exercise of the powers contained in the said act and the other acts incorporated therewith, had taken for and injuriously affected by the execution of the works which by the said act the defendants were authorized to make; by reason whereof the plaintiffs sustained

(1) 21 & 22 Vict. c. cxviii.

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and would sustain damage for which they were and are e
claim and be paid compensation by the defendants. It t
on to allege, that the plaintiffs gave the defendants noti
nature of their claim, demanding 200*l.*, and requiring
appoint an arbitrator; that arbitrators were appointed;
by their award they found that the amount of compen
which the conservators were entitled for and in respect of
pany having entered upon and taken, damaged, and in
affected the said lands and hereditaments, being portion
bed and soil of the river Thames, was the sum of 80*l.*

There was a second count claiming 51*l.*, the taxed cos
reference and award.

The defendants pleaded,—first, that the said portions o
and soil of the bed of the river were not taken, &c.,—secon
the alleged taking and injuriously affecting the lands an
taments of the plaintiffs in the declaration mentioned, co
the making by the defendants of a railway crossing
Thames by means of a bridge which the defendants were a
to make and erect by the railway act in the declaration m
and in placing and making on certain parts of the bed an
the river certain works and supports which were necessar
construction and support of the said bridge and authoriz
said railway act; and that, before the executing or con
the said works, or any of them, in or upon any part of t
shore of the river, they duly obtained the consent and p
in writing of the plaintiffs, signed by the secretary, pu
the provisions of the defendants' railway act and of the
Conservancy Act, 1857, in that behalf, for the performan
defendants of the said works in the bed and shore of the s
and that the defendants in all respects performed the worl
ing to the said consent and permission, and not otherwise

The plaintiffs joined issue on the first plea, and demurr
second. Joinder in demurrer.

At the trial before Keating, J., at the sittings at We
after last term, it appeared that the defendants had, pu
the provisions of their act 21 & 22 Vict. c. cxviii, erected
across the river Thames at Battersea. It was admitted
piers and abutments of the bridge stood partly upon the b

river and partly on the foreshore; and it appeared that, in the plans and books of reference deposited by the company pursuant to the Standing Orders, the portions of the bed of the river and foreshore on which it was proposed to build them were marked out, and the conservators of the river Thames were described as being the owners thereof. Prior to the commencement of the work, the defendants' engineer addressed the following letter to the conservators of the Thames:—

"July 29th, 1858.

"Victoria Station and Pimlico Railway.

"To the conservators of the river Thames.

"Gentlemen,—I beg to inclose for the approval of the con servators of the river Thames a plan and elevation of the bridge proposed to be erected for the purpose of carrying the railway across the river Thames.

"It will be observed that upwards of 20 feet above Trinity high-water mark is given in the centre of each arch of the said bridg, and that the piers and abutments are sufficient to allow of any future deepening of the said river to the extent of at least 30 feet below the level of Trinity high-water mark. I beg also to submit to the conservators a plan of the coffer-dams for the piers and abutments of the said bridge.

"(Signed) John Fowler."

In reply to this letter the engineer of the defendants received from the proper officer of the Thames Conservancy, the following:—

"Thames Conservancy Office, &c., 10 August, 1858.

"To John Fowler, Esq.

"Sir,—Having laid your letter of the 29th of July last before the conservators of the river Thames, together with a plan of the proposed railway-bridge over the Thames for the Victoria Station and Pimlico Railway Company, I am directed to inform you that the conservators have given their approval for the construction of the bridge as proposed.

"(Signed) E. Burstal."

On the part of the defendants it was contended that the plaintiffs were not entitled to recover compensation under the Lands Clauses

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Consolidation Act, 1845, 8 & 9 Vict. c. 18 (which was in
with the special act), and that consequently the award
A verdict was taken for the plaintiffs for 131*l.*, subje
reserved to the defendants to move to enter the verdict
Brown, Q.C., accordingly obtained a rule nisi; and it
that the rule and the demurrer should be argued togeth

Prentice, Q.C., and *Raymond*, shewed cause. The fir
is, whether the defendants were entitled to use the bed
the river and foreshore without making any compensa
plaintiffs; and the second, whether the plaintiffs have a
proper mode for obtaining compensation. The Than
vancy Act, 1857 (1), recites that disputes had arisen b
corporation of London and the Crown as to the owner
bed and foreshore of the Thames, and that it was des
they should be determined; it then recites an agreeme
ing the bed and soil of the Thames (within certain lin
Mayor, &c., of London as "conservators of the river Tha
trust, amongst other things, to render yearly to the con
of woods and forests" [now, of public works] "a true
schedule or rental containing full particulars of all sale
grants or licences for docks, wharves, piers, landing-plac
works of any description of, in, or upon any portions
banks or shores of the Thames," &c., paying over one th
the money, rents, and profits derived therefrom to the
reserving the remaining two thirds for improving the na
the river, and the banks thereof. Sections 50 and 5
vest in the conservators all the estate of the corporation
Crown in the bed and soil of the river. Sect. 54 prohib
tion or building of "any erection, building, or work up
or shore of the Thames," &c., without the permission
servators. Sect. 56 impowers the conservators "upon th
of a fair and reasonable consideration," to grant licences
mation of recesses, docks, &c., and s. 57 for the erection
jetties. The consideration for any such licence or perm
be settled by a competent person, to be appointed by
vators, and approved of by the commissioners of woods

(1) 20 & 21 Vict. c. cxlvii.

s. 58. Such being the rights and powers of the conservators, the defendants in 1858 obtained an act of parliament (21 & 22 Vict. c. cxviii.) for the construction of a station at Pimlico and a railway which was to cross the Thames by a bridge at Battersea. The 2nd section incorporates the three acts of 1845, 8 & 9 Vict. cc. 16, 18, 20. Sect. 21 authorizes the company to erect the bridge in question. Sect. 31 enacts that "the company shall not execute or commence the execution of any work whatsoever upon the shore of the river Thames, &c., without the consent in writing of the conservators of the river Thames, signed by the secretary of the said conservators:" and s. 32, that "the bridge to be erected for the purpose of carrying the railway across the river Thames shall be executed according to a plan and elevation and upon a site to be approved by the conservators of the river Thames, and deposited at their office," &c. The 35th section provides that "nothing in this act contained shall extend or be construed to extend to prejudice or derogate from the estates, rights, interests, privileges, or franchises of the conservators of the river Thames, or to prohibit, defeat, alter, or diminish any power, authority, or jurisdiction which at the time of passing this act the said conservators did or might lawfully claim, use, or exercise." It can scarcely be contended that the company have not taken or injuriously affected land belonging to the conservators. Having under the authority of their act of parliament built the piers and abutments of their bridge upon the bed of the river and foreshore, the land they have so taken has become theirs for ever. The fact of the soil being vested in the conservators for public purposes, cannot vary the rights of the parties. Then, the Lands Clauses Consolidation Act, 1845, 8 & 9 Vict. c. 18, being incorporated with the special act, the proper mode of obtaining compensation is obviously by pursuing the course pointed out in s. 68 of that act, and not, as will be contended by the defendants, by assessing the compensation under s. 58 of the Thames Conservancy Act, and suing for it. The same question arises upon the demurrer as upon the rule.

Brown, Q.C., and *Griffits*, in support of the rule. The company's special act of 1858 impowers them to build the bridge in question, but imposes upon them the obligation of first obtaining the consent in writing of the conservators; and the effect of s. 35

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is, to reserve all the rights of the conservancy, and to give the company only an easement over the bed and soil of the river. As the portion of the bed of the river upon which the piers and abutments are built is practically of no pecuniary value to the conservators, and the bridge is a great advantage to the public, it was competent to them to grant the licence without exacting any compensation, as they have in fact done. Cujus est dare ejus est disponere. Probably the conservators might have bargained for a sum of money when they granted the licence to build, under s. 58 of the Conservancy Act. But they have no right now to claim compensation under s. 68 of the Lands Clauses Consolidation Act, which applies only to the case of lands taken compulsorily, and not to lands taken by agreement.

[KEATING, J. What is thrown out by my Brother Smith in *Metropolitan Board of Works* v. *Metropolitan Railway Company* (1) approaches very near to this case.]

The language of the two acts is somewhat different. Besides, there the claim was in respect of subsequent damage resulting from the execution of the works by the railway company. The authority of the company to build the bridge is derived from their special act, which says nothing about compensation. They are to build the bridge provided they obtain the consent and approbation of the conservators, and so as not to interfere with any of the rights and privileges of that body. The permission here given would, in the case of a private individual, support a plea of leave and licence.

[MONTAGUE SMITH, J. The soil of the river was mentioned in the plans and books of reference deposited under the act, and the conservators were described as the owners thereof.]

It was so. But that would give the company no right to the freehold, which would still remain in the conservators, subject to the easement acquired by the company.

KEATING, J. I am of opinion that the rule to enter a verdict for the defendants in this case should be discharged. The plaintiffs bring their action to recover the amount awarded to them by arbitrators appointed under the Lands Clauses Consolidation Act,

(1) Law Rep. 3 C. P. 612.

1845, to assess the compensation payable to them by the defendants for taking and injuriously affecting lands belonging to them. The plaintiffs are the conservators of the river Thames. By the act of 1857, 20 & 21 Vict. c. cxlvii, the soil of the bed and foreshore of the river is vested in the conservators. That is beyond all dispute. Large powers are given to the conservators for the preservation of the navigation and the banks of the river; and they are authorized to grant licences for the erection of piers, jetties, wharves, &c., receiving compensation, to be assessed by an appointed officer. The Crown has an interest in the compensation so assessed. Such was the state of things when the defendants obtained an act for making their railway. That act, besides authorizing the defendants to make the railway, further authorized them to do that which the plaintiffs under their act probably could not have authorized them to do, viz. to build a bridge across the Thames. The bridge was built, not under any licence or authority given to the company by the plaintiffs, but under the authority of the railway act. That act contains a clause, s. 31, that the company shall not execute or commence the execution of any work whatsoever upon the shore of the river Thames, without the consent in writing of the conservators, and another clause (s. 32) which provides that the work shall be executed according to a plan and elevation and upon a site to be approved by the conservators. Accordingly, a plan of the proposed bridge was submitted to the plaintiffs, and they, through their secretary, gave their consent in writing in the terms of s. 31. It has been contended, on the part of the defendants, that the consent so given under that act amounted to a licence to them to take the land; and that, having given it without imposing any condition, the conservators are not entitled to call upon them for any compensation in respect thereof. I am, however, of opinion that the effect of that consent is not such as the defendants assert. I take the same view of the consent which was taken by my Brother Smith in *Metropolitan Board of Works* v. *Metropolitan Railway Company*. (1) The same argument was urged there as has been urged here. The Metropolitan Board of Works claimed compensation from the railway company for damage done to one of their sewers by the execution of the

(1) Law Rep. 3 C. P. 612.

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works of the railway. Two answers were set up on behalf of the company,—one, that the board were not entitled to any compensation, because no right of theirs had been interfered with by the defendants,—secondly, that, even if there had been, the board had given their consent in writing to the execution of the works, and, as it was conceded that the work had been done properly and according to the plans submitted to them, they were without remedy. The legislative provision under which the consent was required there was very similar to that now in question. The majority of the Court thought that the board had no right to lateral support for their sewer by the land of the adjacent owners. My Brother Smith thought the plaintiffs were entitled to such lateral support; and it then became necessary to consider whether the consent given by the board affected that right. Upon this point he says (1): "It was rather suggested by the defendants than relied on as a distinct point, that the approval of the plans for the railway works by the board, was equivalent to a licence to execute them: but this cannot, I think, be so. The approval is not a voluntary licence by the board, but a condition imposed on the railway company. It would be the duty of the board not to refuse their approval of the plans, if at the time they appeared to afford sufficient security to their own works; but such approval so given in compliance with the act, does not, as it seems to me, carry with it the consequence of a voluntary licence, so that, if any damage is done to the works of the board in the execution of the plans, the railway company is absolved from making compensation." So here, I apprehend it was the duty of the conservators to give their consent to the erection of the bridge, if satisfied from the plans deposited with them that the proposed work was such as they ought to approve. It seems to me, therefore, that their consent does not in the least degree interfere with their right to claim compensation. Then, is there anything in the character which they fill to deprive them of that right? They are the owners of the soil; and are entitled to part with it for a consideration, in which the Crown has an interest. But it is said that the plaintiffs have not parted with the land, but that all the defendants have acquired is an easement over it; and that the compensation to be

(1) Law Rep. 3 C. P. at p. 629.

awarded under the Lands Clauses Consolidation Act is for lands *taken* or injuriously affected by the works of the company. I am not prepared to say that that might not have been a good objection to the award, if founded in fact. But here the land was scheduled in the books of reference deposited under the act, and *was taken* under the powers of the act. The consent to the building of the bridge had nothing to do with the land, but only with the approval of the nature of the works to be done. I am at a loss to see why the plaintiffs should not have compensation. And I think the proper mode of enforcing it is that which the plaintiffs have adopted. The same question arises upon the demurrer to the second plea, and upon that I am also of opinion the plaintiffs are entitled to judgment.

MONTAGUE SMITH, J. I am of the same opinion. The company have built their bridge upon land which is the undoubted property of the plaintiffs. No doubt, it is for the benefit of the public that there should be railways: still those whose property is taken for the purpose, or injuriously affected by the construction of the works, ought to receive compensation. The conservators, as owners of the soil of the river, were primâ facie entitled to compensation. It is for the company to shew something in their act of parliament which deprives them of that right. This I think they have failed to do. It appears that the land upon which the piers and abutments of the bridge stand was included in the plans and books of reference deposited by the company, as mentioned in s. 19. The special act impowers the company to take those lands; and the provisions of the Lands Clauses Consolidation Act are incorporated with the special act. If it had stood there, the conservators would clearly have been entitled to compensation in the same way as other owners whose lands are taken are entitled. Mr. Brown assumes that the land taken was valueless. There is, however, no ground for that assumption. The legislature seem to have considered the soil of the bed and foreshore of the river of some value, because the powers given to the conservators by ss. 56 and 57 of the Conservancy Act to grant licences are by s. 58 expressly restricted to granting them for a pecuniary consideration; the latter part of the section enacting that "no such licence or permission

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shall be granted by the conservators without a previous valuation being made by such competent person as aforesaid; and every such valuation shall be signed and certified by the person making the same to be true and accurate to the best of his judgment and belief; and a copy thereof shall be transmitted by the conservators to the said commissioners" of woods and forests. What is there, then, to lead to the presumption that the company, if they took any part of the bed or soil of the river, were to take it without making compensation for it? I see nothing. Then it was said that the land here was taken by agreement, and that by the agreement no price was stipulated, and therefore it must be assumed that the conservators intended to grant it gratuitously. That argument is based upon the 31st and 32nd sections of the railway act. But it seems to me that our decision is quite consistent with those two sections. They do not profess to affect the land, but merely relate to the works to be constructed, and were designed to give the public an additional security in the supervision of the works by a responsible and known body. Similar provisions are contained in all railway acts, where the railway is intended to cross a navigable river, in order that no injury may be done to the rights of the public. The plaintiffs fill a double capacity: they are conservators of the river and owners of the soil. In the former capacity, they are charged with the duty of seeing that no obstruction to the navigation of the river is caused. In the latter, they are entitled to compensation, like any other owners of land. Upon these grounds, it seems to me that the main objection to the maintenance of this action fails. But it is said that the claim of the conservators should have been enforced at the time the consent was given. What I have already said seems to me to answer that also. The consent to the proposed works had nothing to do with the taking of the land. And, if the legislature contemplated that any compensation should be paid, it is much more consistent to suppose they intended that it should be assessed in the ordinary way, than that it should be left to the conservators themselves to assess it by their own officer. Upon that ground also the defendants have failed to satisfy me that the plaintiffs ought not to succeed. The rule will be discharged, and judgment given for the plaintiffs upon the demurrer.

BRETT, J. The whole argument on the part of the defendants turns upon the fallacy of mixing up the two characters which the plaintiffs fill, of conservators of the Thames, and owners of the soil, and the two consents mentioned in the act. The conservators possess only the powers which the act gives them. They are to give licences in certain cases and consents in others. The document in this case is in truth neither a licence nor a consent. The act of 1857 has nothing to do with the matter. The whole question depends upon the act of 1858, the railway act. The company were impowered to take certain lands, and to build a bridge across the Thames. Part of the land which they were impowered to take was a portion of the bed and foreshore of the Thames, which belonged to the conservators. In their character of landowners, the conservators stood in the same situation as any other owners. In their character of conservators, they were charged with the duty of seeing that the navigation was not improperly interfered with. Sections 31 and 32 apply to the manner of carrying out the works; they have no reference to the taking of the land. The land was not taken by consent, but under the powers of the company's act; and the compensation was to be assessed under the provisions of the Lands Clauses Consolidation Act. The rule for entering a verdict for the defendants must be discharged; and it follows that the judgment on the demurrer to the second plea must also be for the plaintiffs.

Rule discharged.
Judgment on demurrer for the plaintiffs.

Attorneys for plaintiffs: *W. C. Hall, for Frere & Co.*
Attorneys for defendants: *Fladgate, Clarke, & Finch.*

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Nov. 21.

EDMUNDS *v.* GREENWOOD.

Interrogatories—Libel—Common Law Procedure Act, 1854 (17 & 18 *Vict.* c. 125), *s.* 51.

In an action for libel the Court refused to allow interrogatories to be administered to the defendant, under s. 51 of the Common Law Procedure Act, 1854, the express object of the plaintiff being to make the defendant criminate himself if he answered them in the affirmative.

THE defendant, the solicitor of the treasury, was in May, 1864, in conjunction with the late Mr. Hindmarch, Q.C., appointed by the commissioners of patents to institute inquiries concerning disputes which had arisen between the plaintiff, the then clerk to the commissioners of patents, and another gentleman in the office.

In pursuance of these instructions the defendant and Mr. Hindmarch entered upon the investigation, and made three reports to the commissioners. The defendant also sent a letter to the Lord Chancellor concerning the subject of the inquiry.

The present action was brought for alleged libels on the plaintiff contained in two of the reports and in the letter.

The plaintiff applied at chambers for leave to administer interrogatories to the defendant with the object of obtaining an admission of the publication of the alleged libels.(1) Martin, B., refused to make an order.

The affidavit on which the motion was founded stated that, with reference to two of the reports, the defendant admitted in answer to certain questions in the suit of *Attorney-General* v. *Edmunds*

(1) The interrogatories were twenty-nine in number, and inquired minutely into all circumstances from which any evidence of a publication of the alleged libels by the defendant could be gathered. They asked by whom were the reports and letters drawn up; in whose handwriting were the drafts for the reports and letter; were any copies made of the reports and letter; and were such copies lithographed? Were any copies sent to anyone besides the Lord Chancellor and the commissioners of patents? Were the contents of the reports and letter published in any newspaper with the defendant's knowledge or sanction? &c., &c.

The interrogatories further inquired into the nature of the instructions received by the defendant from the commissioners of patents, and the extent of his authority to make the inquiry on which the reports and letter were founded, and the mode in which the inquiry was conducted.

that such reports had been lithographed by the direction of Mr. Hindmarch, Q.C., with the concurrence of the defendant, and no explanation was offered as to the purposes for which such reports were so lithographed; and that deponent had been informed by the Queen's printers, and believed, that a large number of copies of the reports so lithographed were printed by them.

Nov. 21. *D. Seymour, Q.C.*, moved for leave to administer the interrogatories. Questions will arise on the trial as to the scope of the authority given to the defendant and Hindmarch, whether they exercised that authority properly, whether the defendant was party to the publication of the documents, whether they were privileged, and whether or not he was actuated by malice. The proposed interrogatories go into all these inquiries. That interrogatories may tend to criminate the party interrogated is no objection to their allowance. Any question which the party would be bound to answer if in the witness-box, he must answer on interrogatories: *Zychlinski* v. *Maltby*. (1) If his answers may tend to criminate him, he may decline to answer: *Bartlett* v. *Lewis*. (2) If the defendant relies upon any supposed privilege arising out of his public character, the objection must come from himself. *Stern* v. *Sevastopulo* (3) shews that interrogatories may be allowed in an action for slander, though the particular interrogatories there suggested were held not to be admissible. So, in *Atkinson* v. *Fosbroke* (4), in an action of slander, it being shewn that the defendant, at a certain place, in the presence of certain persons, had made imputations against the plaintiff to the effect that he had committed forgery, but that the persons present refused to give the plaintiff any further particulars, the Court of Queen's Bench allowed interrogatories to be put to the defendant as to the precise words which he had used; Cockburn, C.J., after adverting to the affidavits, saying (5), "The result is that a slanderous imputation against the plaintiff of a definite character is shewn to have been made by the defendant . . . . but the plaintiff has no means of ascertaining the exact terms of the slander, except by extracting it, through

(1) (1) 10 C. B. (N.S.) 838.
(2) 12 C. B. (N.S.) 249; 31 L. J. (C.P.) 230.
(3) 14 C. B. (N.S.) 737; 32 L. J. (C.P.) 268.
(4) Law Rep. 1 Q. B. 628.
(5) Law Rep. 1 Q. B. at p. 631.

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means of interrogatories, from the defendant himself. It is clear that the plaintiff has a good cause of action, but is unable to find out the precise form in which to frame it. I think, therefore, the plaintiff is entitled to have the assistance of the Court, and that the proposed interrogatories ought to be allowed." And Blackburn, J., distinguishes the case from *Stern* v. *Sevastopulo*. (1)

In *Tupling* v. *Ward* (2), the Court, in an action for a libel, refused to allow the interrogatories, but they do not profess to lay down any general rule on the subject. In *M'Fadzen* v. *Mayor, &c., of Liverpool* (3), in an action for malicious arrest and false imprisonment brought against a municipal corporation, the plaintiff was allowed to interrogate the town-clerk whether he caused the plaintiff to be arrested, and by what authority he did so. Bramwell, B., there says: "The Court has, of course, a discretion to say that it will not admit of irrelevant, offensive, or scandalous questions. But we ought not, I think, to allow a question to be shut out only because the opposing counsel says that it is a question which the interrogated party may perchance object to answer. In equity, any question that is material may be put, and the objection to answer it must be made under the oath of the person objecting, not on the mere assertion of counsel. Therefore, unless we can see clearly that the question is one that ought not to be put, we ought to allow it, and to leave the objection to be taken at the stage of answering."

In *Stewart* v. *Smith* (4), in an action for a malicious prosecution on a charge of stealing books, the Court allowed interrogatories requiring the plaintiff to state whether or not certain books described were in his possession, and when, where, and from whom he bought them, and the price he paid for them.

[KEATING, J. The plaintiff there could not be exposed to any pains and penalties; for, the questions had reference to a charge of which he had been acquitted. Here, the questions have a direct tendency to criminate.]

The uniform practice has been to allow all interrogatories which bonâ fide tend to support the party's own case, provided there is

(1) 14 C. B. (N.S. 737; 32 L. J. (C.P.) 268.
(2) 6 H. & N. 749; 30 L. J. (Ex.) 222.
(3) Law Rep. 3 Ex. 279, 281.
(4) Law Rep. 2 C. P. 293.

reasonable ground for putting them, and they do not fall within the class of questions which are scandalous or offensive.

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Cur. adv. vult.

Nov. 21. The judgment of the Court (Bovill, C.J., Keating, and Byles, JJ.), was delivered by

BOVILL, C.J. In this case Mr. Seymour moved for leave to administer interrogatories to the defendant, under the 51st section of the Common Law Procedure Act, 1854. The action is brought for alleged libels on the plaintiff contained in two reports made by the defendant to the commissioners of patents, and in a letter addressed by the defendant to the Lord Chancellor: and the object of the interrogatories was stated to be, in the first place, to shew that the defendant in making those reports and in writing that letter exceeded the authority given to him; secondly, that he had circulated the reports amongst persons who were beyond any privilege which could arise from the occasion; and, thirdly, that he had been actuated by malicious motives. The proposed interrogatories were intended to make out those three propositions; the express object being to make the defendant criminate himself if he answered in the affirmative the questions proposed to him. An application had been made to my Brother Martin at chambers; and, he having refused to make an order, the case now comes before us by way of appeal against his decision. Now, in all the cases which have arisen upon this subject, it has been considered that it is for the judge at chambers to exercise his discretion, regard being had to the circumstances of each particular case and the nature of the proposed interrogatories; and the Courts will not interfere unless satisfied that that discretion has been exercised improperly. In many cases interrogatories have been allowed to be put to a party, though the answers thereto might have a tendency to criminate him, as in *Zychlinski* v. *Maltby* (1) and *Stewart* v. *Smith* (2), leaving him to refuse to answer the questions upon that ground, if he should think fit. So, where fraud has been alleged against a party, the Courts have in some cases allowed him to be interrogated upon the matter, and questions to

(1) 10 C. B. (N.S.) 838. (2) Law Rep. 2 C. P. 293.

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be put tending to shew that he was guilty of the alleged fraud, as in *Osborn* v. *London Dock Company* (1) and *Bartlett* v. *Lewis* (2) But, in a case of libel, *Tupling* v. *Ward* (3), the Court of Exchequer refused to allow interrogatories to be put to the defendant with the view of shewing the authorship of the publication complained of; and, after time taken for deliberation, Martin, B., delivering the judgment of the Court, says: "We are all of opinion that, in the exercise of the authority and discretion given to us by the 51st section of the Common Law Procedure Act, 1854, such interrogatories ought not to be allowed. It was scarcely contended that the defendant was bound to answer them; but it was urged that the interrogatories ought to be administered, leaving the defendant to refuse to answer if he thought fit. Without laying down any general rule on the subject, we think that, in cases of this kind, it would be unfair to submit questions which a party is clearly not bound to answer; the object being, either to compel him to answer when not bound, or to refuse, and so create a prejudice against him. We therefore think that these interrogatories ought not to be allowed." This Court, again, in *Stern* v. *Sevastopulo* (4), acted upon the same principle, in an action for verbal slander: and that case is the stronger, because a judge at chambers had allowed the interrogatories, and the Court set aside the order. The cases relied on by Mr. Seymour on moving for this rule, were nearly all cited there, and the case was pressed quite as urgently and forcibly as this has been. But Erle, C.J., said: "It appears to me that this is an attempt to extend the rule to a degree that might lead to most pernicious consequences,—an extent to which, if there be no authority to warrant it, I for one should decline to be responsible for carrying it. In Mr. Day's excellent book on the Common Law Procedure Acts, 2nd ed. pp. 235, 236 (3rd ed. 258), *Tupling* v. *Ward* (3) is referred to to shew that the Courts have a general discretion in the matter of allowing interrogatories, and *Moor* v. *Roberts* (5) to shew that such interrogatories as are of a merely fishing character are not to be allowed. The unprecedented nature

(1) 10 Ex. 698; 24 L. J. (Ex.) 140.
(2) 12 C. B. (N.S.) 249; 31 L. J. (C.P.) 230.
(3) 6 H. & N. 749, 752; 30 L. J. (Ex.) 222, 224.
(4) 14 C. B. (N.S.) 737, 742; 32 L. J. (C.P.) 268, 270.
(5) 2 C. B. (N.S.) 671; 26 L. J. (C.P.) 246.

of these interrogatories, the nature of the action, and the absence of any special circumstances to warrant them, seem to me to afford abundantly sufficient grounds to shew that they overstep the boundary line. I do not mean to say that in no case will the Court allow interrogatories in an action of slander; but, before I allow them, I must be satisfied that there are very peculiar circumstances of grievance and oppression to justify so novel a proceeding." The rest of the Court concur in that judgment. A similar question arose in *Atkinson* v. *Fosbroke.* (1) The Court of Queen's Bench, agreeing in the general principle on which such interrogatories ought to be allowed, as stated in *Stern* v. *Sevastopulo* (2), thought that, under the very peculiar and special circumstances of the case then before them, although it was an action for slander, the interrogatories should be allowed. In the present case, however, we do not find that there are any such special circumstances as in our judgment ought to take it out of the principle which was acted upon by the Court of Exchequer in *Tupling* v. *Ward* (3), and by this Court in *Stern* v. *Sevastopulo.* (2) In fact, every word of the judgments in those two cases might with equal propriety be applied to the present case. The express and avowed object of the plaintiff here is, to put certain questions to the defendant which may tend to make him criminate himself. In the absence, therefore, of any such special circumstances as should, according to the general current of authorities, induce a judge sitting at chambers, or the Court, in the exercise of their respective discretions, to allow interrogatories such as these to be put, we are of opinion that they ought not to be allowed in an action of this description. We are, in effect, asked to say that Martin, B., exercised his discretion improperly. That must be most clearly made out before we will interfere with the deliberate decision of a learned judge. So far from its being made out here, we are all of opinion that his discretion was most properly exercised. The interrogatories must therefore be disallowed.

Rule refused.

Attorneys for plaintiff: *Ashley & Earle.*

Attorneys for defendant: *Raven & Bradley.*

(1) Law Rep. 1 Q.B. 628.

(2) 14 C. B. (N.S.) 737; 32 L. J. (C.P.) 268.

(3) 6 H. & N. 749; 30 L. J. (Ex.) 222.

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Nov. 23.

POTTER AND OTHERS *v.* RANKIN.

Costs—Attendance of country Attorney or managing Clerk on Trial, &c., in London—Commission to examine Witnesses abroad—Legal Assistance—Master's Discretion.

The master, on taxation of the defendant's costs in an action on a policy, where the questions to be tried were admitted to be extremely difficult and complicated, having declined to allow the expenses of the attendance at the trial in London, and on a motion, of the managing-clerk of the defendant's attorney, who had had the entire management of the cause,—The Court refused to interfere.

On the execution of a commission for the examination of witnesses at Calcutta, in a case of much complication and importance, the master, on taxation of the defendant's costs, disallowed the expenses incurred on his behalf in legal assistance to the commissioners in conducting the viva voce examination of the several witnesses, although the order for the commission provided that "the costs of the order, and of the examination, interrogatories, cross-interrogatories, and office-copies thereof, and *all other costs incidental thereto*, should be costs in the cause:"—

The Court refused to interfere with the master's discretion.

THIS was an action against a Liverpool underwriter on freight of the ship *Sir William Eyre*, for a total loss. The cause was tried at the sittings in London after Michaelmas Term, 1866, when a verdict was found for the defendant, subject to a motion. In Hilary Term, 1867, a rule nisi was obtained to enter a verdict for the plaintiffs, which rule was subsequently discharged. (1)

The plaintiffs had obtained a commission for the examination of witnesses at Calcutta, the order for which provided that "the costs of the order, and of the examination, interrogatories, cross-interrogatories, and office-copies thereof, and all other costs incidental thereto, should be costs in the cause."

On taxation of the defendant's costs, the master disallowed the journeys and attendances at consultations with counsel, and at the trial, and on the argument of the rule, of Mr. Snow, the managing-clerk of Messrs. Bateson & Co., of Liverpool, who had prepared the briefs and had had the entire management of the cause, although it was sworn that, from the importance and difficulty of the questions raised, the defendant could not safely or prudently have allowed the trial to take place without his personal attendance.

The bill of costs contained a charge of 136*l.* 7*s.* for the costs of executing the commission at Calcutta, 66*l.* 17*s.* of which was for

(1) Law Rep. 3 C. P. 562.

"legal advice and assistance to the commissioners executing the said commission." The master disallowed this sum of 66*l.* 17*s.* It appeared that the commission had been directed to two merchants, and that, in consequence of the importance and intricacy of the matters in issue, and it being the practice upon the execution of commissions to put questions vivâ voce, in addition to the written interrogatories, each commissioner had thought it necessary to obtain the assistance of an attorney.

A summons was taken out for a review of the taxation: and upon the hearing Blackburn, J., declined to interfere, indorsing the summons,—"No order; without prejudice to an application to the Court in respect to the non-allowance of legal assistance on the commission."

Cohen moved for a rule nisi for a review of the taxation. He submitted, upon the authority of *Bell* v. *Aitkin* (1), that this was a case in which the master, in the exercise of his discretion, ought to have allowed the attendance of the managing-clerk of the defendant's attorneys, especially as it was the act of the plaintiffs, in laying the venue in London, which rendered his attendance here necessary; and that, seeing the importance of the questions at issue, and the difficult nature of the examination of the witnesses under the commission, the expense of obtaining legal assistance for the commissioners ought to have been allowed as "costs incidental to the execution of the commission."

[The Court refused a rule upon the first point, observing that the circumstances of the case relied on were very peculiar; but they granted it upon the second point.]

Sir G. Honyman, Q.C., shewed cause. It would very much aggravate the expense of commissions if an attorney were to be employed on each side to assist the commissioners. There is no precedent for such a claim as this. And there is no pretence for saying that this is not a matter for the discretion of the master, or that the master here has not exercised that discretion properly. If the commissioner had charged a lump sum, including what he had paid for legal assistance, and the master had in the exercise of his discretion allowed it, the Court probably would not have inter-

(1) Law Rep. 3 C. P. 320.

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fered: *Cornet* v. *Dempsey*. (1) But *Stewart* v. *Steele* (2) shews that the master must exercise his discretion on the matter. And, unless he is shewn to have erred in principle, the Court will not send the matter back to him.

[BOVILL, C.J. The inquiry was certainly a very serious one; and, if questions were to be put vivâ voce, it is difficult to see how the duty cast upon these lay commissioners could be properly performed without the assistance of either attorney or counsel. Indeed, I perceive from the bill that there were consultations as to whether or not counsel should be employed. The same course seems to have been pursued by both sides.

BRETT, J. As the parties chose to employ lay commissioners in a case of such importance, in which it must have been assumed that professional assistance would be required, the question is whether the successful party should not have the costs of it.]

It must surely be a matter for the master. And here the master did not decide until after consultation with some of the other masters.

Cohen, in support of the rule. The only question is whether these costs were fairly and reasonably incurred in the execution of the commission. There is no more reason why a lay commissioner should not avail himself of legal assistance, than why a lay arbitrator should not employ competent legal advice in the preparing of his award. And, if ever there was a case that would justify it, this is that case. None but a professional man of great experience could have conducted the examination satisfactorily.

[BRETT, J. Nobody doubts the propriety of the course which was adopted. The only question is, who is to pay for it.]

The reason why the question has not arisen before no doubt is, that the commissioner usually charges a gross sum, which includes the charge for professional advice. If the witnesses had been examined before a master here, the attendance of counsel and attorney would have been allowed as matter of course. So, on a reference to arbitration. The very form of the commission here shews that the employment of a professional adviser was contemplated. The point is one of considerable importance; for, whereas formerly the functions of the commissioners were simple and well defined, very different duties are now cast upon them by the

(1) 1 Dowl. N. S. 422. (2) 4 M. & G. 669.

modern practice of examination vivâ voce: and it is within the experience of every one that commissions frequently fail in consequence of the imperfect manner of their execution.

[BOVILL, C.J. Why was not a mandamus to the Supreme Court obtained?]

That course was deprecated by the Court in *Farnworth* v. *Hyde* (1), in consequence of the increased delay and expense. There had been a second commission in this case to Otago; and as to that, the master allowed a portion of the costs incurred by the commissioners in obtaining legal assistance.

BOVILL, C.J. Mr. Cohen bases his application in this case upon two grounds. In the first place, he contends that the commissioner had a right to call in the aid of an attorney in conducting the examination under the commission, and that the unsuccessful party must pay for it. There is no foundation whatever for that contention. The matter must be for the discretion of the master in each particular case: and, unless we see that the master has been clearly and substantially wrong, we cannot interfere with his decision. The importance of the case, and the nature of the questions to be put to the witnesses, were matters for the consideration of the master: and no doubt everything that could be urged before him in support of the claim was ably urged. It was, probably, highly desirable that the defendant should have the assistance of a legal adviser to conduct the examination before the commissioners. But the question is whether he can impose the expense of that upon the plaintiffs. If the master had altogether declined to exercise a discretion, there might possibly be ground of complaint. But here the master did go into the matter; for, he allowed a portion of similar charges on the Otago commission. It is impossible for the Court to discuss the question of amount.

BYLES and BRETT, JJ., concurred.

Rule discharged, with costs.

Attorneys for plaintiffs: *Thomas & Hollams.*

Attorneys for defendant: *Field & Roscoe, for Bateson, Robinson, & Co., Liverpool.*

(1) 14 C. B. (N.S.) 719.

1868
Nov. 30.

NICHOLS *v.* DAVIS.

Parish Clerk—Assignment of Office—Parish of Manchester Division Act, 1850 (13 & 14 *Vict. c.* 41), *s.* 6.

N., having been appointed parish clerk of the parish of Manchester before the passing of 13 & 14 Vict. c. 41, purported to assign by deed his office of parish clerk to D. By 13 & 14 Vict. c. 41, s. 6, an act passed for subdividing the parish of Manchester, it was provided that there should be paid to the rectors of the new parishes for marriages, churchings, and burials, the fees usually payable at the parish church during the continuance in office of the chaplains, minor canons, and clerks of the parish church then being in office, or any of them; and that the rectors should pay the same to one of the chaplains or minor canons, who should distribute them to the persons entitled. All the chaplains and minor canons had ceased to hold office. N. having sued the rector of one of the parishes created under the act for his portion of the marriage fees:—

Held, that the office of parish clerk cannot be assigned, and N. was therefore still the parish clerk.

Held, also, that the mode by which the fees received by the rectors were to be paid to the parties entitled was only machinery appointed by the act for the purpose, and there being no chaplains or minor canons remaining through whom it could be carried out, N. was entitled to recover by action from the rector the amount due to him.

APPEAL from the county court of Manchester.

The action was brought to recover the sum of 2*l.* 17*s.* 6*d.* for marriage fees claimed by the plaintiff, as being payable to him under the provisions of the parish of Manchester Division Act, 1850 (13 & 14 Vict. c. 41), s. 6 (1), as lay parish clerk of the parish

(1) 13 & 14 Vict. c. 41, s. 6:—"And in order that the setting out and declaring, or setting out, constituting, and annexing, any district or parish, under the provision of this act, to any church or chapel already consecrated, or to be hereafter consecrated, may not prejudice the revenues of the chaplains or minor canons, or of the clerks now holding office in the cathedral and parish church of Manchester, be it enacted, that there shall be paid to the rectors of such districts or parishes respectively, and their successors for the time being, for the performance of marriages, churchings, and burials, during the continuance in office of the said chaplains or minor canons and clerks, or any of them, the fees which are usually and of right ought to be paid for every such marriage and burial, and such offerings as are usually and of right made for every such churching at the said cathedral and parish church of Manchester, and that the said rectors and their respective successors, shall from time to time receive such fees and offerings, and pay to the said chaplains or minor canons such proportion of the same as incumbents of chapelries and districts within the parish of Manchester have hitherto paid of fees and

of Manchester, and of the cathedral or collegiate and parish church of Manchester, for marriages solemnized at Saint Peter's Church, Oldham Road, Manchester, between the 1st of January, 1860, and the 31st of December, 1866. In July, 1818, the plaintiff was appointed by deed to the office of lay parish clerk of the parish of Manchester, and of the cathedral or collegiate and parish church of Manchester, by the late Sir Thomas Joseph de Trafford, in whose gift the office was, as stated in 13 & 14 Vict. c. 41, s. 18. By an indenture dated the 14th of November, 1835, the plaintiff, in consideration of 1900*l.*, assigned to Mr. Thomas Davenport his office of parish clerk of the said parish and church, and the emoluments arising therefrom. The plaintiff had not since 1835 acted as parish clerk, or appointed any deputy to act in his stead other than by the above-mentioned indenture of the 14th of November, 1835. The chaplains or minor canons, and the clerk in orders holding office at the time of the passing of the act (13 & 14 Vict. c. 41), all ceased to hold their respective offices as chaplains, minor canons, and clerk in orders before the commence-

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offerings respectively received by them in respect of marriages, churchings, and burials in their several churches and chapels, to be by the said chaplains or minor canons paid to the person or persons for the time being entitled thereto, and in such shares and proportions as the fees and offerings respectively now payable at the said last-mentioned church are divided, and that the said fees and offerings shall be paid by half-yearly payments, on the Feast of the nativity of our Saviour Christ, and of St. John the Baptist, in every year: Provided always, that on the death of any one or more of the present chaplains or minor canons and clerks, or on the ceasing of any one or more of them to hold his or their office or offices respectively, or being compensated in manner hereinafter provided, such proportion of the fees and offerings to be paid to the said chaplains or minor canons and clerks as would have belonged to the person or persons so dying or ceasing to hold office, or being compensated as aforesaid, shall cease and determine; and from and after the death or vacation of office of all the said present chaplains or minor canons and clerks, such fees only shall be payable at any such church or chapel as aforesaid, as shall be fixed by the bishop of the diocese under the provisions hereinafter contained: Provided also, that nothing in this act contained shall interfere with the right of performing marriages within the parish of Manchester (as now existing) already enjoyed by the incumbents of the churches of St. Mary and St. John, in Manchester, until the next avoidances of the said churches respectively, when the same shall cease and determine, except as to the districts or parishes then severally annexed or to be annexed to the said churches."

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ment of the year 1855. The defendant was the rector of St. Peter's Church, Oldham Road, Manchester, to which a parish constituted out of the ancient parish of Manchester had been annexed under the provision of the above-mentioned act. The church of St. Peter was consecrated in January, 1860, and the defendant had been rector since the time of its consecration.

The county court judge found that in the event of any fees being payable by the defendant to the parish clerk of the cathedral and parish church in respect of marriages at St. Peter's, such fees were one shilling for each marriage by licence, and ninepence for each marriage by banns, and the total amount of such fees at the said rates, from January, 1860, to December, 1866, was 2*l.* 17*s.* 6*d.* Judgment was given for the plaintiff for the sum of 2*l.* 17*s.* 6*d.*, with leave to the defendant to appeal.

The question for the opinion of the Court was, whether the plaintiff was entitled to recover by action in the county court of Manchester the said sum or any part thereof.

John Edwards, for the defendant, contended, first, that the plaintiff was not the parish clerk of Manchester, for that either the office was assignable (Com. Dig. Officer (C. a.)) and passed to Davenport by the deed of the 14th of November, 1835, or else the plaintiff had lost his rights in it by non-user. Secondly: that the plaintiff, if ever entitled to the fees claimed, was only entitled to receive them from one of the chaplains or minor canons in the manner pointed out by the act (13 & 14 Vict. c. 41, s. 6), and not to recover them by action.

R. G. Williams, for the plaintiff, was not called on.

WILLES, J. Mr. Edwards has done all that it was possible to do, but the county court judge was right. The first point made on behalf of the defendant was that the plaintiff had ceased to be parish clerk of Manchester. It could not be doubted that he was so up to the year 1835, because the case finds that Sir T. Trafford had a right to appoint him, and that is a right which, though unusual, he may have had under a private act of parliament. Sir T. Trafford appointed him by a deed which gave him a right to appoint a deputy, but made no mention of assigns, and there is nothing to shew that the plaintiff's office differs from that of any

other parish clerk. In the year 1835 the plaintiff professed to assign his office to Mr. Davenport, and the question is, whether that assignment took the office out of the plaintiff, or only amounted in law to the appointment of a deputy. It certainly would require authority to shew that a parish clerk can assign his office, and the only authority that has been cited is a passage in Comyn's Digest, Officer (C. a.), which says that an office in fee may be assigned; but it goes on to give the reason, viz., because heir includes assigns, which implies that an office granted for life cannot be assigned. The same title (D. 1) states who can appoint a deputy, and it appears at once from what is there laid down that it is a very different thing to be entitled to appoint a deputy and to make an assignment. Amongst the officers who may appoint a deputy is mentioned, though doubtfully, a parish clerk, with a reference to *Peat* v. *Birr* (1); but the whole passage excludes the idea that a parish clerk can assign his office. I think therefore that both upon reason and authority the deed of 1835 amounted only to the appointment of a deputy, the plaintiff being bound to pay over the fees he may receive to Mr. Davenport, upon the principles laid down in *Roe* v. *Tranmarr.* (2) No question arises here as to the effect of non-user in the case of such an office, because no non-user has been shewn of a contumacious kind; but where non-user has been set up as causing a loss of right, as in the case of a lord of the manor letting manorial courts fall into neglect, and failing to appoint a judge, there has been usually some injury to third parties, and a duty to exercise the right to a definable extent.

Then, further, it is contended that the 6th section does not reserve to the plaintiff his rights, but only entitles him to be paid certain moneys by the chaplains or minor canons holding office at the time the act was passed, and that he therefore is not entitled to bring this action. The key to that section however is to be found in the introduction to it, which states the object of the section to be that the consecration of new churches under the act might not prejudice the revenues of amongst others the clerks then holding office, of whom the plaintiff was one. The section then provides a certain course by which the fees of the clerks should

(1) Fitzgibbon, 272. (2) Willes, 682.

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be paid to them, viz., through the hands of the chaplains or minor canons; but the rights of the clerks being distinct rights of their own cannot have been intended to depend on the existence of the chaplains or minor canons. The object of the provisions was obviously to save the rectors of the new churches the trouble of distributing the fees; it is therefore a mere matter of machinery, as if the act had provided that the money should be paid through a certain bank. If in that case the bank had ceased to exist, the plaintiff would still have been entitled to receive the money, and so in this case the only effect of all the chaplains and minor canons having ceased to hold office is that the rector must pay what he owes to the plaintiff in the usual way, instead of in the manner provided by the act. It may be that the plaintiff could have sued the defendant for his fees if the latter had not paid them, even if the chaplains and minor canons had still held office, but it is not necessary to go into that point in this case.

KEATING, J. I quite agree that the county court judge was right. I think the plaintiff was parish clerk at the time he brought the action, for he was, it is admitted, duly appointed previously to 1835; and, as shewn by my Brother Willes, he could not assign his office, and therefore he still remained parish clerk.

Then it is said that he cannot bring an action for the money, the act only entitling him to receive it through the chaplains or minor canons; but there are none of them left, and if that view be correct, he would be unable in any way to recover the money, though he is clearly entitled to it because the act only provides that the shares of those who die, or cease to hold office, shall cease to be paid. I quite agree with my Brother Willes that the provisions of the act, with reference to payment through the chaplains and minor canons, are merely machinery for enabling the plaintiff to obtain payment without unnecessary trouble to the rectors of the new churches, and that he remains entitled to the money as before, though the machinery has failed.

BRETT, J., concurred.

Judgment for the plaintiff.

Attorneys for plaintiff: *Merriman & Pike.*

Attorneys for defendant: *Gregory, Rowcliffes, & Rawle.*

THE BOARD OF WORKS FOR THE WANDSWORTH DISTRICT, APPELLANTS; HALL, RESPONDENT. 1868 Dec. 1.

Metropolis Management Amendment Act, 1862 (25 & 26 *Vict. c.* 102), *s.* 75—"*General line of Buildings*"—*Jurisdiction of Magistrate.*

H. erected a building beyond a line which was subsequently decided by the superintending architect to the Metropolitan Board of Works to be the general line of buildings of the row of houses in which the same was situated. The superintending architect had not decided what was the general line of buildings for that row of houses previously to the date when H. erected his building. A complaint having been made by the District Board of Works before a magistrate, under 25 & 26 Vict. c. 102, s. 75 (1), the magistrate was of opinion that the line determined by the architect was, in fact, the "general line of buildings" at the time that H. built:—

Held, that H. had committed a breach of the statute (25 & 26 Vict. c. 102), and that the magistrate had jurisdiction to order the building to be pulled down.

St. George, Hanover Square, v. *Sparrow* (16 C. B. (N.S.) 209; 33 L. J. (M.C.) 118), and *Bauman* v. *Vestry of St. Pancras* (Law Rep. 2 Q. B. 528), discussed.

CASE stated by one of the Metropolitan Police Magistrates, under 20 & 21 Vict. c. 43.

(1) 25 & 26 Vict. c. 102, s. 75:—"No building, structure, or erection shall, without the consent in writing of the Metropolitan Board of Works, be erected beyond the general line of buildings in any street, place, or row of houses in which the same is situate in case the distance of such line of buildings from the highway does not exceed fifty feet, or within fifty feet of highway when the distance of the line of buildings therefrom amounts to or exceeds fifty feet, notwithstanding there being gardens or vacant spaces between the line of buildings and the highway, such general line of buildings to be decided by the superintending architect to the Metropolitan Board of Works for the time being; and in case any building, structure, or erection be erected, or be begun to be erected or raised, without such consent, or contrary to the terms and conditions on which the same may have been granted, it shall be lawful for the vestry of the parish or the Board of Works for the district in which such building or erection is situate to cause to be made complaint thereof before a justice of the peace who shall thereupon issue a summons requiring the owner or occupier of the premises, or the builder or person engaged in any work contrary to this enactment, to appear at a time and place to be stated in the summons to answer such complaint; and if at the time and place appointed in such summons the said complaint shall be proved to the satisfaction of the justice before whom the same shall be heard, such justice shall make an order in writing on such owner, or occupier, builder, or person directing the demolition of any such building or erection, or so much thereof as may be beyond the said general line so fixed as aforesaid, within such time as such justice shall consider reasonable, and shall also make an order for the payment of the costs incurred up to the time of hearing."

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The respondent appeared on the 5th of June, 1867, to answer the complaint of the clerk to the appellants, acting on their behalf. The summons charged that the respondent had, without the consent in writing of the Metropolitan Board of Works, unlawfully erected certain buildings beyond the general line of buildings in a street called the Wandsworth Road, such line of buildings not exceeding fifty feet from the highway, contrary to the statute 25 & 26 Vict. c. 102, s. 75. (1)

It appeared in evidence that the respondent had, in the month of May, 1867, but before the 13th of that month, erected a building on part of the garden in front of Thurlow Cottage, situate in Wandsworth Road, Clapham, and beyond the general line, as determined by the magistrate, of buildings forming a row of houses on the south-eastern side of Wandsworth Road, between Matrimony Place and the railway abutment of the London, Chatham, and Dover Railway. The superintending architect to the Metropolitan Board of Works, on the 13th of May, 1867, decided the general line of buildings in the row of houses in which the building so complained of was situate, and the magistrate was of opinion that the general line of buildings so decided by the superintending architect was the general line of buildings in the row of houses in which the building complained of was erected. It was proved that the building complained of was erected beyond such general line of buildings. It was contended on behalf of the respondent that, inasmuch as the superintending architect to the Metropolitan Board of Works had not decided the general line of buildings before the building complained of was erected, therefore the respondent had not violated 25 & 26 Vict. c. 102, s. 75 (1), and that the magistrate had no power to order the demolition thereof, and the magistrate, being of such opinion, declined to make any order in the matter.

If the Court should be of opinion that, under the circumstances, the magistrate had power to order the demolition of the building, then the case was to be remitted to him in order that he might make the necessary order for the demolition thereof, otherwise the complaint was to be considered as dismissed.

(1) Ante, p. 85.

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Francis, for the appellants. On the very day when this case was decided by the magistrate, a contrary decision was arrived at by the Court of Queen's Bench in the case of *Bauman* v. *Vestry of St. Pancras*. (1) That case is decisive of the present point; there was an earlier case in this court, *St. George, Hanover Square*, v. *Sparrow* (2), which is in conflict with the case in the Queen's Bench on the question whether the magistrate is bound by the determination of the superintending architect as to what the general line of buildings is; but they agree on the point raised in this case, that the superintending architect need not have given his certificate before the buildings are erected in order to give the magistrate jurisdiction. In this case the magistrate's own decision agreed with that of the superintending architect, and therefore, according to either case, the appellants are entitled to judgment.

Wharton, for the respondent. The question must turn upon the words of the section; and it is evident from them that there can be no offence till there is a general line of buildings decided by the superintending architect. The magistrate had no jurisdiction to decide whether the line settled by the architect was right. The judgments in the two cases that have been referred to are in direct conflict, and the question is which the Court will now follow. The judgments of Erle, C.J., and Willes, J., in *St. George, Hanover Square*, v. *Sparrow* (3), shew distinctly that they thought that there could be no offence till the general line of buildings had been decided by the architect. In *Bauman* v. *Vestry of St. Pancras* (1) the facts were very different from those in this case, for application had been made by the builder to the Metropolitan Board of Works for leave to build beyond the general line, and he had obtained such permission under certain restrictions: he knew, therefore, what was the general line of buildings, and intentionally built beyond it, and no hardship was involved in the case.

Francis, in reply.

WILLES, J. In this case it is impossible to get over the provisions of the statute, whether it is to be construed according to the rule laid down in this court by three judges in the case of *St. George*,

(1) Law Rep. 2 Q. B. 528. (2) 16 C. B. (N.S.) 209; 33 L. J. (M.C.) 118.
(3) 16 C. B. (N.S.) at pp. 218, 220.

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Hanover Square, v. *Sparrow* (1), or to the rule laid down by one or more of the judges of the Court of Queen's Bench, not by the Court, in *Bauman* v. *Vestry of St. Pancras*. (2) The statute in effect lays down, that a person who erects a building within the limits to which the act applies, unless he obtains the consent of the Metropolitan Board of Works, shall at his peril keep within the general line of frontage; and it goes on to say, that such general line shall be decided by the superintending architect of the Metropolitan Board of Works, and that the magistrate may order the building to be pulled down if it be beyond the general line so fixed. Any person, therefore, who erects a building in such a position that it is in danger of being considered by competent authority beyond the general line of buildings, is in danger of having to pull it down; and though it is a hardship that he should be obliged to do so by a subsequent decision, either of the architect, as was thought by the judges of the Court of Queen's Bench, or the architect confirmed by the magistrate, as was thrown out by three judges of this court, yet the hardship is tolerated to prevent the eyesores and inconvenience that would follow if persons were allowed to build without any reference to the other houses in the street. It cannot be that the line is merely imaginary till fixed by the architect, though it is necessary to resort to a mental process to apprehend it, and it is a matter of judgment where the line will fall upon the ground. It is not necessary to go further in this case, because the magistrate has come to the conclusion that the architect has laid down the general line of buildings correctly; both the authorities therefore (in one or both of whom the right to decide must rest) have decided the position of that line against the respondent. It is unnecessary, therefore, to enter into a discussion as to whether the view taken by three judges in this court, or that taken by two judges in the Court of Queen's Bench, was right. It may be proper, however, to observe, that in the case in the Queen's Bench, Shee, J., said that he did not think that in deciding that case their judgment would necessarily conflict with the case in this court; and he goes on to state the reason, viz., because the magistrate in *Bauman* v. *Vestry of St Pancras* (2) adopted the line that had been decided by the architect as the

(1) 16 C. B. (N. S.) 209; 33 L. J. (M.C.) 118. (2) Law Rep. 2 Q. B. 528.

true line, which of course he had a right to do; the question in that case, in fact, was rather whether the architect's certificate had been given in time, than whether the magistrate was bound by it if it were so; but in the case of *St. George, Hanover Square*, v. *Sparrow* (1) it was assumed that it made no difference when the architect gave his certificate, for one reason why the Court thought that the line fixed by the architect was not conclusive against the builder (no one doubted it was so against the architect's employers, the Metropolitan Board of Works), was the hardship of his being bound by a decision ex post facto. The cases in both courts, therefore, are against the respondent. I may say, without any disrespect to the Court of Queen's Bench, that the opinion of the judges of this court was misapprehended, for it is stated in *Bauman* v. *Vestry of St. Pancras* (2) that the Court of Common Pleas had overlooked that it was the decision of the architect which gave the magistrate jurisdiction; it is quite obvious that that remark proceeds on the assumption that the judges of this court thought that, even if the building was within the line laid down by the architect, yet if it was outside what the magistrate thought to be the true line, he could decide against the builder and order the buildings to be pulled down. No such opinion was entertained here; the judges here, equally with the judge I have quoted, thought that the magistrate had no jurisdiction except in relation to the architect's line; they thought the magistrate ought not to convict unless the building was beyond the line so laid down by the architect, but they also thought that he ought not to convict if he was of opinion that the building was not really beyond the general line of houses, though it was beyond that fixed by the architect. To that extent, therefore, the judgment in this court appears to have been misapprehended. The result therefore is, that we must remit this case to the magistrate, for him to make such order as is right.

KEATING, J. I am of the same opinion. The point actually decided by the magistrate, assuming that he had jurisdiction, was right, because he has found that the line laid down by the architect was the true line of buildings; he has, therefore, not decided anything contrary to the decision in this court in *St. George, Hanover*

(1) 16 C. B. (N. S.) 209; 33 L. J. (M.C.) 118. (2) Law Rep. 2 Q. B. at p. 532.

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Square, v. *Sparrow* (1), nor, indeed, has the Court of Queen's Bench, when the case in that Court is properly understood as explained by my Brother Willes. I think the magistrate exercised a wise discretion in sending the case here, as it is one of some difficulty; but we have come to the conclusion that he has jurisdiction, and is entitled to act upon the opinion of the architect and his own.

BRETT, J. I think this case depends on whether the general line of buildings is, in truth, an existing line before the architect has given his decision respecting it; if it be not, then I should think the injustice would be so great, if the architect could by laying down a line compel persons to pull down buildings already erected, that we should be bound to look for some other interpretation of the act. If, however, the line is an actually existing one, and the only difficulty is in discovering its position, and of this the decision of the architect is made evidence by the act, then I think the words of the act are conclusive. The section says that no person shall build beyond the line, and that if he does the magistrate may order the building to be pulled down; and even according to the case in this court, the architect's decision is primâ facie evidence as to its position, though not conclusive as against the person building. On consideration, I think that the line is an existing one, and that the magistrate had therefore authority to order the building now in question to be pulled down. I think the two cases that have been cited are authority for this opinion; although the point was not actually decided in those cases, it was raised in argument, and the judgments were in accordance with what we are now deciding.

Case remitted.

Attorneys for appellants: *Hamber & Ellis, for A. A. Corsellis, Wandsworth.*

Attorney for respondent: *H. I. Riches.*

(1) 16 C. B. (N.S.) 209; 33 L. J. (M.C.) 118.

HAINES *v.* WELCH AND MARRIOTT.

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*Landlord and Tenant—Distress—Emblements—*14 & 15 *Vict. c.* 25, *s.* 1.

Section 1 of 14 & 15 Vict. c. 25, provides that, where the lease of "any farm or lands" shall determine by the death or cesser of the estate of any landlord entitled for his life or for any uncertain interest, instead of claims to emblements, the tenant shall continue to hold such farm or lands until the expiration of the then current year of his tenancy, and shall then quit upon the terms of his lease, as if it had expired by effluxion of time or otherwise; and the succeeding landlord shall be entitled to recover and receive of the tenant a fair proportion of the rent, for the period since the lessor's death or cesser of estate. H. held as tenant from year to year of A., tenant for life, a cottage with about an acre of land, which was partly cultivated as a garden, and partly sown with corn and planted with potatoes. A. died in the middle of a year of H.'s tenancy, and M. thereupon became entitled to the reversion; and, at the expiration of the then current year of H.'s tenancy, distrained for the proportion of the rent due since the death of A.:—

Held, that the act applied to all tenancies in respect of which there might be a claim to emblements; that, but for the act, there might have been a substantial claim for emblements here, and that the premises were, therefore, "a farm or lands" within section 1.

Held, also, that that section gave a right to distrain for the rent, as well as to recover it by action.

SPECIAL case.

The plaintiff had been for several years prior to the 12th of October, 1866, in the occupation of a cottage and close at Holbeach, in the county of Lincoln, as tenant from year to year, from the 11th of October, to Ann Hitch, who was the owner of the premises as tenant for life. The defendant Marriott was entitled to the property on the death of Ann Hitch, under a deed of settlement. Ann Hitch died in February, 1866.

On the 12th of October, 1866, the defendant Welch, as broker of the defendant Marriott, made a distress upon the cottage for the proportion of rent alleged to be due from the death of Ann Hitch up to the 11th of October, 1866, and which had not been paid.

The cottage was a small labourer's cottage standing upon a close containing more than an acre of land, which was partly cultivated as a garden and partly sown with corn and planted with potatoes. There never was any agreement between the plaintiff and the defendant Marriott as to the rent of the cottage after the death of Ann Hitch.

The Court was at liberty to draw inferences of fact in the same way as a jury.

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The question for the opinion of the Court was, whether, under the above circumstances, the defendants had any right to distrain.

Lanyon, for the plaintiff, contended, first, that 14 & 15 Vict. c. 25, s. 1 (1), applied only to agricultural tenants, and that the plaintiff was not such within the meaning of that act; secondly, that that section gave no power to distrain for the rent accruing subsequently to the reversioner coming into possession, but only a right to recover it by action.

Besley, for the defendant, was not called on.

WILLES, J. I am of opinion that this case falls within the statute: there were, in fact, on this land, corn and potatoes, in respect of which the tenant might have claimed a right to emblements; the case comes, therefore, within the mischief to be remedied by the act, the inconvenience, namely, of the owner of land having a right to it which is subject to the right of another person to come upon it and take the crops. It is unnecessary to express an opinion whether the act applies to all lands in respect of which there might be a claim to emblements, whether there are in fact any such or not. No doubt it must be limited to places in which emblements might exist, but the moment there is a right to emblements, which, though small, is not frivolous, the case is brought within the act.

(1) 14 & 15 Vict. c. 25, s. 1:—"Where the lease or tenancy of any farm or lands held by a tenant at rack rent shall determine by the death or cesser of the estate of any landlord for his life or for any other uncertain interest instead of claims to emblements, the tenant shall continue to hold and occupy such farm or lands until the expiration of the then current year of his tenancy, and shall then quit upon the terms of his lease or holding, in the same manner as if such lease or tenancy were then determined by effluxion of time or other lawful means during the continuance of his landlord's estate; and the succeeding landlord or owner shall be entitled to recover and receive of the tenant, in the same manner as his predecessor or such tenant's lessor could have done if he had been living, or if he had continued being landlord or lessor, a fair proportion of the rent for the period which may have elapsed from the day of the death or cesser of the estate of such predecessor or lessor to the time of the tenant so quitting, and the succeeding landlord or owner and the tenant respectively, shall, as between themselves and as against each other, be entitled to all the benefits and advantages, and be subject to the terms, conditions, and restrictions, to which the preceding landlord or lessor and such tenant respectively, would have been entitled and subject in case the lease or tenancy had determined in manner aforesaid at the expiration of such current year.

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Here the land could not be considered as a mere curtilage to the cottage, and we ought to draw the inference in point of fact, that this was such a piece of land as would give rise to a substantial claim for emblements; and is, therefore, "a farm or lands" within the act.

With respect to the second point, that the words "recover and receive of the tenant" do not include the right to distrain, it is true that in strict legal language recover means recover by action. The Court might at one time have so construed it in a case like the present; but it is now often used in the larger sense of obtaining in any legal manner, and that is the sense in which it should be interpreted here; especially as the context expressly provides that the landlord and tenant shall, as against each other, be entitled to all the benefit and advantages to which the preceding landlord and such tenant would have respectively been entitled in case the tenancy had not expired till the expiration of the current year. The defendants were therefore entitled to distrain, and our judgment must be in their favour.

KEATING and BRETT, JJ., concurred.

Judgment for the defendants.

Attorneys for plaintiff: *Wright, Bonner, & Wright.*
Attorneys for defendants: *Wing & Ducane.*

[IN THE EXCHEQUER CHAMBER.]

Dec. 1.

FUENTES AND ANOTHER *v.* MONTIS AND ANOTHER.

Factors Acts, 6 *Geo.* 4, *c.* 94, *and* 5 *&* 6 *Vict. c.* 39—*Authority of Factor to Pledge Goods—Revocation.*

An agent "intrusted with and in possession of goods, or of the documents of title to goods," within the Factors Acts, is a person who is intrusted as agent for sale; and consequently one whose authority to sell has been revoked cannot make a valid pledge of goods which had been intrusted to him for sale, but which he has wrongfully retained after his authority has been revoked, and the goods demanded from him by his principal.

APPEAL, by the defendants, from a decision of the Court of Common Pleas, upon an interpleader issue directed to try the right to certain wines upon which the plaintiffs claimed a lien for

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an advance of money to the defendants' agent under the Factors Act, 5 & 6 Vict. c. 39. (1)

C. Pollock, Q.C. (*Archibald* with him), for the defendants. The question, which in this case comes for the first time before any court is, whether a factor, who has been intrusted with goods for sale as such, and who has pledged the goods so intrusted to him for a bonâ fide advance made after a secret revocation of his authority by his principal, can give a good title to the person who so advances the money. The case will depend upon the true construction of the last Factors Act, 5 & 6 Vict. c. 39; but some light will be derived from a reference to some dicta of learned judges and the previous course of legislation upon the subject. The decisions as to the revocation of the authority of an agent generally have but little application. Before the passing of the earliest of the Factors Acts, 4 Geo. 4, c. 83, one who had held out another as his agent, could not by a secret revocation of his authority invalidate his acts; but an agent to sell had not authority to pledge the goods of his principal. Most of the jurists as well of our country as of Scotland, America, and the principal mercantile states of continental Europe, have from time to time advocated an extension of the agent's authority: see *Williams* v. *Barton* (2); 1 Bell's Commentaries, 181—184; Story on Agency, s. 113, n.; 2 Kent's Commentaries, 10th edit. 869, n. And the object of the Factors Acts was to make that alteration in the law which those learned writers suggest. This object was imperfectly carried out by 4 Geo. 4, c. 83, and 6 Geo. 4, c. 94: see *Phillips* v. *Huth* (3); *Hatfield* v. *Phillips* (4); *Bonzi* v. *Stewart.* (5) Then came the last act, 5 & 6 Vict. c. 39. It recites the 6 Geo. 4, c. 94, and further recites that "whereas advances on the security of goods and merchandize have become an usual and ordinary course of business, and it is expedient and necessary that reasonable and safe facilities should be afforded thereto, and that the same protection and validity should be extended to bonâ fide advances upon goods and merchandize as by the recited act is given to sales, and that owners intrusting

(1) Law Rep. 3 C. P 268.
(2) 3 Bing. 139, 145.
(3) 6 M. & W. 572.
(4) 9 M. & W. 647; 12 Cl. & F. 343.
(5) 4 M. & G. 295.

agents with the possession of goods and merchandize, or of documents of title thereto, should in all cases where such owners by the said recited act or otherwise would be bound by a contract or agreement of sale be in like manner bound by any contract or agreement of pledge or lien for any advances bonâ fide made on the security thereof." It then proceeds to enact, in s. 1, that, "from and after the passing of this act, any agent who shall thereafter be intrusted with the possession of goods, or of the documents of title to goods, shall be deemed and taken to be owner of such goods and documents, so far as to give validity to any contract or agreement by way of pledge, lien, or security bonâ fide made by any person with such agent so intrusted as aforesaid."

[COCKBURN, C.J. That merely extends the words of the former act to a new class of cases.]

Sect. 4 defines the meaning of the words "document of title." It enacts that "any bill of lading, India warrant, dock-warrant, warehouse-keeper's certificate, warrant or order for the delivery of goods, or any other document used in the ordinary course of business as proof of the possession or control of goods, or authorizing or purporting to authorize, either by indorsement or delivery, the possessor of such document to transfer or receive goods thereby represented, shall be deemed and taken to be a document of title within the meaning of this act; and any agent intrusted as aforesaid, and possessed of any such document of title, whether derived immediately from the owner of such goods or obtained by reason of such agents having been intrusted with the possession of the goods, or of any other document of title thereto, shall be deemed and taken to have been intrusted with the possession of the goods represented by such document of title as aforesaid, and all contracts pledging or giving a lien upon such document of title as aforesaid shall be deemed and taken to be respectively pledges of and liens upon the goods to which the same relates;" "and an agent in possession as aforesaid of such goods or documents shall be taken, for the purposes of this act, to have been intrusted therewith by the owner thereof, unless the contrary can be shewn in evidence."

[COCKBURN, C.J. The legislature may have thought that, where one of two innocent persons must suffer from the act of a

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third, it is only just and equitable that the loss should fall upon him who has allowed that third person to have the appearance of owner of the goods. But the case is very different when the true owner has insisted upon having his goods back, and has done all he could to revoke the authority of the factor. In dealing with an act of parliament which alters the existing law, we must give it a reasonable construction, so far as the words used will admit of it. The question is whether an agent who has been intrusted with goods, or with the symbols of property in goods, for the purpose of sale, but whose authority has been revoked, can be said to be intrusted with the possession within s. 1.]

Each successive enactment has given more ample authority to the factor to deal with the property or the symbols of property intrusted to him in accordance with the usages of merchants. The construction put upon this act by the court below gives it a limitation which did not belong even to the common law. In *Truemas* v. *Loder* (1), where there had been a long course of dealing through an agent, a contract made by the agent in the name of the principal, though after the determination of the agent's authority, was held to bind the principal. The object of the act manifestly was, to make the original intrusting and the actual possession evidence of agency. So construing the act, the intention of the legislature is carried into effect, and no violence is done to the language they have used.

Sir G. Honyman, Q.C. (*Channell* with him), for the plaintiffs, was not called upon.

COCKBURN, C.J. We are all clearly of opinion that the judgment of the Court below must be affirmed. Mr. Pollock was under the necessity of admitting that but for the last Factors Act, 5 & 6 Vict. c. 39, he would have had no locus standi at all. By the law as it stood before, it is clear that a man could only transfer that which he himself possessed. The Factors Act intended to make an exception in the case of a person being an agent and being as such intrusted with the possession of goods for sale. Mr. Pollock's proposition is this, that a person who has once been intrusted with goods for sale, and whose authority has been put an

(1) 11 Ad. & E. 589.

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end to, and who retains possession of the goods against the will of his principal, is nevertheless still a person "intrusted with the possession of them," within the meaning of the act. We think the statute did not contemplate such a state of things as that.

BRAMWELL, CHANNELL, and PIGOTT, BB., and HAYES, J., concurred.

Judgment affirmed.

Attorney for plaintiffs: *John Elliott Fox.*
Attorney for defendants: *J. H. Head.*

[IN THE EXCHEQUER CHAMBER.]

Dec. 2.

MORGAN AND ANOTHER *v.* THE METROPOLITAN RAILWAY COMPANY.

Railway Company—Notice to Treat—Lands Clauses Consolidation Act, 1845 (8 & 9 *Vict. c.* 18), *s.* 18—*Notice under Special Act* (27 & 28 *Vict. c. cccxv.*), *s.* 13—*Mandamus under s.* 68 *of the Common Law Procedure Act*, 1854.

The Metropolitan Railway (Tower Hill Extension) Act, 27 & 28 Vict. c. cccxv., by s. 2 incorporates, amongst others, the Lands Clauses Consolidation Act, 1845, and by s. 13 provides that the company, before they enter upon or take any tenement under the powers of the act, shall give six months notice of their intention so to do to the person assessed to the relief of the poor in respect of such tenement. The 18th section of the Lands Clauses Consolidation Act, 1845, provides that, when the promoters of the undertaking shall require to purchase or take lands which they are authorized to take, they shall give notice thereof to the parties interested in such lands, and by such notice shall demand from them the particulars of their estate and interest in such lands, and of the claims made by them in respect thereof; and that every such notice shall state that the promoters are willing to treat for the purchase of the lands, and as to the compensation to be made for damage sustained by reason of the execution of the works.

The Metropolitan Railway Company gave a notice to the plaintiffs of their intention to take at the expiration of six months a tenement for which the plaintiffs were rated. In consequence of this notice (which did not purport to be a notice under, or contain the particulars mentioned in, s. 18 of the Lands Clauses Consolidation Act, 1845), the plaintiffs took other premises, and their former premises remained upon their hands unoccupied. The company having failed to proceed with the purchase of the premises, the plaintiffs after the six months had elapsed commenced an action against them for damages, and claimed a mandamus:—

Held,—affirming the judgment of the Court of Common Pleas,—that the notice served by the defendants bound them to proceed with the purchase of the pre-

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mises within a reasonable time after the expiration of the six months, and that the plaintiffs were entitled to substantial damages, and to a mandamus to compel the defendants to proceed.

Semble, per Kelly, C.B., that the notice delivered was not a sufficient notice to treat, within s. 18 of the Lands Clauses Consolidation Act, 1845.

Quære, as to the form of the mandamus?

ERROR upon a judgment of the Court of Common Pleas on a special case. (1)

By the Metropolitan Railway (Tower Hill Extension) Act, 1864 (27 & 28 Vict. c. cccxv.), the defendants were authorized to purchase and take for the purposes of their undertaking certain scheduled lands, including, among others, certain premises of the plaintiffs.

By s. 13 of that act it is enacted that "the company, before they enter upon or take any tenement under the powers of this act, shall give six months previous notice of their intention to take such tenement to the person whose name shall be in the rate-book as assessed to the relief of the poor in respect of such tenement: and delivery of such notice at such tenement shall be deemed sufficient service thereof."

On the 17th of November, 1865, the defendants caused the following notice to be served upon the plaintiffs:—

"In pursuance of the provisions of the 13th section of the Metropolitan Railway (Tower Hill Extension) Act, 1864, the Metropolitan Railway Company hereby give you notice that it is their intention, on or after the expiration of six months from the service hereof, to enter on and take under the powers of their said act a certain tenement numbered 6, in the parish of the precinct of the Tower Without, in the county of Middlesex, on the plan and book of reference deposited with the respective clerks of the peace for the county of Middlesex and for the city of London with relation to the said act, and of which tenement you are the parties assessed for the poor-rate."

In consequence of this notice, the plaintiffs, having first apprised the defendants of their intention to do so, in March, 1866, proceeded to look after and eventually took other premises on which to carry on their business of wine-merchants. The defendants took

(1) Law Rep. 3 C. P. 553.

no further step towards obtaining possession of the plaintiffs' premises; and the plaintiffs, besides incurring the expense and inconvenience of moving to their new premises, were obliged to continue paying rent for those which they had vacated. To recover compensation for this, as well as a mandamus to compel the defendants to take the necessary proceedings to obtain an assessment of such compensation, the present action was brought.

The special act contained no clause limiting the time within which the powers of the company to take lands compulsorily were to be exercised; but the limit for the completion of the works of the railway was (by s. 9) five years from the passing of the act, viz. the 29th of July, 1864.

The Court below held that the notice bound the company to proceed with the purchase of the premises at the expiration of the six months, and that the plaintiffs were entitled to a mandamus (under s. 68 of the Common Law Procedure Act, 1854) to compel them to do so.

H. Lloyd, Q.C. (*Keane, Q.C.*, with him), for the plaintiffs in error (defendants below). Before a company can put in force its compulsory powers of purchase, a notice (commonly called a notice to treat) must be given under s. 18 of the Lands Clauses Consolidation Act, 1845, 8 & 9 Vict. c. 18; and the notice, once given, cannot be recalled. The company having given a notice to treat, the owner of the land has no power to compel them to take the steps necessary for ascertaining the amount of compensation due, except by issuing a mandamus; and this was the course ordinarily pursued, until *Fotherby* v. *Metropolitan Railway Company* (1): and one question for the decision of the Court in this case will be whether that decision was well founded. Under the present special act, however, a more complicated state of things arises. The 13th section of the 27 & 28 Vict. c. cccxv, in addition to the notice to treat required by s. 18 of the Lands Clauses Consolidation Act, 1845, requires the further notice which was given in this case. That notice was not prescribed for the purpose of altering the mode of proceeding under the general act, but merely to prevent the company from acting at once upon their notice,

(1) Law Rep. 2 C. P. 188.

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and to give the occupier time to obtain other premises. The question, therefore, upon this part of the case, will be, what is the effect of such a notice, and what are the rights of the persons upon whom it has been served? The contention in the Court below was, that it operated as a notice to treat, under s. 18 of the general act; and that, if not, it was an exercise of an option by the company, from which they could not recede: and the plaintiffs claimed a writ of mandamus in the alternative.

[BRAMWELL, B. Your contention will be that the notice which they gave bound the company to nothing, and that they were at liberty to abandon it.]

Precisely so. By s. 18 of the Lands Clauses Consolidation Act, 1845, before the promoters of the undertaking proceed to take any lands, they are required to give notice thereof to all the parties interested in such lands, and by such notice to demand from such parties the particulars of their estate and interest in such lands, and of the claims made by them in respect thereof; and the notice is to state the particulars of the lands so required, and that the promoters are willing to treat for the purchase thereof and as to the compensation to be made to all parties for the damage that may be sustained by them by reason of the execution of the works. From the moment that notice is given, both parties are bound: the company may be compelled to take and to pay for the land, and the owner cannot obtain anything for subsequent improvements. Then, s. 21 and following sections point out the mode of proceeding for ascertaining the amount. The notice here given does not profess to be a notice under that act. It contains none of the incidents required by s. 18: but it is in terms a notice under s. 13 of the special act, and is quite independent of the proceeding for assessing the value of the lands taken.

[KELLY, C.B. The question is whether the company are not bound to take the necessary steps to possess themselves of the land, when they have given such a notice as this, which in effect amounts to a six months notice to quit. Whether the notice to treat is to be given before or after the notice under s. 13 of the special act, can make no difference.

HANNEN, J., referred to *Rex* v. *Manchester Commissioners* (1)

(1) 4 B. & Ad. 333, n.

and *Rex* v. *Hungerford Market Company* (1), where such a notice as this, under very similar provisions, was held to be binding and conclusive on the promoters of the undertaking.]

It is difficult to say that this was not an election on the part of the company to take the land. But there must be a distinct notice to treat. The question is whether the plaintiffs have any remedy otherwise than in equity. It may not be necessary to contest the propriety of the decision of the Court of Common Pleas in *Fotherby* v. *Metropolitan Railway Company.* (2) But it is clear that there cannot be a claim for a mandamus, unless there is a right of action at least for nominal damages; and it is equally clear that no action will lie for not delivering a notice to treat. In *Benson* v. *Paull* (3) it was held that s. 68 of the Common Law Procedure Act, 1854, applies only to the fulfilment of such duties as might be enforced by the prerogative writ of mandamus, and not to the specific performance of contracts.

[KELLY, C.B. Unless that case overrules *Rex* v. *Hungerford Market Company* (1), a mandamus does lie here. A notice to treat was there held to be equivalent to an agreement to purchase. That case is quite conclusive. The first step which the defendants had to take here was, to give the plaintiffs the notice prescribed by s. 18 of the Lands Clauses Consolidation Act, 1845: and the plaintiffs are entitled to a mandamus to compel them to issue such notice.]

The distinction between the prerogative writ of mandamus and the statutory mandamus is, that the former is granted wherever there is a legal right, and no other specific legal remedy; and the latter can only be granted where the party claiming it has a right of action,—the object of s. 68 of the Common Law Procedure Act, 1854, being, that the same Court which tries the right may give the remedy.

[CHANNELL, B. The Court of Exchequer took that view in a case of *Bush* v. *Beavan.* (4)

KELLY, C.B. The plaintiffs here claim a mandamus of some sort. Three questions are presented to us,—1. Whether an action of mandamus is maintainable to compel the defendants to issue

(1) 4 B. & Ad. 327.
(2) Law Rep. 2 C. P. 188.
(3) 6 E. & B. 273.
(4) 1 H. & C. 500; 32 L. J. (Ex.) 54.

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their warrant to the sheriff. 2. Whether, if such action is not maintainable, an action of mandamus is maintainable to compel them to give the plaintiffs a formal notice to treat, under s. 18 of the Lands Clauses Consolidation Act, 1845, or to do any other act for the purpose of settling the amount of compensation to be paid to the plaintiffs in respect of the premises. 3. Whether, if the Court should answer either of the above questions in the affirmative, the plaintiffs are under the circumstances entitled to more than nominal damages. If we answer the second question in the affirmative, our opinion upon the first will be immaterial.]

The exclusion of replevin and ejectment from the operation of s. 68 of the Common Law Procedure Act, 1854, shews that it was intended to confine the remedy to cases where there might be an action for damages. No action will lie for damages for neglecting to give a notice to treat. The company are not required to give such notice within any prescribed period.

[KELLY, C.B. Is there no time limited in the special act for the exercise of the powers of taking lands compulsorily?]

There is not: the only limitation of time in the act is the five years within which the works are to be completed.

[KELLY, C.B. The company, having made their election when they gave the notice of the 17th of November, 1865, were bound within a reasonable time to take the steps necessary to enable the occupiers to obtain their compensation, assuming any other step to be necessary. The reasonable time for taking those steps would at all events be at the expiration of the six months, though I incline to think it would be before that time.]

There is nothing to render it obligatory on the company to proceed to give a notice to treat until a reasonable time before the expiration of the period allowed for the completion of their works.

[KELLY, C.B. Having received this notice, the plaintiffs might reasonably assume that the company would immediately on the expiration of the six months take the steps necessary to enable them to obtain possession of the land; and it was essential that the plaintiffs should at once take other premises in which to carry on their business.]

Sir G. Honyman, Q.C. (*W. G. Harrison* with him), contrà. Bovill, C.J., in the Court below, thought the notice served amounted

to a notice to treat, under s. 18 of the Lands Clauses Consolidation Act, 1845.

[KELLY, C.B. I do not take that view of it. It does not contain any of the requisites of a notice to treat.]

The judgment of the Court (Kelly, C.B., Bramwell, Channell, and Pigott, BB., and Lush and Hannen, JJ.), was delivered by

KELLY, C.B. We are all of opinion that the judgment of the Court of Common Pleas must be affirmed. It appears that the defendants under an act which they had obtained for the extension of their railway (27 & 28 Vict. c. cccxv.), were entitled to take certain premises in the occupation of the plaintiffs; and that, under s. 13 of that act, they gave the plaintiffs a notice to the effect that it was their intention, on or after the expiration of six months from the service thereof, to enter upon and take the premises in question under the powers of the act; and that they took no other step. When we come to look at the act of parliament, we find that the provisions of the Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), amongst others, are incorporated therewith; and that, under s. 18 of the last-mentioned act, the defendants were bound to take other steps to enable them to obtain the particulars of the occupiers' interest in the premises, and proof of their title, and to enable the occupiers to obtain compensation, before they could take possession. The notice to treat under s. 18 confers certain advantages upon both sides. No such notice, it appears, was given; and, the six months having elapsed, the plaintiffs quitted the premises and took others, after due notice to the defendants of their intention to do so, and incurred other expenses, and, after a considerable lapse of time, have brought this action for the purpose of enforcing the payment of compensation under the provisions of the Lands Clauses Consolidation Act. Two points have been urged on the part of the defendants. In the first place, it is said that the action is brought to recover damages, and for a mandamus under s. 68 of the Common Law Procedure Act, 1854, which enacts that "the plaintiff in any action in any of the superior courts, except replevin and ejectment, may indorse upon the writ and copy to be served a notice that the plaintiff intends to claim a writ of mandamus, and the plaintiff may thereupon claim

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in the declaration, either together with any other demand which may now be enforced in such action, or separately, a writ of mandamus commanding the defendant to fulfil any duty in the fulfilment of which the plaintiff is personally interested;" and that the statute does not authorize such an action as this. We find it, however, expressly laid down in *Fotherby* v. *Metropolitan Railway Company* (1), a case which is undistinguishable from the case now before the Court, that the neglect by a railway company to issue a warrant to the sheriff to summon a jury to assess the value of land which they have given notice that they will require for the purposes of the act, within a reasonable time after such notice, is an actionable wrong, and the issue of such warrant may be enforced by an action for a mandamus under the Common Law Procedure Act, 1854, s. 68. Erle, C.J., in delivering the judgment in that case, observes: "In former times, persons in the position of the plaintiff have had recourse to the writ of mandamus issued by the Court of Queen's Bench to enforce their right; but this remedy was fraught with the disadvantages and vexations so concisely and forcibly set out in the report of the commissioners on which the Common Law Procedure Act, 1854, was framed. The question for us to determine is, whether the plaintiff can now avail himself of the remedy of action for mandamus given in that statute. I am with Mr. Harrison on both the points that he has made. I think that the Common Law Procedure Act, 1854, entitles the plaintiff to bring an action for mandamus against the defendants for not issuing a warrant, when he can shew that he has a right to have the warrant issued, and is personally interested in it, whether he is entitled to any damages for its non-issue or not." Here, in consequence of the notice given to them by the defendants, the plaintiffs are not only entitled to a mandamus, but to an action for damages also. It appears from the statement in the case that the next step necessary to be taken by the defendants was the issuing of a notice to treat under s. 18 of the Lands Clauses Consolidation Act; and, that notice not having been issued, we are of opinion that the action is maintainable. Then comes the question, within what time ought that notice to have been given? It is not necessary for us to say whether it should have been before or after the

(1) Law Rep. 2 C. P. 188.

expiration of the six months. Mr. Lloyd contends that in ordinary cases the time for giving the notice to treat would probably be limited by the period limited for the exercise by the company of their power to take lands compulsorily; but that, inasmuch as in this special act there happens to be no such limitation, the notice may be given (if it be obligatory on the company to give it at all) at any time before the expiration of the time limited for the completion of the works, which, by s. 9 of the special act, is five years from the time of its passing. We, however, are of opinion that, if bound to issue the notice at all, the defendants were bound to issue it, at the latest, within a reasonable time after the expiration of six months from the delivery of the notice under s. 13 of their special act; otherwise the plaintiffs when they received the notice would be reduced to the alternative of submitting to be summarily turned out of their dwelling-house or place of business without having any place to go to, or of incurring the inconvenience and expense of providing themselves with other premises before the expiration of the six months. Under the circumstances, therefore, we think that, if the company were bound by their notice at all, they were bound to give the plaintiffs a notice to treat, under s. 18 of the Lands Clauses Consolidation Act, at all events within a reasonable time after the expiration of the six months.

Then comes the question whether it was obligatory on the defendants to take the premises at all. Ever since the case of *Rex* v. *Hungerford Market Company* (1) it has uniformly been held that, wherever a company is entitled to take land compulsorily under the powers of an act of parliament, if they give notice of their intention to take the land, that is an exercise of their option from which they cannot recede, and the notice operates as a contract or an undertaking by them to become the purchasers. That case was decided in the year 1832, and it has never yet been questioned. The result is, that the defendants, having given the notice of the 17th of November, 1865, of their intention at the expiration of six months from the service thereof to enter upon and take the plaintiffs' premises under the powers of their special act, bound themselves to become the purchasers, and were equally bound to proceed to take the necessary steps under s. 18 of the Lands

(1) 4 B. & Ad. 327.

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Clauses Consolidation Act, to entitle themselves to obtain possession of the premises, and to enable the plaintiffs to obtain their compensation. *Rex* v. *Hungerford Market Company* (1) having held that the company is liable to an action under such circumstances, and *Fotherby* v. *Metropolitan Railway Company* (2) having decided that a mandamus will lie for the breach of that duty, we are of opinion that an action is maintainable for the purpose of enabling the plaintiffs to obtain compensation by due course of law, and that the plaintiffs are also entitled to a mandamus in the terms prayed. It is not necessary for us to state what should be the particular form of the mandamus,—whether to give a notice to treat, or to issue a warrant to the sheriff. But probably the proper course would be to issue a mandamus commanding the company to deliver the notice under s. 18 of the Lands Clauses Consolidation Act, and to take all steps necessary to enable the plaintiffs to obtain compensation.

A further question has been raised, viz. whether the plaintiffs were, under the circumstances, entitled to nominal damages only or to recover substantial damages. We are all of opinion that the plaintiffs have by reason of the notice served upon them sustained much more than nominal damages, and that they are entitled to recover in this action such damages as they have actually sustained.

Judgment affirmed. (3)

Attorneys for plaintiffs: *Wright & Bonner.*
Attorneys for defendants: *Burchells.*

(1) 4 B. & Ad. 327.
(2) Law Rep. 2 C. P. 188.
(3) A mandamus was issued commanding the company to give a notice to treat, under s. 18 of the Lands Clauses Consolidation Act, 1845, and the company accordingly gave the notice.

[IN THE EXCHEQUER CHAMBER.]

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Dec. 2.

RANDOLPH AND OTHERS *v.* MILMAN AND OTHERS.

Convocation—Prebendaries—Cathedral Chapters—Right of Voting for Proctors—3 & 4 Vict. c. 113.

The non-residentiary prebendaries of cathedrals have not ceased to be members of the chapters since the passing of the 3 & 4 Vict. c. 113, and consequently have still a right to vote at the elections of proctors to represent the chapters in convocation.

ERROR upon a judgment of the Court of Common Pleas upon a special case. (1)

Sir Roundell Palmer, Q.C. (*Coleridge, Q.C.*, with him), for the plaintiffs in error (defendants below). All prebendaries, whether residentiary or non-residentiary, have from time immemorial had a right to vote at the elections of proctors to represent the chapter in convocation. The Court below held that the effect of certain clauses in 3 & 4 Vict. c. 113, was to take away that right so far as regards non-residentiary prebendaries. That decision is a plain violation of the fundamental rule of law that a vested right is not to be taken away, except by express words or by necessary intendment. The question mainly turns upon four sections of the statute, two of which are enacting and two saving clauses. One of the latter (s. 51) saves rights which, it is submitted, include the right now asserted by the defendants. The object of that section was to vest in the ecclesiastical commissioners the estates of certain deaneries, &c. It enacts that "all lands, tithes, and other hereditaments, excepting any right of patronage, and all other the emoluments and endowments whatsoever belonging to the deaneries of Wolverhampton, Middleham, Heytesbury, and Brecon, and to the dignity or office of sub-dean, chancellor of the church, vice-chancellor, treasurer, provost, precentor, or succentor, and to any prebend not residentiary in any cathedral or collegiate church in England, or in the cathedral churches of St. David's and Llandaff, or in the collegiate church of Brecon, or enjoyed by the holder of any such deanery, dignity, office, or prebend, as such holder, shall,

(1) Law Rep. 2 C. P. 60.

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as to all such of the said deaneries, dignities, offices, and prebends respectively as may be vacant at the passing of this act, immediately upon its so passing, and, as to all others, immediately upon the vacancies thereof respectively, without any conveyance or assurance in the law other than the provisions of this act, accrue to and be vested absolutely in the ecclesiastical commissioners for England and their successors for the purposes of this act." Then comes this proviso,—"Provided always that *all other rights and privileges* whatsoever now by law belonging to any of such dignities, offices, or prebends, except the said last-named deaneries, shall continue to belong thereto, except so far as any of such rights or privileges may be controlled or affected by any of the provisions of this act respecting the right of election now exercised in any chapter." Nothing can be more clear than that, notwithstanding the prebends were to lose their estates, the office was not to cease, or the privileges belonging to them to be taken away, except so far as any of such privileges were controlled by any of the provisions of the act. The right to vote on the election of a proctor was one of the rights and privileges which before belonged to the non-residentiary prebendaries. What provisions are there to affect that right? The 6th paragraph of the case states that "when a vacancy occurred amongst the canons residentiary, it was filled up by election from amongst the existing prebendaries by the other canons residentiary." Part of the scheme of the act was, to make an alteration in that respect. The title of the act is, "An act to carry into effect, with certain modifications, the fourth report of the commissioners of ecclesiastical duties and revenues." One of the recommendations contained in that report was, that, "in all cathedral and collegiate churches in which the residentiaries have heretofore been elected by the chapter from amongst the existing prebendaries, all the canonries be in future in the direct patronage of the bishops of the respective dioceses, with the exception of the three existing canonries in the cathedral church of St. Paul in London; and that these latter canonries be in the direct patronage of the Crown." The clauses of the act which were framed to carry out that recommendation are the 24th, 25th, and 26th; and these are the clauses referred to in s. 51. Section 22 provides that, subject to the provisions thereinafter contained, no presentation,

collation, &c., to the dignity or office of sub-dean, &c., nor to any prebend not residentiary, in any cathedral or collegiate church, &c., shall convey any right or title whatsoever to any lands, &c., or emolument whatsoever now belonging to such dignity, office, or prebend, or enjoyed by the holder thereof in right of such dignity, office, or prebend. The 41st section vests the separate patronage of members of chapters in the bishops of the respective dioceses. Then comes s. 75, which saves existing interests. It enacts that "nothing in this act contained respecting the division of corporate property, the diminution of the income of any deanery or canonry, the severance of separate property, or the limitation of the exercise of patronage possessed in right of separate property, shall affect any dean, canon, prebendary, dignitary, or officer in possession at the passing of this act, except as hereinbefore expressly enacted," &c. The Court below, founding themselves upon the 1st clause and the interpretation clause (s. 93), have drawn an inference that these rights are taken away from existing as well as future members of the chapter. The 1st section enacts that "from henceforth all the members of chapter, except the dean, in every cathedral and collegiate church in England, and in the cathedral churches of St. David and Llandaff, shall be styled canons." That neither gives nor takes away any right. The interpretation clause enacts that, "in the construction of this act, the term 'canon' shall be construed to mean only every residentiary member of chapter, except the dean, heretofore styled either prebendary canon, canon residentiary, or residentiary." Can that apply to the word "canon" in s. 1? If "canon" is construed to be the equivalent of "residentiary member of chapter," how is the clause to be read? It must mean canon residentiary only. Nothing else is referred to in the judgment of the Court below, except s. 44, which has no application. Sect. 2 applies to canons residentiary only. Sect. 23 provides for the appointment of honorary canons.

[BRAMWELL, B. It seems to be conceded that the proper style of these gentlemen now is "canons."]

It may be so, if the interpretation clause confines s. 1 to residentiaries. But the sounder judgment probably will be to exclude the interpretation clause altogether.

[BRAMWELL, B. If s. 1 stood alone, all the members of chapter,

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whether residentiary or not, would be canons. Construing the section by the light of the interpretation clause, it means all the residentiary members.]

The object evidently was, to exclude from the application of the general enactments as to canons any canons who are not residentiary.

Mellish, Q.C. (*Lindley* with him), for the defendants in error. Taking ss. 1, 2, and 93 together, it is plain that the right of voting for the election of a proctor is confined to members of the chapter, and that, from the passing of the statute, non-residentiary prebends ceased to be members of the chapter. Section 1 enacts that henceforth all the members of chapter, except the dean, in every cathedral and collegiate church in England, shall be styled canons. Section 2 limits the number of canons,—in the case of St. Paul's to four. And s. 93 provides that, in the interpretation of the act the term "canon" shall be construed to mean only "every residentiary member of chapter." The chapter is to consist of four residentiary canons. The act throughout follows its own nomenclature. In no part of it are non-residentiary prebends styled "canons." The 17th section, which provides that, in the cathedral churches of St. Paul and Lincoln, "there shall be a fourth canonry," means that the chapter shall henceforth consist of four canons. Wherever the word "chapter" is used, the act refers to canons only. The Court below refer to and somewhat rely on s. 44, which enacts that, "upon the vacancy of any benefice in the patronage of the chapter of any cathedral or collegiate church, the chapter shall present or nominate thereto either a member of such chapter or one of the archdeacons of the diocese, or a non-residentiary prebendary or honorary canon, as the case may be," as shewing that the legislature clearly distinguish non-residentiary prebendaries and honorary canons from members of the chapter. So, in s. 47, "chapter" clearly means "canons residentiary." The same meaning must be attributed to it in s. 68. In dealing with s. 51, the Court below say that the proviso relates to rights belonging to the particular prebendary, and not to the chapter generally. This is consistent with the whole scheme of the act. The 24th section contains an express provision "that the deanery of every cathedral and collegiate church upon the old foundation, excepting Wales, and the

three existing canonries in the cathedral church of St. Paul, shall henceforth be in the direct patronage of Her Majesty." The patronage was in the Queen before. She issued her letters mandatory to the chapter, which were as compulsory on them as a congê d'élire in the case of a bishop. The 24th and 25th sections take away from the chapter of the several cathedral churches therein respectively mentioned the patronage therein, and vests it in the bishops of the respective dioceses "so soon as every person who was a member of the respective chapters of such churches at the passing of this act shall cease to be such member." The proviso in s. 51 is, "that all other rights and privileges whatsoever now by law belonging to any of such dignities, offices, or prebends," except the deaneries mentioned in the earlier part of the section, "shall continue to belong thereto, except so far as any of such rights or privileges may be *controlled* or *affected* by any of the provisions of this act respecting the right of voting now exercised by any chapter." Those words apply whether affected directly or indirectly.

[CHANNELL, B. The difficulty which I feel is, that, the right in question having been once vested, it would require express words to take it away. I doubt whether the plaintiffs are within the act at all.]

The statute would be almost entirely inoperative if it be held not to take effect until all the existing prebendaries are dead.

[BRAMWELL, B. Non-residentiary prebendaries are still appointed. What is a non-residentiary prebendary? Has he any emolument? In Burn's Ecclesiastical Law, 9 ed., vol. ii., p. 88, tit. Deans and Chapters, it is said: "The books do generally confound the two words prebend and prebendary; whereas, the former signifieth the office, or the stipend annexed to that office, and the latter signifieth the officer or person who executeth the office and enjoyeth such stipend. A prebend is an endowment in land or pension in money given to a cathedral or conventual church in præbendam; that is, for a maintenance of a secular priest or regular canon, who was a prebendary, so supported by the said prebend. A canonry also is a name of office, and a canon is the officer in like manner as a prebendary, and a prebend is the maintenance or stipend both of the one and of the other." It would

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seem, therefore, that prebendary and canon are convertible terms.]

The object of having non-residentiary prebendaries is similar t that pointed out in s. 23 as to honorary canons.

Sir R. Palmer, in reply. The contention on the part of the plaintiffs would deprive the non-residentiary prebendaries of a right which they have immemorially enjoyed, not by reason of any express words in the statute to warrant such a construction, but upon a mere suggestion of what was the general scheme of the act; whereas s. 51 in plain terms secures to them the continuance of all capitulary rights and privileges.

The judgment of the Court (Kelly, C.B., Bramwell, Channell, and Pigott, BB., and Lush and Hannen, JJ.) was delivered by

KELLY, C.B. The question submitted to us in this case is whether the non-residentiary prebendaries of St. Paul's are, as well since the passing of the statute 3 & 4 Vict. c. 113 as before, entitled to vote as members of the chapter in the election of a proctor to represent the chapter in convocation. It appears that the chapter of St. Paul's formerly consisted of thirty prebendaries, each of whom had a stall in the choir and a place and voice in the chapter assigned to his prebend. Of these four only were resident, and twenty-six were non-resident. These high dignitaries have existed for many centuries, during all which time they have exercised and enjoyed valuable rights and privileges. They were also entitled to considerable property and considerable patronage, and had the privilege of voting in chapter, amongst other occasions, on the occasion of an election like that now in question. It may be observed here, that, for some purposes enumerated in the case, these non-residentiary prebendaries were not summoned to attend meetings of the chapter. The question is whether under the provisions of this act of parliament the privilege is still preserved to them of voting at the election of a proctor to represent the chapter in convocation. It will be remembered that the order of men still continues, and that for many purposes they are entitled to certain rights and privileges; and, in order to determine whether the right in question is reserved to them or not, we must advert first to the 51st section of the act.

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Now, we agree with the principle of law stated by Sir Roundell Palmer at the outset, that vested rights are not to be taken away without express words or necessary intendment or implication. And, upon adverting to the statute, it will be found not only that there is no express extinction of the right here claimed, and no necessary implication or intendment to that effect, but that the right and privilege is by the 51st section expressly reserved and continued. The statute makes many important alterations in the rights and privileges of officers of the church. But, when we come to s. 51, we find this provision, "that all lands, tithes, and other hereditaments, excepting any right of patronage, and all other emoluments and endowments whatsoever belonging to the deaneries of Wolverhampton, Middleham, Heytesbury, and Brecon, and to the dignity or office of sub-dean, chancellor of the church, vice-chancellor, treasurer, provost, precentor, or succentor, and to any prebend not residentiary in any cathedral or collegiate church in England, or in the cathedral churches of St. David's and Llandaff, or in the collegiate church of Brecon, or enjoyed by the holder of any such deanery, dignity, office, or prebend as such holder, shall, as to all such of the said deaneries, dignities, offices, and prebends respectively as may be vacant at the passing of this act, immediately upon its so passing, and as to all others immediately upon the vacancies thereof respectively, without any conveyance or assurance in the law other than the provisions of this act, accrue to and be vested absolutely in the ecclesiastical commissioners for England and their successors for the purposes of this act." By this provision, in substance, all the profits and emoluments which were formerly attached to the offices mentioned were entirely taken away. But then follows this proviso,—"Provided always that all other rights and privileges whatsoever now by law belonging to any of such dignities, offices, or prebends, except the said last-named deaneries, shall continue to belong thereto, except so far as any of such rights or privileges may be controlled or affected by any of the provisions of this act respecting the right of election now exercised by any chapter." In the first place, is this a right or privilege now, that is, at the time of the passing of the act, by law belonging to the prebendal office? It cannot be doubted that it is. Mr. Mellish endeavoured to distinguish between the rights

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and privileges of a prebendary as prebendary, and his rights as member of chapter. But, if it is to be taken as member of chapter, it is as prebendary residentiary or non-residentiary: therefore, this is a privilege belonging directly to the claimants as non-residentiary prebendaries, and it is by the express language of s. 51 reserved, unless it is within the exception, "except so far as any of such rights or privileges may be controlled or affected by any of the provisions of this act respecting the right of election now exercised by any chapter." The question therefore resolves itself into this, whether this right is controlled or affected by any of the provisions of the act respecting the right of election formerly exercised by any chapter. Now, we have looked in vain for any provision in the act affecting the right of voting of these non-residentiary prebendaries. We do find a provision in s. 24 affecting the right of voting of chapters, for, henceforth the deans of old cathedrals and the three canons of St. Paul's are to be appointed by the Crown. We also find other provisions in ss. 25, 26, and other sections of the act expressly and directly controlling or affecting the right of elections in chapters. But throughout the act we find no words which take away or affect the non-residentiary prebendaries in relation to their office of patron. As, therefore, the right of voting is a right belonging to the office, and the office is retained, so the right is reserved. It is said that the 2nd and 3rd sections of the act come within the exception, and expressly put an end to the right of voting by these prebendaries. Before referring to those sections, I turn to s. 75. By that section it appears that, whereas all emoluments are taken away in respect of these offices, it is provided that "nothing in this act contained respecting the division of corporate property, the diminution of the income of any deanery or canonry, the severance of separate property, or the limitation of the exercise of patronage possessed in right of separate property shall affect any dean, canon, prebendary, dignitary, or officer in possession at the passing of this act, except as hereinbefore expressly enacted; but every dean, canon, prebendary, dignitary, and officer hereafter appointed shall be subject to such regulations as shall be made in pursuance of this act." We find here no provision for continuing to existing prebendaries the right of voting appertaining to them by virtue of their office. How, then, can it be

supposed that all rights are preserved to them, when s. 75 makes no mention of the right of voting, while the emoluments are preserved to existing prebendaries, unless their rights and privileges, including the right of voting in chapter, are preserved to them by s. 51? It appears to us that the manifest intention of the act (and such is its express language) was, to preserve to the existing prebendaries all privileges, and also all estates, property, and patronage, and, as to all future prebendaries, to reserve to them whatever privileges attach to the office of prebendary.

The judgment of the Court below, and the argument in support of it here, proceeded upon three sections of the act, viz. the 1st, 3rd, and 93rd. By s. 1 it is provided that "from henceforth all the members of chapter, except the dean, in every cathedral and collegiate church in England, &c., shall be styled canons;" and s. 93 enacts that, "in the construction of this act, the term 'canon' shall be construed to mean only every residentiary member ot chapter (except the dean), heretofore styled either prebendary canon, canon residentiary, or residentiary." From this it was argued that, because every member of chapter is to be styled "canon," we must take "canon" throughout the act to mean "canon residentiary" only, upon some implied principle of construction that the interpretation clause amounts to a declaration that the members of chapter are to be confined to canons, and that that means canons residentiary. The enactment in substance is, that canons whether residentiary or non-residentiary, and prebendaries whether residentiary or non-residentiary, shall be styled "canons." We cannot think that the construction contended for is a reasonable one; because, when we look to another part of the act which was relied on by Mr. Mellish, as to new foundations (s. 23), we find a new order of persons coming into existence who are to be non-residentiary prebendaries, corresponding for many purposes with the non-residentiary prebendaries who had been already in existence for centuries, under the title of "honorary canons." Why are we by implication to apply the term "canon" to the non-residentiaries already in existence, when there are honorary canons to whom it expressly applies? As to the proviso itself, s. 93 falls short of the contention of Mr. Mellish. "In the construction of this act, the term 'canon' shall be construed to

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mean only every residentiary member of chapter." That means only that, where we find the word "canon" in the enacting portions of the act, we are to read "canon residentiary." Now, beginning with s. 2, and going down to s. 93, there is no instance of canons being made the subject of any enactment, where it may not be applied to canons residentiary also. And, when we turn to s. 1, which provides that from henceforth all the members of chapter, except the dean, in every cathedral and collegiate church in England, &c., shall be styled canons, we find there no enactment concerning canons: it leaves the meaning of the word "canon" throughout open to the construction provided by s. 93, but inapplicable to s. 1. We do not feel called upon to put a construction on the word "chapter" in the earlier clauses of the act. The legislature has not thought fit to do it. It must, therefore, in each instance be construed with reference to the context. It may mean one thing for one purpose and another for another purpose. These prebendaries were members of chapter before, but had not for all purposes a place in the chapter, nor were they entitled to a voice. But, whether they were to be called members of chapter for all purposes, we are not called upon to say. Looking, therefore, at the general rule that vested rights are not to be taken away without express words or necessary implication, and finding that, so far from the right now in question being taken away by express words or by necessary implication, it seems to us to be expressly reserved, we are unanimously of opinion that the judgment of the Court of Common Pleas must be reversed.

Judgment reversed.

Attorneys for plaintiffs: *Pemberton, Meynell, & Pemberton.*
Attorneys for defendants: *Lee & Bolton.*

DAVIDSON AND OTHERS *v.* BURNAND. 1868

Ship and Shipping—Marine Insurance—Perils insured against—Unseaworthiness —Accidental Injury from Sea Water. Nov. 30.

A. effected a policy against "perils of the seas," &c., and "all other perils, losses," &c., in the usual form, upon goods for a voyage by a steamer from K. to Y. While the steamer was loading in the harbour at K. her draught was increased by the weight of the cargo, until the discharge pipe was brought below the surface of the water, which then flowed down the pipe under the valve and, some cocks or valves in the machinery having been negligently left open, flowed into the hold and injured A.'s goods. In an action by A. upon the policy:—

Held, that the injury was caused by one of the perils insured against.

Held, also, that the burden of proving that the vessel was unseaworthy was on the defendant.

SPECIAL case, stated by order at Nisi Prius.

The plaintiffs were merchants carrying on business at Kingston, in Jamaica, under the firm of Davidson, Colthurst & Co., and the defendant was an underwriter at Lloyds.

The plaintiffs effected with the defendant three policies of insurance in the usual form, upon which this action was brought; the policies were upon coffee and other produce, at or from any port or ports, place or places, in Jamaica, to New York, in the *Montezuma*. On the 5th of February, 1866, certain goods within the meaning of the policy were shipped on board the *Montezuma*, at Kingston, in Jamaica. On the following morning it was discovered that sea water had penetrated into the hold of the vessel, and the goods so loaded were greatly damaged thereby. The vessel and cargo were then surveyed, and by agreement between the parties the report of the survey and the protest of the officers of the *Montezuma* were to be received as evidence of the facts stated in them.

The conclusion of the surveyor's report was as follows: "On a thorough examination of the vessel, we see no reason to suppose that she leaks to any injurious extent whatever, but that she is a sound and strong built vessel, and thoroughly seaworthy. It appears that the bulk-heads are not sufficiently watertight, from the fact of the water having found its level throughout the ship. The only conclusion, after mature consideration, at which we can arrive is, that as the draught of the vessel in-

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creased in consequence of the cargo she was taking on board up to 12.30 A.M. of the 6th instant, the main discharge pipe in the engine-room came below the water level, the water could thus find its way beneath the india-rubber valve of the discharge pipe, and through the valves of the air-pump, bucket, &c., filling the condenser and cylinders, when if any cocks or valves, such, for instance, as pet-cocks on cylinders, and swifting-valves on condensers, had been inadvertently left open, the water would find its way into the ship, and account for the whole accident. Such, we are of opinion, has been the case in the present instance. We recommend that a rod with a flat weight attached should be suspended through the top of the discharge pipe in the engine-room, so that it can be lowered and rest upon the india-rubber valve whenever the vessel is in harbour."

From the protest it appeared that there was no appearance of water on the 5th of February, during which day men were at work taking cargo on board till midnight; that on the 6th of February, at 6 A.M. it was found that there was nine feet of water in the hold; that pumps were then set to work, and 200 labourers employed to discharge the cargo, a large part of which was taken out: that the water had decreased about eighteen inches at 1 P.M., when the pumping ceased for an hour, during which time, however, the ship made no water. The pumping was again resumed, and at 2 A.M. of the 7th instant the ship was free from water.

A witness, Thomas Scott, was called at the trial, on behalf of the plaintiffs, who stated, that, having read the survey, he thought the effects referred to would be likely to occur in the way mentioned, and none more likely; that if a splinter got into the valve, it would account for what he saw in the survey, because if the cargo went into the vessel, and the aperture for the discharge got lower, there would be a sufficient passage for the water to get in; that what occurred was quite consistent with the vessel being seaworthy; there might or might not be anything wrong in the construction of the valve; if the valve were broken or out of order it would have the same effect; that he saw no trace in the survey of a broken valve, or anything of that sort; if the leak ceased while the vessel was in harbour he should form the opinion that it was from a temporary accidental cause.

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The declaration in the action was in the common form upon the policy of insurance, and the material pleas were, first, that the loss was not caused by the perils insured against; and, secondly, that the ship was unseaworthy.

The questions for the opinion of the Court were—1. Whether the evidence set forth in the case was evidence which ought properly to have been left to the jury, upon which they might reasonably find a verdict for the plaintiffs upon the issue joined, on the plea that the said goods were not, nor was any part thereof, lost by the perils insured against. 2. Whether or not the evidence set out was evidence which ought properly to have been left to the jury, upon which they might reasonably find a verdict for the plaintiffs upon the issue joined, on the plea that the ship at the time of the commencement of the risk was not seaworthy.

Sir G. Honyman, Q.C. (*Watkin Williams* with him), for the plaintiffs, contended that the loss was caused by perils insured against, since it was a loss by sea water which, through negligence of the crew, had been allowed to reach the goods, and had caused the damage; and that the onus of proving the ship unseaworthy rested on the defendant, while the evidence really shewed that she was seaworthy.

J. C. Mathew (*Mellish, Q.C.*, and *Lodge*, with him), for the defendant, contended that the loss was not occasioned by a peril ejusdem generis, as perils of the sea. That it was not sufficient that the damage should have been occasioned by sea water, but it must have been occasioned by vis major: Pothier, traité du Contrat d'Assurance, § 49; *Magnus* v. *Buttemer* (1); *Thompson* v. *Whitmore* (2); *Paterson* v. *Harris.* (3) And, on the second question, that the accident having happened while the ship was in harbour, the onus of proof of seaworthiness was on the plaintiffs: Parsons on Marine Insurance, vol. i., p. 258. And that if seaworthy for the purpose of the voyage she was not seaworthy for the purpose of receiving the goods, which was a different question: Parsons on Maritime Law, vol. ii., p. 145.

Sir G. Honyman, Q.C., was not called on to reply.

Cur. adv. vult.

(1) 11 C. B. 876. (2) 3 Taunt. 227. (3) 1 B. & S. 336.

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WILLES, J. Notwithstanding the able argument of Mr. Mathew, I am of opinion that our judgment ought to be for the plaintiffs. The only question is, whether there was evidence for a jury such as might reasonably have induced them to have found a verdict for the plaintiffs. So far as regards the question of seaworthiness, that is disposed of by the evidence of competent persons that the ship was seaworthy; and it seems, therefore, after that, impossible for us to say that in our judgment the vessel was unseaworthy. Although the onus of proving unseaworthiness is on the underwriters, yet I agree that, if a vessel were shewn to be lost by leaking as soon as she left the port, the onus of proving her capacity for the sea would be shifted. But that does not apply here, for the owners gave an explanation in this case, and no answer was made to it by the other side. Then, assuming the vessel to have been seaworthy, the question is, whether the loss occurred by perils of the sea, or by some peril analogous thereto. If it were necessary to determine with grammatical precision whether this was a loss by perils of the sea, it might—remembering the case of *Thompson* v. *Whitmore* (1)—be arguable that this was properly not a loss occasioned by the perils of the sea. The reason given in *Thompson* v. *Whitmore* (1) why the loss was not considered as occasioned by the perils of the sea was because the vessel was ashore when the damage happened to her; and the question would be, whether that would be an authority for saying that an injury from water getting into a vessel whilst lying in port would not be an injury from the sea. If the declaration had alleged a loss by perils of the sea only, we should, if necessary, have amended it, but it is not necessary to consider this, because the declaration is drawn alleging generally a loss by the perils insured against, and so raises the question considered in *Cullen* v. *Butler* (2), as to what is the loss which comes within the general words of the policy, "all other perils, losses," &c. The question therefore is, not whether the loss here was strictly one occasioned by the perils of the sea, but whether it was such other loss within the policy which, of course, must be a loss of the same or a similar kind to one happening from the perils of the sea. Now, a loss from perils of the sea would include the case of a loss

(1) 3 Taunt. 227. (2) 5 M. & S. 461.

from another vessel coming in collision with and making a hole in the vessel, the subject of the policy, of the same capacity as that through which the water must have got into this vessel, the *Montezuma;* and whether that accident happened in port or not, in smooth water or in rough water, the underwriter would be equally liable under the policy. Then, unless some distinction can be made between a loss from an accident happening through the negligence of the crew of another vessel and a loss from an accident happening either in the way it has been suggested it did in the present case, from a splinter getting into the valve, or from such negligence of the crew, as was suggested in the report of the survey, the loss would be a loss occasioned by the perils of the sea. As to there being any such distinction between a loss caused by the negligence of the crew of the vessel insured and one caused by the negligence of the crew of another vessel, all such distinction has been swept away by the judgment of Lord Wensleydale, as I understand it, in the case of *Dixon* v. *Sadler.* (1) On the whole, it is not necessary, I think, to say whether these goods were damaged by perils of the sea, as the damage to them was clearly caused by perils of the sea or the like within the words of the policy. I wish to add, that my judgment adopts the report of the survey itself, as to the accident probably arising from a negligence referable to leaving cocks and valves open, rather than the evidence suggesting that the accident might have happened by a splinter getting into the valve, and I only referred to that last by way of illustration.

KEATING, J. I am of the same opinion. I think there was clearly evidence to go to the jury that the underwriter was liable. Apart from the evidence of the witness at the trial, there was evidence that the injury was not due to any defect in the valve, but to some accidental circumstance through which the water got into the engines, and then by accident or negligence, a cock being left unturned, flowed into the engine-room and thence into the hold. The fact that the water ceased to rise in the hold even when the pumping ceased after the goods had been partly unloaded, and that no repairs were ordered in respect of the valve

(1) 5 M. & W. 405.

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or engines, shews that the cause of the leakage was a temporary one. The peril was therefore, at any rate, sufficiently akin to a peril of the sea to be within the policy. On the question of seaworthiness it is unnecessary to add anything to what has been said by my Brother Willes.

BRETT, J. The underwriter declined at the trial to call any evidence, and he said then and now contends that there was no evidence on which the jury ought to find either that the loss was caused by the perils insured against, or that the ship was seaworthy. The question is whether there was any evidence of either of these. I agree that we ought not to take the suggestion of the witness as to a splinter getting into the valve and so causing the accident, because it is not an opinion founded on a fact proved, but a mere suggestion; but that witness agrees with the report on the survey, and that report, which is to be taken as if those who made it had given evidence on the trial and on which this case must mainly rest, explains how probably the accident happened; namely, that by reason of some cock being left open in the discharge pipe the water got into the ship and so damaged the cargo. If that was so, the water got in not by the happening of any ordinary occurrence in the ordinary course of a voyage, but by the accidental circumstance of some cock having been left open by the negligence of the crew. That is, in my opinion, sufficient to make the underwriter liable. The question is the same as it would have been if by the falling of a mast through the vessel, or other negligent act of the crew, the vessel had sunk in deep water, and I think the loss sufficiently comes within the doctrine of one happening by a vis major, and is within the meaning of the policy a loss caused by the perils insured against. With reference to whether the vessel was seaworthy, I hardly think that the burthen of proof was shifted, but even if it was, I think that there was sufficient evidence to go to the jury that the ship was seaworthy and fit to receive the cargo.

Judgment for the plaintiffs.

Attorneys for plaintiffs: *Thomas & Hollams.*
Attorneys for defendant: *Waltons & Bubb.*

CRANE, APPELLANT; POWELL, RESPONDENT. 1868

Master and Servant—30 & 31 *Vict. c.* 141, *s.* 9—*Information*—*Order of Justices* *Dec.* 1.
—*Contract in Writing.*

An information by a master under the Master and Servant Act, 1867, claimed a fulfilment of the contract but not payment of damages in the alternative:—

Held, that it was not invalid to sustain an order for fulfilment.

The justices on the above information ordered that the servant should fulfil the contract, and they adjudged that if, upon a copy of a minute of the order being served on him, he should neglect or refuse to comply with the same, he should, for such his disobedience, be imprisoned for one calendar month:—

Held, that if the justices had not jurisdiction to imprison the servant, except on a fresh summons after he had disobeyed the order, the latter part of the order might be rejected as surplusage, and the order itself was still good.

A. being in want of workmen, applied to the Free Labour Registration Society, and filled up and signed a form sent by them to him, containing the particulars of the employment and terms offered by him, and his address at S. This form was read over to B. by the secretary of the society, and B. then signed an agreement headed "Free Labour Society," by which he stated that he had accepted employment at S. and agreed that one half-day's wages, "being the fee to the society for obtaining him the employment," should be deducted from his wages, and that he would not quit "the service of his employer" without just cause:—

Held, that the documents sufficiently referred to one another, and constituted a contract in writing signed by both parties.

CASE stated by Justices, pursuant to 20 & 21 Vict. c. 43.

The appellant, a journeyman stonemason, appeared by his attorney on the 30th of May, 1868, before the magistrates of the borough of Sheffield, in answer to a summons issued on the information and complaint of the respondent, a master builder at Sheffield. The summons charged the appellant with the following offence:—"That he, Owen Crane, being the servant of James Powell, of Brook Hill, in the said borough, builder, in his trade or business of a stonemason, under a certain contract of service for a period now unexpired, did unlawfully neglect and refuse to enter into and commence his said service, according to the said contract." And the respondent declared by his information that he claimed that the contract should be fulfilled by the appellant.

On the hearing before the justices it appeared in evidence that the respondent in the month of April last, was the contractor for building a house at Endcliffe in Sheffield, and that in the early part of that month there was a strike amongst the masons in his

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employ on such building, and he put himself in communication with Colonel Maude, the secretary to the Free Labour Registration Society, in London, to obtain more men. The following letters and application passed between the respondent and Colonel Maude:—

"April 16th, 1868.

"Brookhill, Sheffield.

"Colonel Maude,—Dear Sir,—Have you any masons that you can recommend to me that are in want of employment. I could provide work for ten or twelve good masons that can work Yorkshire stone for twelve months. if you can I shall take it as a grate favour, if they are good stedy men. the men that I had struck this morning because I let some wall stones to be worked by the peace. this I cannot submit to as I should for every man to be at liberty to work as he thinks fit to agree with his employer. the wage that I should to a good man would be 7*d.* per hour. If you have any men or know of any I shall be glad to hear from you as early as possible.—Waiting your early reply,

"I remain, yours truly,

James Powell, Builder."

"Free Labour Registration Society.

"Head Offices, 9 Victoria Chambers, Westminster, S.W.

"Bankers—Messrs. Ransom, Bouverie & Co.,

"1, Pall Mall East, S.W.

"Dear Sir,—In reply to your note I beg to state that we can supply you with plenty of non-union masons, good steady men, at a few hours' notice. I enclose a form of application, which please fill in with the requisite particulars and send to us per return of post.

"I am, dear sir, yours obediently,

"F. C. Maude, Colonel, Hon. Sec.

"Pro J. R. T."

"April 18th, 1868.

"Brook Hill, Sheffield.

"Dear Sir,—I am in receipt of your note of yesterday. I return you one of the forms filled up and sined. the work that I want the men to do is clensed moulded work. I hope that the men you send will be good steady men as I do not like any drunkards. Will you please to write and say by what train they will come by, and the date, and I will meet them, so that they will not be lost or make any mistake.—Waiting your reply,

"I remain, yours truly,

"James Powell, Builder."

The following was the form referred to in the foregoing letter:—

"Form to be filled up by employers requiring hands from The Free Labour Registration Society. Date, the 18th day of April, 1868.

"Number of hands required . . Twelve masons.

"Nature of employment . . . Banker masons, one or two that can set stone.

"Piece, day work, or otherwise . .	7*d.* per hour.
"Wages	32*s.* 4*d.* per week.
"Probable duration of employment .	Until Crismas or longer.
"Price of lodgings in neighbourhood .	About 3*s.* per week.
"Whether in consequence of a strike or not.	Strike on account of letting some men work by the piece.
"What portion of railway fare will be paid by employer . . .	10*s.* each man, and if they are steady good men and will stop until the work is completed, I will pay the remainder of their fares.

"Any further particulars . . . . . .

"I hereby agree to conform to the rules of the Free Labour Registration Society.

(Signature of employer) "James Powell,

(Address of employer) "Brook Hill, Sheffield."

It further appeared that on the 22nd of April the appellant went to Colonel Maude's office, and the two letters from the respondent and the above form were then read to him and other men. The appellant said that he was not a member of any trades' union, and he and several others signed an agreement, of which the following is a copy:—

"Free Labour Society.—We, the undersigned, members of the above society, having accepted employment in Sheffield, do agree that one half days' wages (and 9*d.*) for a card of membership, being the fee to the said society for obtaining us the employment, shall be deducted by instalments from our wages during the ensuing four weeks. And we do also agree that we will not quit the service of our employer without just or reasonable cause, or unless by mutual agreement before the expiration of the current year.—London, 22nd April, 1868."

The agreement was sealed with Colonel Maude's seal for the purpose of identification, and on the 22nd of April the appellant and seven other men went down to Sheffield, but refused to work for the respondent.

It was contended for the appellant, first, that the respondent ought under the Master and Servant Act, 1867, and in the information laid by him before the justice, under s. 4, to have set forth the amount of compensation claimed for breach of contract, and not claimed the fulfilment of the contract. Secondly, that under the 3rd section of the Master and Servant Act, 1867, the respondent was bound to prove a contract of service within the meaning of some enactment described in the first schedule to that act, and that he had not done so. Thirdly, that there was no jurisdiction in the justices of the borough of Sheffield to hear and determine the

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case at Sheffield. Fourthly, that the contract had been altered, as appeared on the face of it, by the erasure of six of the names of the contracting workmen after being signed by the appellant, and thereby vitiated. Fifthly, that the appellant was brought to Sheffield through fraud by the Free Labour Registration Society, and that the respondent having accepted what they had done, it became his fraud.

The magistrates overruled all the above five objections, and made the following order:—"That the said employed shall fulfil the contract forthwith, and that the said employed shall forthwith find good and sufficient security by recognizance, himself in the sum of 20*l.* and two sureties in the sum of 10*l.* each, for the due fulfilment of the said contract; and if upon a copy of a minute of this order being served upon the said employed, he shall neglect or refuse to comply with the same, in that case we adjudge the said employed, for such his disobedience, to be imprisoned in the house of correction at Wakefield, in the West Riding of Yorkshire, for the space of one month, unless he shall sooner find such security as aforesaid."

The question for the Court was, whether, regard being had by the Court to the evidence as presented to the magistrates, and to the five objections taken on the hearing by the appellant's attorney, and their views and opinions thereon, the order made by them in this case was or was not a valid and effectual order within the provisions of the Master and Servant Act, 1867.

C. Crompton (*Fitzjames Stephen, Q.C.*, with him), for the appellant. The information is not framed according to the act, and is invalid: it assumes that the respondent was entitled to decide whether the appellant should continue his service or pay compensation, while 30 & 31 Vict. c. 141, s. 9, expressly leaves the decision of this to the magistrates. The information ought to have been framed in the alternative, instead of claiming only the former.

[WILLES, J. As the respondent has not asked for compensation, if the magistrates had thought the appellant was not bound to return to his service they ought perhaps to have dismissed the summons altogether; but the information certainly is not bad,

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and any objection to its form ought to have been taken before the magistrates.]

Next, the order is bad because it adjudges that if the appellant shall neglect or refuse to comply with it, he shall be imprisoned for a month. The act only empowers the justices after he has disobeyed the order, to commit him to prison, not to adjudge in the original order his committal in case he shall disobey it.

[WILLES, J. That may be so, but if it be, the latter part of the order will be simply invalid, and may be treated as surplusage. We have no power to quash this order, only to see if the justices have decided rightly the points raised before them. We ought not to express any opinion in these proceedings whether the latter part of the order can be enforced.]

The next point is, that 30 & 31 Vict. c. 141, s. 9, only applies to contracts within the meaning of the enactment described in the 1st schedule to the act, or some or one of them. The only acts within which this contract could come are 20 Geo. 2, c. 19, and 4 Geo. 4, c. 34. The former, however, only applies to contracts under which the servant has actually entered on the service. The latter extends the former to cases in which the service has not been commenced, but applies only to cases in which the contract is in writing and signed by both parties. Here it is found by the case that the service had not been commenced, and the documents do not shew a contract in writing signed by the parties. In the agreement signed by the appellant, none of the terms of the contract are mentioned, and there is no reference in it to the other writings, and the documents cannot be connected by any evidence outside the documents themselves. The whole intention of the act was to alter the remedies, not to give a remedy when there was none before, and though the interpretation clause (s. 2) appears at first sight to favour the contrary interpretation, it must be limited by the provisions of s. 3.

The other points raised before the magistrates were abandoned.

J. L. Hannay, for the respondent, was requested to confine himself to the question whether the contract was within 30 & 31 Vict. c. 141. The contract is within the statute, even if it be not in writing. The interpretation clause (s. 2) expressly provides that "contract of service" shall include any contract,

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whether in writing or by parol, and though there appears to be some little variance in s. 3, the latter must be interpreted as only confining the contracts to those between such parties as were affected by the former acts. There have been many cases decided on the question what classes of servants were within the earlier statutes; thus domestic servants have been held not to have been within them. In *Lowther* v. *Lord Radnor* (1) it was held that day labourers were within the terms of 20 Geo. 2, c. 19. In *Branwell* v. *Penneck* (2) it was held that a person employed by an attorney under a fi. fa. was not within the act. The 4th section of 30 & 31 Vict. c. 141 must be interpreted by s. 2; and there is nothing in it requiring the contract to be in writing, nor is there in form A given in schedule 3. But further, if it be necessary, this contract is in writing. Evidence is always admissible to shew that the persons mentioned in letters making and accepting an offer are the same, and there was quite enough here appearing on the documents to connect them.

C. Crompton, in reply. Even if the documents can be connected there is no signature by the respondent to the contract; his name attached to the form sent him by the Free Labour Registration Society, being intended as a signature to a contract with Colonel Maude, not with the appellant. But further, the mere use of the word "employment" in the agreement signed by the appellant cannot identify a document containing the terms of the employment which is in no other way referred to.

WILLES, J. In this case it is unnecessary to give any opinion on the objection which has been taken to that part of the order which adjudges that if the appellant neglects or refuses to return to his work he shall be imprisoned for a month. The justices can of course only adjudge the appellant to be imprisoned under the authority of an act of parliament, whose provisions they must follow; and it will be for the respondent to consider whether he can enforce that part of the order without bringing the appellant before the justices again on a fresh summons after he has failed to return to his work. The only question before us, however, is, whether or not the order made by the justices in this case is or is not a

(1) 8 East, 113. (2) 7 B. & C. 536.

valid and effectual order within the provisions of the Master and Servant Act, 1867; that refers to the decretal part, if one may so call it, of the order, viz., that the appellant should fulfil his contract, and the remainder may be considered as surplusage for this purpose. All the objections raised by the appellant have been sufficiently disposed of in the course of the argument except one, viz., that the contract was not such as to be within the jurisdiction of the magistrates, because the late act only applies to parol contracts when the service has been actually commenced, in other words, that s. 3 of the Act of 1867 ought to be so read that the law introduced by 20 Geo. 2, c. 19, and 4 Geo. 4, c. 34, should be considered to be still existing for the purpose of defining what cases are within the act. Whether the effect of the late statute is, that all contracts of such a character that they would fall within any of the former acts, whether by parol or not, and whether the service has been commenced or not, are within the jurisdiction of the magistrates, or whether 4 Geo. 4 is still to be looked at, and the contract must necessarily be in writing when the service has not been commenced, it is unnecessary to pronounce an opinion; because I think that in this case there was a contract in writing which would have given jurisdiction to the magistrates under the act of Geo. 4. In so deciding, I do not intend to throw any doubt upon the cases which shew that where it is necessary to connect the document which has been signed with that containing the terms of the contract, the reference of one to the other must appear on the face of the document signed. It was so decided in *Boydell* v. *Drummond* (1), which has ever since been acted on by the profession; but I think that in this case there is upon the face of the agreement signed by the appellant, a reference to the document signed by the master, of abundant distinctness to enable me to say that that, and no other, is the document referred to in it.

In *Boydell* v. *Drummond* (1), the plaintiff, being about to publish an edition of Shakespeare, prepared a prospectus containing the terms of subscription, which lay on his counter, and a book headed "Shakespeare subscribers,—their signatures," which was signed by the defendant. It was held that, as the book did not refer to the prospectus, the two could not be con-

(1) 11 East, 142.

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nected so as to constitute a written agreement signed by the defendant. The distinction between that case and the present will be quite clear when the documents are compared, and the more as the history of the documents must, of course, be taken into account. From the first letter, in this case, it appears that the respondent applied to a society called the "Free Labour Registration Society," to procure him some workmen; the secretary to the society wrote in answer, inclosing a blank form, which showed under various heads the details of the employment; that was filled up and signed by the respondent; the form was headed "To be filled up by employers requiring hands from the Free Labour Registration Society," and it was signed "Signature of employer, J. Powell," "Address of employer, Brook Hill, Sheffield." That being so, the document was brought to the knowledge of the appellant, and the question is, whether it was assented to by a writing referring to it, and signed by the appellant. Now, the document signed by the appellant states that he had accepted employment at Sheffield, the place where, as appears by the other document, the respondent lives, and it contains the expression "being the fee to the said society for obtaining us the said employment," and "we do also agree that we will not quit the service of our employer," referring especially to some employment found for the appellant by the society. Upon inquiring what was the employment procured for the appellant by the society, which we are thus led to do by the document itself, it appears to have been in writing and contained in the form filled up and signed by the respondent; a complete contract in writing, signed by the two parties, is therefore obtained. Acting then upon the plain intention of the statute, and seeing it has been substantially, and I think literally complied with, though that is of less importance, we must affirm so much of the order as we are at present concerned with, and, as the objection is not one going to the merits, with costs.

KEATING, J., concurred.

BRETT, J. The only objection on which it remains for us to give judgment is, whether the contract was within 30 & 31 Vict. c. 141. It is said that the contract would not have been within 4 Geo. 4, c. 34, or any of the other acts mentioned in the first schedule to the new statute, because it was not in writing and

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the service had not been commenced. That raises two questions—first, whether there was a contract in writing; secondly, whether if not, it was necessary that there should be such to bring the case within the late statute. Now, I must say that I have very considerable doubts whether, in order to bring the case within the late statute, the contract need be such as would have given jurisdiction to the magistrates under 4 Geo. 4, c. 34, or one of the other statutes mentioned in the schedule above referred to; but it is unnecessary to decide that point, because I agree that this contract was in writing. To make it so, the documents, no doubt, must refer to one another, but there is a reference in the document of the 22nd of April to employment obtained for the appellant by the Free Labour Registration Society, and as soon as evidence is given to shew what that employment was, it appears at once that it was contained in a written document signed by the other party. I think, therefore, the two documents may be taken together and form a written contract signed by both parties.

Appeal dismissed with costs.

Attorneys for appellant: *Purkis & Perry.*
Attorney for respondent: *W. Pitman.*

KNOCK *v.* THE METROPOLITAN RAILWAY COMPANY.

Nov. 2.

Railways Clauses Consolidation Act, 1845 (8 & 9 *Vict. c.* 20)—*Compensation for Damage to Goods in the Exercise by the Company of the Powers conferred on them by the Acts.*

The 6th and 16th sections of the Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), are not confined to structural damage and depreciation in value of the premises, but also entitle a claimant to compensation for damage occasioned to goods therein by reason of the exercise of the powers conferred upon the company by the acts of parliament.

ACTION upon an award under the Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), s. 68. The award recited, amongst other things, that Knock claimed and contended that, in and by the execution of the works authorized by, and in exercise of the powers contained in, the Metropolitan Railway (Notting Hill and

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Brompton Extension) Act, 1864 (27 & 28 Vict. c. ccxci.), and the several acts of parliament incorporated therewith, the Metropolitan Railway Company had injuriously affected the house, land, and premises, 27, Alfred Terrace, Queen's Road, Bayswater, in the county of Middlesex, belonging to Knock, and that he (Knock) had sustained and would sustain damage by reason of the injurious affecting of the said house, land, and premises by the execution and use of the works so authorized as aforesaid; that, by a notice in writing under the hand of Knock, bearing date, &c., he, Knock, gave the company notice that he was possessed of and interested in the said house, land, and premises under and by virtue of a lease (describing it), and further gave the company notice that he required them to pay him compensation for the injurious affecting of the said house, land, and premises, and that the amount of compensation claimed by him by reason of the premises was 1650*l.*, and further gave the company notice that, unless they were willing to pay him the said sum, and should enter into a written agreement with him for that purpose within twenty-one days of the receipt by them of that notice, then he desired to have the amount of such compensation settled by arbitration according to the provisions of the act or acts of parliament in that behalf; and that Knock, by an instrument in writing under his hand, did in pursuance of the provisions of the Lands Clauses Consolidation Act, 1845, in that behalf, nominate and appoint W. M. to be an arbitrator on the part and behalf of him, Knock, to settle and determine the compensation to be paid by the company to him (Knock) for the damage sustained and to be sustained by him by reason of the execution by the company of the works authorized by the first-mentioned act, and the exercise by the company of the powers of the said act and the several acts of parliament incorporated therewith, &c. &c.

The arbitrator made his award on the matters so referred to him, as follows:—

"1. I find, award, and determine that the said house, land, and premises before mentioned, and the said interest of Knock therein, were injuriously affected by the execution of the works authorized by, and the exercise of the powers contained in, the said several acts of parliament; and that Knock has sustained and will sustain

damage by reason of the injurious affecting of the said house, land, and premises by the execution and use of the said works.

"2. I find, award, and determine that the amount of compensation to be paid by the company to Knock for and in respect of such injurious affecting, and of the damage so sustained and to be sustained by him as aforesaid, is as follows,—1. For structural damage to the said house and premises, the sum of 200*l.*,—2. For damage and injury occasioned to goods of Knock therein, 486*l.*,—3. For depreciation in the value of the said leasehold interest of Knock in the said house, land, and premises, 340*l.*: amounting in the whole to the sum of 1026*l.*" The arbitrator further ordered the defendants to pay the costs of the reference and award.

At the trial before Bovill, C.J., at the sittings in Middlesex after last Trinity Term, a verdict was entered for the plaintiff for the sum claimed, subject to leave reserved to the defendants to move to enter a verdict for them, or to reduce the damages by the sum of 486*l.*, on the ground that the plaintiff was only entitled to recover compensation for structural damage affecting the value of the land, and not for injury done to the goods upon the premises, and that the award was bad for giving compensation for such injury.

Nov. 2. *Day* moved accordingly. It may be conceded that the award is divisible, and might be good for the amount of injury and depreciation of the structure; but, inasmuch as costs are awarded generally as to the whole, the award is bad altogether. The question turns upon s. 68 of the Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), and ss. 6 and 16 of the Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20). The remedy by award is given by the former provision; but the right to compensation depends upon the two latter. The 6th section of 8 & 9 Vict. c. 20, enacts that, "in exercising the powers given to the company by the special act to construct the railway and to take lands for that purpose, the company shall be subject to the provisions and restrictions contained in this act and in the said Lands Clauses Consolidation Act; and the company shall make to the owners and occupiers of and all other parties interested in *any lands* taken or used for the purposes of the railway, or *injuriously affected by the construction thereof*, full compensation for the value

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of the lands so taken or used, and for all damage sustained by such owners, occupiers, and other parties, by reason of the exercise, *as regards such lands*, of the powers by this or the special act, or any act incorporated therewith, vested in the company." Under this section the right is limited to compensation for injury done to the claimant's interest in the land.

[KEATING, J. The award shews that the damage for which the arbitrator has given compensation was occasioned by the exercise of the powers by the acts of parliament vested in the company.]

The injury affecting the house was no doubt occasioned by the exercise of the powers vested in the company.

[BOVILL, C.J., referred to *Metropolitan Board of Works* v. *Metropolitan Railway Company*. (1)]

The 6th and 16th sections of 8 & 9 Vict. c. 20, must be read together. The 16th contains a proviso that, "in the exercise of the powers by this or the special act granted, the company shall do as little damage as can be, and shall make full satisfaction, in manner herein and in the special act and any act incorporated therewith provided, to all parties interested, for all damage by them sustained by reason of the exercise of such powers." (2) The 68th section of 8 & 9 Vict. c. 18, which provides the remedy, supports this view: it speaks of "compensation in respect of any *lands*, or of *any interest therein*, which shall have been taken for or injuriously affected by the execution of the works."

[BOVILL, C.J. The right to compensation does not depend on s. 68 of the Lands Clauses Consolidation Act alone. That is in addition to the ordinary remedies.]

It shews, however, that the legislature intended to limit the compensation to injuries affecting the land, or the claimant's interest therein,—that is, to structural damage; and that they did not contemplate compensation for injury to moveable chattels.

[KEATING, J. If the injury to the plaintiff's goods resulted from the exercise by the company of powers conferred upon them by the act, so that the plaintiff's right of action was gone, unless he

(1) Law Rep. 3 C. P. 612; affirmed in Ex. Ch. post.

(2) These words do not apply to what is done, but to the manner of doing it: see *Reg.* v. *East and West India Dock and Railway Company*, 22 L. J. (Q.B.) at p. 384.

be entitled to compensation under the Railways Clauses Consolidation Act, he will be altogether deprived of remedy.]

That is no reason for imposing upon the company a liability under the act, upon which alone his claim for compensation rests. Besides, the claimant has the remedy in his own hands. He might remove the goods, and so prevent injury.

BOVILL, C.J. Mr. Day has cited no authority for the proposition for which he contends; but he relies solely upon the words of the sections of the acts of parliament to which he has referred. According to my experience, which has extended over a considerable period, no doubt has ever been suggested,—and indeed it has always been one of the most serious heads of compensation,—that, where premises are damaged or injuriously affected by the exercise of the powers vested in the company, the claimant is entitled to compensation for damage done to stock in trade or other property thereon. What was referred to the arbitrator here was, "to settle and determine the compensation to be paid by the company to the claimant for the damage sustained and to be sustained by him by reason of the execution by the company of the works authorized by the acts." It seems to me that the submission entirely follows the act of parliament in terms and in substance, and that the arbitrator was perfectly at liberty to enter upon the whole inquiry as to the damage sustained by the plaintiff by reason of the exercise of the powers of the act. The arbitrator finds that the house, land, and premises, and the interest of the claimant therein, were injuriously affected by the execution of the works authorized by, and the exercise of the powers contained in, the acts of parliament; and that the claimant has sustained and will sustain damage by reason of the injurious affecting of the said house, land, and premises by the execution and use of the said works. He then proceeds to find that the amount of compensation to be paid by the company to the claimant for and in respect of such injurious affecting, and of the damage so sustained and to be sustained by him, is as follows: and then he enumerates three separate heads of damage, all of which are with reference to the previous terms of the award. The first, which is not disputed, is, "for structural damage to the said house and premises, 200*l*." The third, which

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also is undisputed, is, "for depreciation in the value of the leasehold interest of the claimant in the said house, land, and premises, 340*l*." The second head is, "for damage and injury occasioned to goods of the claimant therein, 486*l*." Mr. Day contends that, although the claimant is entitled to compensation for structural damage to the house and premises, and for depreciation in the value of his leasehold interest in the house, land, and premises, he is not entitled to any compensation for injury occasioned to his goods therein, notwithstanding such injury was caused by the execution of the works done by the company under the powers vested in them by the acts. It seems to me that the case falls clearly within the provisions of the Railways Clauses Consolidation Act. It is not necessary to go further than s. 16 of that act. Several extensive powers are thereby conferred upon the company; but they are all subject to the proviso at the end of the section, that, "in the exercise of the powers by this or the special act granted, the company shall do as little damage as can be, and shall make full satisfaction, in manner herein and in the special act, and any act incorporated therewith provided, to all parties interested, for *all damage* by them sustained *by reason of the exercise of such powers*." This is a damage sustained by the plaintiff by reason of the exercise of such powers. I find nowhere any such limitation of these general words as Mr. Day suggests; and the universal practice has been to include such matters in the estimate of compensation, and, as I think, most properly. I am of opinion, therefore, that there should be no rule.

BYLES, J. I am of the same opinion. It seems to me that the claim in this case falls within the very words of s. 6 of the Railways Clauses Consolidation Act, 1845, 8 & 9 Vict. c. 20. That section provides for three things,—1. For compensation for the value of the land, where the land is taken or used for the purposes of the railway,—2. For compensation for the injuriously affecting the land, or the claimant's interest therein, where the land itself is not taken,—3. For all damage (which must mean all *other* damage) sustained by such owners, &c., by reason of the exercise as regards such lands of the powers vested in the company. If the damage to the goods in this case was such that it would not have occurred

if they had been removed, that would be matter for the consideration of the arbitrator. But the arbitrator finds in substance that the damage occasioned to the goods was caused by the execution of the works authorized by, and the exercise of the powers contained in, the several acts of parliament. It seems to me, therefore, that what the arbitrator has done is justified by the provisions of s. 6 of the Railways Clauses Consolidation Act.

KEATING, J. I am of the same opinion. We must assume upon this award that the arbitrator was satisfied that the damage done to the goods in question was done in the exercise of the powers conferred upon the company by the acts of parliament referred to. If so, the claimant's right of action would be taken away; and, if Mr. Day's argument were to prevail, the claimant would be altogether without remedy unless he were entitled to compensation under the Railways Clauses Consolidation Act. We should be very slow to come to such a conclusion as that. It seems to me, however, that this case falls distinctly within the words of s. 6 of that statute; for, compensation is to be given, not only for lands taken or injuriously affected, but "for all damage sustained by the owners, &c., by reason of the exercise, as regards such lands, of the powers by this or the special act, &c., vested in the company;" and the arbitrator finds that the damage in question was a damage sustained by reason of the exercise of such powers.

BRETT, J. I am of the same opinion, and for the reasons given by my Brother Byles.

Rule refused.

Attorney for plaintiff: *W. H. P. Sharp.*
Attorneys for defendants: *Burchells.*

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Nov. 16.

Shipping—Construction of Bill of Lading—"Freight to be paid within Three Days after Arrival, and before Delivery"—Accidental Destruction of Goods whilst on Board.

The defendants shipped cement under a bill of lading which stipulated that freight should be paid "within three days after arrival of ship, and before delivery of any portion of the goods." The ship arrived in port with the cement on board, but was within the three days, in consequence of an accidental fire, scuttled with a view to the saving of ship and cargo; and on her being raised the cement was found to be useless, having ceased to exist as cement, and the consignees refused to accept it or to pay freight:—

Held, that the ship-owners, not being ready to perform their part of the contract, were not entitled to sue for freight.

THIS was an action brought for the recovery of 86*l.* 12*s.* 6*d.* for freight for the conveyance of goods from England to Australia, and for work done. By consent, and by judge's order, the following case was stated:—

1. The plaintiffs are owners of the ship *John Duthie;* the plaintiff Phillips being her commander. The defendants are cement-manufacturers carrying on business in copartnership in London.

2. The *John Duthie* is one of a line of ships which trade between London and Australia.

3. In August, 1866, the *John Duthie* was lying in the East India Docks in charge of Messrs. G. Thompson & Co., of 24, Leadenhall Street (the plaintiffs' agents) for the purpose of receiving goods and passengers for conveyance to Sydney.

4. In September the defendants applied to Thompson & Co. for accommodation in the ship for 300 casks of Portland cement, to be forwarded to Sydney. Terms of freight were arranged between the defendants and Thompson & Co., and the 300 casks of cement were in a short time received on board the ship.

5. A bill of lading was signed by the plaintiff Phillips, as follows:—"Shipped in good order and well conditioned by C. J. Hilton & Co. in and upon the good ship called the *John Duthie*, whereof is master for the present voyage J. D. Phillips, and now riding at anchor in the river Thames, and bound for Sydney, to say, 300 casks Portland cement, being marked and numbered as in the margin, and are to be delivered in the like good order and well

conditioned at the aforesaid port of Sydney, New South Wales (the act of God, &c. excepted), unto Messrs. Rabone, Feez, & Co., merchants of Sydney, or to their assigns, he or they paying freight for the said goods 86*l.* 12*s.* 6*d.*, as per indorsement, with primage and average accustomed. In Witness, &c. Weight and contents unknown; and not accountable for leakage, breakage, rust, or destruction by vermin. *Freight to be paid within three days after arrival of ship, and before the delivery of any portion of the goods specified in this bill of lading.*" There was no charterparty or other document signed by any of the parties, in addition to the above bill of lading.

6. The *John Duthie* sailed from the port of London on or about the 10th of September, 1866, and arrived at Sydney and anchored there in the harbour on or about the 19th of December, 1866. On the night of and after her arrival in Sydney, a fire was discovered to be raging in the hold. Every endeavour was made by the captain and the crew to arrest the progress of the fire, but without avail. By the advice of Lloyd's agent and several commanders of other vessels, who had come on board to render assistance, and of the harbour-master, the plaintiff Phillips ordered the ship to be scuttled and sunk, as the only means of extinguishing the fire, and for the purpose of afterwards raising and thereby saving the ship and cargo. The ship was accordingly scuttled. She was raised on the 24th of December, 1866; and what remained of the cargo was afterwards discharged at Sydney, and the ship was repaired. The fire was accidental.

7. The defendants' goods were raised in the vessel, but were found to have been rendered useless. The cement no longer existed as cement, it having been hardened into solid masses by the action of the water; a circumstance which also involved the destruction of the casks. On application being made to the consignees, they refused to accept the goods or pay the freight; and the goods were brought back to England by the plaintiffs, in whose possession they remain.

8. The question for the opinion of the Court was, whether under the circumstances the defendants ought to pay the plaintiffs the amount of the freight, or otherwise pay to them remuneration for the conveyance of the goods.

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Mellish, Q.C. (*Macnamara* with him), for the plaintiffs. As a general rule, no doubt, freight is the reward payable to the carrier for the safe carriage and delivery of goods, and is payable only on safe carriage and delivery: *Kirchner* v. *Venus*. (1) But, as is said in Abbott on Shipping, 11th ed. 364, "if the parties choose to stipulate by express words, or by words not express but sufficiently intelligible to that end, that a part of the freight should be paid absolutely by anticipation, and not depend upon the performance of the voyage, they are at liberty to do so." By the terms of the bill of lading in this case, the only condition precedent to the right of the ship-owner to demand the freight is the arrival of the ship, not the delivery of the goods. If the goods had remained safe on board the vessel until after the expiration of three days of her arrival, it could not have been contended that the freight was not payable. Does, then, the loss after arrival and within the three days make any difference?

[MONTAGUE SMITH, J. Suppose the master had within the three days refused to deliver the goods, could the ship-owner have recovered the freight?]

The defendants would have had a remedy for the non-delivery; but they would have had no answer to the claim of freight under the bill of lading. That the goods are so damaged that they are of less value than the freight is no answer to the ship-owner's claim, even though the damage was the result of the negligent and unskilful navigation of the master and crew: *Dakin* v. *Oxley*. (2) In the learned and elaborate judgment delivered by Willes, J., in that case, it is said (3): "The true test of the right to freight is, the question whether the service in respect of which the freight was contracted to be paid has been substantially performed; and, according to the law of England, as a rule, freight is earned by the carriage and arrival of the goods ready to be delivered to the merchant, though they be in a damaged state when they arrive. If the ship-owner fails to carry the goods for the merchant to the destined port, the freight is not earned. If he carry part, but not the whole, no freight is payable in respect of the part not carried, and freight is payable in respect of the part carried, unless the

(1) 12 Moo. P. C. 361.
(2) 15 C. B. (N.S.) 646; 33 L. J. (C.P.) 115.
(3) 15 C. B. (N.S.) at p. 664.

charterparty make the carriage of the whole a condition precedent to the earning of any freight,—a case which has not within our experience arisen in practice." And at p. 667 the learned judge goes on to say: "If it (the cargo) has arrived, though damaged, the freight is payable by the ordinary terms of the charterparty; and the question of fortuitous damage must be settled with the underwriters, and that of culpable damage in a distinct proceeding for such damage against the ship captain or owners." In 2 Parson's Maritime Law, p. 381, it is said: "It is well settled that if the goods insured arrive at the port of destination existing in specie, the underwriters are not liable, although they are of no value whatever. Some question has arisen as to the meaning of the word specie. The primitive meaning of the word is, undoubtedly, *appearance*, and it is in this sense that it is commonly applied to memorandum articles. Thus, if the box of a chariot is lost, and nothing but the wheels remain, these cannot be said to have the appearance of a chariot, and consequently the article no longer exists in specie, and the underwriters are liable as for a total loss with salvage: *Judah* v. *Randal.* (1) But it has been held that the value of the article has nothing to do with its existence in specie. Thus, fish, though absolutely spoiled,—*Cocking* v. *Fraser* (2),—and corn which was putrid,—*Neilson* v. *Columbian Insurance Company* (3),—were both held to exist in specie. And pork has been held not to lose its identity by being roasted: *Skinner* v. *Western Marine and Fire Insurance Company.*" (4) *Garrett* v. *Melhuish* (5) is also an authority to shew that, if a shipper of goods sustain a loss by reason of the misconduct or negligence of the ship-owner or his agents, his remedy is by action at law, and he cannot resist payment of freight on the ground that the goods were unfit for use when they arrived at the port of destination.

[BRETT, J. You must admit that this was a case of total loss, and that, if the bill of lading had been an ordinary one, freight would not under the circumstances have been payable.]

That must be conceded. The plaintiff's contention is that, upon the construction of this particular bill of lading, the freight was

(1) 2 Caines Cas. 324.
(2) Park Ins. 151; Marsh. Ins. 227.
(3) 3 Caines Rep. 108.
(4) 19 La. 273.
(5) 4 Jur. (N.S.) 943.

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expressed. Now, under an ordinary bill of lading, the ship-owner is not entitled to claim freight unless the goods have arrived and he is ready and willing to deliver them. Here there is an alteration in that part of the contract: and the question is how far it departs from the accustomed form. It seems to me that the ordinary contract was intended to exist during the three days after the arrival of the vessel with the goods on board. If the freighters within the three days demanded the goods and tendered the freight, the ship-owners would be bound to deliver them. But, after the expiration of the three days, I incline to think that the ordinary state of things would be altered, and that the ship-owner might sue for the freight without averring readiness and willingness to deliver. Here, however, the plaintiffs could not at any time have averred that they were ready and willing to deliver, the goods having been destroyed before the expiration of the three days. I therefore think they are not entitled to recover.

Judgment for the defendants.

Attorneys for plaintiffs: *Lewis, Munns, Nunn, & Longden.*
Attorney for defendants: *James Crowdy.*

END OF MICHAELMAS TERM, 1868.

CASES

DETERMINED BY THE

COURT OF COMMON PLEAS

AND BY THE

COURT OF EXCHEQUER CHAMBER,

ON ERROR AND APPEAL FROM THE COURT OF COMMON PLEAS,

IN AND AFTER

HILARY TERM, XXXII VICTORIA.

BEAL AND OTHERS, PETITIONERS; SMITH, RESPONDENT. 1869 Jan. 12.

Parliamentary Elections Act, 1868—*Form of Petition—Particulars of alleged Bribery, Treating, and Undue Influence.*

Under the Parliamentary Elections Act, 1868 (31 & 32 Vict. c. 125), it is enough to allege generally in the petition that "the respondent, by himself and other persons on his behalf, was guilty of bribery, treating, and undue influence before, during, and after the election."

Upon a summons for particulars of the names, &c., of the "other persons," and of the date of each alleged act of bribery and treating, and the names of the persons bribing and of the persons bribed and treated, and the times and nature of the alleged acts of treating, and of each alleged act of undue influence, the judge at chambers ordered "that the petitioners shall three days before the day appointed for the trial leave with the master, and also give the respondent or his agent, particulars in writing of all persons alleged to have been bribed, of all persons alleged to have been treated, and of all persons alleged to have been unduly influenced:"—

Held, that the judge had exercised a right discretion; and the Court declined to interfere.

THE petition alleged that the respondent, by himself and other persons on his behalf, was guilty of bribery, treating, and undue influence before, during, and after the election, whereby he was and is incapacitated from serving in parliament for the city of West-

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earned by the arrival of the ship with the goods on board, and was payable three days after arrival.

Manisty, Q.C. (*Butt* with him), for the defendants. To entitle the ship-owners to sue for freight under a bill of lading like this, they must aver and prove readiness and willingness to deliver the goods at all events during the three days succeeding the arrival of the ship with the goods on board. The case states that before the expiration of the stipulated period, the master scuttled the ship and so destroyed the defendants' goods. The stipulation for payment of freight "within three days after arrival of the ship," is not like the ordinary stipulation for payment of the freight or a portion of it in advance on the sailing of the ship. In that case it is not subject to all the incidents of freight properly so called. Suppose the plaintiffs had sold the cement within the three days, could they then have sued for the freight? This is in truth nothing more than the ordinary contract for the carriage and delivery of goods, with a condition superadded that the merchants shall be allowed three days after the ship's arrival for taking away the goods and paying the freight.

Mellish, Q.C., in reply. The case finds that the fire was accidental, and that the scuttling of the ship was the best course to pursue for the purpose of saving the ship and cargo. The plaintiffs were to be paid freight within three days after the arrival of the ship. They were not bound to be ready and willing to deliver the goods during those three days. The ship might not have been able to get to the quay, or the delivery of the cargo might have been impeded by a variety of circumstances which would not affect the contract between the parties.

[BRETT, J. Does not "arrival" mean arrival at that part of the port where such ships usually deliver their cargoes? Suppose the captain anchors at a place in the port where the merchants cannot take delivery of the goods, are they bound to pay the freight notwithstanding?]

Arrival means arrival in the port. If the captain failed to use diligence in so mooring the ship as to enable the merchants to get their goods, he might render his owners liable to an action; but that would not affect the terms of a positive contract for payment of freight.

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KEATING, J. Looking to the terms of this bill of lading, I am of opinion that the defendants are entitled to the judgment of the Court. Under an ordinary bill of lading, the freight would be payable concurrently with the delivery of the goods, which must be within a reasonable time after arrival. (1) Here, the defendants by the express terms of the bill of lading bind themselves to take delivery and to pay the freight within three days after the ship's arrival at her destination. It seems to me that the period of three days is substituted for the reasonable time which the law would otherwise imply, and that the ship-owner must be ready to deliver the goods at the end of that time. The goods in question having (as I think we must assume) been destroyed, the plaintiffs were not ready to deliver them, and consequently are not entitled on this bill of lading to sue for freight.

MONTAGUE SMITH, J. I am of the same opinion. Freight is ordinarily payable on the arrival and right delivery of the cargo. The bill of lading in question has provided that the time of payment shall be not longer than three days after the arrival of the ship. During the three days the defendants' goods, whilst on board, and before they could be delivered, were destroyed by an accidental fire, and ceased to exist as cement. I agree that it is competent to the parties to make a special contract as to the time at which freight shall be paid, and that the intention of the parties here was that the freight should be paid within three days after the arrival of the ship; but, to entitle the ship-owner to demand the freight, the contract on his part must have been performed by the cargo being brought to port and the master being ready to deliver it. The plaintiffs not being in a condition to deliver this cement, they were not entitled to sue for freight: and therefore there must be judgment for the defendants.

BRETT, J. The whole question in this case arises upon the construction of the bill of lading; and, though it is in an unusual form, I think it must be construed with reference to what is the ordinary form of a bill of lading, and how far the parties have intended to depart from that form, and how that intention is

(1) See *Paynter* v. *James*, Law Rep. 2 C. P. 348.

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of the person alleged to have been bribed, treated, or unduly influenced, and of the persons by whom the bribery, &c., were effected. The learned judge ordered that the petitioners should *three days before the day appointed for trial* furnish particulars "of all persons alleged to have been bribed, treated, or unduly influenced." This clearly gives the respondent no information which will enable him to meet the charges made against him. It is sworn that the number of electors on the register for the city of Westminster was 18,839, and that of these 7648 votes were recorded for Mr. Smith, 6584 for the Hon. Captain Grosvenor, and 6284 for Mr. Mill. The number of canvassers and agents employed was necessarily very large: and the respondent distinctly swears that no act of bribery, treating, or undue influence was committed by himself, or, as he verily believes, by any other person acting or employed either directly or indirectly on his behalf in the matter of the election. Under these circumstances, it is impossible that the respondent can have a fair and effectual trial without more extensive particulars than the learned judge has thought fit to order.

BOVILL, C.J. An order for particulars has been made by my Brother Willes, as one of the judges appointed for the trial of election petitions in England, pursuant to the Parliamentary Petitions Act, 1868. The respondent is not satisfied with the order so made; and, in order to obtain further and better particulars of the alleged bribery, treating, and undue influence, he frames his motion in two ways. He prays, first, that the petition may be taken off the files of the Court, for non-compliance with the statute and the rules; and, secondly, he asks for particulars of a very special and extensive nature. Now, with regard to the form of the petition, it seems to me that it sufficiently follows the spirit and intention of the rules; and no injustice can be done by its generality, because ample provision is made by the rules to prevent the respondent being surprised or deprived of an opportunity of a fair trial, by an order for such particulars as the judge may deem reasonable. I think, therefore, it would be quite useless to require anything further to be stated in the petition than appears here. The statement therein of extraneous matter would, under rule 3, put the petitioners to the

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peril of costs. It is in the discretion of the judge at chambers to order particulars; and the parties have been before him. The practice which has been adopted by the learned judges upon whom this duty has devolved seems to me to be a material improvement upon the former practice. Upon the trial of election petitions before committees of the House of Commons, no information whatever was given as to the sort of case intended to be set up by the petitioner. The order made here is, that the petitioners shall, three days before the day appointed for the trial, give the respondent particulars in writing of all persons alleged to have been bribed, of all persons alleged to have been treated, and of all persons alleged to have been unduly influenced. It may be that cases might arise where it would be expedient to order fuller particulars to be given. The order, however, is not conclusive. If it can be shewn that injustice will be done, the judge will postpone the trial, upon such terms as he may think it right to impose. But, acting in this case according to the ordinary practice of the Court, before we can interfere with the exercise of discretion by a judge at chambers, we must be satisfied that he has done wrong; and the more so in reference to a matter which has been so well considered by the very learned and experienced judges whose attention has been so especially given to this new description of business. The statements laid before us have failed to satisfy my mind that a wrong conclusion has been come to, and therefore I think there should be no rule.

BYLES, J. I am of the same opinion. I do not feel myself competent to criticise the exercise of discretion by the learned judge who made this order, and who has so repeatedly and so profoundly considered the matter.

KEATING, J. I entirely agree with my Lord and my Brother Byles.

MONTAGUE SMITH, J. I think the particulars should in these cases be given fairly, regard being had to the interests of both parties. The petitioners may have a difficulty in finding the persons who have bribed, though they may more easily discover the persons who have been bribed. The extent of the particulars

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to be ordered was clearly in the discretion of my Brother Willes; and I see no ground for saying that he has not exercised it properly. The judge before whom the matter comes to be tried will take care that no injustice is done by the generality of the particulars; and he has ample powers for the purpose. If the practice adopted be found to work any real injustice, it may at a future time be altered.

Rule refused. (1)

Agents for petitioners: *Cobb & Southey.*

Agents for respondent: *Rogerson & Ford.*

(1) The following report of the decision of the Court of Session in Scotland) upon this point, in the case of The Greenock Election Petition, on the 28th of December, 1868, is taken from *The Scotsman* of the 29th of December.

Upon a motion by the respondent praying for the dismissal of the petition, on the ground that it did not comply with the regulations issued by the Court as to the form of election petitions,

Lord Cowan said: A few observations may be necessary in explanation of the grounds on which, after full consultation with my Brother Lord (Jerviswoode), I have proceeded in disposing of the application made by the respondent. Its object is, to have the petition dismissed in respect of its not complying with the 2nd rule of procedure issued under the act of 1868; and, as explained by the counsel in opening the case, it was said to be made under the 24th rule, whereby any one of the judges is impowered to dispose of interlocutory matters. By the 20th section of the act, the petition is to be "in such form and state such matters as may be prescribed:" and the rule referred to is made to carry out this enactment: it prescribes that the petition shall set forth articulately in the form of a condescendence the matters stated in the three heads of which the 2nd rule consists. This has been here strictly observed in regard to the first and second heads; but, as regards the third head, which requires the facts relied on in support of the prayer of the petition to be stated, the petition merely says in article 3, "the election was brought about by undue influence, and by large expenditure," and under article 4, "that bribery, treating, and undue influence were practised by the respondent and his agents, and by others in his behalf." On these facts thus generally stated, he relies in support of the prayer of the petition, which is to the effect that the respondent was not duly elected, and that his election was void. But, general as the statement in article 4 as to bribery, treating, and undue influence, certainly is, it is not doubtful, in my opinion, that, upon these corrupt practices, as alleged, being established by evidence as matters of fact, the prayer of the petition will have been supported. It might have been more in accordance with the prescribed rules that each of the three heads should have been separately set forth as practised by the respondent, his agents, and others on his behalf, and that some detailed information of a general nature should have been given. But the facts relied on as to bribery, treating, and undue influence having been practised are stated generally; and, as the statement is not alternative in any of its branches,

IN RE THE ILFRACOMBE PUBLIC CONVEYANCE COMPANY (LIMITED), AND THE LONDON AND SOUTH WESTERN RAILWAY COMPANY.

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Jan. 15.

Practice—Costs of Unsuccessful Application for Injunction at Chambers—Discretion of Judge—Railway Traffic Act (17 & 18 *Vict. c.* 31).

A judge at chambers refused to allow a railway company their costs of resisting an unsuccessful summons for an injunction under the Railway Traffic Act—the Court declined to review his decision.

ON the 30th of June, 1868, the Ilfracombe Public Conveyance Company, Limited, took out a summons at chambers, under the Railway Traffic Act, 17 & 18 Vict. c. 31, calling upon the London and South Western Railway Company to shew cause why they should not be restrained from preventing the complainants entering the yard of the railway company's station at Barnstaple at all

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it is not so open to this objection as it might otherwise have been. On full consideration of the document, therefore, I cannot entertain the objection to the effect of dismissing this petition. It is in truth an objection, in the light in which I regard it, to the form rather than to the substance of the petition, and, in that view, falls within the 35th rule. I have arrived at this conclusion the more readily, as it appears to me, as it does to Lord Justice Jerviswoode, that the hardship to which the respondent may be exposed from the generality of the statements in the petition, may be obviated by ordaining the petitioner to lodge with the clerk, and to furnish the respondent with, a written statement of the particular matters in support of the several charges of bribery, treating, and undue influence to which his evidence at the trial is to be directed. Such an order has accordingly been embodied in the deliverance on this application. The number of days before the trial for lodging the written statement has been the subject of deliberate consideration. According to the practice in election petitions hitherto, it is understood that information as to the facts to be proved was only given at the opening of the proceedings before the committee, by the opening counsel. But, while this might obviate the danger to the petitioner, of premature disclosure of his case, it has been considered by the judges in England, acting under the Parliamentary Elections Act, 1868,—and both Lord Justice Jerviswoode and I concur with them in their views on this subject,—that notice of particulars at least three days before the day fixed for the trial should be given to the respondent, that he may not be taken by surprise, and that he may have time for preparation. There are difficulties as regards this matter. The interests of both parties have to be consulted. But the order now pronounced will substantially meet, as we think, the justice of the case. If this is found not to be fully realised; it will be in the power of either party, under the act and relative rules, to make such further application to the Court, or to

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reasonable and proper times with their carriages, for the purpose of conveying passengers and their luggage, and parcels, &c., to and from the station, and from giving greater facilities in that respect to any other person or carrier, and why the railway company

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either of the judges, as may be thought expedient. Besides the specific charges of bribery, and others, there are the general statements in the petition, which cannot be allowed to stand with a view to the trial without amendment, if under those general terms any other than those corrupt practices is intended to be charged. The concluding part of the deliverance now pronounced deals with this matter, and is sufficiently explicit. Should an amendment be made, to the effect of adding to the charges of bribery, treating, and undue influence, any other illegal or corrupt practice, the same particulars must be furnished in regard to it as in reference to those of bribery and other charges, and within the same time before the trial: and this amendment must be lodged within four days from the date of this order.

The interlocutor pronounced was as follows:—

"Having considered the note for the respondents, and heard counsel for the parties, refuse the prayer for the dismissal of the petition in so far as regards the averment in article four of bribery, treating, and undue influence, under the declaration that, not less than three days before the day fixed for the trial, the petitioner shall lodge with the principal clerk, and serve upon the respondent, a written statement setting forth articulately the names and designations of the person or persons alleged to have been bribed, treated, and unduly influenced by the respondent and his agents, and by others on his behalf, with such particulars as to the said alleged acts as shall afford to the respondent fair information in reference thereto; and that no evidence shall be received at the trial except as to matters within said written statement, and tending to support the same, without the leave of the Court or a judge, and upon such conditions as to the postponement of the trial, payment of costs, and otherwise, as may be ordered. And inasmuch as article 4 of the petition, and also article 3, contain allegations in general terms of 'corrupt practices having' generally prevailed,' and of 'extensive and elaborate organization,' and 'undue influence to a large extent,' appoint the petitioner to state within four days of the date of this order what illegal acts and corrupt practices are thereby intended to be charged, distinct from the bribery, treating, and undue influence charged in article 4, against the respondent, his agents, and others on his behalf."

The respondent's counsel suggesting that the petitioner should also furnish the names of the persons who were said to have acted as agents of the respondent in bribing, treating, or otherwise unduly influencing the election,

Lord Cowan said he thought the interlocutor ordered all the information that was necessary; that he had endeavoured as far as possible, keeping in view the difference between the practice in the two countries, to conform to the actings of the English judges in these matters; that, in regard to the suggestion of the respondent's counsel, if anything was done in the way of keeping back information, whereby the interest of the respondent might be injured, he had the power of applying to the Court

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should not be ordered to pay the costs of the application and consequent thereon.

Blackburn, J., at chambers, referred the matter to the Court.

A motion was accordingly made in Michaelmas Term last, and the Court declined to grant a rule, on the ground that the affidavits filed on behalf of the complainants failed to disclose a sufficient case for the interference of the Court. (1)

On the 10th of December, 1868, the railway company took out a summons calling upon the complainants to shew cause why they should not pay to the railway company the costs occasioned to them by the summons of the 30th of June, 1868. Blackburn, J., after hearing the parties, and taking time to consider, indorsed the summons as follows:—"In the event of a second application being made, and not succeeding, the costs of this application to be paid to the railway company; otherwise, no order as to costs."

The application for an injunction was not renewed.

C. W. Wood moved to rescind the order of Blackburn, J., and for a rule upon the complainants to pay the costs incurred by the railway company in successfully opposing the summons at chambers. The Court will always review the exercise of discretion by a judge at chambers, in order to prevent injustice being done. The order in question makes the railway company's right to be repaid the costs to which they have been wantonly put, depend upon something which the complainants may or may not do. In the case of *Re Baxendale and the London and South Western Railway Company* (2), a rule as to costs is distinctly laid down by this Court which ought to embrace such a case as this. It was there suggested in argument that the railway company ought to be visited with costs because the affidavits which they had filed were of an evasive character. The Court, however, declined to put their decision on that ground; and Erle, C.J., said: "We give the costs because we think it of importance not to depart from the rule

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and shewing that it was not full and fair information, and, on payment of costs, the Court could postpone the trial; and that to make the additional order asked for by the respondent's counsel would be tying up the hands of parties too much.

(1) W. N. 1868, p. 289.

(2) 12 C. B. (N.S.) 758, 769.

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which this Court has previously adopted, that, when a company has so acted as to make it proper for any person to come to this Court for relief under the statute, that relief ought to be obtained at the costs of those whose acts have occasioned the application." If the railway company are to pay costs where the application against them is successful, surely it is but equal justice that a party who makes a groundless charge against them should indemnify them against the costs of defending themselves.

[BYLES, J. Do you find any case where, the costs being in the discretion of the judge at chambers, and he having exercised his discretion, the Court has interfered?]

It seems that there is no such case.

BYLES, J. I am of opinion that there should be no rule. The learned judge before whom the application was heard at chambers no doubt had power to grant or to refuse the costs in question. In the exercise of his discretion, and not without deliberation, he declined to allow them, except conditionally. I should be sorry to set a precedent, by a decision of this Court, for reviewing the discretion of a judge in such a matter.

KEATING, J. I am of the same opinion; and, further, I think my Brother Blackburn rightly exercised his discretion in the matter. He referred the original application to the Court; and the Court declined to grant a rule, the affidavits not disclosing a sufficient case; but it was competent to the complainants to renew their application upon amended materials. The only tribunal which could under the circumstances (no second motion having been made to the Court) deal with the costs incurred at chambers, was the judge before whom the summons was heard.

BOVILL, C.J., and MONTAGUE SMITH, J., took no part in the decision.

Rule refused.

Attorney for the company: *Lewis Crombie.*

THE FINANCIAL CORPORATION, LIMITED, JUDGMENT-CREDITORS; PRICE, JUDGMENT-DEBTOR; THE CHINA STEAM-SHIP AND LABUAN COAL COMPANY, LIMITED, GARNISHEES.

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Jan. 19.

Common Law Procedure Act, 1854 (17 & 18 *Vict.* c. 125), *Garnishment Clauses*, ss. 60, 61—*Order of Court of Chancery for Payment of Money.*

By 1 & 2 Vict. c. 110, s. 18, orders of Courts of equity for payment of money shall have the effect of judgments in the superior Courts of common law, and the persons to whom such money shall be payable shall be deemed judgment-creditors within the meaning of the act. By the Common Law Procedure Act, 1854, ss. 60, 61, debts owing by a third person (the garnishee) to a judgment-debtor may be attached to answer the judgment-debt.

F., having obtained an order of a Court of equity upon P. for payment of money, sought to attach a debt due to P. from C.:—

Held, that ss. 60, 61 of the Common Law Procedure Act, 1854, applied only to judgments in the superior Courts of common law; and the Court refused an order to attach C.'s debt.

ONE Price was a shareholder in the Financial Corporation, Limited. The company being in the course of winding up under the supervision of the Court of Chancery, calls were made by the official liquidator upon the contributories, and amongst them upon Price, and an order of the Master of the Rolls was obtained requiring him to pay the amount. The China Steam-Ship and Labuan Coal Company, Limited, being indebted to Price, the official liquidator of the Financial Corporation took out a summons before Blackburn, J., to attach that debt under the provisions of ss. 60, 61 of the Common Law Procedure Act, 1854, 17 & 18 Vict. c. 125. The learned judge referred the matter to the Court.

Milward, Q.C., and *J. W. J. Stephenson*, for the official liquidator. The order of the Master of the Rolls requiring Price to pay the calls has the same effect as a decree of the Court of Chancery; and the question is whether that order constitutes a judgment-debt within the meaning of the Common Law Procedure Act, 1854, ss. 60, 61. By s. 18 of 1 & 2 Vict. c. 110, it is enacted that "all decrees and orders of Courts of equity, and all rules of Courts of common law, &c., whereby any sum of money, or any costs, charges, or expenses shall be payable to any person, shall have the effect of judgments in the superior Courts of common law, and the

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persons to whom any such moneys, or costs, charges, or expenses shall be payable shall be deemed judgment-creditors within the meaning of this act." And by force of ss. 60, 61 of the Common Law Procedure Act, 1854, a debt due to the judgment-debtor may be attached in the hands of the garnishee at the suit of the judgment-creditor. The words of s. 61 are, that it shall be lawful for a judge, &c., "to order that all debts owing or accruing from such third person (the garnishee) to the judgment-debtor shall be attached to answer the judgment-debt." The order of the Master of the Rolls, being for payment of a fixed sum at a given time, is by the express terms of 1 & 2 Vict. c. 110, s. 18, to have "the effect of a judgment in a superior Court of common law," consequently it must be a judgment-debt within the Common Law Procedure Act, 1854, s. 61.

[BOVILL, C.J. If s. 61 applies to a decree of the Court of Chancery, all the garnishment clauses must equally apply. If so, how is s. 63 to be applied? That section enables the garnishee to pay the money into Court. What authority is there for paying into this Court money ordered by the Court of Chancery to be paid?]

The money could, of course, only be paid into the Court in which the garnishment order is made.

[BYLES, J. Might one who has obtained a judgment in an action in the Court of Exchequer come to this Court for a garnishment order?]

There is nothing in the language of ss. 60, 61 to prevent his so doing. A party who has obtained an order for costs in an interpleader issue under 1 & 2 Wm. 4, c. 58, s. 7, has been held to be a judgment-creditor within those sections: *Hartley* v. *Shemwell.* (1) It is true that, in *Stanford* v. *Robinson* (2), it was held that a writ of execution cannot issue out of this Court upon a decree or order of a Court of equity, under 1 & 2 Vict. c. 110, s. 18; but that is because the party could have that which is tantamount in Chancery. There are no means, however, of attaching a debt in the hands of a third party in Chancery.

A. L. Smith, contrà. *Stanford* v. *Robinson* (2) is an express authority to shew that the common law Courts cannot carry into

(1) 30 L. J. (Q.B.) 223. (2) 3 M. & G. 407.

effect decrees or orders of the Courts of equity; and, if there could be any doubt as to the applicability of the provisions of the Common Law Procedure Act, 1854, to such a case as this, it is removed by s. 99, which enacts that, in the construction of that act, the word "Court" shall be understood to mean any one of the superior Courts of common law at Westminster.

The judgment-debtor did not appear.

BOVILL, C.J. Under s. 18 of 1 & 2 Vict. c. 110, no doubt, all decrees and orders of Courts of equity for the payment of money or costs are to have the effect of judgments in the superior Courts of common law. But the statute, in s. 20, gives the Court of Chancery power to frame writs of execution for the purpose of enforcing its decrees. And, when this question came before the Court in the case of *Stanford* v. *Robinson* (1), it was held that a writ of execution cannot issue out of a Court of common law upon a decree or order of a Court of equity. Ever since that case it has been held that such decrees or orders must for purposes of execution be enforced in Chancery. Nothwithstanding there is no power in the Court of Chancery to attach a debt in the hands of a third party, I think it never was intended by the Common Law Procedure Act, 1854, to enable the Courts of common law to give effect to its decrees in that way. The 60th and 61st sections clearly refer to judgments in the superior Courts of common law only. And the interpretation clause, s. 99, puts the matter beyond doubt.

BYLES, J. I am of the same opinion. The remedy by attachments of debts in the hands of third persons did not exist at the time of the passing of 1 & 2 Vict. c. 110, and therefore could not have been contemplated by s. 18. The Court mentioned in s. 60 of the Common Law Procedure Act, 1854, is the Court in which the judgment was obtained.

KEATING, J. I am of the same opinion. The circumstance that this particular remedy does not exist in Chancery, makes it conclusive to my mind that the Common Law Procedure Act, 1854, was not intended to apply to it.

(1) 3 M. & G. 407.

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during her life, if she shall so long continue my widow and unmarried; and, after her decease or second marriage, which shall first happen, then, as to the dwelling-house and premises No. 4 Hillsborough Terrace, with all the furniture and effects therein, upon trust to convey and assign the same to my daughter Elizabeth Annie Martin, her heirs and assigns for ever; and, as to the dwelling-house and premises No. 9 Montpelier Terrace, upon trust to convey and assure the same to my daughter Caroline Rogers Martin, her heirs and assigns for ever; and, as to the dwelling-house and premises No. 9 Coronation Terrace, and the furniture therein, upon trust to apply the rents for the advancement and benefit of my grand-daughter Mary Annie Clarke until she attains the age of twenty-one years; but, in case my said grand-daughter should die under that age, then I devise the said dwelling-house and furniture to my daughters Elizabeth Annie Martin and Caroline Rogers Martin, their heirs and assigns, as tenants in common; and I hereby declare that the said trustees or trustee shall after the decease or second marriage of my said wife, and during the minority of my said children, apply the whole or such part as they or he shall think fit of the rents to which my children Elizabeth Annie Martin and Caroline Rogers Martin shall for the time being be presumptively entitled under the trusts hereinbefore declared, for or towards the maintenance or education of such children respectively, either directly or to her guardian respectively, without seeing to the application thereof or requiring any account of the same, and shall accumulate the residue, if any, thereof." [Then followed provisions that the receipts of the trustees should be sufficient discharges, and for the appointment of new trustees, the indemnity of the trustees against involuntary losses, and the reimbursement of their necessary expenses.] "And I appoint my said wife and the said Henry Day and Robert Henry Moon guardians of my infant children and grandchild Mary Annie Clarke; and I appoint my son Henry Martin and my daughters Mary Clarke and Annie Cropton executor and executrixes of this my will, to whom I bequeath all the residue of my real and personal estate of whatever kind or description and not hereinbefore specifically bequeathed, as tenants in common, but so that the shares of my said daughters Mary Clarke and Annie Cropton shall be for their

separate use, and shall not be subject or liable to the debts or engagements of their present or any future husbands; but the residue as aforesaid shall be subject to the payment of my debts, legacies, and funeral and testamentary expenses, and also to the payment of 25*l.* 10*s.* yearly to Mrs. Seal during her life."

2. The Mary Annie Clarke mentioned in the will is the defendant Mary Annie Davies. She attained the age of twenty-one years before the commencement of this suit, and is living, and married to the defendant Robert Davies.

3. The Henry Martin mentioned in the will is dead. The Mary Clarke and Annie Cropton, mentioned in the will, and Thomas Cropton, the husband of the latter, are the plaintiffs in this action; and any interest that Henry Martin would have had in No. 4 Coronation Terrace, had he been living, has passed to the plaintiffs.

4. The widow of the testator died in the month of March, 1867.

The question for the opinion of the Court was, whether the plaintiffs or the defendants were under the will above set forth entitled to the premises No. 4 Coronation Terrace, Ilfracombe, aforesaid.

Seymour, Q.C. (*Beresford* with him), for the plaintiffs. The question is whether the testator's grand-daughter Mary Annie Clarke takes under the will by necessary implication an estate in fee in the house No. 4 Coronation Terrace. In the devises both before and subsequent to the devise to her, the testator uses language which shews that he well understood how to give a fee-simple where it was his intention to do so. As to two of the houses, the trust is "to convey and assure the same" to his two daughters respectively, their "heirs and assigns for ever:" but, as to the house in question, it is, "to apply the rents for the advancement and benefit of my grand-daughter Mary Annie Clarke until she attains the age of twenty-one years," with a gift over in case she should die under that age: and the residue of the testator's real and personal estate is bequeathed to his son and his two daughters as tenants in common. Upon the plain and unambiguous terms of the will, the rents and profits are to be applied to the maintenance of the grand-daughter until she shall attain the age of twenty-one; and the Court will not construe them so as

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to convey a fee, unless compelled by necessary implication to do so,—more especially as the will contains a residuary devise. The Court called on

Brown, Q.C. (*R. E. Turner* with him), for the defendants. The only sensible construction of this will is, that it gives Mary Annie Clarke (now Davies) an estate in fee, by implication, on her attaining the age of twenty-one. It is incredible to suppose that the testator intended to provide for the maintenance of his granddaughter until she should attain the age of twenty-one, and then to leave her destitute. The necessary implication from the whole of the will is, that he meant the estate to go over in the event of the grand-daughter dying under twenty-one, and in that event only. There are several decisions upon devises some of which very closely resemble, and some which are altogether undistinguishable from, the devise in question. In *Newland* v. *Shephard* (1), the testator, after the devise of several parts of his real and personal estate to several persons, devised the interest and produce of the surplus of his real and personal estate to his grandchildren until their age of twenty-one: and Lord Macclesfield, C., said: "The intention is most plain, that the grandchildren should have the surplus both of the real and personal estate after their age of twenty-one. . . . Can it be imagined that the testator would shew a concern for his grandchildren when they did not want it, and leave off that care at the only time when they could be supposed to stand in need of it, viz. as soon as they should come of age and be marriageable?" In *Peat* v. *Powell* (2), a devise of the residue of real and personal estate to executors for A. "till he attain twenty-one, and then the trust to cease," was held to give the whole beneficial estate to A. Lord Keeper Henley said that "it was the same as if the testator had said 'I give the estate to trustees, in trust for A. till he attain twenty-one, and then to A. and his heirs,' and that *Newland* v. *Shephard* (1) was a much stronger case." In *Tomkins* v. *Tomkins* (3), where the devise was to the testator's brother, "in trust for his eldest son B. till he should attain twenty-one years; and, if he should die before twenty-one," then a devise over,—the Court held the age of

(1) 2 P. Wms. 194, 195.
(2) Ambl. 387; 1 Eden, 479.
(3) Cited in *Goodtitle* d. *Hayward* v. *Whitby*, 1 Burr. 234.

twenty-one to be no limitation of B.'s interest, but only a limitation of the trust during his minority, and that B. took the whole by implication. In *Goodright* d. *Hoskins* v. *Hoskins* (1), the testator devised leaseholds "to my son Richard until his son Thomas shall attain his age of twenty-one years, and no longer; but, in case the said Thomas shall die in minority," then to John or Richard (sons of the testator's son Richard) or either of them surviving or attaining their age of twenty-one years as aforesaid; "and I desire the said premises may be quitted and delivered up as aforesaid by my said son Richard accordingly:" and it was held that Thomas on attaining twenty-one took the estate by necessary implication.

[BRETT, J. Were *Peat* v. *Powell* (2) and *Tomkins* v. *Tomkins* (3) cited in that case?]

No. The cases cited were *Roe* d. *Bendale* v. *Summerset* (4) and *Roberts* v. *Roberts*. (5) In the first of these the devise was as follows:—"I give to my daughter Mary, after the decease of my daughter Betty, my house, &c., during the life of John Bendale;" and Willes and Blackstone, JJ., held that "Betty took an estate for life by implication; and that a strong *probable* implication was sufficient; it needs not be a *necessary* implication." In *Gardiner* v. *Stevens* (6), a bequest of leaseholds in trust for two persons until one of them should attain twenty-five, and, if such one should die under twenty-five, then over, was held to be an absolute gift, subject to the gift over on death under twenty-five. Vice-Chancellor Wood, in giving judgment, said that there was considerable authority (7) for holding that the first gift vested; and that, "where there was a gift over in the event of the first taker dying under twenty-one, there was enough to indicate an intention in the first instance to dispose of the whole interest, and that the gift over should take effect in that particular event, and that only." That is entirely in harmony with the conclusion which Mr. Jarman draws from the cases, in 2 Jarman on Wills, 3rd ed. 251.

(1) 9 East, 306.
(2) Ambl. 387; 1 Eden, 479.
(3) Cited 1 Burr. 234.
(4) 5 Burr. 2608; 2 W. Bl. 692.
(5) 2 Bulstr. 123.
(6) 30 L. J. (Ch.) 199.
(7) The cases cited were, *Roberts* v. *Roberts*, 2 Bulstr. 123; *Newland* v. *Shephard*, 2 P. Wms. 194; *Peat* v. *Powell*, Ambl. 387, 1 Eden, 479; *Atkinson* v. *Paice*, 1 Bro. C. C. 91; *Goodright* d. *Hoskins* v. *Hoskins*, 9 East, 306; *Fitzhenry* v. *Bonner*, 2 Drew. 36.

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The direction that the residue shall be subject to the payment of the testator's debts, legacies, and funeral expenses, and also to the payment of the annuity to Mrs. Seal, plainly shews that the house in question was not to form part of the residue.

Newland v. *Shephard* (1) was acted upon in *Peat* v. *Powell* (2) and in *Gardiner* v. *Stevens*. (3) And the doctrine of those cases is manifestly in accordance with what may be presumed to have been the intention of the testator.

Seymour, Q.C., in reply. There are one or two broad distinctions between this case and those which are relied on to support the defendant's construction. This is not a case in which an estate is in a given event to be enlarged into a fee by implication; the trust is "to apply the rents for the advancement and benefit of my grand-daughter Mary Annie Clarke until she attains the age of twenty-one years," and then the testator goes on to provide what shall happen in the event of her dying under that age, leaving the alternative event of her surviving altogether unprovided for. The defendants' argument rests mainly upon *Newland* v. *Shephard* (1), and *Peat* v. *Powell* (2), which latter case was decided solely upon the authority of the former. Both, therefore, must be taken subject to the observation of Lord Hardwicke in *Fonnereau* v. *Fonnereau* (4), that "he saw no reason to approve of *Newland* v. *Shephard*" (1), as well as to the disapproval of Mr. Jarman, vol. 2, 3rd ed. p. 253. Besides, in *Newland* v. *Shephard* (1), there was no residuary devise; and the decision was based in great measure upon the assumption that the word "produce" was contained in the will, though, according to Mr. Cox's note in the 6th ed. of P. Wms, that word does not occur in the cases stated in Reg. Lib. B. 1723, fo. 88. The words of the devise in *Tomkins* v. *Tomkins* (5) materially differ from those in the present case; and it does not appear that there was any residuary devise in that case or in *Gardiner* v. *Stevens*. (3) In *Goodright* d. *Hoskins* v. *Hoskins* (6), the language of the will abundantly warranted the decision of the Court. *Fitzhenry* v. *Bonner* (7) is in the plaintiffs'

(1) 2 P. Wms. 194.
(2) Ambl. 387; 1 Eden, 479.
(3) 30 L. J. (Ch.) 199.
(4) 3 Atk. 315.
(5) Cited 1 Burr. 234.
(6) 9 East, 306.
(7) 2 Drew. 36.

favour. There, the testator gave the residue to his wife for her and her son's support, clothing, and education, until he should attain twenty-one; should he attain twenty-one, then the testator gave all the interest of his Bank stock to his wife for life, and, after her death, he gave all his property to his daughter; and it was held that the son did not take any estate by implication on attaining twenty-one; but that there was an intestacy.

[MONTAGUE SMITH, J. There is this apparent inconsistency in the argument urged on the part of the plaintiffs, that, if Mary Annie Clarke had died under the age of twenty-one, the house in question would have gone to A. and B.; whereas, if she lived to attain twenty-one, it would go to C. and D.]

Mere incongruity will not induce the Court to decide against a construction which is borne out by the language of the testator, especially when the whole will shews that he knew how to convey a fee where that was his intention.

[BRETT, J. If there had been no residuary clause, would you have said that there was an intestacy as to the house in question?]

The presence or absence of a residuary clause is not a conclusive test. The testator may have had reasons of his own for making this more limited provision for his grand-daughter.

Cur. adv. vult.

Feb. 12. The judgment of the Court (Keating, Montague Smith, and Brett, JJ.) was delivered by

BRETT, J. This was an action of ejectment brought by the plaintiffs to recover possession of a house No. 4, Coronation Terrace, Ilfracombe. The plaintiffs claimed as residuary devisees under the will of John Martin, deceased, or as representatives of his son Henry Martin, who was also his heir-at-law. The defendants claimed in right of the defendant Mary Annie Davies as devisee under the will.

John Martin, the testator, by his will, dated the 17th of February, 1855, after several bequests to his wife and other members of his family, proceeded to devise three houses (including that in dispute) to trustees, in trust, as to the first two houses, to receive the rents and to pay the same to his wife during her life or widowhood,

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persons. Such an intent cannot, we think, be presumed from the structure and language of the will.

We are of opinion that the decision of Vice-Chancellor Wood in *Gardiner* v. *Stevens* (1), which seems to recognize the doctrine of the earlier cases, is in accordance with our present judgment; and that it is not in conflict with the decision of Vice-Chancellor Kindersley in *Fitzhenry* v. *Bonner* (2), which seems to admit that words such as are used in the devise in question are sufficient to pass the whole interest, if, "looking to the language and to all the dispositions of the will, and the circumstances, there is an irresistible inference in favour of implying such a gift."

We think there is such an inference in the present case, and therefore give judgment for the defendants.

Judgment for the defendants.

Attorney for plaintiffs: *Mason.*

Attorneys for defendants: *Surr & Gribble.*

Feb. 5.

PEPLOW, APPELLANT; RICHARDSON, RESPONDENT.

Public-house—Refreshment for Travellers on Sunday—11 & 12 *Vict. c.* 49, *s.* 1.

11 & 12 Vict. c. 49, s. 1, enacts that no licensed victualler, &c., shall open his house for the sale of wine, spirits, ale, &c., or sell the same, on Sunday, before half-past twelve o'clock in the afternoon, except "as refreshment for travellers."

A. walked on a Sunday to a spa two and a half miles distant from his residence for the purpose of drinking the mineral water there for the sake of his health, and was supplied with ale at an hotel at the spa before half-past twelve o'clock in the afternoon:—

Held, that A. was a "traveller" within the exception in s. 1 of 11 & 12 Vict. c. 49.

CASE stated under 20 & 21 Vict. c. 43.

At a petty sessions at Willington, in the county of Salop, on the 8th of June, 1868, an information was preferred under 11 & 12 Vict. c. 49, s. 1, against the appellant, for opening his public-house for the sale of beer on Sunday, May 31st, 1868, before the hour of half-past twelve, otherwise than as refreshment for travellers.

(1) 30 L. J. (Ch.) 199. (2) 2 Drew. 36.

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The appellant is the keeper of the Admaston Spa Hotel, which, in the months of May, June, and July, is frequented on Sunday mornings by large numbers of colliers and others living in the Shropshire mineral district and the neighbourhood for the purpose of drinking the mineral waters which exist at the Admaston Spa. A charge of 4*d.* for each person is made, which entitles him to as much water as he thinks proper to drink.

On Sunday morning, the 31st of May, at half-past seven o'clock, the premises were visited by a police-constable, George Woolley, who found in the house several people drinking ale, and, amongst them, Joseph Deakin, who resided at a distance of about two and a half miles from the Spa. The constable called the attention of the appellant's wife (who principally attended to the business) to Deakin, and asked her if she knew where he came from; to which she replied that he came from Oaken Gates, which was about five miles from the Spa. The constable then told her that Deakin came from Ketley (about two and a half miles from the Spa); that he knew him well; and that he had been many times before the magistrates at Willington. Upon this the appellant's wife said that Deakin should not have any more drink. The constable then left, leaving Deakin in the house. He returned at eight o'clock, and found Deakin where he had left him; and the servant was taking him another pint of ale, for which he paid her, and she handed the money to the appellant's wife, who put it in her pocket.

It was the practice of the appellant to keep a book, in which the names and residences of the parties applying for refreshments were entered; the name of Deakin was entered in the book on the day in question; and he was stated to reside at Oaken Gates. This book was produced to the constable; and appellant's wife informed him that the address written in the book was that given by Deakin. It was admitted that the Spa is frequented by colliers drinking the water for the benefit of their health.

The magistrates convicted the appellant in a penalty of 2*l.* and costs, upon four grounds, viz. 1. That Deakin was not a "traveller," within the meaning of the act of parliament. 2. That the appellant's wife had not good reason to believe, and did not believe, that Deakin was a traveller; having been informed by

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the police-constable that he had given a false address, and that he resided nearer to the hotel than that false address would indicate. 3. That the appellant's wife having said that Deakin should have no more drink, she was of opinion that he was not entitled, as a traveller, to refreshment. 4. That no evidence was given to shew that Deakin was at the hotel for any other purpose except to drink ale; and that his stay there was longer than was caused by the need of refreshment, if any had been required.

The question for the opinion of the Court was, whether the appellant was rightly convicted.

Lanyon, for the appellant. The statute under which this information was laid (11 & 12 Vict. c. 49, s. 1) enacts that no licensed victualler, &c., shall open his house for the sale of wine, spirits, beer, &c., or sell the same, on Sunday, before half-past twelve o'clock in the afternoon, &c., except as refreshment for travellers. The case finds that, attached to the appellant's hotel is a spa, which is much frequented by the inhabitants of the neighbouring mining district for the purpose of drinking the waters for the benefit of their health. Some of these persons coming from a long distance, they would necessarily require refreshment. It appears that Deakin resided about two and a half miles from the spa; and the question is, whether he falls within the description of a "traveller." In *Taylor* v. *Humphreys* (1), the Court held, that a man who goes to an inn a short distance from his home for the mere purpose of drinking is not a traveller within the meaning of the exception in the 18 & 19 Vict. c. 118, s. 2 (2); but that one who goes to an inn for refreshment in the course of a journey, whether of business or of pleasure, and whether on foot or otherwise, is a traveller within the statute. The distance the parties there had walked was four miles. In a subsequent case of *Taylor* v. *Humphries* (3), also in this Court, it was held—upon the statute now in question—that persons walking from their residences in a town to enjoy the country air on a Sunday morning, and in the course of such walk resorting to an inn for refreshment, are

(1) 10 C. B. (N.S.) 429; 30 L. J. (M.C.) 242.

(2) See *Atkinson* v. *Sellers*, 5 C. B. (N.S.) 442; 28 L. J. (M.C.) 12.

(3) 17 C. B. (N.S.) 539; 34 L. J. (M.C.) 1.

travellers within the exception in s. 1, although the inn be within two miles of their place of abode, provided they do not go abroad for the mere purpose of drinking. In *Peache* v. *Colman* (1), it was held that, where a licensed victualler has opened his house on Sunday within the prohibited hours for the supply of refreshment to travellers arriving at an adjacent railway station, the mere fact that refreshment has been supplied to persons residing within a mile of the house, and who did not come by the train, will not justify a conviction under the 11 & 12 Vict. c. 49, s. 1.

The respondent did not appear.

BYLES, J. I will not attempt to define who is a traveller within the meaning of the enactment in question. To dispose of this case, it is enough to say that the man Deakin did not go to the Admaston Spa Hotel for the mere purpose of drinking ale; I gather from the evidence that he went there for the purpose of drinking the mineral water, for the benefit of his health, and that in the course of his journey in pursuit of that object, he was supplied with some refreshment by the appellant. I do not think that any ground was made out for a conviction.

KEATING, J. I must own that, if this had been res integra, I should have said that Deakin was not a traveller; but, after the cases which have been decided in this Court, I think we are bound to hold him to come within the exception in the statute.

MONTAGUE SMITH, J. I am of opinion that Deakin was a traveller within the meaning of the act of parliament. I collect from the evidence set out in the case that his primary object was to take a long walk, and at the end of it to drink the mineral water, and that he afterwards went into the hotel for rest and refreshment. He had walked two miles and a half to get there, and he had to walk home. I see nothing in the facts which can reasonably be held to deprive him of the character and rights of a traveller. If I could have been satisfied that he went to the Admaston Spa Hotel for the mere purpose of tippling, I should have felt disposed to support the decision of the magistrates. But

(1) Law Rep. 1 C. P. 324.

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I cannot come to that conclusion. The present case nearly resembles the case last cited, *Peache* v. *Colman*. (1) The primary object of the party in each was not tippling; but, the parties being absent from home for a lawful purpose, the refreshment they took was merely ancillary to that purpose.

Conviction quashed.

Attorney for appellant: *F. W. Blake, for Smallwood, Newport.*

Feb. 12.

DAVIS, APPELLANT; SCRACE, RESPONDENT.

Public-house—Evidence—Onus of Proof—Refreshment for Travellers on Sunday —2 & 3 Vict. c. 47, s. 42—11 & 12 Vict. c. 43, s. 14.

By 2 & 3 Vict. c. 47, s. 42, no licensed victualler shall open his house for the sale of wine, spirits, &c., on Sundays "before the hour of one in the afternoon except refreshment for travellers."

By 11 & 12 Vict. c. 43, s. 14, if a complaint before justices "shall negative any exemption, exception, proviso, or condition in the statute on which the same shall be framed," it shall not be necessary for the complainant to prove such negative, but the defendant may prove the affirmative thereof in his defence if he would have the advantage of the same.

Upon a complaint against a keeper of an ale-house under s. 42 of 2 & 3 Vict. c. 47, for keeping his house open for the sale of wine, spirits, &c., "before one o'clock on Sunday afternoon, the same not being for the refreshment of travellers":—

Held, following *Taylor* v. *Humphries* (17 C. B. (N.S.) 539; 34 L. J. (M.C.) 1), that notwithstanding s. 14 of 11 & 12 Vict. c. 43, the complainant was bound to prove affirmatively that the persons supplied by the defendant were not travellers.

CASE stated under 20 & 21 Vict. c. 43.

This was a summons against the appellant, licensed to keep an ale-house known by the sign of the Pegasus, in the parish of Stoke Newington, in the county of Middlesex, for opening the house for the sale of wine, spirits, &c., before the hour of one in the afternoon, the same not being then for the refreshment of travellers, contrary to the Metropolitan Police Act, 2 & 3 Vict. c. 47.

Inspector Goble, at half-past twelve on Sunday afternoon, December 13th, visited the appellant's public-house, and found six men in front of the bar. On the counter there were three glasses containing spirits, and two pint pots containing malt liquor. A plate of bread and cheese was put up in front of the bar; and a

(1) Law Rep. 1 C. P. 324.

large cheese was behind it; but no one appeared to be eating. The defendant said that all the parties there were travellers. Two of the six present, who gave their names as "Jones," said that they came from Gun Alley, Southwark; two others from Hoxton, and had been for a drive in the country; and two of them made no answer. The defendant thereupon said that the inspector had no business to question them. Inquiries were subsequently made as to the persons who said they resided in Gun Alley; and no such persons could be found living there. There was no evidence before the magistrate as to whether the appellant did or did not know of the misrepresentation as to the residence of the men Jones. There was a vehicle outside the public-house.

Between the hours of nine and one on that same morning, about one hundred and sixty persons entered the public-house. The defendant and his potman were standing outside, and spoke to some of the persons who came up, and several went away. None of the persons who entered the house were known to the inspector. A large number of people come into the neighbourhood on Sundays, who do not come on other days.

The appellant called no witnesses.

The appellant contended that the burden of proof that the parties were not travellers lay upon the complainant; and, on the other side, it was argued that the appellant was bound to shew that they were travellers. The magistrate decided that the onus of proof was upon the appellant under s. 14 of 11 & 12 Vict. c. 43; and that there was not evidence to satisfy him that the persons who entered the house were bonâ fide travellers; that the defendant did unlawfully open his house for the sale of spirits and beer before the hour of one o'clock in the afternoon on the day named; and he convicted the appellant, and adjudged him to pay a penalty of 1*s.* and 2*s.* costs.

The question for the opinion of the Court was, whether the complainant was bound to prove affirmatively that the persons in question were not travellers. If the Court should be of opinion in the affirmative, the conviction was to be quashed.

Quain, Q.C., for the appellant. The conviction in this case is upon s. 42 of the Metropolitan Police Act, 2 & 3 Vict. c. 47,

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which enacts that "no licensed victualler or other person shall open his house within the metropolitan police-district for the sale of wine, spirits, &c., on Sundays, Christmas Day, or Good Friday, before the hour of one in the afternoon, except refreshment for travellers;" and the question is, upon whom lies the onus of proof. *Taylor* v. *Humphries* (1), where a question similar to that in the present case arose upon the 11 & 12 Vict. c. 49, s. 1, disposes of this. The counsel for the respondent in that case referred to s. 14 of Jervis's Summary Convictions Act (2), and contended that the burthen of establishing the exception of refreshment for travellers was cast upon the accused. It was held however "that, as the exception of refreshment to a traveller is contained in the clause creating the prohibition, the burthen of proving that the prohibition has been infringed, and that the case is not within the exception, is cast on the informer: *Rex* v. *Pratten* (3), *Gill* v. *Scrivens* (4), and that, if the publican believed, and had reason to believe, when he supplied the drink, that he was supplying refreshment to a traveller, he ought not to be convicted." It is impossible to distinguish that case from the present.

F. M. White, for the respondent. But for 11 & 12 Vict. c. 43, s. 14, it would no doubt have been incumbent on the complainant to negative the exception: *Atkinson* v. *Sellers* (5); *Taylor* v. *Humphreys*. (6) The later case of *Taylor* v. *Humphries* (1), however, seems to have decided that this section does not alter the law in this respect, but, according to the report in the Law Journal, the section does not appear to have been referred to; and the Lord Chief Justice does not allude to it in the considered and probably written judgment of the Court. But for *Taylor* v. *Humphries* (1), it is perfectly clear that the magistrate in this case would have called upon the defendant to shew that he was within

(1) 17 C. B. (N.S.) 539; 34 L. J. M.C.) 1.

(2) 11 & 12 Vict. c. 43, s. 14, provides that, if the information or complaint in any case before justices "shall negative any exemption, exception, proviso, or condition in the statute on which the same shall be framed, it shall not be necessary for the prosecutor or complainant in that behalf to prove such negative, but the defendant may prove the affirmative thereof in his defence, if he would have advantage of the same."

(3) 6 T. R. 559.

(4) 7 T. R. 27.

(5) 5 C. B. (N.S.) 442; 28 L. J. (M.C.) 12.

(6) 10 C. B. (N.S.) 429; 30 L. J. (M.C.) 242.

the exception: Paley on Convictions, 5th ed. p. 124. To uphold *Taylor* v. *Humphries* (1) will operate as a repeal of the proviso in s. 14 of 11 & 12 Vict. c. 43.

KEATING, J. I am unable to distinguish this case from *Taylor* v. *Humphries*. (1) It has been strongly pressed upon us, that, inasmuch as the report of that case in the Law Journal makes no mention of s. 14 of the 11 & 12 Vict. c. 43, and the Lord Chief Justice does not allude to it in his judgment, we ought to assume that the attention of the Court was not called to it, and therefore we ought not to hold ourselves bound by that decision. Looking, however, at the report in 17 C. B., New Series, we can entertain no doubt that that proviso was distinctly brought to the attention of the Court, and was present to the mind of the Chief Justice when he prepared the judgment. Not only was the statute referred to, but a case of *Tennant* v. *Cumberland* (2), where it was held that the burthen of proof lay upon the inkeeper, was cited. *Taylor* v. *Humphries* (1), therefore, must bind us, unless we can see clearly that it proceeded upon a mistake. I agree with Mr. White as to the serious consequences which may ensue from our pronouncing a decision which may have the effect of repealing the proviso in question. The Court has no intention to do so upon the present occasion; neither did Erle, C.J., in *Taylor* v. *Humphries* (1), intend to do anything of the kind. All the Court there intended to decide was, that, under the peculiar words of the statute then under consideration, that which appeared to be an exception was in truth not an "exemption, exception, proviso, or condition," within the proviso in s. 14 of Jervis's Act, 11 & 12 Vict. c. 43. And I think a contrary decision would cast upon the innkeeper an intolerable burthen; for, he would then be precluded from supplying refreshment to any person whom he did not personally know. Under these circumstances, I think it right to adhere to the decision in *Taylor* v. *Humphries*. (1)

MONTAGUE SMITH, J. I also think we must hold ourselves bound by the decision of this Court in *Taylor* v. *Humphries*. (1)

(1) 17 C. B. (N.S.) 539; 34 L. J. (M.C.) 1.
(2) 23 Just. of Peace, 51.

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It is a decision which is entitled to great weight. The Court took time for deliberation; and Erle, C.J., seems to have bestowed much attention upon the act of parliament. Still, it is an authority upon this act, and upon this act only, and in the construction of the act there is undoubtedly some difficulty. The Court, in dealing with the question, considered the state of the common law as to the liability of an innkeeper, as well as the particular language of the statute. The innkeeper is under an obligation to supply refreshments to all persons who come to the inn as travellers. This statute, the object of which was to close public-houses within certain hours on the Sunday, leaves the innkeeper open to his common law liability for refusing to supply refreshment to a traveller. He is bound to receive travellers and to supply them with refreshment; and he is rendered liable to consequences which are highly penal if he opens his door to persons who are not travellers. All he can do is to do his best to satisfy himself whether the persons presenting themselves are or are not travellers. The substance of the enactment is, that he must close his house during the prohibited hours on Sunday to all but travellers. The Court in *Taylor* v. *Humphries* (1) evidently thought that, though the refreshment for travellers was in form an exception, the substance of the enactment was as I have suggested. The proviso in s. 14 of 11 & 12 Vict. c. 43, was pointedly brought to the attention of the Court; and, after time taken to consider, they held that it lay upon the informer to shew that the persons supplied with refreshments were not travellers. Whether that decision be well founded or not, I should feel bound by it; but I think there are good reasons for supporting that construction of the statute.

BRETT, J. It is quite impossible to distinguish this case from *Taylor* v. *Humphries*. (1) It was a decision upon the very statute now under discussion; and it is clear from the report in the Common Bench that 11 & 12 Vict. c. 43, s. 14, was in the minds of the Court at all events upon the argument of that case. They seem to have held that, though the word "except" is used in 11 & 12 Vict. c. 49, s. 1, it is not in truth an exception within the meaning of the proviso in s. 14 of 11 & 12 Vict. c. 43, and that therefore

(1) 17 C. B. (N.S.) 539; 34 L. J. (M.C.) 1.

that proviso had no application to the case in hand. I think we must adopt the same construction here.

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Quain asked for costs, referring to *Lee* v. *Strain*. (1)

PER CURIAM. This is an appeal against the decision of a magistrate upon a point which was fairly arguable; and, the costs being in our discretion, we do not think it a case in which they ought to be allowed. (2)

Decision reversed.

Attorney for appellant: *J. Croft.*
Attorneys for respondent: *Ellis & Ellis.*

SCOTT *v.* COUSINS.
SCOTT *v.* INGLIS.

Jan. 25.

Broker—Penalty for acting as Broker without a License—57 Geo. 3, c. lx, s. 2.

By 57 Geo. 3, c. lx., s. 2, it is provided that any one acting as broker within the city of London without a license shall be subject to a penalty of 100*l.*

A. was an officer of a company formed for the purpose of carrying on the business of stockbroking, and in the course of business bought some stock for a customer, and signed the bought and sold notes, the principals not seeing one another and no one else acting as broker in the transaction. A. had no license to act as broker:—

Held, that A. was liable to the penalty.

THESE were two actions brought by the Chamberlain of the city of London for penalties of 100*l.*, alleged to be due from the defendants under the provisions of 57 Geo. 3, c. lx., s. 2 (3), for having acted as brokers within the city without being duly licensed. The defendants pleaded not guilty by statute 21 James 1, c. 4, s. 4.

(1) 28 L. J. (M.C.) 221.

(2) See *Caswell* v. *Cook*, 12 C. B. (N.S.) 242.

(3) 57 Geo. 3, c. lx. s. 2, enacts that "if any person shall take upon him to act as a broker, or employ, or cause, permit, or suffer any person or persons to be employed with, under, or for him to act as such within the said city [of London] and liberties, not being admitted in pursuance of 6 Anne, c. 16, every such person shall forfeit . . . for every such offence the sum of 100*l.*, to be recovered by action of debt, in the name of the chamberlain of the said city, in any of his Majesty's courts of record."

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The cases were tried before Bovill, C.J., at the sittings in London after Trinity Term, when it was proved that the defendant Cousins was the bookkeeper, and the defendant Inglis the secretary, of a company called the Open Stock Exchange Company, Limited, which had been formed for the purpose of carrying on the business of stock and share agents.

The company usually bought and sold stock and shares by auction, and if they bought or sold them otherwise for any of their customers they did so through the medium of a Mr. Soilleuse, who was a member of the Stock-Exchange. One of their customers having applied to them to buy 1000*l.* Great Eastern Stock, the defendant Cousins, who usually superintended the sales in the absence of the manager, bought the stock of Mr. Soilleuse, and signed a contract note in the following form:—

"The Open Stock Exchange, Limited,

"5, Lothbury,

"London, E.C., 10th Feb., 1868.

"Bought by order and for the account of William Ainslie, Esq., of E. Soilleuse, for the 28th of February, 1000*l.* Great Eastern Stock, at 30⅝ £306 5 0

Stamp and Fee . . . 1 17 6

Commission 1 5 0

£309 7 6

"E. Cousins, per pro manager."

Mr. Ainslie subsequently wrote to the defendant Inglis as the secretary of the company, directing him to re-sell the shares, and he accordingly sold them to Mr. Soilleuse, and signed the contract note "R. W. Inglis, sec." There were several similar transactions, in all which the contract notes were signed by the defendant Inglis in the same way; but the plaintiff only sought to enforce one penalty against each of the defendants.

A verdict was entered for the plaintiff in each case, with leave to the defendant to move to enter the verdict on the grounds, first, that the defendant did not take upon himself to act as broker within 57 Geo. 3, c. lx.; and secondly, that the defendant acted only as clerk or servant, and was not liable to the penalty imposed

by that statute: the Court were to be at liberty to draw inferences of fact.

Montague Chambers, Q.C., having obtained a rule in each case accordingly,

Archibald (*Giffard, Q.C.*, with him), shewed cause. The question in these cases is the same, and they may, therefore, be conveniently considered together. The statutes giving the Corporation of the city of London control over persons acting as brokers within the city go back as far as 13 Edw. 1, and are very stringent. The statute on which the present question turns is 57 Geo. 3, c. 60, which amended 6 Ann, c. 16. The object of the statute is to prevent any person acting as broker, and that for the safety of the public; and it would lead to constant evasion if a person could protect himself by saying he was only acting for another person. The person who signs the contract note acts as broker: *Scott* v. *North* (1), and even if acting under another person, would still be acting with him within the meaning of the statute.

[MONTAGUE SMITH, J. Might not an ordinary broker act through one of his clerks?]

No; the legislature has treated the matter as one of personal trust, and though he might allow his clerk to help him, the clerk could not sign the contract note. The bond taken by the brokers is given in *Kemble* v. *Atkins* (2), and shews the practice that has been adopted in respect to licensing. In any case, the defendants cannot shelter themselves under the plea that they acted only as agents, because they knew that they were not acting under any person who could properly give them any authority to do the business of a broker.

Montague Chambers, Q.C. (*Mansel Jones* with him), in support of the rule. The question turns simply on the meaning of 57 Geo. 3, c. lx., s. 2, that section imposes the penalty upon a person employing another to act as broker, but was not intended to render the servant himself liable; the liability of the master is a sufficient protection for the public. Here the company may be liable, but the defendants are not.

(1) Law Rep. 2 C. P. 270. (2) Holt, N. P. Rep. 427.

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BOVILL, C.J. In each of these cases there was a contract for the purchase or sale of some stock, and the contract was arranged by a third party without any personal interview between the principals; the person who thus intervened between the principals, Mr. Ainslie and Mr. Soilleuse was, in the first case, the defendant Cousins; he was the sole person through whom the contract was made, and when the terms of the bargain were settled, he signed the contract which was to bind the principals in his own name, with the addition of the words "pro manager." It appeared that the company usually acted through its manager, but that when he was absent Cousins used frequently to act for him, as he did in this case. Cousins was not the servant to the manager, but acted on behalf of the company, to whom the profits belonged; and there was, therefore, no person, who was a broker, as whose servant Cousins can have acted, even if that would be a sufficient compliance with the provisions of the act.

The company could not act as a broker itself, and it appears to me that it employed Cousins to act as such, and that the case, therefore, falls distinctly within the act, and that the verdict against Cousins must stand. In the case of Inglis the two parties entered into a contract which was for the resale of the shares through him, and he signed the contract note. It seems to me that this case is similar to the former, and that Inglis, though performing his duties to the company as secretary, was acting as broker, and that the verdict against him also must therefore stand.

BYLES, J. I am of the same opinion. The defendants were acting as brokers, and there was no one above them as whose servant they acted, and who was a licensed broker. It is not necessary to say, and I express no opinion whether, if the clerk of a broker acts for him as a broker in any particular transaction, it is a breach of the act; and whether, if so, the clerk, as well as his employer, is liable to a penalty.

KEATING, J. I am of the same opinion. These parties acted as brokers and they could only act as principals, because there was no one for whom they acted who had or could have a license.

MONTAGUE SMITH, J. I am of the same opinion. It seems to

me that the defendants came within the description of brokers, and there was no licensed broker from whom they can have received their authority, nor did they profess to be acting on behalf of any one who was licensed.

Rule discharged.

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SCOTT v. INGLIS.

Attorney for plaintiff: *T. J. Nelson.*
Attorney for defendants: *John Tucker.*

COX *v.* THE GREAT EASTERN RAILWAY COMPANY.

Feb. 12.

Cattle Plague Orders, 1867—*Construction—Cleansing and Disinfecting of Carriages, &c.—Railway Tolls*—25 & 26 *Vict. c. ccxxiii, s.* 230.

An order in council under the Cattle Plague Act, 11 & 12 Vict. c. 107, directed that every carriage, truck, &c., should be cleansed and disinfected by the owners in manner therein pointed out once in every twenty-four hours during the time when it is used for any animal.

S. 230 of 25 & 26 Vict. c. ccxxiii authorized the defendants to charge certain rates for the carriage of goods on their line, and also to "charge a reasonable sum for loading, covering, and unloading of goods . . . and for delivery and collection and any other services incidental to the business or duty of a carrier . . . and for any other extraordinary services performed" by the defendants.

The plaintiff sent cattle by the defendants' line:—

Held, that the defendants could not under this section require the plaintiff to pay the cost properly incurred by the defendants under the order in cleansing the truck in which the cattle were sent, as the cleansing was not a service done for the plaintiff individually as distinguished from the rest of the public.

APPEAL from a County Court.

1. The plaintiff was a cattle-salesman residing at Ipswich. The defendants were railway carriers, subject to the Railways Clauses Consolidation Act, 1845, and a private act 25 & 26 Vict. c. ccxxiii.

3. On the 18th of November, 1867, the defendants carried a cow from Diss to Ipswich for the plaintiff, and, upon its arrival at Ipswich, gave notice thereof and of their charges which were 5*s.* 8*d.* for carriage, and 1*s.* for the cleansing of the truck.

4. By the regulations of the Board of Trade, as set forth in the *London Gazette* of the 23rd of August, 1867, and by the Consolidated Cattle Plague Orders of the 20th of August, 1867, every truck, carriage, &c., used for the carriage of cattle, should be

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cleansed in a certain specified manner once in every twenty-four hours, and this cleansing should be done, and was done, by the defendants; and it was to be taken that 1*s.* was a reasonable sum to charge for such cleansing.

5. The plaintiff refused to pay the 1*s.*, but tendered the 5*s.* 8*d.* to the defendants, who however refused it, and detained and sold the cow, under s. 97 of the Railways Clauses Consolidation Act, 1845.

The plaintiff then commenced this action to recover the value of the cow.

At the trial, the judge of the county-court directed the jury to find a verdict for 18*l.*, the value of the cow; being of opinion that the defendants were not entitled to charge the plaintiff for cleansing the truck, or, if so entitled, that the defendants were not entitled to detain and sell the cow for the same; and he gave leave to either party to appeal against such direction.

The questions for the opinion of the Court were,—1. Whether the defendants had a right to charge the plaintiff with the cost of the cleansing,—2. Whether, the defendants having a right to charge the plaintiff such cost, they had a right to sell the cow.

Kemp, for the defendants. By s. 230 of their special act, 25 & 26 Vict. c. ccxxiii, the defendants are empowered to charge the plaintiff with the cost of cleaning the truck. (1) The object of the Cattle Plague Order was, that the animals to be carried should be carried in trucks which were not likely to infect them with the prevailing disease. The disinfecting process, which may be an expensive one, was a matter in which the company were not interested; and it never could have been intended that the charge should be thrown on them. S. 97 of the Railways Clauses Conso-

(1) 25 & 26 Vict. c. ccxxiii. s. 230, enacts "that for the conveyance of goods, animals, &c., along the railway, including the tolls for the use of the railway and waggons or trucks and locomotive power, and every expense incidental to such conveyance, except a reasonable sum for loading, covering, and unloading of goods at any terminal station of such goods, and for delivery and collection, and any other services incidental to the business or duty of a carrier, where such services or any of them are or is performed by the company, and except a reasonable sum for warehousing and wharfage, or for any other extraordinary services performed by the company (in respect of which the company may make a reasonable extra charge)" the company may charge any rates or sums not exceeding certain rates or sums specified.

lidation Act, 1845, authorizes the company to detain and sell goods in default of payment of tolls.

Brown, Q.C., for the plaintiff, was not called upon.

KEATING, J. I am of opinion that the charge in question was not a charge for a service rendered by the company to the plaintiff. The Privy Council have made an order requiring that every carriage or truck shall be cleansed and disinfected once in every twenty-four hours during the time when it is used for any animal. That is a duty cast upon the owners of the carriage or truck, &c. It does not appear upon the face of this case whether the cleansing process took place before or after the plaintiff's cow was carried. I do not, however, think that this is material; for in neither case could it be said to be a service done for the plaintiff individually, as contradistinguished from the rest of the public. Without inquiring whether or not the company might have recouped themselves in any other way, it is enough to say, that the charge for cleansing the truck was improperly made, and therefore that the judgment of the county court was right.

MONTAGUE SMITH, J. I am of the same opinion. I am not satisfied that this was a "service" performed for the plaintiff within the meaning of s. 230 of the company's special act. If the disinfecting took place after the plaintiff's cow was carried, it could not in any sense be a service rendered to him. If it was done before, it might in some sense be said to have been a service done for the plaintiff. But, looking at the terms of the order in council, I think the duty of cleansing and disinfecting the carriages or trucks is cast upon the company, and does not warrant any specific charge on the sender of the animal for so doing.

BRETT, J. I also think the cleansing and disinfecting is a duty imposed upon the company, and that the doing of it is not a service rendered to any individual for which they could make a charge.

Judgment affirmed, with costs.

Attorney for plaintiff: *W. H. Shaw.*

Attorneys for defendants: *Patteson & Cobbold.*

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Jan. 24.

VILLEBOISNET *v.* TOBIN AND OTHERS.

Interrogatories—Tendency to criminate—Discretion of the Court.

Interrogatories, the answers to which may criminate the person interrogated, will not be allowed under the Common Law Procedure Act, 1854, upon the common affidavit. Special circumstances must be shewn which render them necessary, and it is a matter for the discretion of the judge whether there is sufficient ground for allowing them to be put.

MOTION to vary an order of Martin, B., at chambers, refusing to allow certain interrogatories to be put to the defendants.

The action was by a shareholder of a company against three of its directors for false and fraudulent representations contained in a prospectus of the company, that 2500 shares had been applied and paid for, by which he had been led to take shares in the company.

The following were the interrogatories sought to be administered to each of the defendants, of which Martin, B. allowed the first six, but refused to allow the remainder:—

1. Did you on or about the 24th of April, 1867, or at any other and what time, sign the memorandum of association of the Ovens Gold Quartz Mines Company, Limited, and was not the said memorandum on or about the 24th of April, aforesaid, registered in the office of the registrar of joint-stock companies?

2. Did you on the said 24th day of April, 1867, or at any other and what times, attend any meeting or meetings of the promoters or directors of the said Ovens Gold Quartz Mines Company, Limited; if yea, state at what place or places such meeting or meetings were held, and who were present at such meetings?

3. Did you, at any and what time or times, see or hear of any prospectus or draft, or proposed prospectus, or of any paper purporting to be a prospectus or draft, or proposed prospectus of the said Ovens Gold Quartz Mines Company, Limited, and have you any such prospectus or draft, or proposed prospectus, in your possession, or under your control?

4. Did you, at any and what times, hear or become aware that your name appeared on any and which of such prospectuses or draft, or proposed prospectuses, or papers, as one of the directors of such company?

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5. Look at the document marked "A" (1), and say whether you ever and when first saw or heard of any such document or prospectus, and state whether the same was ever and when first issued by, or by any and what person for or on behalf of the said Ovens Gold Quartz Mines Company, Limited, or how otherwise?

6. Were you ever, or did you ever, act as a director of the said company?

7. Were 2500 shares of or in the said company ever, and when first applied for?

8. Was 1*l.* per share paid upon any, and what number of shares, on or before the 30th day of May, 1867?

9. What is the total number of shares which have been applied for in the said company?

10. What is the total amount of money received by the said company on account of shares applied for, and how much thereof was received on or before the said 30th day of May, 1867?

11. Have any and what number of shares ever, and when, been allotted?

12. Were any allotments of shares cancelled, and if yea, how many, and of how many shares, and when and to whom had the same been allotted?

13. Were any deposits, and of what amounts, at any and what time or times, returned to any and what person, and why?

14. Were any certificates of shares in the said company issued, at any and what times, to any and what persons, and in respect of what number of shares?

15. How many shares did you at any and what time apply for or hold in the said company?

16. Have you ever, and when, paid any and what money, in respect of any shares applied for or held by you in the said company?

17 and 18. Asking as to the books, papers, &c., under the control of the defendants, or of the company.

The motion was supported by the following affidavit, made by the plaintiff's attorney:—

1. This action is brought to recover damages from the defend-

(1) The prospectus which contained the alleged misrepresentations for which the action was brought.

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ants, who are named as three of the directors of the Ovens Gold Quartz Mines Company, Limited, in the prospectus of the said company hereunto annexed, marked A, for the false and fraudulent representations contained in the said prospectus, that 2500 shares in the said company had been applied and paid for, whereby the plaintiff was induced to apply and pay for 200 shares in the said company.

2. An action has also been commenced by the above-named plaintiff against the said Ovens Gold Quartz Mines Company, Limited, to recover from the said company the amount so paid by the said plaintiff for the said shares, and in such action an order was made by Mr. Baron Cleasby on the 14th day of December, 1868, for discovery of the documents in the possession of the said company relating to the matters in dispute in the said action, but the said company have failed to make such discovery in obedience to the said order.

3. On the 23rd, and again by adjournment on the 24th day of December, 1868, a summons in this cause for leave for the plaintiff to deliver interrogatories to the defendants was heard by Mr. Baron Martin, when the several interrogatories hereunto annexed and marked respectively B, C, and D (1), were submitted to him, and his lordship allowed the interrogatories numbered 1 to 6, but disallowed the remainder.

4. That previous to the commencement of this action, at an interview which I had with Mr. Luke Williams, the manager of the said Ovens Gold Quartz Mines Company, Limited, the said Luke Williams informed me that only three persons had applied and paid for shares in the said company, one of whom was the plaintiff, who had applied and paid for 200 shares, and the other of such persons had applied and paid for 300 shares and one share respectively, and the said Luke Williams produced for my inspection the banker's pass-book of the said company, which shewed the correctness of this statement.

5. That being unable to obtain an inspection of the books and other documents of the said Ovens Gold Quartz Mines Company, Limited, pursuant to the order above mentioned, it is material and necessary for the plaintiff that the defendants should answer the

(1) The interrogatories referred to were those set out above.

whole of the said interrogatories, and I believe that the plaintiff will derive material benefit in this cause from the discovery which he seeks by the said interrogatories, and that the plaintiff has a good cause of action on the merits.

Day, for the plaintiff. The interrogatories ought to be allowed, though the defendants may refuse to answer them if by doing so they would criminate themselves. In the recent case of *McFadzen* v. *Mayor and Corporation of Liverpool* (1), Bramwell, B., said, "unless we can see clearly that the question is one which ought not to be put, we ought to allow it, and to leave the objection to be taken at the stage of answering." In that case Martin, B., differed from the rest of the Court, and took the same view that he has taken upon this summons. *Bickford* v. *Darcy* (2) is another recent case in which interrogatories were allowed under similar circumstances. Martin, B., there refers to Wigram on Discovery, 2nd ed., p. 80, where a similar rule is laid down with respect to discovery in Equity. In *Edmunds* v. *Greenwood* (3) the interrogatories were disallowed, but there the circumstances were very special, and the case really only decides that the Court has a discretion, and will not allow the interrogatories if they think they are not put bonâ fide and without any ulterior purpose. In this case there is no pretence for saying that the interrogatories are not bonâ fide.

[KEATING, J. Could not the information as to the number of shares subscribed for be easily obtained in some other way?]

No. The plaintiff has done all he can, and even brought an action against the company, though he knew there were no assets, in order to obtain an order for inspection of their books, but the company have failed to obey the order. In *Bartlett* v. *Lewis* (4) the interrogatories were stronger than those in this case, and the Court allowed them to be put: *Osborn* v. *London Dock Company* (5), decided that any questions might be put in interrogatories which could be put in examining a witness in court, unless they were put malâ fide, or any other special ground could be shewn for not

(1) Law Rep. 3 Ex. 279, 281.
(2) Law Rep. 1 Ex. 354.
(3) Ante, p. 70.
(4) 12 C. B. (N.S.) 249; 31 L. J. (C.P.) 230.
(5) 10 Ex. 698; 24 L. J. (Ex.) 140.

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sider, there say: "In the absence of any such special circumstances as should, according to the general current of authorities, induce a judge sitting at chambers, or the Court, in the exercise of their respective discretions, to allow interrogatories such as these to be put, we are of opinion that they ought not to be allowed in an action of this description," from which it would appear that some special circumstances ought to be shewn rendering such interrogatories necessary before they are allowed. I rather think that the plaintiff's affidavit in this case was drawn with that view, since it refers to the order for inspection made in the action against the company, apparently to shew that the information sought by these interrogatories cannot otherwise be obtained. If the statement is introduced for that purpose, it seems to me to fall very far short of what is required: the affidavit does not state in terms that the information cannot be obtained in any other manner; nor does it furnish particulars from which such should be inferred. The rule laid down in *Edmunds* v. *Greenwood* (1) seems to be that, where there are no special circumstances, the interrogatories should not be allowed, and I cannot see any such circumstances in this case; certainly none which would justify us in setting aside the order of my Brother Martin, and so interfering with the discretion of the judge at chambers. It is suggested that he acted on a hard and fast rule that such interrogatories ought never to be allowed, and did not exercise his discretion on the circumstances of the case; but we cannot assume this; and as I see no reason to depart from the rule stated by this Court in *Edmunds* v. *Greenwood* (1), I am of opinion that this rule should not be granted.

MONTAGUE SMITH, J. If I knew that my Brother Martin had acted upon the notion that in no case would he allow interrogatories to be put where the answers might have a tendency to criminate the party interrogated, and had not exercised his discretion on the circumstances of this case, I should be disposed to make this rule absolute; because I am not satisfied that there was here such an absence of special circumstances that the defendants ought not to be called upon to answer these interrogatories. But

(1) Ante, p. 70.

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if my Brother Martin exercised his discretion in the matter in the circumstances of the particular case, then, upon the general ground that the Court will not interfere with the exercise of the discretion of a Judge at chambers, unless it clearly sees he is wrong, I should feel equally satisfied to discharge the rule. I am left in doubt in what way my Brother Martin disposed of this matter; but as I infer from the argument that the special circumstances were brought before him, I must, I think, presume that he took them into consideration and exercised his discretion upon them; and therefore, as my Brother Keating agrees with my Brother Martin in the exercise of such discretion, or at all events does not disagree with him, I do not dissent from this rule being discharged. The subject is not in a very satisfactory state. The question arose soon after the passing of the Common Law Procedure Act, 1854, whether interrogatories were to be administered on the principle of discovery in Equity, or whether they might be carried to a wider extent; and the question as to allowing such an inquiry as is here objected to, because it might tend to criminate the party interrogated, came early before the Court of Exchequer, in *Osborn* v. *London Dock Company* (1), when that court held that the interrogatories might be put to the party on the same principle of inquiry as if he were in the witness-box to be examined, he having the privilege to refuse to answer them if he chose, on the ground that his answer would have a tendency to criminate him. That case was followed by this Court in *Bartlett* v. *Lewis* (2), and therefore the principle which ought to govern the allowing of such interrogatories was apparently settled by authority. Cases have arisen since that time which cannot, I think, be altogether reconciled with the earlier decisions. As far as I can see, the only intelligible rule to be deduced from the cases, including that of *Edmunds* v. *Greenwood* (3), is, that when the interrogatories are bonâ fide put for the purpose of discovery and are relevant to the matter in issue they may be allowed, although the answers to them may tend to criminate the party answering (if answered in one way), leaving to such party the option of refusing to answer on that

(1) 10 Ex. 698; 24 L. J. (Ex.) 140.

(2) 12 C. B. (N.S.) 249; 31 L. J. (C.P.) 230.

(3) Ante, p. 70.

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ground. But where such interrogatories are sought to be put, the Court and the Judge at chambers will require a stronger case to be made out for allowing them than is requisite in ordinary cases, and such interrogatories will not be allowed on the common affidavit only, but some special circumstances must be laid before the Judge, by affidavit or otherwise, to induce him to order them. As my Brother Keating has said, no hard and fast line can be laid down, and it must be left to the discretion of the Judge in each individual case to determine whether the special circumstances are or not sufficient for allowing such interrogatories.

Rule discharged, without costs.

Attorney for plaintiff: *J. V. Harting.*
Attorneys for defendants: *Pattison, Wigg, & Co.*

Feb. 4.

[IN THE EXCHEQUER CHAMBER.]

THE METROPOLITAN BOARD OF WORKS *v.* THE METROPOLITAN RAILWAY COMPANY.

Sewers—Easement—Right to lateral support—Metropolitan Board of Works— 11 *&* 12 *Vict. c.* 112—18 *&* 19 *Vict. c.* 120—*Metropolitan Railway Company—*17 *&* 18 *Vict. c. ccxxi.*

A sewer made by the Metropolitan Commissioners of Sewers under the powers vested in them by 11 & 12 Vict. c. 112, was transferred to the Metropolitan Board of Works by 18 & 19 Vict. c. 120. The Metropolitan Railway Company having, by the construction of their railway, deprived the sewer of its lateral support less than twenty years after it was made, the sewer burst. In an action by the Metropolitan Board of Works to recover the sum awarded by an arbitrator, under the Lands Clauses Consolidation Act, for the damage thereby sustained:—

Held, affirming the judgment of the Court below, that the Metropolitan Board of Works had acquired no right to lateral support for their sewer, either under the above acts or otherwise, and were not entitled to recover.

APPEAL from a judgment of the Court of Common Pleas in favour of the defendants on a special case. (1)

The action was brought by the Metropolitan Board of Works to recover damages for an injury occasioned to part of the Fleet sewer, which had burst in consequence of its lateral support being taken away by excavations made by the Metropolitan Railway Company

(1) Law Rep. 3 C. P. 612.

in the course of the construction of their railway. It was admitted that the sewer had been properly constructed, but within twenty years of the time of the accident, and that the works of the railway had been conducted without negligence.

The facts of the case are fully set out in the report of the case in the Court below. (1)

Sir J. B. Karslake, Q.C. (*Raymond* with him), for the plaintiffs, contended that the acts of parliament which authorized the construction of the sewer, gave a right by implication to the lateral support, which was necessary to its safety.

Sir J. D. Coleridge, Q.C. (*S. G.*) (*Quain, Q.C.*, and *Horace Lloyd* with him), for the defendants, contended that in the absence of any express provisions in the acts, the right to the lateral support did not pass, and that the plaintiffs, not having purchased any easement over the defendants' land as they might have done, had no such right.

The arguments used and authorities relied on were the same as in the Court below.

KELLY, C.B. We are of opinion that the judgment of the Court below should be affirmed. A claim is made to a large sum of money in respect of damage done to a sewer, of which the plaintiffs are to be deemed in point of law proprietors, by the defendants having dug into land not contiguous, but near to the sewer, and so caused the sewer to burst; and also for the costs of an arbitration, by which the amount of damage was determined. The question which arises on the case is, whether the defendants have done an illegal act. Now, what is it that the defendants have done? They are seised in fee simple of a quantity of land near to the plaintiffs' sewer, within which land they have constructed a railway; and they found it necessary, in the course of their works, to excavate to a depth exceeding by sixteen feet the bottom of the sewer; and it was by this excavation that the support of the sewer was taken away, and the damage to it occasioned. It cannot be denied that the defendants in thus excavating were only availing themselves of one of the original rights attached to the ownership

(1) Law Rep. 3 C. P. 612.

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of their property, and that if the plaintiffs can complain of it, it must be because they have in some way entitled themselves to such lateral support as may be necessary for the safety of the sewer.

The plaintiffs are a public body not acting for their own profit, but appointed for great and important purposes, and have succeeded, under 18 & 19 Vict. c. 120, to all the rights of the Commissioners of Sewers, who were also a public body, and by whom this sewer was constructed under the provisions of 11 & 12 Vict. c. 112. The question immediately arises, whether by those statutes, or what has been done under them, the plaintiffs have acquired a right to lateral support for the sewer. The right they claim is an easement, and, as such, might be acquired either by the provisions of an act of parliament, or by means of the sale and conveyance of the right by the owners of the adjoining land. The plaintiffs contend that in this case it has been conferred upon them by the provisions of the above-mentioned acts of parliament, and that the sewer having been properly made, the right at once arose, and became vested in the Commissioners for Sewers, in whose place they stand. If the act of parliament (11 & 12 Vict. c. 112) really intended that the plaintiffs should have such a right, one would have expected to find the usual provisions, viz., that the board might construct the works; but that, if they did any injury, they should make compensation for it; and if they required any land or easement, they should have power to purchase it. We find, however, no such provisions. The most important sections are the 38th and 66th. The first gives power to make sewers "into, through, and under any lands," and directs that compensation should be made to their owners, but gives no power to purchase the lands, or to make compensation to any one except those "into, through, and under" whose lands the sewer is made. The section appears to have no reference to the owners of neighbouring lands such as the defendants. When we come to s. 66 we find that it is wider in its terms, and contemplates that it may be desirable to take lands near to the sewer, and it therefore provides that "it shall be lawful for the commissioners to purchase by agreement, or to take on lease on such terms as they may think fit, any land which may be necessary for the formation or construction of any works which the commissioners are author-

ized to execute under this act," which implies that the plaintiffs may from time to time acquire neighbouring lands for the protection of the sewer. The act, however, only authorizes them to acquire these lands by agreement. In a later act, passed shortly after the making of the sewer now in question, they are authorized to take compulsorily any land or easement that they may require, which confirms the view we take of the case, that the legislature contemplated that if any land or any easement should be required it should become the property of the Board, not by force of the act, without compensation, but under the first act by voluntary assessment, and by the last, by compulsory purchase. It was argued for the plaintiffs that, since no compulsory powers for the purchase of any land or easement are given by the earlier acts, if such an easement was absolutely necessary, the easement must be considered to have been conferred upon them at once without any purchase, or any payment or compensation for its value. It is enough to say that we find nothing in the act of parliament to warrant such a conclusion, and that we cannot interpolate such provisions in the act, especially where it is expressly provided that such easement may be purchased by agreement. Looking at the date of the acts, it may well have been thought that at that time there would be no difficulty in obtaining the necessary land and easements, and, in fact, for very many years the powers that were given proved to be sufficient. It is only when so unexpected a work has been accomplished as the construction of underground railways throughout the metropolis that the existence of these sewers has proved to be endangered, and we find accordingly that in the later act, which was passed after these underground works were begun, or at least contemplated, express power is given for the compulsory purchase of an easement such as that now in question for the protection of the sewer. But it is said that, although it can hardly be supposed that the legislature would have given such a right without some compensation to the persons whose land is subjected to the easement, the making of the sewer would in itself amount to a damage to the adjacent owner over whose lands the easement was claimed, and that he would therefore be entitled to compensation under 11 & 12 Vict. c. 112, s. 38. The right to lateral support, though usually of small value, is some-

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times of great price, as in the case where there are mines under the land for which the easement is claimed, or where a railway is intended to be made through it, as in the present case; and, in fact, if the plaintiffs had such a right as they claim, they might have obtained an injunction to prevent the railway, on which such vast sums had been expended, being completed so as to interfere with their sewer. It is to meet the difficulty arising from these considerations, that the plaintiffs have endeavoured to shew that the defendants were entitled to compensation for the making of the sewer. What damage, however, resulted to the defendants' predecessors when the sewer was made? The land was not damaged, and the easement upon it of the right to lateral support was a mere speculative possibility unforeseen and unthought of. There seems no ground therefore for saying that there could have been a claim for compensation by the defendants or their predecessors for the making of the sewer. Under these circumstances, we are of opinion that no right to lateral support was acquired by the mere construction of the sewer under the act, but that such a right can be acquired only by purchase. Two cases have been cited for the plaintiffs. The case of *In re Pettiward and Metropolitan Board of Works* (1) is said to have decided that the obtaining a right to lateral support by the construction of a sewer is a damage to the owner of the land over which the easement is claimed. The case, however, really only decides that a person may seek and recover the damage caused to him by the construction of the sewer whenever he actually sustains it. The nature of the damage in that case, when it is looked at, appears to have been that a sewer had been constructed in, under, and through the lands of the plaintiff's predecessors, and that the plaintiff had been prevented thereby from building certain houses in the way he had planned. The other case, *North London Railway Company* v. *Metropolitan Board of Works* (2), goes only to shew that before an easement can be acquired by a public body they must have either the authority of an act of parliament or an agreement with its owner. The result therefore of the whole case is, that the plaintiffs have no such right to lateral support for their sewer as they claim,

(1) 19 C. B. (N.S) 489; 34 L. J. (C.P.) 301.
(2) John. 405; 28 L. J. (Ch.) 909.

and the defendants are entitled to our judgment, and the judgment of the Court of Common Pleas must be affirmed.

CHANNELL and PIGOTT, BB., and MELLOR and HANNEN, JJ., concurred.

CLEASBY, B. I ought to say that I still retain the doubt expressed by me during the argument, whether where works have been constructed, as in this case, by a body acting with all the powers originally given by an act of 23 Henry 8, c. 5, and continued by various subsequent acts, a right to lateral support ought not to be considered as conferred by those acts. Otherwise, I should expect to find clauses enabling the commissioners compulsorily to acquire so essential a right. The consequence would be that after a work of great national importance, a sea-wall for instance, had been constructed under those acts, protecting a large area of country, an adjoining landowner might dig down any depth below its foundations, and on the water rising the wall would give way and the country be flooded. The idea in my mind is, that as there is a right conferred to have the sewer, so there is conferred along with it a right to the under support and the lateral support, by a liberal application of the maxim that when anything is granted, whatever is essential to the enjoyment of it, is, if it can be, granted also. But as this view, though adverted to by me, was not insisted upon in the argument, or noticed in the Court below, it is most probable that I am mistaken in it.

Judgment affirmed.

Attorneys for plaintiffs: *W. Wyke Smith.*
Attorneys for defendants: *Burchells.*

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Jan. 15.

SAXBY *v.* THE MANCHESTER, SHEFFIELD, AND LINCOLNSHIRE RAILWAY COMPANY.

Nuisance created by a third Person upon the Defendants' Land.

The defendants were owners of the soil of a stream which supplied water to two print-works. A., whilst occupier of both works, erected a weir across the stream, and thereby diverted the water from one of the works. The plaintiff, becoming lessee of the last-mentioned work, and entitled to the water of the stream, removed the weir. A. afterwards, without any authority from the defendants, and against their will, replaced the weir:—

Held, that the defendants were not responsible for the act of A., or for the continuance of the nuisance.

THE first count of the declaration stated that the plaintiff was possessed of certain print-works, land, and premises, and by reason thereof was entitled to the flow of water in and along a certain watercourse for working the said works and for the more beneficial use thereof; and that the defendants obstructed and diverted, to wit, by a weir and planks, &c., the water of the said watercourse, to the plaintiff's injury.

The second count stated that the plaintiff was possessed of certain print-works, land, and premises, and was entitled to the flow of water in and along a certain watercourse for working the said print-works, and for the more beneficial use thereof; and that the defendants, by means of a trough and cutting by the side and bank of and across and over the said watercourse, and keeping the same in bad repair, wrongfully diverted the water of the said watercourse, to the plaintiff's injury.

The third count alleged that the plaintiff was possessed of certain land, and was entitled to the flow of water in and along a certain watercourse through the said land; and that the defendants obstructed and diverted the water, to the plaintiff's damage. Claim, 500*l.*

Pleas: 1. Not guilty. 2. A traverse of the possession of the land and works. Issue thereon.

The cause was tried before Channell, B., at the Chester spring assizes, 1868, when the following facts were proved:—

Down to the year 1858, one John Welch was possessed of two print-works, viz. the Furnace Works, which he held under a

lease from one West, dated the 25th of March, 1797, and the Whaley Bridge Works, which he held under a lease from one Joddrell, dated in 1854. Both these works were supplied with water from a stream called Todd's Brook. The defendants were the proprietors of the Peak Forest Canal, which was constructed under the authority of an act of 34 Geo. 3, c. xxvi (in 1794), and also of Todd's Brook, a portion of which in forming their railway they necessarily diverted by means of a new cut. In August, 1858, Welch assigned the Furnace Works to the plaintiff, who continues to occupy them, Welch continuing the Whaley Bridge Works down to 1864. In 1854, Welch, whilst he occupied both works, erected a weir across the new cut, and laid down a pipe, which had the effect of diverting the water from the Furnace Works to a reservoir attached to the Whaley Bridge Works, and in dry seasons materially impeded the working of the Furnace Works. The soil of the new cut was vested in the defendants, and by the original act they were to keep its banks, &c., in order and repair; but they had no interest in the use of the water, and the land on both sides of the cut belonged to Joddrell. Some time in 1864, the plaintiff caused the weir to be removed; and after a short time the obstruction was replaced, but by whom did not appear.

A long correspondence then ensued between the plaintiff's attorneys and the attorneys for the defendants, in which the former complained of the obstruction of the cut, and required the company to remove it, and the company's attorneys, disclaiming all interference in the matter, gave the plaintiff free liberty to remove the obstruction himself, as far as they were concerned, it having been caused without their sanction, and against their will.

The learned judge was of opinion that there was no evidence of obstruction by the defendants; and he directed a nonsuit.

Bowen, in Easter Term last, obtained a rule nisi for a new trial, on the ground of misdirection. He referred to the judgments of Rolfe, B., in *Reedie* v. *London and North Western Railway Company* (1), and of Crompton, J., in *Gandy* v. *Jubber*. (2)

M'Intyre (*Giffard, Q.C.*, with him), shewed cause. It was not

(1) 4 Ex. 244. (2) 5 B. & S. 78, 86; 33 L. J. (Q.B.) 151.

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enough for the plaintiff to shew that the obstruction complained of was in the bed of the stream, which was vested in the defendants. He should have shewn that it was done by the defendants, or for their benefit, and with their assent. The weir only became wrongful when Welch ceased to possess the two works: and the question is whether the defendants were responsible for its continuance, because they failed to remove it when requested. Admitting that the obstruction was upon their land, the defendants gave the plaintiff permission to remove it, so far as they were concerned.

[KEATING, J. If the plaintiff had a right to the flow of the water to his works, and the defendants gave him all the assent they could give him for the removal of the obstruction, why could not the plaintiff have sued the persons who caused or continued the nuisance?]

No doubt, the plaintiff had a remedy against those persons; but he wished to cast the burthen upon the defendants.

[BOVILL, C.J. I am at a loss to see any legal obligation on the defendants to do anything.]

No case is to be found where a party has been held liable for an act done by a trespasser on his land against his will. *Reedie* v. *London and North Western Railway Company* (1) was a totally different case. And *Gandy* v. *Jubber* was virtually overruled in the Exchequer Chamber (2); for, though the defendant, at the suggestion of the Court, on the ground that the plaintiff was a very poor person, consented to a stet processus, all the judges manifestly were of opinion that the decision of the Court below was wrong. Here, for anything that appears, the weir was erected without the defendants' knowledge; and it was erected by a riparian proprietor coming upon his own land. The defendants had no interest in the stream. It was necessarily diverted for the purpose of constructing the railway: their only obligation was to keep the banks of the new cut in repair.

[BYLES, J. Your contention is that no greater obligation to remove the weir was cast upon the defendants than if the natural stream had remained undiverted?]

Precisely so. The plaintiff must seek his remedy against the persons who interfered to prevent his removing the obstruction.

(1) 4 Ex. 244. (2) 5 B. & S. 485.

[MONTAGUE SMITH, J. Persons coming into possession of land after the creation of a nuisance upon it have been held responsible for its continuance. (1)]

To render them liable it must be shewn that the nuisance was created by or with the consent of the former owner, and continued by the consent of the new owners. It may be said that the defendants are bound under s. 13 of the act of 1794 to keep the banks, &c., of the stream or cut in repair. But, assuming this to involve an obligation to prevent or to remove obstructions, the action is not founded upon that obligation. Nothing short of evidence of an active obstruction of the stream by the defendants will sustain this declaration.

Mellish, Q.C., and *Bowen*, in support of the rule. The question is whether one who is found to be the owner of landed property upon which there is something which causes a continuing nuisance and damage to a third person, and who is in the actual occupation of the thing which causes the damage, is not responsible for its continuance. The defendants were the owners of the soil of the stream; and the effect of the correspondence is, that they decline to remove the obstruction, though they will not object to the plaintiff's doing it himself. In short, they desire to remain perfectly neutral. Had they not, however, a duty to keep their land free from obstruction which may interfere with the rights of others? *Penruddock's Case* (2) shews that the continuing the nuisance after request made to abate it renders the occupiers of the land liable. In *Reg.* v. *Watts* (3), an indictment was held to lie against a tenant at will for suffering a house on a highway to be ruinous and likely to fall down. In giving judgment, the Court say: "It is not only charged but found that the defendant was occupier, and in that respect he is answerable to the public; for, the house was a nuisance as it stood, and the continuing the house in that condition is continuing the nuisance. And, as the danger is the matter which concerns the public, the public are to look to the occupier, and not to the estate, which is not material in such case as to the public." The like doctrine was held in *Reg.* v. *Bradford Navigation*. (4)

(1) See *Todd* v. *Flight*, 9 C. B. (N.S.) 377; 30 L. J. (C.P.) 21.

(2) 5 Co. Rep. 100. b.

(3) 1 Salk. 356.

(4) 6 B. & S. 631; 34 L. J. (Q.B.) 191.

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"Persons," says Blackburn, J. (1), "who maintain their property so as to be a public nuisance are indictable." *Todd* v. *Flight* (2) shews that they are also liable to an action.

[BOVILL, C.J. Every person who is accessory to a nuisance is responsible for it upon an indictment. In *Reg.* v. *Bradford Navigation* (3), it was not contended that the defendants were responsible for the fouling of the stream. The wrongful act was bringing down the foul water.]

If a grating on a public pathway is broken, the occupier of the house to which it belongs is bound to repair it; and it would be no answer for him to say that the breaking of the grating was the act of a wrongdoer: *Gandy* v. *Jubber*. (4)

[BYLES, J. In that case, a pit has been dug by the owner of the property upon the highway, and he or his tenant must take care that no injury results from it.]

The rule is well laid down by Rolfe, B., in *Reedie* v. *London and Great Northern Railway Company*. (5) "It is not necessary," he says, "to decide whether, in any case, the owner of real property, such as land or houses, may be responsible for nuisances occasioned by the mode in which his property is used by others not standing in the relation of tenants to him, or part of his family. It may be that in some cases he is so responsible. But then his liability must be founded on the principle that he has not taken due care to prevent the doing of acts which it was his duty to prevent, whether done by his servants or others. If, for instance, a person occupying a house or a field should permit another to carry on there a noxious trade, so as to be a nuisance to his neighbours, it may be that he would be responsible, though the acts complained of were neither his acts nor the acts of his servants. He would have violated the rule of law 'Sic utere tuo ut alienum non lædas.' This is referred to by Cresswell, J., in delivering the judgment of the Court of Common Pleas in *Rich* v. *Basterfield* (6), as the principle on which parties possessed of fixed property are responsible for acts of nuisance occasioned by the mode in which

(1) 6 B. & S. at p. 651; 34 L. J. (Q.B.) at p. 200.
(2) 9 C. B. (N.S.) 377; 30 L. J. (C.P.) 21.
(3) 6 B. & S. 631; 34 L. J. (Q.B.) 191.
(4) 5 B. & S. 78, 485; 33 L. J. (Q.B.) 151.
(5) 4 Ex. 244, 256.
(6) 4 C. B. 783, 802.

the property is enjoyed." So, here, the defendants have omitted to take due care to prevent the doing of an act upon their property which it was their duty to prevent. When the weir was first erected, there was unity of occupation of the two works which were supplied by the stream, and consequently the act might not have been unlawful. Whether or not it was done with the consent of the defendants, does not appear; but, assuming it to have been with their consent, when the unity of occupation ceased in 1858 by the assignment of the lease of the Furnace Works to the plaintiff, the plaintiff was entitled to have the weir removed. It clearly was the duty of the defendants not to permit the continuance upon their land of a thing which had thus become a nuisance and an injury to the plaintiff's rights. It was not enough for them to say that they would stand neutral in the matter. The question ought to have been submitted to the jury.

BOVILL, C.J. I am of opinion that the ruling of my Brother Channell was right, and that there was no evidence which ought to have been left to the jury. The act complained of was not an act done by the defendants or by any one authorized by them, nor was it an act done for their benefit, or adopted by them. On the contrary, we must assume from the correspondence that it was against their will. It has, however, been contended that, the nuisance having been wrongfully created by a stranger, the defendants are responsible for its continuance. There might have been something for the jury, if it had been shewn that the defendants had sanctioned or approved of the act of Welch, or had derived any benefit from it. But nothing of the kind appeared. The weir was erected at a time when the two print-works were in the occupation of the same tenant: and it was only upon the discontinuance of this unity of occupation that its existence afforded any ground of complaint. It is suggested that the nuisance being upon land in the possession of the defendants, they could have removed it, and are therefore responsible for its continuance. But the question is whether they were bound to risk the consequences of a personal conflict by doing that which the plaintiff (they assenting) might have done himself. I must confess I do not see why the plaintiff should cast upon the defendants, who have no

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interest whatever in the matter, a responsibility which he himself declines to incur. I cannot say there was any evidence which could have warranted a verdict for the plaintiff.

BYLES, J. I also am of opinion that the plaintiff was properly nonsuited. No doubt the defendants would have been liable if they had been parties to the creation of a nuisance upon their own land. But here the nuisance was created by a stranger. When called upon to remove it, they very naturally say they had nothing to do with it, and decline to incur any expense or responsibility in its removal, and give the plaintiff permission, so far as they are concerned, to go upon the land and himself abate the nuisance.

KEATING, J. I am of the same opinion. I do not think our decision in this case will infringe on any general rule as to the creation or continuance of a nuisance detrimental to a neighbour; for, here there was no evidence of a continuance by the defendants of the obstruction which Welch created in 1854. There was no privity between the defendants and Welch. The nonsuit was clearly right.

MONTAGUE SMITH, J. I am of the same opinion, resting entirely upon the particular facts of the case. There was no evidence of a wrongful continuance of the nuisance on the part of the defendants. They were quite as desirous of its removal as the plaintiff was, and to co-operate with him in removing it. I see nothing to render them liable to this action.

Rule discharged.

Attorneys for plaintiff: *Worthington & Plunkett, for Sale & Co., Manchester.*

Attorneys for defendant: *Pritchard & Englefield, for Grundy & Coulson, Manchester.*

EX PARTE MARTHA ROBINSON. 1869

Husband and Wife—Conveyance of Wife's Property under 3 & 4 *Wm.* 4. c. 74, s. 91—*Form of Affidavit.* [Jan. 30.

Upon an application under the 3 & 4 Wm. 4, c. 74, s. 91, to dispense with the husband's concurrence in a conveyance of the wife's property, on the ground of desertion, the affidavit must shew that he does not contribute to her support.

Crompton, on a former day in this term, moved for an order under the 3 & 4 Wm. 4, c. 74, s. 91, to enable Mrs. Martha Robinson to execute a conveyance without the concurrence of her husband.

The affidavit stated that the applicant was married to one Robert Robinson in or about the year 1838; that, in 1848, her said husband left her in this country destitute, and went to the United States of America, and that since he so left her she had never heard from or had any communication either directly or indirectly with him, and she did not believe it was his intention to return to this country; that, since her husband so left her, she had become entitled under the will of Matthias Brown, late of Liverpool, deceased, to a share, on the death of Mary Brown, the testator's mother, of the residue arising from the sale of houses and property in Liverpool, late of the said Matthias Brown; that the property had been sold by the trustee and executor under the will; and that the purchaser had required that the applicant should become a party to and execute the conveyance.

[BOVILL, C.J. The affidavit should state, if the fact be so, that the husband does not contribute to the wife's support.]

That can hardly be necessary here, as the wife is not a conveying party; the trustee has the legal estate.

BOVILL, C.J. We have laid down a rule upon the subject which applies to all cases; and it is necessary that it should be adhered to; otherwise, we shall have an argument in every case as to whether or not it comes within the reason of the rule. The affidavit may easily be amended by adding the requisite allegation.

The affidavit was amended by the introduction of a statement that, "from the day the applicant's husband deserted her in 1848,

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up to the date of swearing the affidavit, she had never been supported by him, nor had he in any manner whatever, directly or indirectly, contributed to her support; nor had she ever received in any way anything from any property of her said husband," and the rule was granted.

Rule granted.

Attorneys for applicant: *Wright & Venn.*

Feb. 11.

TAYLOR *v.* DUNBAR.

Marine Insurance—Total Loss—Voyage delayed by reason of Tempest.

Meat shipped at Hamburgh for London was delayed on the voyage by tempestuous weather, and solely by reason of such delay became putrid, and was necessarily thrown overboard at sea:—

Held, not a loss by perils of the sea, or within the words "all other perils, losses, and misfortunes," &c., in the policy.

THIS was an action upon a policy of insurance on goods per steamer from Hamburgh to London, the perils insured against being declared to be "of the seas, men of war, fire, enemies, pirates, rovers, thieves, jettisons, letters of mart and countermart, surprisals, takings at sea, arrests, restraints and detainments of all kings, princes, and people, of what nation, condition, or quality soever, barratry of the master and mariners, and of *all other perils, losses, and misfortunes* that have or shall come to the hurt, detriment, or damage of the said goods and merchandizes, and ship, &c., or any part thereof." The declaration averred a total loss of "dead meat" on two occasions, viz. on the 3rd of November, 1866, and the 6th of February, 1867, on board the *Leopard* and the *Ostrich*.

The defendant pleaded: 1. That he did not subscribe the policy as insurer. 2. That the plaintiff was not interested, as alleged. 3. That the goods were not lost, as alleged. Issue thereon.

The following case was stated for the opinion of the Court:—

1. The plaintiff, who is a wholesale butcher in London, on the 10th of February, 1866, effected the policy in question, which was subscribed by the defendant for 300*l.*, in consideration of a premium of 4*l.* 10*s.* paid to him by the plaintiff.

2. On the 3rd of November, 1866, twenty-six packages of dead

pigs were shipped at Hamburgh on board the *Leopard*, consigned to the plaintiff in London. The vessel sailed on the same day on her voyage to London with the dead pigs on board, and, whilst proceeding on her voyage, encountered hard gales of wind and most tempestuous weather, accompanied by high running seas which frequently broke over the ship; and the ship was on the 5th of the same month put back to Cuxhaven.

3. On the 6th of November the ship put to sea again, and again encountered hard gales and high running seas, and was again put back to Cuxhaven.

4. On the 8th of November, the ship finally sailed from Cuxhaven, and experienced throughout the voyage most boisterous weather, and shipped much water.

5. The dead pigs were in no way affected or injured by the sea or by the storm or tempest: but it was discovered on the 10th of the same month that the dead pigs, owing to the length of time to which the voyage was protracted and delayed by the weather, had become putrid; and they were necessarily thrown overboard at sea.

6, 7. The value of the dead pigs was 28*l.*; the proportion payable by the defendant under the policy in respect of the loss being 4*l.* 13*s.* 8*d.*

8. On the 6th of February, 1867, thirty-two quarters of beef were shipped at Hamburgh on board the *Ostrich*, consigned also to the plaintiff in London. The *Ostrich* sailed on the same day on her voyage to London with the thirty-two quarters of beef on board, and at noon the same day came to anchor at Cuxhaven, and there encountered such a violent gale that it was not deemed prudent by the pilot in charge of her to put to sea in face of it; and the gale so continued until the 8th of February, when it somewhat abated, and the *Ostrich* put to sea.

9. The same day the *Ostrich* encountered strong gales of wind and cloudy weather, and was put back to Cuxhaven.

10. On the 10th of February the ship sailed again from Cuxhaven, and proceeded on her voyage to London, and encountered a very strong gale, with a heavy running sea, shipping much water over all; and this continued throughout the next day, the 11th, the ship continuing to ship much water over all.

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11. The said quarters of beef were in no way affected or injured by the sea-water or by the storm or tempest; but, owing to the retardation and delay of the voyage, it was discovered on the afternoon of the 11th of February that they had become putrid, and quite unfit for consumption, and were then necessarily thrown overboard at sea.

12, 13. The value of the thirty-two quarters of beef was 128*l.*; the proportion payable by the defendant under the policy in respect of the last-mentioned loss being 7*l.* 13*s.* 7*d.*

14. The plaintiff was interested in the dead pigs and beef to the amount of all the moneys insured thereon by the policy; and the insurance was made for his use and benefit and on his account.

15. The ordinary voyage of the said steamers from Hamburgh to London is fifty hours; but they were respectively delayed on the two occasions mentioned in this case as above stated. Had the above voyages been of the ordinary duration, the said packages of dead meat would have arrived in good condition; and the damage was due solely to the delay caused as above stated.

The question for the opinion of the Court was, whether the plaintiff was entitled to recover the said two sums of 4*l.* 13*s.* 8*d.* and 7*l.* 13*s.* 7*d.* in respect of the said several losses.

Beasley, for the plaintiff. The question is, whether the loss was proximately caused by perils of the seas, within the meaning of this policy. The expression "perils of the seas" is thus defined in 1 Phillips on Insurance, 3rd ed. 626, § 1099: "Under perils of the seas, which constitute a part of the risks in almost every marine policy, are comprehended those of the winds, waves, lightning, rocks, shoals, collisions, and in general all causes of loss and damage to the property insured, arising from the elements and inevitable accidents other than those of capture and detention." Chancellor Kent, 3 Com. 10 ed. 407, says: "Those words apply to all those natural perils and operations of the elements which occur without the intervention of human agency, and which the prudence of man could not foresee, nor his strength resist." And Emerigon, p. 286 (by Meredith), says: "Perils of the sea (fortunes de mer), properly termed, are those which proceed from rocks and tempests, ex marinæ tempestatis discrimine. But, in the matter of insur-

ance, by perils of the sea is understood all losses and damages which happen at sea by a fortuitous event, and even sometimes under the same denomination are understood accidents which happen in the course of the voyage through the misconduct of the captain and of the mariners. Thus, perils of the sea (fortunes de mer) is a generic term, comprehending every thing for which the insurers are responsible." In *Montoya* v. *London Assurance Company* (1), where tobacco was damaged by the ill flavour imparted to it from the putrefaction of hides caused by the shipping of sea-water, Pollock, C.B., says: "I think it may be laid down as a general rule, that, where mischief arises from perils of the seas, and the natural and almost inevitable consequence of that mischief is to create further mischievous results, the underwriters in such case are responsible for the further mischief so occasioned." In *Lawrence* v. *Aberdein* (2), a policy was effected on living animals, warranted free from mortality and jettison. Some of the animals, in consequence of the agitation of the ship in a storm, were killed, and others from the same cause received such injury that they died before the termination of the voyage: and this was held to be a loss by perils of the sea. The like was held in *Gabay* v. *Lloyd* (3), where horses were killed by reason of the breaking down of the partitions which separated them, in consequence of the agitation of the ship in a storm. So, here, the loss arose from damage sustained by the meat in consequence of its being knocked about in the storm.

[MONTAGUE SMITH, J. The case states that the pigs and beef were in no degree affected or injured by the sea-water or by the storm or tempest, but became putrid by the retardation and delay of the voyage. The present case more nearly resembles *Tatham* v. *Hodgson*. (4) There, upon an insurance of slaves against perils of the sea, their death by failure of sufficient and suitable provisions, occasioned by extraordinary delay in the voyage from bad weather, was held not to be a loss within the policy.]

The loss here was the proximate result of the bad weather which the vessels encountered. Speaking of the general clause, "and of all other perils, losses, and misfortunes," &c., Mr. Arnould (2 Arnould

(1) 6 Ex. 451; 20 L. J. (Ex.) 254.
(2) 5 B. & A. 107.
(3) 3 B. & C. 793.
(4) 6 T. R. 656.

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on Insurance, 3rd ed. p. 727), says: "This general and sweeping clause, it is now decided, covers other cases of marine damage of the like kind with those specially enumerated, and occasioned by similar causes."

[KEATING, J., referred to *Ionides* v. *Universal Marine Insurance Company*. (1)]

Sir G. Honyman, Q.C., contrà. Underwriters do not insure against mere delay of the voyage caused by change of wind or the prudence of the captain in avoiding foul weather: *Everth* v. *Smith* (2); *Philpott* v. *Swann*. (3)

KEATING, J. Mr. Beasley has referred us to every authority which could at all favour the view he wished to present; but they do not, in my opinion, go far enough to sustain his argument. The facts stated in the case shew beyond a doubt that the proximate cause of the loss of the meat was the delay in the prosecution of the voyage. That delay was occasioned by tempestuous weather: but no case that I am aware of has held that a loss by the unexpected duration of the voyage, though that be caused by perils of the sea, entitles the assured to recover upon a policy like this. I think we should be establishing a dangerous precedent if we were to give effect to Mr. Beasley's argument, seeing that there are so many cargoes which are necessarily affected by the voyage being delayed. I am not disposed to create such a precedent. I think our judgment ought to be for the defendant.

MONTAGUE SMITH, J. I am of the same opinion. The loss here has arisen in consequence of the putrefaction of the meat from the voyage having been unusually protracted. That is a loss which does not fall within any of the perils enumerated in this policy. To render the underwriters liable, it must be shewn that the loss is proximately due to one of the known perils. Retardation or delay of the voyage is not one of them. The case states that the meat was not affected by the sea or by the storm. It was not, therefore, as Mr. Beasley wished us to assume, damaged

(1) 14 C. B. (N.S.) 259; 32 L. J. (C.P.) 170.

(2) 2 M. & S. 278.

(3) 11 C. B. (N.S.) 270; 30 L. J. (C.P.) 358.

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by knocking about. If it had been, the case might have been brought within the principle of *Lawrence* v. *Aberdein* (1), and *Gabay* v. *Lloyd.* (2) But the statement in the case precludes us from drawing any such inference. If we were to hold that a loss by delay, caused by bad weather or the prudence of the captain in anchoring to avoid it, was a loss by perils of the sea, we should be opening a door to claims for losses which never were intended to be covered by insurance, not only in the case of perishable goods, but in the case of goods of all other descriptions. By the common understanding both of assured and assurers, delay in the voyage has never been considered as covered by a policy like this. I therefore agree that our judgment should be for the defendant.

BRETT, J. I am also of opinion that damage to goods caused by delay of the voyage, though the consequence of stormy and tempestuous weather, is not one of the perils covered by an ordinary policy. Such damage must have occurred many times, and yet no trace is to be found of such a claim being maintained. If it be desired, a clause may easily be inserted in the policy to meet the case.

Judgment for the defendant.

Attorneys for plaintiff: *Lewis & Sons.*
Attorneys for defendant: *Ellis, Parker, & Clarke.*

(1) 5 B. & A. 107. (2) 3 B. & C. 793.

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Feb. 11.

SPEDDING *v.* THOMAS NEVELL.

Vendor and Purchaser; Measure of Damages on Breach of a Contract for a Lease—Principal and Agent; False Representation of Authority.

The plaintiff being in the occupation of a house and shop, as assignee of a term which would expire on the 25th of March, 1867, at a rent of 65*l.* a year, the defendant (who had for several years acted as agent for the freeholder, in the receipt of the rents of the property), on the 16th of November, 1863, agreed in writing, "on behalf of his brother" (the freeholder), to grant the plaintiff, at the expiration of the existing term, a renewed lease for twenty-one years, at a rent of 70*l.* a year, and upon terms slightly varying from those of the former lease, the plaintiff contracting in the meantime to modernize the house by putting in a new shop-front at her own expense.

The plaintiff put in a new shop-front at an expense of 50*l.*, and expended 10*l.* more in permanently improving the premises; and, on the 28th of June, 1865, she contracted with one Budd to sell him all her interest in the existing and future leases for a premium of 150*l.*, Budd taking the shop-fixtures and stock at a valuation. Budd was let into possession under this agreement, and paid the premium, &c. Neither the defendant nor his brother had notice of this agreement.

The defendant had no authority from his brother to make the agreement of the 16th of November, 1863; and the latter refused to ratify it. The plaintiff, who had no notice of the defendant's want of authority to make the agreement, thereupon (in conjunction with Budd) filed a bill against the defendant's brother for a specific performance. The brother in his answer denied all knowledge of the agreement; and the defendant, when before the examiner, swore that he was not authorized by him to enter into it: the plaintiff's bill was consequently dismissed with costs, which were paid by her.

Budd, who had been turned out of possession, brought an action against the plaintiff upon her contract with him, and on a reference recovered damages to the amount of 280*l.*, which was made up as follows:—205*l.* assessed by the arbitrator as the value of the lease; 22*l.* 10*s.* for the loss incurred by Budd on the re-sale of fixtures which he had brought upon the premises; 35*l.* for loss of business by removal; 17*l.* 10*s.* for solicitor's charges. These damages, together with the costs of the action and reference, were paid by the plaintiff:—

Held, that the plaintiff was entitled to recover against the defendant all the costs paid and incurred by her in the Chancery suit, and also the value of the lease which she had lost through the non-performance of the agreement of the 16th of November, 1863 (assumed to be 205*l.*); but not the damages and costs which arose out of her agreement for the re-sale of the lease to Budd, these not necessarily or naturally resulting from the wrongful act of the defendant, and consequently being too remote.

THE first count of the declaration set out an agreement by the defendant, as agent for one James Nevell, his brother, for the renewal of a lease to the plaintiff of a house, shop, and premises in

Ebury Street, Pimlico, and averred that the plaintiff, relying upon and in pursuance of the same, laid out money in modernizing the house and shop, and entered into an agreement with one Budd to sell him all her interest in the unexpired term of the existing lease and in the lease to be granted in pursuance of the agreement; and alleged for breach that the defendant and his brother refused to renew the lease, whereby the plaintiff was incapacitated from performing her agreement with Budd, and was obliged to pay him damages and costs, and also incurred costs in a Chancery suit instituted by her against James Nevell for specific performance of the defendant's agreement.

The second count was for a false and fraudulent representation by the defendant that he was authorized by his brother to enter into the agreement set out in the first count, whereby the plaintiff was induced to spend money upon the premises, and to incur costs, &c.

The third count alleged that, in consideration that the plaintiff would enter into a contract with the defendant as and assuming to be agent of his brother for the renewal of the lease by the latter on the terms set forth in the agreement, the defendant promised the plaintiff that he was authorized by his brother to make the contract for him as agent; that the plaintiff did enter into the contract, and spent large sums of money, &c.; but that the defendant was not authorized as such agent as aforesaid, and that by reason thereof the plaintiff was not able to enforce the performance of the contract, and was put to expense, &c.

Pleas, traversing every allegation in the several counts. Issue thereon.

The following case was stated by an arbitrator for the opinion of the Court:—

1. The plaintiff, Mrs. Spedding, on the 16th of November, 1863, was in occupation of a house and shop and premises, No. 23, Ebury Street, Pimlico; Mr. James Nevell, the defendant's brother, being the freeholder. The plaintiff was equitably entitled or interested in the premises for the residue of a term of twenty-one years created by a lease granted by James Nevell to William Fuller, dated the 30th of May, 1846, and expiring on the 25th of March, 1867. On the 18th of February, 1867, the plaintiff became

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assignee, by a legal assignment, of the residue of the said term then unexpired.

2. The defendant had for several years previous to and during the year 1863 acted as the agent of his brother, James Nevell, in the receipt of the rents of the house and premises in question and of other property. The plaintiff, being desirous to obtain a renewal of the lease of the premises, applied to the defendant to obtain such renewal from his brother; and afterwards, on the 16th of November, 1863, the defendant, assuming to have his brother's authority, agreed on his behalf so to do, and made and signed an agreement (duly stamped) as follows:—

"5, Eccleston Street, 16th Nov. 1863.

"Madam,—I undertake, on behalf of my brother, Mr. James Nevell, to renew to you the lease of house No. 23, Ebury Street, Pimlico, at the expiration of the term, of twenty-one years from such period, at the rental of 70*l.* per annum, being an increase of 5*l.* per year, upon the following conditions, viz. that you modernize the house by putting in a new shop-front at your sole cost and expense; the terms of the present lease to be the terms of the renewed one, with this exception, that the words 'or wine, spirit, and beer-merchant' be added to the list of restricted trades mentioned therein, to any of which it will be contrary to your agreement to let the shop or house during any part of your tenancy.

"Mrs. H. Spedding. (Signed) "Thomas Nevell."

3. The defendant had no authority from his brother, express or implied, to make any such agreement.

4. The plaintiff, shortly after the making of the agreement of the 16th of November, performed the said agreement by putting in a new shop-front, at an expense of 50*l.*, and she also expended a further sum of 10*l.* in permanently improving the house, shop, and premises.

5. By an agreement dated the 28th of June, 1865, made between the plaintiff of the one part and George Budd of the other part, the plaintiff, in consideration of 150*l.* to be paid, and which was in fact paid, by Budd to her, agreed to sell to Budd all her interest in the term then unexpired under the lease of the 30th of May, 1846, and also in the lease to be granted to her pursuant to the agreement of the 16th of November, 1863; and she thereby agreed to

take up the lease so to be granted to her, and assign the same to Budd. By this agreement [a copy of which was annexed to the case] the plaintiff contracted to sell all her interest in the existing term, and also all her interest in "a lease proposed and promised to be granted to her from the 25th of March, 1867, for a term of twenty-one years, at the rent of 70*l.*" &c., for the sum of 150*l.*; Budd further agreeing to take the shop-fixtures and stock in trade at a valuation; and the plaintiff undertaking to use her best endeavours to obtain the lease to be made direct to Budd, and, failing to do so, to take the same herself, and (at her own expense) to assign the same immediately to Budd.

6. James Nevell refused to perform the agreement of the 16th of November, 1863; and on or about the 10th of January, 1867, he gave notice, by his solicitor, that he should require possession of the premises upon the expiration of the term created by the lease of the 30th of May, 1846. No lease has been granted, in pursuance of the agreement of the 16th of November, 1863, to the plaintiff or any other person. Budd was at the time of the expiration of the lease of the 30th of May, 1846, in the occupation of the premises, and carrying on a trade and business therein. James Nevell permitted Budd to continue in such occupation until Christmas, 1867. When Budd ceased the same, James Nevell took possession thereof, and shortly afterwards granted a lease of the premises to one Thomas Perry, at a rent of 100*l.* per annum.

7. James Nevell having so refused to perform the agreement of the 16th of November, 1863, the plaintiff applied to Budd to become a co-plaintiff jointly with her in a suit to be instituted in Chancery against James Nevell for specific performance of the said agreement; and Budd consented to become such co-plaintiff, upon the plaintiff indemnifying him against all costs and expenses he might become liable to pay by reason of becoming such co-plaintiff. The plaintiff thereupon signed a written indemnity.

8. A suit was afterwards instituted in Chancery, in which the now plaintiff and Budd were plaintiffs, and James Nevell was defendant; the bill praying that James Nevell might be decreed to specifically perform the agreement and grant the plaintiff a proper lease of the house and premises for the term of years, and

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at the yearly rent, and according to the terms mentioned in the agreement; the now plaintiff stating in the said bill her readiness and willingness, and thereby offering, to perform the agreement on her part, and, on the execution and delivery of the lease to her, to execute and deliver to the defendant, James Nevell, a counterpart thereof.

9. James Nevell put in an answer to the said bill, alleging among other things that the now defendant never communicated with him on the subject of a renewal of the lease, and had no authority to enter into the agreement of the 16th of November, 1863: and the now defendant, Thomas Nevell, was called and examined upon oath as a witness on behalf of the plaintiffs in the suit, before one of the examiners of the Court. He stated, in substance, that he never communicated with his brother on the subject of renewing the lease to the now plaintiff, and that it was very wrong in him to sign the agreement of the 16th of November, 1863, that he had no authority to sign it on behalf of his brother, James Nevell, and that his said brother knew nothing about it.

10. The bill in the suit of *Spedding and Budd* v. *Nevell* was, upon the petition of the plaintiffs therein, ordered to be dismissed out of Court as against the defendant therein, with costs, to be taxed. The now plaintiff thereupon paid to James Nevell 28*l.* 13*s.* 2*d.* for his taxed costs of the said suit; and the now plaintiff incurred costs of herself and her co-plaintiff in the said suit to the amount of 70*l.* (this last-mentioned sum, if recoverable in this action against the defendant, was to be subject to taxation).

11. Budd commenced an action against the now plaintiff for damages for breach of the agreement of the 28th of June, 1865; and the said action was referred to the arbitration of A. Coxon, Esq., the costs of the cause to abide the event thereof: and the said A. Coxon having heard both parties, awarded that the now plaintiff should pay to Budd for damages 280*l.*, together with the costs of the reference and award. Mr. Coxon was examined before the arbitrator by whom this case was stated, as a witness; and he stated that the said sum of 280*l.* so awarded was made up as follows:—He found that the premises were of the annual value of 90*l.*, and he capitalized the difference between that sum and 70*l.*,

the reserved rent, on an 8 per cent. table, making 205*l.* He found that the plaintiff, Budd, had incurred a loss of 22*l.* 13*s.* 4*d.* on the re-sale of fixtures bought by him and put up on the premises. He found that the plaintiff, Budd, would sustain a loss in his business by removal therefrom, and incur expense by removal amounting to 35*l.*; and that the plaintiff, Budd, had become liable to pay for solicitors' charges, for advising him, and otherwise in and about the matters, 17*l.* 17*s.* 6*d.* And, throwing off the odd shillings and pence, Mr. Coxon awarded all those sums to the plaintiff, Budd, as damages, making in the aggregate 280*l.*

12. The now plaintiff has paid Budd the sum of 280*l.* so awarded as damages as aforesaid, together with 66*l.* 5*s.*, the taxed costs of Budd in the action and on the reference: and the now plaintiff has incurred costs to her attorney, in defending the action and attending the reference, to the amount of 80*l.* This last-mentioned sum was also to be subject to taxation.

13. Subject to the opinion of the Court, the arbitrator awarded and directed that the verdict entered for the plaintiff do stand upon each and every count in the declaration, but that the amount thereof be reduced to 584*l.* 18*s.* 2*d.*, made up as follows:—50*l.* costs of new shop-front; 10*l.* expended for permanent improvement of the premises; 28*l.* 13*s.* 2*d.* for the costs of the defendant James Nevell in the suit of *Spedding and Budd* v. *Nevell*; 70*l.* for the plaintiff's costs incurred in the suit, subject to taxation as aforesaid; 280*l.* the damages awarded and paid by the now plaintiff in the action of *Budd* v. *Spedding*; 66*l.* 5*s.* the plaintiff's costs in the last-mentioned action and of the reference; and 80*l.* the defendant's costs of the last-mentioned action and reference, subject to taxation as aforesaid.

14. The pleadings in the action were to be taken as and form part of the case.

The question for the opinion of the Court was, whether the several sums mentioned in the 13th paragraph, making together 584*l.* 18*s.* 2*d.*, or any and which of them, or any part thereof respectively, were recoverable in this action, on any count or counts in the declaration, and whether any and what deduction from the 584*l.* 18*s.* 2*d.* should be made in respect of the sum of 150*l.* paid by Budd to the plaintiff as aforesaid; it being agreed that the

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verdict should stand for the sum of 584*l.* 18*s.* 2*d.*, or for any less sum, as the Court might direct.

J. Brown, Q.C. (*Bush Cooper* with him), for the plaintiff. The plaintiff is entitled to recover the whole of the sums enumerated by the arbitrator, with the exception of the 50*l.* expended in putting in a new shop-front, and 10*l.* for permanent repairs; these must be considered as included in the assessment of the value of the new lease. As to the costs paid and incurred in the Chancery suit, she is clearly entitled to them, upon the principle laid down by this Court in *Randell* v. *Trimen* (1), and by the Court of Queen's Bench in *Collen* v. *Wright.* (2) When that suit was instituted, the plaintiff had a right to suppose that the defendant had authority from his brother to make the contract for the new lease; and she was first informed of the absence of authority by the evidence given by the defendant before the examiner. It is true that James Nevell, on the 10th of January, 1867, gave notice, through his solicitor, that he should require possession of the premises upon the expiration of the former lease; but, under the circumstances, the plaintiff was well warranted in assuming collusion between the two brothers. The defendant for the first time disclosed his want of authority when he came to give his evidence upon oath in this suit. *Collen* v. *Wright* (2) is an exactly parallel case. There, as here, all the expenses sought to be recovered were occasioned by the assertion of authority made at the time of the contract being continued and persisted in by the defendant, and bonâ fide acted upon by the plaintiff, down to the time of the commencement of the proceedings in Chancery. That was the ground upon which the judgment of the Queen's Bench was affirmed in the Exchequer Chamber. Then, as to the damages and costs in the action of *Budd* v. *Spedding.* The defendant having contracted to grant the plaintiff a renewed lease, she entered into an agreement for the sale of all her interest in the premises, and in the fixtures and stock thereon to Budd; and being, in consequence of the defendant's fraud, unable to carry out that contract, she was sued by Budd, who recovered damages against her to the amount

(1) 18 C. B. 786; 25 L. J. (C.P.) 307.
(2) 7 E. & B. 301; 26 L. J. (Q.B.) 147: in error, 8 E. & B. 647; 27 L. J. (Q.B.) 215.

of 280*l.*, besides costs, and she herself incurred other costs in defending herself in that action. All these she is entitled to recover here, as the consequences of the defendant's false and fraudulent representation.

[MONTAGUE SMITH, J. How can the plaintiff recover damages for the loss on the re-sale? Could she have recovered them from the vendor, assuming that he had title and wilfully refused to perform the contract?]

She would clearly be entitled to the value of the term. The authorities upon the subject are conveniently collected in *Lock* v. *Furze*. (1) There, the plaintiff was allowed to recover the difference in value between the term which he obtained and that which the defendant's testator had contracted to grant him; and the rule in *Flureau* v. *Thornhill* (2) was held not to apply; but that laid down in *Hopkins* v. *Grazebrook* (3), *Robinson* v. *Harman* (4), and *Pounsett* v. *Fuller* (5), was adopted by the Court. Damages for the loss of the bargain were also allowed to be recovered in *Engel* v. *Fitch*. (6) After an elaborate review of the authorities, Cockburn, C.J., in the last-mentioned case (7), says: "There is nothing in the nature of real property which, either on technical or general grounds, should take a contract for the sale of real estate out of this general rule, with one single exception, viz. that, owing to the state of the law as to real property, the undoubted owner of an estate often finds, unexpectedly, difficulty in making out a title, which he cannot overcome; if, an obligation to make out title being implied on every such contract, the opposite party rejects the title and repudiates the contract, it seems not altogether unreasonable that he shall be entitled to no more than the return of the deposit, if any, and the expense of investigating the title. . . . But the limit of the exception is to be found in the reason on which it is based: the reason ceasing, the rule should also cease. It can properly have no application where the non-performance of the contract arises, not from a difficulty as to title, but from the fact of the party who engages to sell not having

(1) 19 C. B. (N.S.) 96; 34 L. J. (C.P.) 201.
(2) 2 W. Bla. 1078.
(3) 6 B. & C. 31.
(4) 1 Ex. 850.
(5) 17 C. B. 660; 25 L. J. (C.P.) 145.
(6) Law Rep. 3 Q. B. 314.
(7) Law Rep. 3 Q. B. at p. 330.

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first secured to himself the property in the thing of which he takes on himself to dispose. In such case, there seems no sound reason why the consequences which arise on a breach of contract on the sale of goods should not equally attach." The decision in *Williams* v. *Reynolds* (1), which will probably be relied on for the defendant, proceeded upon the principle that, upon the seller's refusal to complete the contract, the buyer might have gone into the market and purchased other goods. That principle does not apply to the case of a contract to grant a lease.

[MONTAGUE SMITH, J. Has the arbitrator properly assessed the value of the term? He has adopted Mr. Coxon's valuation as between the plaintiff and Budd. The true question here is, what has the plaintiff lost through the defendant's misrepresentation: *Simons* v. *Patchett*. (2) As to the other damages, and the costs of Budd's action, those clearly are too remote.

KEATING, J. The plaintiff cannot recover against the defendant larger damages than she could have recovered against his principal, if he had had one.]

In *Smith* v. *Compton* (3), the defendant conveyed premises to the plaintiff, and covenanted for good title: an action of formedon was afterwards brought against the plaintiff by one having better title, and the plaintiff compromised that action for 500*l*.; and it was held that he might, in an action for breach of covenant, recover the whole sum so paid, and his costs as between attorney and client in the compromised suit, though he had given the defendant no notice of that suit. *Wrightup* v. *Chamberlain* (4) also shews that, where the costs are reasonably incurred, they are recoverable. Besides, here is a count in tort: and there is no reason why the measure of damages should be narrowed in the case of a wrongdoer. It is the fraud of the defendant which has occasioned all this loss to the plaintiff. It was impossible to assess the damages which Budd had sustained without the intervention either of a jury or an arbitrator. The absence of notice could at the most only be ground for contending that the plaintiff had not done the best she could.

Quain, Q.C. (*Cookson* with him), for the defendant. Upon the

(1) 6 B. & S. 495; 34 L. J. (Q.B.) 221.
(2) 7 E. & B. 568; 26 L. J. (Q.B.) 195.
(3) 3 B. & Ad. 407.
(4) 7 Scott, 598.

authority of *Collen* v. *Wright* (1), it may be conceded that the plaintiff was entitled to a verdict upon the count for breach of warranty. But there is no ground whatever for inferring fraud. Having for many years acted as agent for his brother, the defendant not unnaturally thought there would be no difficulty in getting him to renew the lease upon the more advantageous terms offered.

[BRETT, J. It is not usual to refer a case to arbitration, unless the charge of fraud is withdrawn.

MONTAGUE SMITH, J. The defendant must have known at the time he entered into it, that he had no authority from his brother to make the agreement. The propriety of the verdict, however, is not referred to us, but only the question of damages.]

In *Collen* v. *Wright* (1) the defendant persisted, down to the time of the commencement of the Chancery proceedings, in asserting that he had the authority which he professed to have: and that was the very ground of the judgment of Willes, J., in the Exchequer Chamber. Here, however, there is no such finding; which affords a material distinction between the two cases. If the plaintiff chose to commence proceedings against James Nevell, without inquiry of any kind, *Collen* v. *Wright* (1) is an authority to shew that she is not entitled to charge the defendant with the costs of those proceedings. As to the damages and costs paid to Budd, there is no pretence for imposing those upon the defendant. The utmost the plaintiff can in any view be entitled to is, the loss she has sustained by not getting the renewed lease she bargained for. She must abide the loss incurred by her having improvidently contracted for the resale of the lease before she had secured it. It is a damage too remote to charge upon the defendant; it could not have been in the contemplation of the parties at the time of making the contract. The plaintiff may be entitled to recover the 50*l.* and 10*l.* which she expended on the premises upon the faith of the agreement for a renewed lease, but not the value of the term in addition. This, indeed, is conceded. If she be entitled to the value of the term which she has lost, it must be upon the principle laid down in the cases already referred to, which have engrafted an exception upon the rule in *Flureau* v. *Thornhill* (2), all of

(1) 7 E. & B. 301; 26 L. J. (Q.B.) 147: in error, 8 E. & B. 647; 27 L. J. (Q.B.) 215.
(2) 2 W. Bla. 1078.

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which turned upon fraud or wilful misconduct; the vendor knowing he had no title, or, having title, wilfully and improperly refusing to convey. Then, assuming that the plaintiff is entitled to damages for the loss of the term, what are those damages to be? There is no finding as to that: all that appears in the case is, that Budd recovered 280*l.* damages against her, and that in that action the arbitrator assessed the loss of the term to Budd at 205*l.*

[MONTAGUE SMITH, J. There is some evidence, as against the defendant, that the premises were worth 100*l.* per annum. If so, the arbitrator, if he adopted the mode of valuation suggested by Mr. Coxon, should have capitalized the difference between 70*l.* a year and 100*l.*]

Smith v. *Compton* (1) and *Wrightup* v. *Chamberlain* (2), have no very serious bearing upon the question. The costs of Budd's action cannot be allowed in any event. Having no defence, the plaintiff should not have allowed those costs to be incurred. The other damages awarded to Budd fall within the same category.

J. Brown, Q.C., in reply.

KEATING, J. This is an action in which the plaintiff charges the defendant with having assumed to be the agent of his brother, James Nevell, and entering into a contract with her for the renewal of a lease of which she was possessed for the residue of a term of years, the reversion being in the defendant's brother, whereas he was not such agent, and also with having falsely represented that he had authority to make the contract; and the plaintiff claims damages for the false representation of authority, and for the loss of the term. It appears that, by an agreement of the 16th of November, 1863, the defendant contracted, on behalf of his brother, James Nevell, to grant the plaintiff a renewed lease for twenty-one years, at the expiration of the then existing term, at a rent of 70*l.* per annum, which was an advance of 5*l.* per annum on the rent theretofore paid, and subject to certain other conditions. The defendant in fact had no authority from his brother to make such contract. But the plaintiff, assuming that the defendant had authority, on the 28th of June, 1865, entered into an agreement to dispose of her

(1) 3 B. & Ad. 407. (2) 7 Scott, 598.

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interest in this agreement for a lease to one Budd for 150*l.*, and at a rent of 70*l.* per annum. When the time arrived for the granting of the new lease, James Nevell repudiated his brother's authority, and declined to renew; and at the expiration of the original term, Budd, who had been let into possession by the plaintiff, was turned out, and James Nevell granted a lease to another person at a rent of 100*l.* per annum. The plaintiff, thereupon, in conjunction with Budd, commenced a suit in Chancery against James Nevell to enforce specific performance of the agreement of the 16th of November, 1863. James Nevell, in his answer, alleged that the now defendant never communicated with him on the subject of the renewal of the lease, and had no authority to make such agreement for him; and the now defendant, who was examined as a witness, also swore that he had no authority to sign the agreement on behalf of his brother. As far as appears from any finding in the case, that was the first time it was brought to the knowledge of the plaintiff that the defendant had falsely represented that he had an authority which he did not possess. It was much pressed by Mr. Quain that it does not appear that he had not before that disclosed the fact of his want of authority. We cannot infer that before the revelation in the Chancery suit the plaintiff had any information on the subject. The plaintiff's bill was thereupon dismissed. Budd then brought an action against the plaintiff upon the agreement which she had entered into with him, and upon a reference recovered damages and costs. The plaintiff also incurred costs in defending that action. That being so, the plaintiff has brought this action against the defendant, who was the cause of all the mischief; and she divides her claim into several branches. In the first place, she claims to be entitled to the costs which she was compelled to pay and has incurred in the suit instituted in Chancery. I am of opinion that, so far as those costs are concerned, her claim is well founded. Mr. Quain has very strongly urged that the case is not within either *Collen* v. *Wright* (1), or *Randell* v. *Trimen* (2), because there was no persistence by the defendant in his false representation, as there was in those cases. There is nothing, however, in the case, as stated by the arbitrator, to shew that the defendant

(1) 7 E. & B. 301; 26 L. J. (Q.B.) 147: in error, 8 E. & B. 647; 27 L. J. (Q.B.) 215.
(2) 18 C. B. 786; 25 L. J. (C.P.) 307.

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ever recalled his false statement that he had authority to contract on behalf of his brother, until his evidence was taken before the examiner in the Chancery suit.

Next, the plaintiff claims to be placed in the same situation as she would have been in if the contract had been fully carried out; in other words, she claims to be entitled to recover damages commensurate with the value of the lease which she would have had if the defendant had had authority from his brother to enter into the agreement of the 16th of November, 1863. I am of opinion that the plaintiff is, under the circumstances, entitled to recover against the defendant the value of the term. That value might be ascertained in various ways. It appears that the plaintiff had contracted to assign her interest in the renewed lease to one Budd for 150*l.*, and upon certain other terms mentioned in the agreement. Being unable to carry out that contract, an action was brought against her by Budd; and, upon a reference to ascertain what damages Budd was entitled to recover in that action, the arbitrator found that the annual value of the premises was 90*l.*, and, capitalizing the difference between that sum and 70*l.*, the rent to be reserved by the lease, he assessed the value at 205*l.* It may be that the arbitrator has taken too low an estimate, seeing that the premises have since been let for 100*l.* per annum: but I will assume that he has correctly estimated the value, and therefore I think the plaintiff is entitled to recover the 205*l.* If, however, Mr. Quain thinks it prudent to incur the risk of going back to the arbitrator for the purpose of assessing the value of the term as between these two parties, the Court will not object to its being referred back to him. For the disposal of the question before us, it is enough to say that in my opinion the plaintiff is entitled to recover against the defendant the value of the term.

The third head of claim is this:—The plaintiff insists that she is entitled to recover as against the defendant all the costs she has incurred in consequence of the action which was brought against her by Budd, and the entire damages assessed by the arbitrator in that action. I am of opinion that she is not entitled to recover those damages and costs. I think it cannot, under the circumstances here stated (and every case of the kind must stand upon its own particular ground), be taken to have been in the contem-

plation of the parties, at the time of entering into the contract for a renewal of the lease, that this re-sale should take place. Besides, this agreement with Budd was entered into without any communication with the defendant, and without any inquiry on the part of the plaintiff, and without the knowledge either of the defendant or his brother. Now, without laying it down that such notice should have been given, it is enough to say that the absence of notice is an additional circumstance to induce me to say that this consequence of a breach of the contract could not have been in the contemplation of the parties at the time, so as to make the damages resulting from it naturally flow from the wrongful act of the defendant.

I am therefore of opinion that the plaintiff is entitled to recover upon these two heads of claim first referred to, but not upon the third. And this, I think, substantially disposes of all the questions which the arbitrator has submitted to us.

MONTAGUE SMITH, J. I am of the same opinion. The action, so far as it is founded upon contract, rests upon a warranty given by the defendant, who assumed to be acting as agent for his brother, that he was such agent. The plaintiff, relying upon that warranty, entered into a contract for the sale of her interest in the intended lease to Budd: and the defendant's brother, when applied to, refused to grant a lease. The plaintiff thereupon filed a bill for specific performance against James Nevell, the defendant's brother. The defendant was examined as a witness for the plaintiffs in that suit, and on such examination admitted that he had no authority from his brother to enter into the contract for renewal of the lease. The plaintiff's bill was thereupon dismissed, with costs; and she now seeks to recover from the defendant the costs incurred by her in that suit, as well as those which she was compelled to pay to the then defendant and also to her co-plaintiff, Budd, who became a party to the suit under an indemnity. Mr. Quain contends that the case differs from *Collen* v. *Wright* (1), where such costs were held to be recoverable against a person who had in a similar manner falsely represented himself to be authorized as agent to contract for the grant of a lease, because in that case the defendant had down to the time of the filing of the bill persisted in asserting that

(1) 7 E. & B. 301; 26 L. J. (Q.B.) 147: in error, 8 E. & B. 647; 27 L. J. (Q.B.) 215.

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he had the authority which he had represented himself to have. It is quite consistent with the facts found by the arbitrator here that this defendant had done the same. James Nevell repudiated the defendant's authority; but the defendant never communicated to the plaintiff that he had no such authority, until he appeared before the examiner as a witness. Seeing the relationship of the parties, and the manner in which the defendant appeared to have acted before for his brother, I am by no means satisfied that, even if the defendant had made such a communication, the plaintiff would not have been justified in going on with the suit. Upon his evidence, the plaintiff was compelled to abandon the suit and pay the costs. I am clearly of opinion that those costs constitute a damage which naturally flowed from the contract which the defendant entered into with the plaintiff, and that she is entitled to recover them in this action.

The next question is whether the plaintiff is entitled to recover the value of the term agreed to be granted. I apprehend that in this case (though possibly not in all cases), the proper measure of damages is the same as it would be if this had been an action against the principal for refusing to carry out the agreement; because, if the defendant had possessed the authority which he represented himself to have, there would have been a binding contract for the renewal of the lease. If James Nevell had not possessed the estate, or had been insolvent, the case might have been different. But there is no suggestion that he was not perfectly solvent; and it is clear that he had title to grant the lease which the defendant contracted that he should grant. The proper measure of damages therefore must be, the loss which the plaintiff has sustained in not having a valid contract with James Nevell. To ascertain the amount of that loss, we must see what would have been the value of the lease, if granted. The case of *Simons* v. *Patchett* (1) clearly shews that the value of the estate is the proper measure of damages in this case. That was an action against the defendant for falsely assuming to have authority as agent of Rostron & Co. to contract for the purchase of a ship from the plaintiff. It turned out that the defendant had no such authority, and Rostron & Co. refused to adopt the contract. The

(1) 7 E. & B. 568; 26 L. J. (Q.B.) 195.

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plaintiff re-sold the ship for a price considerably less than that which the defendant had contracted for, and sued him for the difference. It was held that the proper measure of damages was the loss on the re-sale. Mr. Brown further says that the plaintiff, having been prevented from carrying out her contract with Budd, and having been sued by him and been compelled to pay him damages and large costs, she is entitled to recover, in addition to the value of the lease, the damages and costs which she has paid to Budd. I cannot, however, come to that conclusion. It is impossible to lay down a rule which shall govern all cases. Here, the defendant, professing to have authority as agent to do so, contracts with the plaintiff for a renewal of her lease. Did that warrant her in entering into a sub-contract for the sale of her interest in the intended lease, so as to throw upon the defendant the loss of that bargain, supposing the contract which he had entered into not to be ratified? I find no sufficient reason for holding that a re-sale of the lease may be considered to have been in the contemplation of the parties at the time of making the original contract. Upon the whole, therefore, it appears to me that the plaintiff is only entitled to recover the value of the lease, enhanced by the expenditure contemplated by the agreement itself, and that the loss upon and arising from the resale cannot be recovered. The arbitrator who decided the question of damages between Budd and the plaintiff estimated the value of the lease at 205*l.*, capitalizing the difference between 70*l.* a year which the plaintiff was to have paid, and 90*l.* a year which he considered to be the value of the premises. It is true, that is higher than the price which Budd had agreed to pay the plaintiff for the lease. But the 150*l.* which Budd agreed to pay is not necessarily to be considered as the actual value of the lease, because he further agreed to take the stock and fixtures upon the premises at a valuation; and the plaintiff might, in consideration of that stipulation, have consented to take a less sum for the lease than she would otherwise have demanded. I therefore think we may fairly take the 205*l.* as the value of the lease, and allow that sum to the plaintiff as damages for the loss of the term. If the defendant is not satisfied, he may go back to the arbitrator to have the value assessed. It seems to me that the sums I have referred to com-

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prehend the whole amount of damages which the plaintiff is entitled to recover.

With regard to the damages and costs which Budd recovered against the plaintiff in the action and under the reference, I think they fall within the principle which has led me to the conclusion that the consequences of the plaintiff's breach of contract with Budd are not to fall upon the defendant, all those consequences being too remote.

Upon the whole, I agree with my Brother Keating that the plaintiff is entitled to judgment for the sums I have mentioned.

BRETT, J. I am entirely of the same opinion, and for the same reasons.

Judgment for the plaintiff for 303*l.* 13*s.* 2*d.* (1)

Attorney for plaintiff: *Vant.*

Attorney for defendant: *G. Carew.*

Feb. 4.

[IN THE EXCHEQUER CHAMBER.]

MATTHEWS *v.* THE DISCOUNT CORPORATION.

Measure of Damages—Weight Notes on Sale of Jute—Title to Deposit after Destruction of Goods.

A. having purchased jute, warehoused it at the London Docks, paid a deposit on it, and received weight notes for it from the Dock Company, and these he deposited with B. as a security for advances made to A. by C., and B. agreed to hold them as such security. The jute having been destroyed by fire, A. applied to B. for the notes, who wrongfully gave them up to him, and A. then went to the vendor of the jute and obtained back the deposit and subsequently became insolvent and failed to repay C. his advances.

C. having sued B. for his breach of contract in delivering up the weight notes to A.:—

Held, that C. was entitled to substantial and not merely nominal damages.

THIS was an appeal from a judgment of the Court of Common Pleas, making absolute a rule obtained by the plaintiff to increase the damages from a nominal sum to 719*l.*, an amount agreed upon between the parties.

(1) Subject, as to the 70*l.* costs, to taxation.

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The facts of the case, as far as is material for the present decision, were as follows:—

In January, 1866, Messrs. Steele, Scott, & Co., who were commission agents in London, purchased of Messrs. Rathbone Brothers & Co., of Liverpool, through Messrs. Corrie & Co., their brokers, a quantity of jute, per ship *Irwell*, upon the usual terms. The purchase was on the joint account of Messrs. Steele, Scott, & Co. and the plaintiff, under an arrangement that the former were to keep the plaintiff out of cash advance, it being anticipated that the jute would be resold at a profit before the prompt day.

According to the usual terms, the jute was to be at the risk of the sellers till the prompt day.

The jute on arrival was deposited in the jute warehouse of the West India Dock Company, and weight notes were made out by the company to Messrs. Corrie & Co., the selling brokers.

Messrs. Steele, Scott, & Co., being unable to arrange for the payment of the deposit money as agreed, applied to the plaintiff, who advanced 2000*l.* for that purpose, and subsequently agreed that Messrs. Steele, Scott, & Co., should draw upon him three further bills amounting to 3300*l.*, upon the security of a portion of the weight notes, and that the bills should be discounted by the defendants, who were to receive such weight notes as security, and hold them for the plaintiff.

The defendants accordingly discounted the bills and signed receipts for the weight notes, stating that they held them for the plaintiff.

The weight notes are documents issued by the Dock Company and contain amongst other things the description and weight of the jute. Their use is shewn by the form of agreement on the back, which is as follows:—

" engage to deliver to
or order, the warrant issued by the East and West India Dock Company, for the within-mentioned goods, paying for the same on or before . Should the delivery be required before the expiration of the prompt, the weight note, must be produced at the East India Docks together with the warrant regularly endorsed, without which no delivery can take place; but after that date the warrant alone will be sufficient to obtain

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possession of the property, and this weight note will be of no validity whatever. The holder hereof is authorized to inspect and sample the goods until the expiration of the prompt on paying the usual charges."

This endorsement is signed by the selling broker, and the weight note is handed to the buyer on his paying the deposit.

The jute was destroyed by fire before the prompt day, and Messrs. Steele, Scott, & Co., then retired the bills so discounted by the defendants, who thereupon delivered up to them the weight notes, without any authority from the plaintiff.

The same day Messrs. Steele, Scott, & Co. handed the weight notes to Messrs. Corrie & Co., and received back from them the deposit.

Messrs. Steele, Scott, & Co. were at the time insolvent, and the plaintiff sustained a loss by them on the transactions to the amount of 719*l.* 9*s.* 5*d.*

Under these circumstances, the plaintiff sued the defendants in trover for the weight notes, and for their breach of agreement to hold them for the plaintiff, and the case was tried before Bovill, C.J., at the sittings in London after Hilary Term, 1867, when a verdict was found for the plaintiff for nominal damages, with leave to him to move to increase the damages to 719*l.* 9*s.* 5*d.*

A rule nisi having been obtained accordingly, by the consent of parties and the order of the Court an arbitrator was to ascertain: 1. What is the usual form, if any, of the contract for the sale of jute afloat or to arrive. 2. What is the usual form, if any, of the contract for the resale of jute afloat or to arrive; and what is the usual course, if any, adopted in subcontracts for the sale of jute with respect to the deposit made on the original contract of sale.

The arbitrator certified: 1. That there was no usual form of contract. 2. That the usual course adopted in the jute trade in sub-contracts for the sale of jute before the prompt day, is for the sub-vendor to pay his vendor the amount of the original deposit, plus or minus, as the case may be, the difference between the original price. Should the depression in the price on the re-sale be greater than the amount of the original deposit, then the sub-vendor would receive from his vendor a sum equal to the difference

between the amount of the original deposit and the total amount of depreciation.

Upon this report the Court of Common Pleas made absolute the rule to increase the damages to 719*l.* 5*s.* 9*d.*

From this judgment the defendants appealed; and the question for the opinion of the Court of Appeal was, whether or not the said rule nisi ought to have been made absolute.

Sir G. Honyman, Q.C. (*Prideaux, Q.C.*, with him), for the defendants. The plaintiff has not sustained any actual damage, for the weight notes would have given him no right to the deposit. They represent the jute, it is true, till the prompt day, and must be produced at the dock with the warrant in order to obtain a delivery of the goods; but after the prompt day the warrant alone is sufficient, and the weight notes are valueless; and they are equally so after the jute has been destroyed. The right to the return of the deposit arises from the original contract, which was between Messrs. Steele, Scott, & Co. and Messrs. Corrie & Co.; and the latter would have been bound to pay back the deposit to the former, even if they had not had the weight notes. The plaintiff, as holder of the weight notes, had purchased the contract, but he had not thereby acquired all the rights connected with it. The destruction of the jute would not necessarily give the sub-vendee any claim to the deposit; thus, if the original purchase had been for 1000*l.*, and the deposit 100*l.*, then if, the market having fallen, the sub-sale had been for 900*l.*, the sub-vendee would pay nothing, but would only become liable to pay the 900*l.* to the original seller on the prompt day; and when the goods were destroyed, it would be the original purchaser, and not the sub-vendee, who would be entitled to the 100*l.* deposited. In any case the original seller is bound to return the deposit to the person who purchased from him, and with whom alone he has any privity of contract; and the latter must then, if necessary, settle with the sub-vendor, paying over part or the whole of it, as the special circumstances may require.

[PIGOTT, B. We are sitting here as a jury, and if, in fact, Messrs. Corrie & Co. paid over the deposit to Messrs. Steele, Scott, & Co. without inquiry, because they produced the weight

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notes, a substantial loss will in fact have been occasioned to the plaintiff by the defendants' conduct.]

If Messrs. Steele, Scott, & Co. could have forced Messrs. Corrie & Co. to pay them back the deposit without producing the weight notes, the Court will not presume that Messrs. Corrie & Co. would have refused to do what they were legally bound to do, or that Messrs. Steele, Scott, & Co. would have had any difficulty in obtaining the deposit from them, if the defendants had refused to return the weight notes. If the plaintiff, on the other hand, had received the weight notes, and brought them to Messrs. Corrie & Co., they would not have been justified in paying him the deposit. If, indeed, there had really been an equitable assignment of the deposit, and express notice of it to Messrs. Corrie & Co., then, no doubt, the latter would have had a defence to any action brought against them by Messrs. Steele, Scott, & Co.: *Jeffs* v. *Day* (1); but here there was neither, and that express notice is necessary was decided in *Thompson* v. *Speirs*. (2) If there had been such an assignment and notice, Messrs. Corrie & Co. would have been bound to pay the deposit to the plaintiff, even without his producing the weight notes; and even in that case, therefore, the act of the defendants would not have occasioned the plaintiff loss. It does not follow that damages are recoverable for every loss, in fact, occasioned by the defendants' act. The cases of *Hadley* v. *Baxendale* (3), and *Roux* v. *Salvador* (4), may be cited as instances to the contrary; and the judgment of Willes, J., in *Ionides* v. *Universal Marine Insurance Company* (5) is also in point. Here the defendants' act in no way affected the legal rights of the parties in accordance with which the defendants might well presume all parties would act.

J. Brown, Q.C. (*Thesiger* with him), for the plaintiff. The purchase of the weight notes gave the plaintiff not only a right to the jute, but an equitable interest in the deposit; and if he had produced to Messrs. Corrie & Co. the weight notes and the correspondence with Messrs. Steele, Scott, & Co., they would have paid him the deposit. It is clear that, in fact, Messrs. Steele, Scott, & Co.

(1) Law Rep. 1 Q. B. 372.
(2) 13 Sim. 469.
(3) 9 Ex. 341; 23 L. J. (Ex.) 179.
(4) 3 Bing. N. C. 266.
(5) 14 C. B. (N.S.) 259, 289; 32 L. J. (C. P.) 170, 176–9.

obtained the deposit on producing the weight notes, and that they thought they could not obtain it otherwise may be inferred from the fact that they paid to the defendants 33,000*l.* in order to retire their bills and so obtain possession of the weight notes. [He was stopped by the Court.]

Sir G. Honyman, Q.C., in reply. No question arises as to what use the plaintiff could have made of the weight notes, if he had had them, for the action is not for refusing to deliver the weight notes to him, but for delivering them to Messrs. Steele, Scott, & Co.

KELLY, C.B. In this case we are called on to say whether we will reverse the decision of the Court of Common Pleas. The case is so stated as to throw upon us the necessity of forming our judgment upon questions of fact, a course which is very undesirable in appeals from the decision of the courts of Westminster Hall. We must, however, deal with it as best we can. Messrs. Corrie & Co., on receiving the deposit, handed to Messrs. Steele, Scott, & Co., who paid it, the weight notes which were the indicia, and the only indicia of the property; and the only thing that remained to be done was the payment of the rest of the price upon the prompt day by the holder of the weight notes, to whom the goods, or a warrant to receive them, would then have been delivered up. The plaintiff became interested in the purchase, and was the means of obtaining the advance of a large sum to Messrs. Steele, Scott, & Co., by which means alone they were able to make the deposit; and until the contract was carried out the plaintiff was to have the security of the weight notes, which were accordingly deposited with the defendants, to be held by them for the plaintiff. The defendants, in violation of their contract, gave up the weight notes to Messrs. Steele, Scott, & Co., who went the same day to Messrs. Corrie & Co., and gave them up to them, and demanded and received back the deposit. The plaintiff having brought this action against the defendants for their breach of contract, we have to determine whether he is entitled only to nominal damages or the whole amount of his interest in the contract. This seems to depend upon whether the plaintiff has sustained this loss by reason of the defendants having delivered up the weight notes. Let us consider then what would have happened if the defendants

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had, instead, delivered them over to the plaintiff on the happening of the fire. It is unnecessary to decide whether the plaintiff could have sued Messrs. Corrie & Co. for the deposit, because it is clear that either the latter would have paid it over to him upon his producing the weight notes, which were the indicia of the jute which had been destroyed, and he would then have retained what was due to him, and paid over the remainder to Messrs. Steele, Scott, & Co.; or else, if the deposit had been also claimed by Messrs. Steele, Scott, & Co., Messrs. Corrie & Co. would have filed an interpleader bill, and the Court would then have ordered so much of the deposit as was due to him to be paid to the plaintiff. The loss that the plaintiff has sustained seems, therefore, to flow as a natural and necessary consequence from the defendants' act. I do not enter into any other facts; but our conclusion, if it had been necessary to form one, would have been that Messrs. Corrie & Co. would not have paid over the deposit to Messrs. Steele, Scott, & Co. without the production of the weight notes. The judgment of the Court of Common Pleas, into the terms of which I do not enter, must therefore be affirmed.

MELLOR, J. I am not prepared to work out the question quite so far as my Lord has done, and it is unnecessary to do so, as the parties have agreed what the amount of the damages shall be, if they are more than nominal. I do not differ, but am not so clear as my Lord as to what the exact amount of the damages would be, apart from the agreement of the parties.

CHANNELL, B. I should have been quite content to leave the case in the way that it has been put by my Lord; but it is unnecessary to say more than that the plaintiff is entitled to substantial damages, as the amount has been agreed upon by the parties.

PIGOTT, B., HANNEN, J., and CLEASBY, B., concurred.

Judgment affirmed.

Attorneys for plaintiff: *Linklaters, Hackwood, & Addison.*
Attorneys for defendants: *Flux, Argles, & Rawlins.*

PEASE AND OTHERS, PETITIONERS; NORWOOD, RESPONDENT.
HULL ELECTION PETITION.

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Jan. 21.

PEGLER, PETITIONER; GURNEY AND HOARE, RESPONDENTS.
SOUTHAMPTON ELECTION PETITION.

Parliamentary Elections Act, 1868 (31 & 32 *Vict. c.* 125), *ss.* 6, 8, 9, 22, 26—*Amount of Security—Sufficiency of Sureties, and mode of curing an Objection to the Security—Who may be Sureties—Practice—Computation of Time.*

Section 6 of the Parliamentary Elections Act, 1868, enacts that security shall be given by the petitioner for costs to an amount of 1000*l.*, either by recognizance to be entered into by any number of sureties not exceeding four, or by a deposit of money, or partly in one way and partly in the other.

S. 8. That it shall be lawful for the respondent, where the security is given wholly or partially by recognizance, to object in writing to such recognizance, on the ground that the sureties or any of them are insufficient.

S. 9. That, if an objection to the security is allowed, it shall be lawful for the petitioner to remove such objection by a deposit of such sum of money as may be deemed to make the security sufficient.

S. 22. That two or more candidates may be made respondents to the same petition, and their case may for the sake of convenience be tried at the same time, but for all the purposes of this act such petition shall be deemed to be a separate petition against each respondent.

S. 26. That, until rules of Court have been made in pursuance of this act, and so far as such rules do not extend, the principles, practice, and rules on which committees of the House of Commons have heretofore acted in dealing with election petitions shall be observed so far as may be by the Court and judge in the case of election petitions under this act:—

Held, that security to the amount of 1000*l.* is all that can be required, though the petition is against the return of two or more members.

Held also, that the petitioners themselves cannot be sureties; but that the fact of some of them entering into a recognizance as sureties does not render the security *invalid*, but is an objection to its *sufficiency* under s. 8, and may be amended by a deposit of money pursuant to s. 9.

A recognizance having been objected to as *void*, on the ground that the sureties were four of the petitioners, the election judge at chambers refused to order the petition to be removed from the files of the Court, but held the security to be insufficient, and ordered that, if 1000*l.* should be deposited, the petition should be deemed at issue; and that, in default, the proceedings on the petition be stayed:—

Held, that the mode of questioning the order was by application to the Court in virtue of its general jurisdiction.

Sundays are not to be reckoned in computing the twenty-one days allowed by s. 6, sub-sect. 2, for filing the petition.

CHARLES MORGON NORWOOD and James Clay having been returned as members to serve in parliament for the borough of

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Kingston-upon-Hull, a petition was, on the 9th of December, 1868, presented by Joseph Walker Pease and twelve other persons, complaining of such return, and praying that the election might be declared void, on the ground of bribery, treating, and undue influence.

At the time of filing the petition, or within three days afterwards, a document purporting to be a recognizance pursuant to 31 & 32 Vict. c. 125, s. 6, sub-sect. 5, but entered into by four of the petitioners, who were described as follows,—Joseph Walker Pease, of Hessle, in the east riding of the county of York, banker, Henry Barkworth, of Tranby, in the east riding of the county of York, timber-merchant, Anthony Bannister, of Hessle aforesaid, coal-merchant, and William Leetham, of the town or borough of Kingston-upon-Hull, steam-ship owner (1),—and who each became bound in the sum of 250*l.* in respect of the costs which should become payable by the petitioners or any of them under the Parliamentary Elections Act, 1868, was also filed.

On the 16th of December, a summons was taken out on behalf of Mr. Norwood, calling upon the petitioners to shew cause before Willes, J., one of the judges appointed for the trial of election petitions under the act, why the petition should not be set aside and removed from the records of the Court, on the ground that the bond entered into as and for a recognizance to prosecute the said petition was not a recognizance in accordance with the provisions of the statute, and was wholly null and void. After several adjournments, and after consultation with Martin, B., and Blackburn, J. (the other two election judges), the learned judge made the following order:—

"Upon hearing counsel on both sides upon the summons issued herein and dated the 16th of December instant, I make no order in the terms thereof; and treating it, by arrangement, as a summons properly before me to declare the security insufficient, I declare the security to be insufficient, and I deem the sum of 1000*l.* requisite to make the security sufficient: And I order that, if 1000*l.* be deposited in the manner prescribed by the general

(1) The description of these four persons in the petition was as follows: Joseph Walker Pease, J.P., banker, Henry Barkworth, timber-merchant, Anthony Bannister, J.P., coal-merchant, William Leetham, steam-ship-owner.

rules within five days from the date of this order, not including such date, the petition shall be deemed at issue; and that, unless that amount be so deposited, all proceedings upon this petition be stayed; and that this order may be drawn up by either party."

The order was drawn up by the petitioners, and the sum of 1000*l.* was duly deposited in the Bank of England in pursuance thereof. There was an affidavit identifying the parties to the recognizance as four of the petitioners.

Mellish, Q.C., moved for a rule calling upon the petitioners to shew cause why the above order should not be rescinded, and why all proceedings upon this petition against the respondent Norwood should not be stayed.

There was a similar motion on behalf of Clay, the other sitting member.

The objections to the order in this case were, that, inasmuch as the sureties were four of the petitioners, the recognizance was an absolute nullity, and consequently that the condition imposed by s. 6, sub-sect. 4 of the statute had not been complied with; that the learned judge had no power to cure the defect by allowing a deposit of money to be made after the expiration of the three days mentioned in that section; and that, assuming he had such power, the deposit of 1000*l.*, the petition being against two members, was not enough.

Rules were moved for in several other cases involving all or some of the above points; and in one of them,—the Southampton Petition, *Pegler* v. *Gurney and Hoare*,—an additional point was taken, viz. that the petition was filed too late. In that case the return was made on the 20th of November, 1868, and the petition was not filed until the 14th of December, which would be within the twenty-one days provided by s. 6 of the statute, sub-sect. 2, if the intervening Sundays were to be excluded from the computation, but not so if they were to be reckoned.

Staveley Hill, Q.C., who moved for the rule, contended that Sunday was only to be excluded provided it were the last of the twenty-one days; and that, if the Sundays were to be excluded in computing the twenty-one days in s. 6, they must equally be excluded in computing the seven years mentioned in ss. 43, 45.

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BOVILL, C.J. These cases involve some very serious and important questions, viz. the jurisdiction of the judges at chambers, and of the Court to hear appeals from them, and also the construction of various clauses of the act of parliament, all of which are deserving of solemn argument. Rules will therefore be granted in all the cases and upon all the points except that urged by Mr. Staveley Hill in the Southampton Case as to the computation of the twenty-one days allowed for filing the petition. We are all agreed that Sundays are excluded by s. 49, which enacts that, "in reckoning time for the purposes of this act, Sunday, Christmas Day, Good Friday, and any day set apart for a public fast or public thanksgiving shall be excluded." The twenty-one days within which the petition is to be filed are to be twenty-one working days.

Rules nisi.

Sir John Karslake, Q.C. (with whom was *J. Beaumont*), shewed cause. (1) The main points to be discussed upon this rule are, whether the recognizance which has been entered into by the petitioners was a void recognizance, and whether the judge had power under ss. 8 or 9 of the Parliamentary Elections Act, 1868 (31 & 32 Vict. c. 125), to cure the defect by directing a deposit of money in lieu thereof. The petition being against two members, a recognizance has been entered into for a sum of 1000*l.* by four sureties. The judge decided that, inasmuch as the sureties were four of the petitioners, they were not proper persons to become sureties; and it would be difficult to contend that his decision was not correct. The judge, treating the objection as an objection to the sufficiency of the security, ordered that 1000*l.* should be deposited within five days; and that order has been duly complied with. Now, the recognizance, which satisfies all the requirements of s. 6 of the act, and is in the form prescribed by rule 19, is good upon the face of it, and therefore cannot be treated as a mere nullity. The 8th section of the act of 1868 very nearly follows the language of ss. 13 and 14 of 11 & 12

(1) It was arranged that one case only should be argued; and that the counsel instructed in the remaining rules should be heard to make any additional suggestions that might occur to them.

Vict. c. 98. Under that act, the recognizance (which, whatever the number of persons petitioned against, was only for 1000*l.*) was submitted to an officer called the examiner of recognizances, who heard and decided upon all objections to its validity, and reported thereon to the Speaker; and his certificate was final and conclusive: See May's Parliamentary Practice, 5th ed. pp. 602 et seq. At page 606 the following case is stated:—"On the 15th of July, 1857, after the general committee had reported the names of the members appointed to try the Falkirk election petition, a petition was presented alleging that the election petition was not the petition in respect of which the recognizance had been entered into; but, if not a new petition, had been so altered by erasures and interlineations as to render not only the recognizance null and void, but also to invalidate the petition. The House, however, considering that, if the facts alleged were true, the parties should have appeared before the examiner and objected to the validity of the recognizance, declined to inquire further into the allegations of the petition." (1) By s. 26 of the act of 1868, it is provided that, "until rules of Court have been made in pursuance of this act, and so far as such rules do not extend, the principles, practice, and rules on which committees of the House of Commons have heretofore acted in dealing with election petitions shall be observed so far as may be by the Court and judge in the case of election petitions under this act." This objection, therefore, could only be taken before the master (who seems to be substituted for the examiner of recognizances under the former practice) or a judge, under ss. 8 and 9. (2) The same tribunal which determines the

(1) 112 Com. J. 314; 146 Hans. Deb., 3rd ser. 1551.

(2) S. 8. "Notice of the presentation of a petition under this act, and of the nature of the proposed security, accompanied with a copy of the petition, shall, within the prescribed time, not exceeding five days after the presentation of the petition, be served by the petitioner on the respondent; and it shall be lawful for the respondent, where the security is given wholly or partially by recognizance, within a further prescribed time, not exceeding five days from the date of the service on him of the notice, to object in writing to such recognizance on the ground that the sureties, or any of them, are insufficient, or that a surety is dead, or that he cannot be found or ascertained from the want of a sufficient description in the recognizance, or that a person named in the recognizance has not duly acknowledged the same."

S. 9. "Any objection made to the security given shall be heard and decided on in the prescribed manner. If an objection to the security is allowed, it shall be lawful for the petitioner

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sufficiency or insufficiency of the recognizance may allow an amendment. Assuming this to be a question for the Court in the first instance, it would still be necessary to go before the master to ascertain whether the recognizance was good: it could not be treated as a nullity. Suppose the objection had been that one or more of the sureties were infants, or married women, or alien enemies, the recognizance would still be good upon the face of it. There would be a fact to be determined; and there is only one tribunal to determine it. If the question were res integra, there can be no doubt that a recognizance for one sum of 1000*l.* would be sufficient within s. 6 of the act of 1868. The only difficulty arises from s. 22, which enacts that "two or more candidates may be made respondents to the same petition, and their case may for the sake of convenience be tried at the same time, but for all the purposes of this act such petition shall be deemed to be a separate petition against each respondent." Under the old practice, the petition might be against two or more members, and yet only one recognizance for 1000*l.* was required: 11 & 12 Vict. c. 98, s. 3. And it is to be observed that the liability of the petitioners for costs is not limited to the amount of the security: 31 & 32 Vict. c. 125, ss. 41, 42.

[BYLES, J. What effect do you give to the latter words of s. 22?]

It may be that the judge who tries the petition may report against one of the respondents and not against the other. As to one he may find the petition to be frivolous, and as to the other well founded; or as to one of the respondents he may decide that the petitioner is liable for costs, and not as to the other. The only object of requiring security for the costs was to prevent frivolous and vexatious petitions being filed. The petition against two may

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within a further prescribed time, not exceeding five days, to remove such objection by a deposit in the prescribed manner of such sum of money as may be deemed by the Court or officer having cognizance of the matter to make the security sufficient. If on objection made the security is decided to be insufficient, and such objection is not removed in manner hereinbefore mentioned, no further proceedings shall be had on the petition; otherwise, on the expiration of the time limited for making objections, or, after objection made, on the sufficiency of the security being established, the petition shall be deemed to be at issue."

for many purposes be treated as separate; but there is no language in the act which warrants the implication that the security, which is altogether collateral to the petition, shall be separate.

Mellish, Q.C., and *H. James*, in support of the rule. Under the circumstances presented in this case, no security at all has been given; and the judge had no power to amend the defect under 31 & 32 Vict c. 125, ss. 8, 9. Before the passing of 11 & 12 Vict. c. 98, the objections to the sufficiency of the sureties were to be taken before the examiner of recognizances, but all objections to the validity of the recognizance were made by petition to the House of Commons. The 13th section of that act provides that any sitting member petitioned against, or any electors petitioning and admitted parties to defend the election or return, may object to any such recognizance "on the ground that the same is invalid, or that the same was not duly entered into or received by the examiner of recognizances, with the affidavit thereunto annexed as hereinbefore [s. 4] required, or on the ground that the sureties, or any of them, are insufficient, or that a surety is dead, or that he cannot be found or ascertained from the want of a sufficient description in the recognizance, or that a person named in the recognizance has not duly acknowledged the same." That provision is re-enacted in s. 8 of the act of 1868, leaving out the first ground. By s. 15, the examiner of recognizances was to decide on the objections, and his decision was to be final and conclusive; and by s. 46 a list was to be made of all election petitions in which the examiner of recognizances had reported to the Speaker that the recognizances were unobjectionable. There was no power of amendment, except by substituting a new surety for one who had died.

[BOVILL, C.J. By s. 7, no petition was to be received unless indorsed by the examiner of recognizances; so that, if there were no recognizance, the petition could never reach the House at all.]

All these things were required as conditions precedent. By s. 6, sub-sect. 4, 5 of the act of 1868, the petitioners are to give security for the payment of costs. Is a recognizance by the petitioners themselves, or some of them, a giving of *security* within those provisions? The petitioner, being already liable for costs, is to give security.

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[BOVILL, C.J. The learned judge at chambers has already decided that point in your favour, and your opponents have not argued it.]

That being so, the petitioners have not complied with the requirements of the act, for they have given no security at all.

[BOVILL, C.J. There is an instrument which purports to be a recognizance, and which is good upon the face of it. Under 11 & 12 Vict. c. 98, s. 13, unless an objection was urged against it, the examiner of recognizances would certify.]

It would have been his duty to withhold his certificate, if it appeared on the face of the recognizance that the sureties and the petitioners, or some of them, were the same persons. Sufficiency of the surety, as well in s. 8 of the act of 1868 as in rules 22 and 23, does not mean capacity to become surety, but sufficiency in point of pecuniary responsibility; and a defect of this sort can no more be amended than a default in making the deposit in the Bank of England could.

Then, as to the amount of the deposit. The first power conferred upon committees of the House of Commons for the trial of election petitions was given by 10 Geo. 3, c. 16. Between the passing of that act and 9 Geo. 4, c. 22, several acts were passed upon the subject, but the only one which spoke of a recognizance was 28 Geo. 3, c. 52, by s. 5 of which it was provided that no proceeding should be had upon any petition unless one of the subscribers entered into a recognizance in the sum of 200*l.* to appear before the committee to support the petition. So things remained until 9 Geo. 4, c. 22, s. 5, which provided that no proceeding should be had upon any such petition unless the persons subscribing the same, or one of them, should, within fourteen days after the same should be presented to the House, &c., personally enter into a recognizance in the sum of 1000*l.*, with two sureties in the sum of 500*l.* each, or four sureties in the sum of 250*l.* each, for the payment of all costs, &c. There was no power under the act to recover costs to a greater extent than the amount mentioned in the recognizance. The 2 & 3 Vict. c. 38, and 4 & 5 Vict. c. 58, left the amount of recognizance, and the petitioner's liability to costs, as before. Then came 11 & 12 Vict. c. 98, by s. 3 of which it was enacted that the recognizance should be by one, two,

three, or four persons as sureties for the person subscribing the petition, for the sum of 1000*l.* in one sum, or in several sums of not less than 250*l.* each, "for the payment of all costs and expenses which, under the provisions hereinafter contained, shall become payable by the person subscribing the petition to any witness summoned on his behalf, or to the sitting member, or other the party complained of in such petition, or to any party who might be admitted to defend such petition, as hereinafter provided." And s. 6 enabled the petitioner to deposit money in lieu of entering into a recognizance. That act for the first time made the petitioner liable for *all* the costs where the petition was adjudged to be frivolous and vexatious. In like manner, by the act of 1868, s. 41, the costs of the petition are to be defrayed by the parties as the judge may in his discretion determine; and by s. 42, the recognizance is to be estreated on default of payment. If the recognizance does not in all respects comply with the statute, it is no security at all. Sect. 22 of the act of 1868 enacts that "two or more candidates may be made respondents to the same petition, and their case may, for the sake of convenience, be tried at the same time; but, for all the purposes of this act, such petition shall be deemed to be a separate petition against each respondent." If the petition is to be deemed separate *for all the purposes of the act*, it must be so for the purpose of the security; otherwise, gross injustice will be done. There may be a petition against *four* members, each requiring a different time and mode of trial, and the costs of the first respondent may exhaust the whole security, if there is to be but one deposit of 1000*l.* to meet the costs of all.

[BOVILL, C.J. The express enactment in s. 6 is, that "the security shall be to an amount of 1000*l.*" It is only by inference from the language of s. 22 that it is sought to be enlarged.]

The section assumes that there may be a separate petition against each.

Then, as to the power of amendment under s. 9. It is said that any objection to the validity of the recognizance must be taken under s. 8. The meaning of that section, however, is, that objections to the pecuniary sufficiency or ability of the sureties shall be taken in the manner therein pointed out. This was clearly the construction of s. 13 of 11 & 12 Vict. c. 98. In all the acts prior

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to 11 & 12 Vict. c. 98 there was no power to amend at all. The petitioner, as a condition to the reception of his petition, was to enter into a recognizance with *sufficient* sureties. In the year 1848, a difficulty occurred in the case of the Cheltenham Petition (1), the words "and each of the" being omitted from the condition of the recognizance. It was found that the examiner of recognizances had no power to deal with the objection. A commission accordingly sat, and they went fully into the question of recognizances; and the result was the passing of a temporary act, 11 & 12 Vict. c. 18, which, after reciting those doubts, proceeded to enact in s. 1 that the person or persons petitioned against might six days before the day appointed for choosing the committee to try the petition give "notice in writing that a preliminary objection would be made before such select committee to the form or substance of the recognizance or recognizances entered into by or on behalf of the petitioner or petitioners against such return; provided that the ground or grounds of such objection be not such as would, under the recited act (7 & 8 Vict. c. 103) have entitled any sitting member petitioned against to object to the sureties or any of them who should have entered into such recognizance or recognizances, and that the grounds of objection be stated in such notice." And s. 2 enacted that, "in all cases in which such notice of objection shall have been delivered in as aforesaid, the select committee chosen to try the petition to which such notice relates shall in the first instance inquire into and decide upon such preliminary objection;" "and, if such select committee should be of opinion that such recognizance was good and valid for all the intents and purposes of the recited act, such committee should decide that the same was good, and should thereafter proceed to try the merits of the return or election the petition relating to which should have been referred to them; and if such committee should be of opinion that the recognizance objected to was void, and that such invalidity was in any degree attributable to the neglect or laches of the petitioner or the party or parties entering into such recognizance, or their or any of their agents, then the committee should report to the House accordingly, and no further proceedings should be had upon such petition, and the order refer-

(1) May's Parliamentary Practice, 5th ed. 605.

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ring the same to such select committee should be discharged." But by s. 17 of 11 & 12 Vict. c. 98, the report of the examiner of recognizances upon the validity of a recognizance is "final and conclusive to all intents and purposes." Under s. 13 of that act, the grounds of objection allowed to be urged against the recognizance were that the same was *invalid*, or was not duly entered into or received by the examiner of recognizances, or that *the sureties or any of them were insufficient*, or that a surety was dead, or that he could not be found or ascertained from the want of a sufficient description in the recognizance, or that a person named in the recognizance has not duly acknowledged the same. If any one of these objections (except the death of a surety, which by s. 16 might be cured by a deposit of money,) was sustained, the petition was gone, and there was no power of amendment. Unless all the requisites of s. 6 of the act of 1868 are duly complied with, the petition never can be at issue. A strict compliance with them within the prescribed time is as imperative as is the giving notice of appeal against a decision of justices within the three days, under 20 & 21 Vict. c. 43, s. 2. (1) The objection here was, not to the sufficiency of the security, but to the absence of sureties. It is impossible to estimate the sufficiency of a thing which does not exist.

Notwithstanding the form in which the summons was indorsed by the judge, nothing passed at chambers which ought to preclude the respondents from urging these objections by way of appeal.

[BOVILL, C.J. Certainly not.]

Manisty, Q.C., Huddleston, Q.C., O'Brien, Serjt., Nasmyth, Cave and *Beaumont*, were heard in support of, and *Sir P. Colquhoun, Q.C., Price, Q.C., O'Malley, Q.C., Jelf, Herschel, Gates* and *Jeune*, against similar orders made by Willes, J., in other petition cases.

BOVILL, C.J. We have already, during the progress of the argument, intimated our opinion that the parties are not precluded by anything that passed at chambers from coming to the Court by way of appeal against the order made by my Brother Willes.

(1) See *Peacock* v. *The Queen*, 4 C. B. (N. S.) 264.

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The questions which we have had to consider arise upon the construction to be put upon some sections of the Parliamentary Elections Act, 1868, 31 & 32 Vict. c. 125. We have found great difficulty, looking at the language of the act, and comparing one section with another, in discovering the meaning of the legislature; and I am by no means certain that the conclusion we have arrived at is the correct one. It is, therefore, with some hesitation that I express the opinion which I have formed, and which seems to me in some measure to solve the difficulty.

The first question is, whether, where the petition is against two or more members whose election is complained of, the security to be given by the petitioners under s. 6 is to be to the amount of 1000*l.* only, or whether the statute requires it to be for 1000*l.* in respect of each member petitioned against. In considering that question, we must not disregard the previous legislation and the practice which prevailed on the trial of election petitions before the tribunal which formerly existed. According to that practice and the last act upon the subject, 11 & 12 Vict. c. 98, it seems to have been established that, although the petition might be against the return of two or more members, one security for 1000*l.* alone was required: and, by s. 26 of the Parliamentary Elections Act of the last session, it is expressly enacted that, "until rules of Court have been made in pursuance of this act, and so far as such rules do not extend, the principles, practice, and rules on which committees of the House of Commons have heretofore acted in dealing with election petitions, shall be observed so far as may be by the Court and judge in the case of election petitions under this act." The principal object of the late act was, to substitute a new tribunal for the trial of these petitions in lieu of the committees of the House of Commons; and, although numerous changes are introduced by the act, they all seem to be addressed to the making provisions suitable for the new tribunal, viz. the Court of Common Pleas, and the judges appointed for the trial of election petitions pursuant to s. 11. If it had been intended to make so important a change with regard to the extent of the security as that here contended for by the respondent, I should have expected to find some distinct and express enactment on the subject. But, so far as there is any specific provision, all the earlier sections of the

act throughout point to one petition and one security only. It is said, however, that s. 22 renders it necessary for the Court and the election judges to treat the petition, where there are more respondents than one, as separate petitions for all purposes. That section enacts that "two or more candidates may be respondents to the same petition, and their case may for the sake of convenience be tried at the same time, but for all the purposes of this act such petition shall be deemed to be a separate petition against each respondent." That section therefore assumes that there may be one petition against two or more respondents, and that the proceedings thereon may be continued to trial as upon one petition against all the respondents, where the same objection applies to all. In a case of that kind, it is plain that there could only be one petition and one trial. What, then, does the section mean, as applicable to such a case, when it says that "for all the purposes of this act such petition shall be deemed to be a separate petition against each respondent?" In point of fact it is not so, and cannot be made so. I have great difficulty in putting any sensible construction upon this part of the act. What are the "purposes" of the act? To test the validity of the election of the sitting members, to unseat them, and to seat other persons. For the purposes of the judgment, and the consequences that are to follow it, it may be that the petition is to be considered a separate petition against each respondent, though that construction does not meet the whole difficulty. No satisfactory solution has been offered by any of the learned counsel who have appeared for the respondents in the several cases which depend upon our judgment in this case. It was, indeed, suggested by Mr. Mellish that s. 22 applies to candidates only. But the answer to that is, that, by the interpretation clause, s. 3, "candidate" includes "member." For the purpose of the practical application of the section to the present cases, however, I do not think it necessary to attempt to define the meaning of the expression to which I have referred. The only question before us is, whether it applies to the security which is to be given. Now, the security is no part of the petition, or of the proceedings upon or under the petition: it is a matter which is wholly collateral to the petition, and is made a condition by an express and positive enact-

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ment having reference to one petition; and I cannot construe s. 22 as requiring a separate security to be given in the case of each separate respondent. As a general principle, our law does not require a plaintiff to give security for costs; and in many cases there would be as much reason for calling upon the respondent as upon the petitioner to give security for costs upon an election petition. It was probably found in former times, when political feeling ran high, that it became a habit to put forward sham petitions; and it may be that that which was at first imposed as a test of bona fides ultimately became a real security. The security, however, is not the only remedy for the costs which the respondent has. Under the old acts, the petitioners were liable for costs in certain cases. That liability was from time to time enlarged; and, under the present act (s. 42), the security is only to be had recourse to upon the failure of the petitioners to pay costs. If the deposit or recognizance was intended to be the actual and only security for the full amount of all the costs to be incurred under the petition, considerable hardship would no doubt arise where there was one security only for 1000*l.* and several respondents, especially where there were separate cases against the several respondents each requiring a different time and mode of trial, the one being comparatively inexpensive, the other involving a prolonged inquiry and large expenditure of money; and more particularly in the city of London, where there might be one petition against four members. It being perfectly clear that, down to the passing of the act of last session, one security for 1000*l.* was the limit in all cases, if the legislature had thought it right to alter it, I should have expected that they would have done so in plain and unambiguous terms, and not left it to be inferred from such language as we find in s. 22. If I am wrong in this, or if parliament think that the deposit or recognizance should be a security for the actual costs incurred, it will be for them to interfere. It may be that they may think that the respondent also should give security. We, however, cannot speculate. All we have to do is, to deal according to the best of our judgment with what the legislature has declared. Looking, therefore, at the former practice, and at the objects of this act of parliament, and seeing that there is no express enactment requiring more than one security to be given, and that

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the security is a matter collateral to the petition, I have come to the conclusion that the view taken by my Brother Willes, and concurred in by the other election judges, was right. This objection, therefore, in the principal case, as well as in all the other cases which depend upon it, fails.

The next question is, whether a recognizance entered into by some out of a larger number of petitioners is a compliance with the act of parliament, and, if not, a further question arises, as to the nature and effect of the objection, and whether it can be raised under the 8th or the 9th section of the act, and can be removed by a deposit, or whether effect is only to be given to it under the general jurisdiction of the Court. I entirely concur with my Brother Willes and the other election judges that the security must be by persons other than the petitioners themselves. The recognizance is to be "a security given on behalf of the petitioner:" s. 6: and there are many clauses in the act which point to the same construction. I am therefore of opinion that the recognizance in this and in all the other cases where it was signed by petitioners is not a compliance with the act. Then arises the question, what is the nature of the objection, and whether it is an objection to the *validity* or to the *sufficiency* of the security? In order to answer that question, it will be necessary to refer to the act which regulated the rights of the parties in this respect before the passing of the act of last session, viz. the 11 & 12 Vict. c. 98. Under s. 13 of that act, the power given to the respondent to object to the recognizance was given in these words:—"Any sitting member petitioned against, or any electors petitioning and admitted parties to defend the election or return, may object to any such recognizance on the ground that the same *is invalid*, or that the same was not duly entered into or received by the examiner of recognizances, with the affidavit thereunto annexed as hereinbefore (s. 3) required, or on the ground that the sureties or any of them are *insufficient*, or that a surety is dead, or that he cannot be found or ascertained from want of a sufficient description in the recognizance, or that a person named in the recognizance has not duly acknowledged the same." Under that section, there are two classes of objections referred to,—first, that the recognizance is *invalid* or has not been duly entered into or

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received by the examiner,—secondly, that the sureties or any of them are *insufficient*, or that a surety is dead, &c. All these objections under 11 & 12 Vict. c. 98 had to be disposed of by the examiner of recognizances. His decision was final; and there was no power of amendment, except by the substitution of a new surety in the place of one who had died. That being so, when the act of the last session was passed, certain sections were introduced with a view to objections to the recognizance being made upon various grounds: but it is somewhat remarkable that throughout the act there is no provision which expressly defines the mode in which objections to the *validity* of the recognizance are to be determined: and in s. 8, which authorizes and requires certain objections to be made, the time at which the objections are to be presented, and their nature, are distinctly stated:—"It shall be lawful for the respondent, where the security is given wholly or partially by recognizance," within a prescribed time "to object in writing to such recognizance, on the ground that the sureties or any of them are *insufficient*, or that a surety is dead, or that he cannot be found or ascertained from the want of a sufficient description in the recognizance, or that a person named in the recognizance has not duly acknowledged the same." All these objections are included in the second class mentioned in s. 13 of 11 & 12 Vict. c. 98; and I have failed to discover any reason why objections to the *validity* of the recognizance were not included in s. 8 of the late act; and it seems to me that it is only such objections as are mentioned in s. 8 that can be deemed to come within s. 9. (1) If there had been nothing in the act upon the subject, it might have been assumed that all objections to the security must be heard and decided, under the general jurisdiction, by the Court, or by a judge sitting as a judge of the Court, and not as a judge appointed under the act. Now, the language of s. 8 of the act of last session being similar to part of s. 13 of the act of 1848 (11 & 12 Vict. c. 98), I am disposed to put the same construction upon the former as was put upon the latter: and, so far as this question is concerned, it will not be necessary to refer to all the grounds of objection enumerated. I will mention only that one included in the first class of s. 13 is a ground of *invalidity*, the

(1) Ante, p. 239, note 2.

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other in the second class is a ground of *insufficiency*. Here, there was a recognizance in point of fact, and a *valid* one in the sense that it might be enforced by the ordinary remedies. Further, it is a recognizance which is good upon the face of it. It seems to be in the nature of a suretyship. It is further a recognizance which, even looking at it as the recognizance of some of the petitioners, is at all events a security for the other petitioners; and it creates a different degree of liability and constitutes an additional security for the petitioners themselves who sign it. If that be so, can it be said that it is an objection to the validity of the recognizance that the parties to it are principals as well as sureties? or that they are not sureties at all? What meaning is to be given to the word "*insufficient*?" May it include personal incapacity? I agree that it does not mean a general incapacity of entering into a suretyship, but insufficiency for the purpose of the act. Take the case of infancy: would that go to invalidity or mere insufficiency? It seems to me that it would fall within the latter. So, in the case of a married woman; she would be insufficient as a surety, because she is as a married woman incapable of contracting. Is it to be the less *insufficiency* because created by the act itself? I can understand that if any illegality conclusively appears upon the face of the recognizance, it may amount to no recognizance at all. It does not appear with certainty that the four persons who signed this recognizance were four of the petitioners; indeed, the names and descriptions upon the two documents are not identical. And, even if they were, does that make the recognizance *invalid* on the face of it? It seems to me that the utmost that can be said is, that it is a presumption of fact that they are the same persons. Then, if it be a presumption of fact, it is liable to be rebutted by contrary evidence; and there must be some tribunal before which the fact is to be tried. What right have the respondents to ask to have the recognizance taken off the file, or that they may be relieved from the petition? The recognizance is to my mind valid as a recognizance, but liable to be objected to on the ground that the parties who have entered into it are principals as well as sureties. It seems to me that this objection is one which goes only to the *sufficiency* of the sureties; and in that view it is an objection which falls expressly within

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s. 8 of 31 & 32 Vict. c. 125. If so, it must equally come within s. 9; and then the objection may be removed by making a deposit under that section. This is the view which was taken by my Brother Willes and the other election judges: and I am of opinion that they were right in so deciding. The consequence is, that a sum of 1000*l.* having been duly deposited in pursuance of the order, the objection to the recognizance fails, and the petition must be allowed to proceed.

The points which have been argued upon these rules were undoubtedly points of grave difficulty; and it is not without considerable doubt and hesitation that I have come to this conclusion as to the proper construction of the act of parliament. The matters were very properly brought to the attention of the Court: and, under the circumstances, I think justice will substantially be done by discharging the several rules without costs.

BYLES, J. I am of the same opinion. So thoroughly do I coincide in all that has fallen from my Lord that I will only add a very few words. This act of parliament, like many others, is somewhat difficult to construe; and some liberality must be exercised in interpreting some of its words. The legislature, however, require us, difficult as it may be, to construe it, and to take their general intention, so far as we can gather it from the act itself, as a guide to conduct us through its dark passages. The first question is whether, where the petition is against a plurality of members, one security or deposit of 1000*l.* is enough, or whether there must be as many securities of that amount as there are members petitioned against. Under the old practice, it seems, one single security for 1000*l.* was enough; and s. 26 of the Parliamentary Elections Act, 1868, obliges us to abide by the old practice unless and until it is altered by some new rule. And by the plain words of s. 6, sub-sections 4 and 5, it is provided that, at the time of the presentation of the petition, or within three days afterwards, security for the payment of all costs, &c., that may become payable by the petitioner to the member (which, by force of 13 & 14 Vict. c. 21, s. 4, may be read "members") whose election or return is complained of, shall be given on behalf of the petitioner "to an amount of 1000*l.*" We are asked to double the amount of

the security in the case of a petition against two members, to treble it where there are three members petitioned against, and to quadruple it where there are four, as there may be in the city of London. Before we do this, we certainly ought to be satisfied that there is some clear and positive enactment to warrant it; especially since the legislature has admitted a lower class of persons to the position which qualifies them to be petitioners. The difficulty, if there be any, is introduced by s. 22, which provides that two or more candidates may be made respondents to the same petition, and their case may for the sake of convenience be tried at the same time; but that, "for all the purposes of this act, such petition shall be deemed to be a separate petition against each respondent." I am not sure that the qualification in the last passage does not apply simply to when the cases of the two or more respondents are tried together. But, if it is intended to apply to the petition in general, it clearly does not apply to the recognizance, which is a condition precedent to the definitive reception and prosecution of the petition. I entertain no doubt whatever that a security for 1000*l.* is enough in every case. The next question,—as to the power to amend by ordering a deposit of money upon an objection to the sufficiency of the security,—is one of more difficulty. This depends in great measure upon the particular expressions used in s. 8, which provides that it shall be lawful for the respondent, where the security is given wholly or partially by recognizance, to object to such recognizance, "on the ground that the sureties, or any of them, are insufficient," &c., and upon the 9th section, which provides that the objection may be removed by the deposit of such a sum of money as will make the security sufficient. The language of s. 8 would perhaps have been more accurate if the word used had been "incompetent" or "improper." Insufficiency here must not be read in the sense of defect of pecuniary ability, but as conveying that the sureties are persons who ought not to be sureties; for example, infants, married women, and foreigners residing abroad, would no doubt be deemed insufficient. It is, I think, enough to bring the case within the healing efficacy of the act, if the sureties are persons who, although they ought not to be sureties, are persons who have honestly undertaken the full liability of sureties, and are able to fulfil their engagement; especially if,

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as in this case, the security on the face of it is good, and could not be decided by the master to be bad without an inquiry. It is true there are here several sureties and several petitioners the names and surnames of whom are the same; but the question would have been exactly as it is now, if there had been one petitioner, and his own name and the name of one of his sureties had been John Smith, of a large town. I think, in determining this matter, we have not only to consider that the security is good on the face of it, but to recollect that these persons who have entered into a recognizance are by the terms thereof mutually sureties for one another. The strict literal sense, therefore, of the act of parliament may be satisfied so far as to authorize the substituted deposit.

I am also influenced by another consideration in coming to this conclusion. This is a substantial security; it was intended that these parties should take upon themselves the obligation of being sureties, they are of ability to do so, and no fraud was intended. It is an error, but an error which may be amended. I think my Brother Willes was quite right, even if the matter had stood upon s. 8 alone. I am not satisfied that it would not have fallen within s. 9; but upon that I pronounce no opinion.

KEATING, J. The petition, which was signed by thirteen persons, embraced the two members returned for the borough. The time having gone by for giving security pursuant to section 6 of 31 & 32 Vict. c. 125, the respondents went before a judge at chambers and asked to have the petition taken off the file, on the ground that no recognizance had been entered into within the meaning of the statute. The ground of objection was that the recognizance was entered into by four of the thirteen petitioners, and so in truth there was no recognizance *with sureties* as required by the act. My Brother Willes refused to make the order as prayed; but, treating the summons as an objection to the sufficiency of the security, held the security to be insufficient, and required a sum of 1000*l.* to be deposited within five days. The respondents now come and ask the Court to do what the learned judge refused to do; the contention before us on their part being that there was in effect no security at all, and therefore that the proceedings upon the petition ought to be stayed. If that con-

tention were well founded, it would, in my opinion, be the duty of this Court, even at this stage, to stay the proceedings. The main ground urged before us was that s. 8 of the statute only provides for objections to the validity of the recognizance on the ground of the pecuniary insufficiency of the sureties; and it was insisted that what is complained of here is not insufficiency within the 8th section, and therefore is not aided by the provision in s. 9. I agree that s. 9 applies only to the objections specified in s. 8; and, supposing this not to be an objection to the recognizance by reason of the insufficiency of the sureties, I think the provision in s. 9 would not aid the petitioners in their argument. Now, the respondents contend that there is a total absence of all security here, because the petitioners themselves could not be sureties. We have already in the course of the argument thrown out an intimation of opinion that the petitioners could not be sureties within this act. But, a security appearing upon the face of it to have been regularly entered into, the question is, whether, when it is brought to the knowledge of the Court that the persons signing the recognizance are principals, the Court is not bound to hold it to be no security within the act. I must confess I have entertained considerable doubts; and I cannot say that those doubts are entirely removed. At the same time, I feel the full force of the observations of my Lord and my Brother Byles as to the importance of giving a wide and liberal construction to this act of parliament, and therefore I do not press my doubts so far as to dissent from the order made by my Brother Willes.

As to the amount of the security, I agree with my Lord and my Brother Byles that one security for 1000*l.* is enough. Looking fairly at the words of the act, and reading them as any person of ordinary understanding would read them, I come to the conclusion that s. 6 distinctly provides for one security only of 1000*l.*, and that no other or greater security is mentioned throughout the act. The only argument in favour of the contrary construction is the provision in s. 22, that two or more candidates may be made respondents to the same petition, but for all the purposes of the act such petition shall be deemed to be a separate petition against each respondent. The word there used is "candidates:" but, by

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the interpretation clause, s. 3, candidate is to be read as any person elected a member, or who has been nominated as or declared himself a candidate at an election. If the legislature had intended to impose the further condition that, where the petitions are to be deemed separate, a separate security for 1000*l.* should be given on each, it seems extraordinary that they should not have expressed that intention in distinct terms, but have left it to inference and conjecture.

Upon the whole, it seems to me that the giving security is a step that is initiatory in the proceedings on the petition, that a single security for 1000*l.* is all that the statute requires, and that the 22nd section has no such effect as has been contended for. I agree, therefore, that the rule should be discharged; but, seeing that some difficulty and doubt surround the matter, I think there should be no costs.

MONTAGUE SMITH, J. This is an application to the Court to stay the proceedings on this petition; and, assuming that the objections to the security do not fall within the grounds of objection mentioned in the 8th section of the Parliamentary Elections Act, 1868, I think this is the right course to take. It appears to me that the 8th and 9th sections are to be read together, and that the grounds of objection which can be gone into on the 8th may be amended, as the 9th section shews, not by leave of the Court, but by the parties themselves as of a right given to them by the statute. The reason why no power was given in the 8th section to object to the invalidity of the security generally, seems to be that the legislature meant to allow an amendment in certain specified cases only. Therefore the legislature specified the grounds of objection which, if made, might be amended, and left open what was to happen if the recognizance should be invalid on other grounds. The statute omits altogether to make provision for what is to be done in a case of that kind. But, inasmuch as it is clear in my opinion that a valid recognizance is a condition to the right of the petitioner to proceed with his petition, I am of opinion that the course which has been taken here, of applying to the Court to stay the proceedings because there had not been a compliance with what the legislature has made a condition to the prosecution of the petition, is

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right. It seems to me it is consistent with what was done by parliament itself when it had the control of these petitions within its own walls. There was no power to amend the security at the time when this act passed; but, if the security was objectionable on the ground of invalidity or insufficiency, then the order for proceeding with the petition was discharged by the House. I think, if I may be allowed to say so, that the most convenient provisions which have been enacted on this subject are to be found in the temporary act of 11 & 12 Vict. c. 18; and, if the powers there given to the select committee appointed to try election petitions were now intrusted to the election judges, or to the master, it seems to me that full security would be given to the sitting members, and petitioners would be secured from danger arising from mistakes perhaps beyond their control and which did not result from any default on their part. Such being in my view the construction of the act with regard to procedure, it is now to be considered whether the two objections which have been made to this security are good objections, and whether, if good, the security can be amended.

Now, with regard to the first objection, viz. that this security is for a sum of 1000*l.* only, the petition being against two members, I entirely agree with the rest of the Court that on the proper construction of this act of parliament the sum of 1000*l.* is sufficient. No difficulty whatever would have arisen if s. 22 had not been inserted in the act. The old practice was that a petition might be presented against two members, and in that case one security to the amount of 1000*l.* was sufficient. The legislature in passing this act of parliament has provided that there shall be still the sum of 1000*l.* given by the petitioner as security; and, though I have looked through every clause in the act in which anything is enacted on the subject of security, I find no trace whatever of any intention on the part of the legislature to alter the old practice in that respect, or to impose greater impediments in the way of petitioning than existed before. Certainly when the practice of parliament has existed so long, it must have been very well known that one security had always been deemed sufficient in the case of one petition against two members; and, if the legislature had intended to alter that state of things, I should have expected it

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would have done so in distinct terms. The whole question turns on the insertion of the 22nd clause, which, no doubt, is in very wide terms; but it is plain that those terms must have some limitation, otherwise there seems no object in making the provision that there may be one petition against two members; for, if everything was to be in duplicate, nothing would be saved except the paper on which the petition was written. It seems to me that the act, in saying that the petition may be against two, and the trial may be against both at the same time as one proceeding, if convenient, but providing that for all purposes it shall be deemed separate against the two members, meant, as my Lord has put it, for all purposes under the petition; but that it was not meant to apply to the condition as to security imposed on the petitioner. The security under the former acts was a condition precedent to the reception of the petition. Here, no doubt, it is made a condition subsequent, but it is still a condition to the prosecution of the petition, and is collateral to the petition itself. On these grounds, and for the reasons already given by the other members of the Court, I think we should be putting a construction on this act which the legislature did not intend, if we imposed a larger obligation on the petitioners than that which existed before.

The other objection is, certainly, to my mind more formidable. The act requires that the security shall be by a deposit of 1000*l.*, or a recognizance entered into by sureties. I confess that I have felt during the argument, and I still entertain, considerable doubt whether the recognizance here was a recognizance at all within the meaning of the act of parliament, and whether the objection does not go to its validity altogether, and not to its sufficiency. However, as my Lord and my Brother Byles, and the election judges who have considered it, have come to a clear opinion that the objection is one as to the sufficiency only, and may be amended, I have hesitation in arriving at a conclusion different from theirs, though I confess I cannot see my way to agree with them, or to comprehend how a principal can in any sense be deemed a surety for himself. After all, the matter is one of practice only, as to which certainty is of the essence of benefit; and, as there is no appeal from this Court, and my Brother Keating does not dissent, I also do not wish to dissent from the

judgment of the rest of the Court upon this point. The result is that this rule will be discharged.

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Rule discharged.

Agents for petitioners: *Baxter, Rose, & Norton.*
Agents for respondents: *Hicks & Son.*

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Feb. 5.

Bankrupt: Annuity proveable under 12 *&* 13 *Vict. c.* 106, *s.* 175—*Deed of Assignment under* 24 *&* 25 *Vict. c.* 134, *s.* 192: *Joint and several Creditors—Debtor and Creditor.*

An annual payment was reserved to the plaintiff by a deed by which it was provided that the payment should cease if the plaintiff should refuse, neglect, or fail or become incapable to perform, observe, or abide by any of the stipulations therein contained. Amongst these were stipulations that the plaintiff should use his best endeavours to preserve and extend the business of the grantors, and would not by any act, neglect, omission, or default injure the same, or impede the success thereof; that he should perform such services and discharge such duties as the grantors should reasonably require; that he would not, whilst the grantors should continue to carry on the business in question, be engaged or concerned in a similar business within twenty miles of St. Paul's; and that any difference between the parties should be referred to arbitration:—

Held, that this was not an annuity proveable under s. 175 of 12 & 13 Vict. c. 106, the conditions for its defeasance being so uncertain as to render it incapable of valuation, and that it was therefore not barred by a deed executed by the grantors for the benefit of creditors under s. 192 of the Bankruptcy Act, 1861.

THIS was an action brought to recover 75*l.* claimed to be due from the defendant to the plaintiff by virtue of a deed dated the 8th of January, 1866, made between one Charles Nolda of the first part, Charles Beardsall and the defendant of the second part, and the plaintiff of the third part, by which Beardsall and the defendant jointly and severally covenanted to pay to the plaintiff during his life the clear yearly sum of 150*l.*, by equal payments, on &c., if and so long as the plaintiff should perform and observe the stipulations on his, the plaintiff's, part covenanted to be performed by the said deed. The following case was stated for the opinion of the Court:—

1. In the year 1863, the plaintiff carried on the business of a woollen warehouseman in the city of London, under the style or

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firm of Brett, Brothers, & Co., and in the same year he executed and perfected a deed of assignment of all his estate and effects to trustees for the benefit of his creditors under the provision contained in the Bankruptcy Act, 1861. The plaintiff's stock in trade and goodwill and his interest in the premises in which the business was carried on were sold and transferred by the trustees to Nolda, Beardsall, and the defendant.

2. On the 8th of April, 1863, a deed of arrangement was made between Nolda, Beardsall, and the defendant, of the one part, and the plaintiff, of the other part, by which Nolda, Beardsall, and the defendant, in consideration of the services rendered and to be rendered by the plaintiff to them in the said business, and of the plaintiff's observing and performing the covenants and stipulations in the last-mentioned deed on his part to be observed and performed, agreed to pay him 600*l.* within twelve months, and also to pay him 150*l.* a year by quarterly payments as above mentioned. A copy of this deed was annexed to the case.

3. On the 20th of December, 1865, Nolda retired from the firm of Nolda, Beardsall, & Jackson; and on the 8th of January, 1866, the deed sued on in this action was made between Nolda, Beardsall, the defendant, and the plaintiff.

4. That deed (a copy of which was set out in the case) recited that, by an indenture of the 8th of April, 1863, it was agreed and declared, amongst other things, that Nolda, Beardsall, and Jackson, or the survivor of them, &c., thereinafter called Nolda & Co., should pay to Brett during his life, if he should so long continue to perform, observe, and abide by the stipulations on his part thereinafter contained, a clear yearly sum of 150*l.*, to be considered as accruing from day to day, and to be paid quarterly, &c.; that Brett should use his best endeavours to preserve and extend the business of Nolda & Co., in the manner therein mentioned; that it had recently been agreed that the partnership so carried on by Nolda, Beardsall, and Jackson should be dissolved, so far as related to Nolda, as from the 20th of December, 1865, and that the business should thenceforth be carried on by Beardsall and Jackson; that, upon the treaty for such dissolution, it was amongst other things agreed that Brett should execute such release as was thereinafter contained, and that Beardsall and Jackson and

Brett should enter into such further arrangements as were thereinafter contained; and that the said partnership had accordingly been dissolved. The deed then witnessed that, in pursuance of the agreement, and in consideration of the premises, Brett thereby released Nolda, Beardsall, and Jackson, and each of them, their heirs, &c., and they thereby released Brett, his heirs, &c., from the covenants contained in the recited indenture; and that, in further pursuance of the agreement, and in consideration of the premises and of the mutual agreements and covenants thereinafter contained, it was mutually agreed as follows:—

(1). Beardsall and Jackson, or the survivor of them, or the executors &c. of such survivor, shall pay to Brett during his life, if he shall so long continue to perform the stipulations on his part hereinafter contained, a clear yearly sum of 150*l.*, to be considered as accruing from day to day, and to be paid by four equal payments, on &c.

(2). If Brett shall refuse, neglect, or fail, or become incapable to perform, observe, or abide by all or any of the stipulations on his part hereinafter contained, then and immediately thereupon the said annual sum shall cease and be no longer payable; but it is not intended that the same shall in any respect release Brett from the obligations imposed on him by the fifth article of these presents, or any of them.

(3). Brett shall use his best endeavours with both the old and the present customers of the late firm of Brett, Brothers, & Co., or of the late firm of Nolda & Co., or of the present firm of Beardsall & Jackson, and with all other persons, to preserve and extend the said business, and to promote the success thereof, and to carry on the same to the profit and for the benefit of Beardsall & Jackson, and shall not by any act, neglect, omission, or default, injure the same, or impede the success thereof.

(4). For the purposes of the third article of these presents, Brett shall perform such services and discharge such duties as Beardsall & Jackson shall reasonably require, save that he is not to be called upon to give his personal attendance to the working of the business of Beardsall & Jackson.

(5). Brett shall not at any time hereafter while Beardsall & Jackson or either of them shall continue to carry on the said busi-

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ness, or any branch thereof, carry on or be concerned in the business of a woollen warehouseman, or a buyer, seller, or packer or shipper of woollen goods, or goods of a fabric containing wool, in the city of London or within a radius of twenty miles from St. Paul's Cathedral or that city, either alone or in partnership with, or as agent for, or clerk of, or assistant to, any other person or persons except Beardsall & Jackson; and shall not select, accept or execute any order for buying, selling, &c., or dealing in any such goods, except for and on behalf and for the sole benefit of Beardsall & Jackson; and he shall not allow, nor so far as he can prevent it suffer any other persons or person to use his name or the name of Brett, Brothers, & Co., or any imitation or modification thereof, in the business aforesaid, or any similar business.

(6). Messrs. Beardsall & Jackson shall be considered to represent exclusively the late firm of Brett, Brothers, & Co., and shall be at liberty to style themselves late Brett, Brothers, & Co.

(7). If any dispute shall arise between the parties hereto or any of them, or their respective representatives, touching these presents or any article thereof, or the rights, duties, powers, or liabilities of the respective parties hereto, or their respective representatives, in relation thereto, such disputes shall be referred to arbitration, and settled by two arbitrators or their umpire, agreeably to the provisions of the Common Law Procedure Act, 1854.

5. On the 25th of August, 1866, Beardsall and the defendant executed and perfected a deed of assignment of all their estate and effects to trustees for the benefit of their creditors, under and according to the provisions contained in the Bankruptcy Act, 1861, of which the following is a copy:—"This deed, made &c., between Beardsall and Jackson, of &c., of the one part, and H. P. Webb, J. Lockwood, and B. Hurst, hereinafter called the trustees on behalf and with the assent of the creditors for Beardsall and Jackson, of the other part,—witnesseth that the said Beardsall and Jackson do, and each of them doth, hereby convey all their and his estates and effects to the said trustees absolutely, to be applied and administered for the benefit of the creditors of Beardsall and Jackson, in like manner as if the said Beardsall and Jackson had been at the date hereof duly adjudged bankrupts: And, in consideration of the premises, each of the creditors of Beardsall and Jackson doth by

these presents release Beardsall and Jackson and each of them from his and their respective debts, in like manner as if Beardsall and Jackson had obtained a discharge in bankruptcy; but nothing herein contained shall affect the rights of the creditors as against any surety or co-debtor. In witness," &c.

6. The last-mentioned deed was duly executed, attested, stamped, and registered according to the requirements of s. 192 of the Bankruptcy Act, 1861; and a majority in number representing three fourths in value both of the joint and of the separate creditors of Beardsall and the defendant whose debts amounted to 10*l.* and upwards, assented thereto.

7. From the date of the registration of the last-mentioned deed up to the present time, Beardsall and the defendant have wholly ceased to carry on the said business, or any branch thereof, either together or separately.

8. The amount claimed by the plaintiff became due after the registration of the deed of assignment.

The question for the opinion of the Court was, whether the deed of assignment dated the 25th of August, 1866, was or was not a bar to the plaintiff's claim.

Lord, for the plaintiff. Two questions arise in this case,— 1. Whether the deed of the 5th of August, 1866, was a valid deed within s. 192 of the Bankruptcy Act, 24 & 25 Vict. c. 134,— 2. Whether the obligation arising upon the covenant contained in the deed of the 8th of January, 1866, constituted a debt proveable under s. 175 of 12 & 13 Vict. c. 106. As to the first point, it is now clearly settled that a deed of arrangement under s. 192 of the Bankruptcy Act, 1861, to be binding upon a non-assenting creditor, must embrace all the creditors, several as well as joint: *Ex parte Glen* (1); *Tomlin* v. *Dutton* (2); *Rixon* v. *Emary* (3); *European Central Railway Company* v. *Westall.* (4) The effect of the deed here is, to assign the joint and separate property of the two debtors for the exclusive benefit of the creditors of the firm; and it is the joint creditors only who release. The deed is, therefore, clearly not a deed within s. 192 of the Bankruptcy Act, 1861. The second

(1) Law Rep. 2 Ch. App. 670.
(2) Law Rep. 3 Q. B. 466.
(3) Law Rep. 3 C. P. 546.
(4) Law Rep. 1 Q. B. 167.

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point turns upon the construction of s. 175 of 12 & 13 Vict. c. 106, which enacts that any annuity-creditor of any bankrupt, by whatsoever assurance the same may be secured, and whether there were or not any arrears of such annuity due at the bankruptcy, shall be entitled to prove for the value of such annuity, which value the Court shall ascertain, regard being had to the original price given for such annuity, deducting therefrom such diminution in the value thereof as shall have been caused by the lapse of time since the grant thereof to the date of the fiat, &c. Now, the payment stipulated for by the deed of the 8th of January, 1866, is subject to the observance by the plaintiff of stipulations which are of such a nature as to render it utterly impossible to value the so-called annuity pursuant to that section. It is not contended that the section is confined to annuities granted for a pecuniary consideration. The payment is to cease if the plaintiff shall neglect or refuse to perform, or become incapable of performing, the stipulations on his part to be performed. These, amongst others, are, that he shall use his best endeavours to preserve and extend the business. Who is to determine whether he has done so or not? or to measure the degree of care which is to be shewn? The statute contemplates, not a series of acts to be done from time to time, but something to be done once for all. In truth, that which is here called an annuity is nothing more than a payment of salary for services performed. The case which will probably be relied on for the defendant is *Ex parte Parratt.* (1) The marginal note of the report in Mont. & Ayr. is not, however, supported by the facts. There, A. and B., having a lease of certain salt-works for twenty-one years, entered into articles with the bankrupt, by which the latter undertook the manufacture of the salt, and it was provided that the contract should subsist for the term granted by the lease, wanting three months; but that, if there should be a failure of brine in the pits for ten days successively, the bankrupt was to be exonerated from his liability to manufacture the salt, to an extent proportioned to the extent of the failure of the brine. The bankrupt afterwards granted an annuity to the petitioner, charging it on the sums payable to the bankrupt from A. and B. for the manufacture of the salt: and it was held that, notwithstanding the possi-

(1) 2 Mont. & A. 626; 1 Deac. 696.

bility of the discontinuance of the salt contract, and of the forfeiture of the lease by non-payment of rent or non-performance of covenants, the annuity was capable of valuation. That decision was based upon the assumption that the intention of the parties was clear that twenty-one years, wanting three months, should be the period of the continuance of the agreement, and that the petitioner was to receive the annuity till the end of that time, if he should live so long. Assuming the case to have been well decided, it can hardly govern the present.

Lanyon, contrà. No doubt, a deed under s. 192 of the Bankruptcy Act, 1861, should on the face of it shew that *all* the creditors can sue upon it. Here, the assignment is of the joint and separate property of the two partners, and there is a provision obliging the trustees to administer the fund as in case of bankruptcy. The deed, therefore, is good. Then, is this an annuity which can be valued under s. 175 of the Bankruptcy Act of 1849? In *Ex parte Sitger* (1), an agreement by a parent to give his daughter, upon her marriage, 150*l.* per annum, was held to be a debt proveable under the corresponding provision in 6 Geo. 4, c. 16. So, in *Ex parte Annandale* (2), a promise to give the daughter 100*l.* a year, until the parent could do something better for her, was treated as an annuity for the joint lives. *Ex parte Broadly* (3) is to the same effect. There is no contingency or uncertainty in any of the stipulations contained in this deed, which may not by recourse to the well-known tables be reduced to certainty. The annuity here is clearly as capable of being valued as that in *Ex parte Parratt.* (4)

Lord, in reply. In *Ex parte Davis* (5), Lord Lyndhurst held that, where the contingency depended upon the separation of husband and wife, and of a widow's not marrying, it was not within the 6 Geo. 4, c. 16, s. 56. And in *Mudge* v. *Rowan* (6), where by a deed of separation a husband covenanted to pay an annuity to his wife by quarterly instalments, the annuity to cease in the event of future cohabitation by mutual consent, it was held that this was

(1) Mont. B. C. 100.
(2) 2 Mont. & A. 19; 4 D. & Ch. 511.
(3) 2 M. D. & De G. 524.
(4) 2 Mont. & A. 626; 1 Deac. 696.
(5) Mont. B. C. 121, 297.
(6) Law Rep. 3 Ex. 85.

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not an annuity proveable under 12 & 13 Vict. c. 106, s. 175, nor a liability to pay money under 24 & 25 Vict. c. 134, s. 154.

BYLES, J. I am of opinion that the plaintiff is entitled to our judgment. The 175th section of 12 & 13 Vict. c. 106, enacts that any annuity-creditor of any bankrupt, by whatsoever assurance the same may be secured, and whether there were or not any arrears of such annuity due at the bankruptcy, shall be entitled to prove for the value of such annuity, which value the Court shall ascertain, regard being had to the original price given for such annuity, deducting therefrom such diminution in the value thereof as shall have been caused by the lapse of time since the grant thereof to the date of the fiat, &c. This must mean that the thing of which the Court is to ascertain the value is an annuity the value of which is capable of being ascertained by computation. By the deed in question a vast variety of things are to be done by the annuitant. Amongst others, there is this condition: "If Brett shall refuse, neglect, or fail, or become incapable to perform, observe, or abide by all or any of the stipulations on his part hereinafter contained, then and immediately thereupon the said annual sum shall cease and be no longer payable." Then follows an enumeration of the things to be done by the annuitant. He is "to use his best endeavours to preserve and extend the business, and to promote the success thereof," &c.; and he is not "by any act, neglect, or default to injure the same or impede the success thereof." And there are various other indefinite stipulations of the same kind. Then there is this stipulation, that, if any dispute shall arise between the parties touching these presents, or any article thereof, or the rights, duties, powers, or liabilities of the respective parties thereto, or their representatives, in relation thereto, such disputes shall be referred to arbitration. These contingencies, upon which the continuance of the annuity is to depend, are, as it seems to me, altogether incapable of being ascertained by valuation: and, if it were otherwise, they are to be submitted to arbitration, and the value of the annuity is made thus to depend upon the view which an arbitrator might take. I should therefore hold, even if there was an entire absence of authority upon the subject, that the annuity was not capable of valuation under s. 175 of

12 & 13 Vict. c. 106. As to the authorities, the only one which looked at all in favour of the defendant is *Ex parte Parratt* (1); but in that case there was, so far as the first point is concerned, no distinct provision for a suspension of the sum to be paid by way of annuity, and only a remote possibility so far as the lease was concerned. And, as to the suggestion that by possibility the lease might be forfeited, the lease not being before the Court that contingency was merely speculative. *Ex parte Davis* (2), *Parker* v. *Ince* (3), and the recent case of *Mudge* v. *Rowan* (4), seem to me to be distinct authorities the other way. I therefore think that this annuity was not proveable under s. 175, and consequently that our judgment should be for the plaintiff.

KEATING, J. I am of the same opinion. The cases have no doubt extended the proveability of annuities somewhat beyond what the words of the statute would naturally import; for, they seem to assume every annuity to be capable of easy calculation. The authorities have certainly gone far; but no one of them has gone so far as it is sought to go in this case. *Ex parte Parratt* (1) at first sight appeared to countenance Mr. Lanyon's argument: but, on examination, I agree that it is not an authority for the defendant's view. The stipulations here are extremely indefinite: it is not a case in which a certain result may be assumed from the doctrine of probabilities even; but one where the value of the annuity depends upon a variety of matters as to which there might fairly be difference of opinion. The plaintiff was to discharge such duties as his employers might reasonably require. The reasonableness of the requirements must depend upon a variety of circumstances; and it may fairly be doubted what view an arbitrator would take of them. So as to the undertaking to use his best endeavours to promote the success of the business. However astute actuaries may be in reducing contingencies to certainty of computation, I cannot think that such contingencies as these were within the contemplation of the statute, and therefore there must be judgment for the plaintiff.

(1) 2 Mont. & A. 626; 1 Deac. 696.
(2) Mont. B. C. 121, 297.
(3) 4 H. & N. 53; 28 L. J. (Ex.) 189.
(4) Law Rep. 3 Ex. 85.

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MONTAGUE SMITH, J. I am of the same opinion. It is conceded that this annuity, if proveable at all, is only proveable under s. 175 of 12 & 13 Vict. c. 106. In terms, that section provides only for annuities granted for some original price. It enacts that every annuity-creditor of any bankrupt shall be entitled to prove for the value of such annuity, which value the Court shall ascertain, regard being had to the original price given for such annuity, deducting therefrom the diminution of value arising from lapse of time. The act, therefore, would seem to have contemplated annuities, for which a price was paid, thus affording a datum for calculating the value; and doubts were entertained, when it was attempted to prove other descriptions of annuities, whether the section was to be extended to cases not directly pointed at by its words. But it appears from numerous cases that annuities, the considerations for which bear some analogy to the definite ground of value therein mentioned, have been held to fall within the intention of the clause. Thus, a contingency depending upon a life or lives, is clearly ascertainable in point of value, there being well-known data by which to value it. But here there are no definite materials for making anything like a valuation. An actuary might form a loose opinion as to the probable continuance of the annuity; or a jury might form a rough estimate of its value. But that is a very different sort of computation from that which the statute means when it says that "the Court shall ascertain the value." It clearly points to a case where there shall be no difficulty or speculation,—a sum to be worked out in figures from some definite and precise data. Mr. Lanyon admits that the case is primæ impressionis; and certainly he has produced no case in which a similar annuity has been held to be proveable. The nearest to it that could be found was the case of *Ex parte Parratt* (1); but that has been so fully distinguished by my learned Brothers, that I need not further advert to it. It seems to me that this case is in principle determined by the Lord Chancellor's judgment in *Ex parte Davis.* (2) I should have thought there was much less difficulty in estimating the value of the contingency there, which depended upon the chances of a widow marrying, than the duration of an annuity which, like this, was to depend upon the performance

(1) 2 Mont. & A. 626; 1 Deac. 696. (2) Mont. B. C. 297.

or non-performance of a great variety of acts by the annuitant himself, which offer no data whatever on which to found a calculation. It is quite impossible for the Court or any one else to put a value upon such an annuity, and therefore it is not proveable under s. 175. The plaintiff being entitled to the judgment of the Court upon this point, it is unnecessary to consider whether the deed of the 25th of August, 1866, was a valid deed or not. I do not wish to express the slightest doubt of its validity.

Judgment for the plaintiff.

Attorneys for plaintiff: *Lawrence, Plews, & Boyer.*
Attorneys for defendant: *Linklaters, Hackwood, & Addison.*

END OF HILARY TERM.

CASES

DETERMINED BY THE

COURT OF COMMON PLEAS

AND BY THE

COURT OF EXCHEQUER CHAMBER,

ON ERROR AND APPEAL FROM THE COURT OF COMMON PLEAS,

IN AND AFTER

EASTER TERM, XXXII VICTORIA.

1869
April 30.

JENNER *v.* SMITH.

Sale of unascertained Goods—Passing of Property—Appropriation—Assent—Vendor and Purchaser.

The plaintiff at a fair orally contracted to sell to the defendant at a given price per cwt. two pockets of hops which were on the spot, and which were there inspected and approved by the defendant, and also two other pockets of which samples were shewn, but which were lying in a warehouse in London. The defendant took away with him (and afterwards paid for) the first two pockets, but the last two were to be forwarded to him at a future time. On his return to London, the plaintiff went to the warehouse and selected two out of three pockets which he had there, and directed the warehouse-keeper to mark them "to wait the buyer's order," but no alteration was made in the warehouse-keeper's books, and he continued to hold the plaintiff liable for the rent. The plaintiff a few days afterwards sent the defendant an invoice describing the numbers, the weight, and the prices of the two pockets delivered at the fair, and also of the two which had been set apart at the warehouse, and at the same time inclosed a draft for acceptance. The defendant sent back the draft unaccepted, and refused to receive the last two pockets. In an action for goods bargained and sold,—

Held, no evidence which would warrant a jury in finding that the appropriation

of the two pockets in the London warehouse was either originally authorized or subsequently assented to by the buyer, and that consequently the property in them did not pass by the contract.

ACTION for goods bargained and sold and goods sold and delivered. Pleas: Never indebted, payment, and payment of 8s. 2d. into court. Replication, taking issue, and damages ultrà.

The cause was tried before Brett, J., at the sittings at Westminster after last Michaelmas Term. The facts were as follows:— On the 14th of October, 1867, the plaintiff, who is a hop-merchant in London, met the defendant, a maltster of Devizes, at Weyhill Fair, Hants. The defendant wished to buy of the plaintiff four pockets of Carpenter's Sussex hops which the plaintiff had there; but, as the plaintiff had already sold two of them, he proposed to sell the defendant in lieu of them two pockets of Thorpe's, of which he shewed him a sample, offering to let the defendant have the two pockets of Carpenter's at 9l. per cwt. (the price of that day's fair being 9l. 9s.), if he would take two pockets of Thorpe's at 7l. 15s. per cwt. The plaintiff at the same time or shortly after informed the defendant that the last-mentioned two pockets were lying at Prid & Son's warehouse, Kentish Buildings, Southwark, and agreed that he should have them upon the same terms as if they had been in bulk at the fair, that is, that he should be at no expense for warehousing or carriage. The defendant consented to purchase the four pockets upon these terms, and took away with him the two pockets of Carpenter's, but requested that the two pockets of Thorpe's should not be sent until he wrote for them.

The plaintiff had at this time three pockets of Thorpe's hops at the warehouse of Prid & Son. On the 21st of October, the plaintiff's son went to the warehouse, and instructed the warehouseman to set apart two of the three pockets of Thorpe's for the defendant; and the warehouseman thereupon placed on two of them, numbered respectively 1 and 3, what is called a "wait order card," that is, a card upon which was written, "To wait orders," and the name of the vendee. No alteration, however, was made in the warehouse books; and the plaintiff, the original depositor, still remained liable for the rent.

On the 4th of November, the plaintiff sent the defendant an

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invoice, as follows, at the same time inclosing a draft for acceptance :—

" Mr. S. Smith. Bought of Charles Jenner.

" 2 pockets Sussex hops (Carpenter, 1867).

" No. 2 . . . 1 cwt. 2 qrs. 26 lbs.

4 . . . 1 cwt. 2 qrs. 13 lbs.

3 cwt. 1 qr. 11 lbs. @ 9*l.* per cwt. £30 2 8

" 2 pockets Sussex hops (Thorpe, 1867).

" No. 1 . . 1 cwt. 2 qrs. 27 lbs.

3 . . 1 cwt. 0 qr. 21 lbs.

2 cwt. 3 qrs. 20 lbs. @ 7*l.* 15*s.* per cwt. 22 13 10

£52 16 6

" The two last pockets of hops are lying to your order."

On the 8th of November the defendant wrote to the plaintiff, as follows :—

" Sir,—I have returned your bill unsigned ; but, as I have never received the two pockets of hops or heard anything about them, I concluded you had not thought of sending them, and have made an exchange for some malt, and shall not require them. As I will never sign a bill, I will pay, as was agreed, in February, the weight of the two Carpenter's."

The defendant subsequently paid the price of the two pockets which he had received, all but a small balance which was covered by the payment into Court.

It was objected on the part of the defendant that, as to the two pockets of Thorpe's hops, there was no contract binding within the Statute of Frauds, no delivery or acceptance, or part payment, and no evidence of goods bargained and sold.

For the plaintiff it was insisted that the whole was one bargain, and consequently that there had been a part delivery and part payment, and that the property in the whole four pockets passed by the contract.

The learned judge ruled that it was one entire contract, and that,

therefore, there had been a part delivery so as to make a contract binding within the Statute of Frauds; that the plaintiff could not rely upon the part payment, because the defendant, at the time of making the payment, repudiated the bargain as to the two pockets in question; that, though there was a binding contract, the property did not pass thereby, inasmuch as the contract was to deliver two out of a larger number of pockets of Thorpe's hops equal to sample, the price to be determined according to the weight; and that there had been no sufficient appropriation afterwards to pass the property, because Prid & Son never bound themselves to hold for the defendant instead of for the plaintiff. He thereupon nonsuited the plaintiff, reserving him leave to move to enter a verdict for 22*l.* 13*s.* 10*d.*, the Court to draw inferences of fact.

Morgan Lloyd, in Hilary Term last, obtained a rule nisi accordingly.

H. T. Cole, Q.C., and *Bromley*, shewed cause. The rule of law which must govern this case is laid down in Blackburn on the Contract of Sale, pp. 151, 152,—Where the vendor is to do anything to the goods for the purpose of putting them into a deliverable state, or for the purpose of ascertaining the price, as, by weighing, measuring, &c., the performance of those things is a condition precedent to the transfer of the property: *Hanson* v. *Meyer* (1); *Rugg* v. *Minett* (2); *Castle* v. *Sworder* (3); *Simmons* v. *Swift* (4); *Farina* v. *Home* (5); *Hunt* v. *Hecht* (6); *Acraman* v. *Morrice* (7); *Godts* v. *Rose*. (8) Here, two things remained to be done before the property in the two pockets of Thorpe's hops could vest in the defendant: he had a right to object to them if not equal to sample; and the price was to be ascertained by the weight. The plaintiff had three pockets at Prid's warehouse. He might have had a hundred. That which was done at the warehouse without the knowledge or assent of the defendant was not such an appropriation as to pass the property to him in the two so selected. In the course of the argument in *Bannerman* v. *White* (9), Willes, J., says: "The

(1) 6 East, 614.
(2) 11 East, 210.
(3) 6 H. & N. 828; 30 L. J. (Ex.) 310.
(4) 5 B. & C. 857.
(5) 16 M. & W. 119.
(6) 8 Ex. 814; 22 L. J. (Ex.) 293.
(7) 8 C. B. 449; 19 L. J. (C.P.) 57.
(8) 17 C. B. 229; 25 L. J. (C.P.) 61.
(9) 10 C. B. (N. S.) 844, 855.

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property does not pass by the contract of sale; but only upon acceptance, after inspection and weighing. Our law is peculiar in that respect." In *Aldridge* v. *Johnson* (1), Lord Campbell, C.J., says: "No rule of the law of vendor and purchaser is more clear than this, that, until the appropriation and separation of a particular quantity, or signification of assent to the particular quantity, the property is not transferred." And Erle, C.J., affirms the same principle in *Campbell* v. *Mersey Dock Trustees.* (2) [Benjamin on the Sale of Personal Property, 115, 222, 223, was also referred to.]

Morgan Lloyd, in support of the rule. This case is governed by the rule laid down by Erle, J., in *Aldridge* v. *Johnson.* (3)

[KEATING, J. There, the bulk had been seen and approved of; all that remained to be done was to appropriate the quantity sold to the plaintiff; and it was held that the filling his sacks was an appropriation, with his assent, of so much of the barley as had been put into the sacks. But here there was no appropriation. Could not the plaintiff have satisfied his contract by delivering to the defendant any two pockets of Thorpe's hops which were equal to the sample?]

It is submitted he could not. The plaintiff at the time of the bargain informed the defendant that he had some pockets of Thorpe's hops at Prid & Son's warehouse, of which he contracted to sell him two. That gave the plaintiff authority to set aside two of those pockets as the hops contracted for, to await the purchaser's convenience. The plaintiff accordingly went to the warehouse and instructed the warehouseman to set apart two pockets to await the orders of the purchaser. Having thus made his election, and communicated it to the defendant by the letter of the 4th of November, the appropriation was complete, and could not be recalled: Blackburn on the Contract of Sale, p. 128, citing *Heyward's Case* (4); *Fragano* v. *Long* (5) and *Atkinson* v. *Bell.* (6) If the two pockets were equal to sample,—and there was no suggestion that they were not,—the appropriation was made with the assent of the defendant; for, when the invoice was sent to him

(1) 7 E. & B. 885, 898; 26 L. J. (Q.B.) 296, 299.
(2) 14 C. B. (N.S.) 412.
(3) 7 E. & B. 885, 900; 26 L. J. (Q.B.) at p. 300.
(4) 2 Co. Rep. 36.
(5) 4 B. & C. 219.
(6) 8 B. & C. 277.

with the number and weight of each pocket, and an intimation that they were lying at the warehouse to his order, he did not repudiate it.

[BRETT, J. My Brother Blackburn treats the subject of appropriation at p. 127. There is no pretence for saying there was any previous authority here; and there was no subsequent assent to the appropriation, for the defendant, in his reply to the letter inclosing the invoice, repudiated the whole transaction.]

The defendant's request that the plaintiff would keep the two pockets of Thorpe's hops until he should want them, was an authority to the latter to make the appropriation.

[KEATING, J. It is difficult to say that the right of selection is conceded to the vendor, whilst the correspondence of the bulk with the sample and the price remain to be ascertained.]

The price per cwt. was agreed on: and the weighing rule is inapplicable to a sale of specific packages.

KEATING, J. I am of opinion that this rule should be discharged. The action is brought to recover the price of two pockets of hops as sold and delivered and bargained and sold. It appears that the parties met in October, 1867, at Weyhill Fair, and that it was orally agreed between them that the defendant should purchase of the plaintiff two pockets of Carpenter's Sussex hops, which were then in the fair and had been inspected by the defendant, at 9*l.* per cwt., and also two pockets of Thorpe's hops, of which a sample was shewn, at 7*l.* 15*s.* per cwt. After the purchase had been agreed on, the defendant was informed that the latter were lying in a warehouse in London, and he requested that they might be left there until he sent word that he was ready to receive them. On the 4th of November the plaintiff sent an invoice describing the numbers, weight, and price of the four pockets, with an intimation that the two pockets of Thorpe's were lying at the warehouse to the defendant's orders. The plaintiff had three pockets of Thorpe's hops at the warehouse; and he had in the meantime gone to the warehouse and directed the warehouse-keeper to put certain marks upon two of them, to indicate that they were sold and were to wait the orders of the purchaser. No alteration, however, was made in the books of the warehouse-

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keeper; nor was any intimation of this appropriation of the two pockets given to the defendant until the 4th of November, when the invoice was forwarded to him. The defendant declined to accept the two pockets. At the trial various objections were urged. It was said, amongst other things, that there was no contract as to the two pockets of Thorpe's hops to bind the defendant within s. 17 of the Statute of Frauds; that the contracts for the purchase of the two pockets of Carpenter's hops and for the two pockets of Thorpe's were distinct contracts; and that, consequently, there had been no delivery or part-payment to take the case out of the statute. My Brother Brett ruled that the contract was entire, and the objection founded upon the Statute of Frauds was thus got rid of. Then came the question whether the count for goods sold and delivered or goods bargained and sold could be maintained, the property in the goods not having passed. Upon this my Brother Brett nonsuited the plaintiff, but gave leave to move to enter a verdict for the plaintiff for the price of the two pockets in dispute, reserving power to the Court to draw such inferences as a jury might draw. The question before us, therefore is, whether, upon the facts proved, we can see that the property in the hops passed to the defendant so as to make him liable in this action. The general rule of law was not contested on the part of the plaintiff, that, where an article (not specific) is sold, but something remains to be done by the vendor before it is dispatched to the vendee, no property passes by the contract of sale. It was contended on the part of the defendant that much remained to be done here before the property could pass,—that, the hops having been sold by sample, they would require to be inspected, and to be weighed, in order to ascertain the price. On the other hand it was urged that, though that may be so as a general rule, *Aldridge* v. *Johnson* (1) and other cases shew that, if it appears from the contract that the vendee has made the vendor his agent for the purpose of weighing and doing all the other acts necessary to be done to pass the property, the property in the goods will pass so soon as those acts are done. It is, however, observable that in *Aldridge* v. *Johnson* (1) the bulk of the barley had been inspected and approved, and all that remained to be done

(1) 7 E. & B. 885; 26 L. J. (Q.B.) 296.

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was to sever and measure the portion to be appropriated to the vendee; and that the vendor had filled a number of sacks which had been sent by the vendee, thereby measuring it. The barley which was to be appropriated to the fulfilment of the contract, was therefore severed from the bulk and measured with the assent of both parties. There could be no doubt that the property in the barley so dealt with passed. Mr. Lloyd sought to bring the present case within that by saying that a similar extensive authority was conferred by the defendant on the plaintiff in this case. I cannot draw any such inference from the facts proved here: on the contrary, I think they negative it. I cannot suppose that the defendant meant to part with the right of objecting to the correspondence of the hops with the sample, or of insisting on the weight being ascertained, before the property passed. It is true, there was an intimation to the warehouse-keeper that the two pockets numbered 1 and 3 had been sold to the defendant: but no transfer was made in his books; and he still held them at the charge and at the risk of the vendor. I think it is impossible for the Court to draw the inference that an authority such as was given in *Aldridge* v. *Johnson* (1) was given here: and, if no such authority was given, the case is brought within the multitude of authorities in which it has been held that, where there is a sale of unascertained goods with reference to which something remains to be done by the vendor before delivery to the vendee, no property passes until that has been done.

BRETT, J. At the trial I proposed to nonsuit the plaintiff, on the ground that there was no evidence to go to the jury in support of the count for goods bargained and sold. It was not then suggested that there was any authority from the defendant to the plaintiff to select the two pockets for him. If it had been, I should not have nonsuited the plaintiff, but would have left that question to the jury. The question now is, not whether there was any evidence for the jury, but whether the Court can infer from the facts proved, that the property in the two pockets of Thorpe's passed. It is clear that no property passed by the contract itself. The contract was for a sale by sample of unascertained hops, the

(1) 7 E. & B. 885; 26 L. J. (Q.B.) 296.

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price depending on the weight. Then comes the case put by my Brother Blackburn in the passage at p. 127, to which I referred in the course of the argument. Here, there was no previous authority given to the plaintiff to appropriate; and, if not, what evidence was there to shew that the appropriation of the two pockets in Prid & Son's warehouse was ever assented to by the defendant? The defendant's assent might have been given in either of two ways,—by himself, or by an authorized agent. By himself, after the receipt of the letter containing the invoice; or by the warehouse-keepers, if there had been any evidence of agency or authority in them to accept, and assent by them to hold the hops for him. I think the defendant's letter refusing to accept the draft was strong, if not conclusive, to shew that there had been no such assent by the defendant. And, as to Prid & Sons, the evidence fails on both points. They never agreed to hold the two pockets on behalf of the purchaser; and, if they did, there is no evidence of any authority from him that they might do so. Mr. Lloyd has strongly put forward a point which was not made at the trial, viz. that there was evidence that, by agreement between the parties, the purchaser gave authority to the seller to select the two pockets for him. If he did so, he gave up his power to object to the weighing and to the goods not corresponding with the sample; for, he could not give such authority and reserve his right so to object; and indeed it has not been contended that he gave up those rights. That seems to me to be conclusive to shew that the defendant never gave the plaintiff authority to make the selection so as to bind him. Under the circumstances, therefore, it is impossible to say that the property passed; consequently, the plaintiff cannot recover as for goods bargained and sold.

Rule discharged.

Attorney for plaintiff: *R. W. Roberts.*

Attorneys for defendant: *Gregory, Rowcliffes, & Rawle.*

COLLINS *v.* THE MIDDLE LEVEL COMMISSIONERS.

1869
May 3.

Drainage Act, Construction of—Negligence in Construction of Works—Proximate Damage.

By a drainage act, the commissioners were to construct a cut, with proper walls, gates, and sluices, to keep out the waters of a tidal river, and also a culvert under the cut to carry off the drainage from the lands on the east to the west of the cut, and to keep the same at all times open. In consequence of the negligent construction of the gates and sluices, the waters of the river flowed into the cut, and, bursting its western bank, flooded the adjoining lands.

The plaintiff and other owners of lands on the east side of the cut closed the lower end of the culvert, which prevented the waters overflowing their lands to any considerable extent; but the occupiers of the lands on the west side, believing that the stoppage of the culvert would be injurious to their lands, reopened it, and so let the waters through on to the plaintiff's land to a much greater extent:—

Held, that the commissioners were responsible for the entire damage thus caused to the plaintiff's land.

THIS was an action brought by the plaintiff, a farmer and occupier of lands situate in a district called the Marshland Fen, in the county of Norfolk, against the defendants, being the commissioners for carrying into execution an act of parliament of the 7 & 8 Vict. c. cvi, intituled "An act for improving the drainage and navigation of the middle level of the fens," to recover compensation for damage sustained by the plaintiff, by reason of lands in his occupation being inundated and injured and his crops destroyed through the breaking of a sluice and the bank of a certain cut made by and belonging to the commissioners, in consequence of the negligence of the commissioners in making and maintaining the sluice and cut. The action was referred to three arbitrators, who stated the following case:—

1. The declaration stated that, before and at the time of the committing by the drainage commissioners of the grievances thereinafter mentioned the plaintiff was and thenceforth had been and still was possessed of lands in the parish of West Walton, in the county of Norfolk, within a certain district called Marshland Fen, and that by the said act it is enacted [s. 137] that the commissioners shall make and maintain a cut for conveying the water from the said Middle Level into the river Ouze, and which cut shall commence at the sixteen feet river about half a mile

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above the lower end of the said river, and shall terminate at the river Ouze southward of a sluice called the Marshland New Sluice, and the bottom of the said cut at the lower end thereof shall not be less than fifty feet in width nor less than three feet below the datum line of the several plans and sections of the said cut deposited with the clerks of the peace of the counties of Norfolk, Cambridge, Huntingdon, and the Isle of Ely, and thereafter referred to, and the sides of the said cut shall be made with gradient and proper slopes from the bottom thereof to the surface of the land; and the commissioners shall also, where necessary, make and maintain in a substantial manner a bank on each side of the said cut, with front and back forelands thereto; and each of the said banks shall be constructed with a good and sufficient puddle-clay wall in or near the centre thereof, of a proper depth, width, height, and dimensions, and so as effectually to defend the lands lying on each side of the said drain from the passage of the water through the said bank at all times; and the said puddle-wall and banks shall be so formed and maintained as effectually to prevent the water of the said cut from passing over or soaking through the same into any of the adjoining lands: and that by the said act it is further enacted [s. 138] that the commissioners shall make and maintain a good and substantial sluice of brick and stone at or near the entrance of the said cut into the river Ouze, with two or three openings, the waterways of which shall not altogether be less than fifty feet, and with doors to each of the said openings of sufficient height to exclude the tidal waters; and the sill of such sluice shall be placed not less than six feet below the aforesaid datum line in the said act mentioned: and that, after the passing of the said act, the commissioners did make a cut for the purpose aforesaid, commencing and terminating as by the said act it was directed (to wit) in and through Marshland Fen aforesaid, and did also make a sluice of brick and stone at or near the entrance of the said cut into the river Ouze; yet that the said commissioners so carelessly, negligently, unskilfully, and wrongfully conducted themselves in and about making and maintaining the said cut, banks, and walls thereof, and in and about making and maintaining the said sluice good and substantial, that by means of such their careless, negligent, unskilful, wrongful, and

improper conduct, the tidal waves burst, ran, and broke through the said sluice and into the said cut, and broke down and passed over and through the banks of the said cut into Marshland Fen aforesaid, and overflowed and submerged the same and the lands of the plaintiff; and by reason of the premises the plaintiff, who then was and still is possessed for an unexpired term of years of the said lands, not only was and from thence hitherto had been and still was, and for a long space of time would be, expelled from and deprived of the use of his said lands, but certain crops then on the said lands were destroyed, and the plaintiff lost the gains which otherwise he would have made of the same, and also by reason of the premises the said lands of the plaintiff had become saturated with the water of the sea, and made unfit for bearing crops, and the fertility of the same had been destroyed.

Pleas: 1. Not guilty. 2. That the plaintiff was not possessed, as alleged. Issue thereon.

2. In pursuance of the powers given to the commissioners by their act of parliament, they, after the passing thereof, made the cut and sluice in the declaration mentioned. The cut conveyed a large body of water from the Middle Level district into the tidal river Ouze, and passed in its course through a part of the Marshland Fen district, in which the plaintiff's land was situate, and which district is not within the jurisdiction of the defendants, but of a distinct body of commissioners called the Marshland Fen commissioners.

3. In May, 1862, the said sluice of the defendants was broken and destroyed by the force of the tidal waters of the river Ouze, which burst into the defendants' cut in large quantities, and continued to do so from tide to tide until one of the banks gave way, and the waters overflowed a vast extent of the fen-lands near that part of the cut, and ultimately reached and overflowed the plaintiff's lands, and destroyed a considerable part of his crops, as hereinafter particularly mentioned.

4. It was, for the purpose of the reference, admitted by the defendants on the hearing that the breaking of the sluice and bank of the cut arose from their negligence, as alleged in the declaration (1); but it was contended on their part that, under the

(1) See *Coe* v. *Wise*, Law Rep. 1 Q. B. 711.

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particular circumstances hereinafter stated as to the flooding of the plaintiff's lands, the defendants were not responsible for the damage occasioned to the plaintiff thereby, or at all events for the greater part of such damage.

5. The cut of the defendants is a broad embanked channel, and, where it passes through the Marshland Fen, it conveys the Middle Level waters to the Ouze at a much higher level than the adjacent fen lands. It runs in a direction from the southward to the northward, and before the inundation its waters entered the river Ouze through the sluice above mentioned, which was situate near the point of junction of the cut with the river.

6. The plaintiff's lands which were flooded are situate on the eastern side of the cut, and the waters from the plaintiff's lands and other neighbouring lands on that side of the cut used to drain from the east to the west side of the cut through a culvert made under the cut by the commissioners for that purpose, in pursuance of the 148th section of the act, and without which culvert the drainage of the lands of the Marshland Fen district on the east of the cut would have been interrupted and stopped by the formation of the cut.

7. The defendants were required under the provisions of the said act of parliament to make proper communications for this purpose in those districts in which a portion of the lands would be severed from the remainder by the formation of the cut; and s. 148 provides that the said drainage commissioners shall make and maintain culverts under the said cut of proper dimensions and in convenient situations for carrying the waters of the said several lands into the drains of the districts or fens with which the said lands before were severally drained; and the said waters shall at all times have a free passage to the said culverts through the ditches thereinbefore directed to be made by the commissioners for fencing the back forelands of the said cut from the adjoining lands. (1)

8. On the 4th of May, 1862, the tidal waters of the Ouze broke down and burst through the defendants' sluice and entered their said cut, and continued to do so with each succeeding tide, until on Monday, the 12th of May, the western bank gave way, and a great

(1) The act was to be referred to as part of the case.

breach was made in it, through which the waters of the cut and the tidal waters overflowed the low lands lying west of the cut to a very considerable extent, and which rapidly increased from tide to tide.

9. On Monday, the 12th of May, the waters of the flood had not yet reached the culvert, which was situate at some distance from the breach, and the drainage waters continued to flow through it in the ordinary manner from east to west. But, as the flood waters were rapidly approaching the culvert, it occurred to the plaintiff and some other occupiers of land east of the cut, that, if the culvert could be stopped up, their lands would be saved from the inundation; and accordingly they forthwith began to stop up the culvert at the western side of the cut, and would most likely have effectually done so if it had not been for the interruption and obstruction which they experienced. But many of the occupiers and persons interested in the lands on the west side of the cut considered that the stopping of the culvert would be injurious to their lands, by preventing the great body of advancing water from finding an outlet there, and so causing it to accumulate more on their side than it otherwise would have done; and they accordingly removed and took away the piles and other means with which the occupiers on the eastern side were endeavouring to close up the culvert, thus rendering these attempts ineffectual. The culvert being thus kept open, the flood waters, having reached it, began to pass through it from the western to the eastern side.

10. On Tuesday, the 13th of May, the flood waters were flowing freely through the culvert and over the lands lying near it on the east, but had not reached the lands of the plaintiff, or at all events not in any considerable quantity; and another attempt was made by the sons of the plaintiff and other persons who were occupiers and interested in the lands on the eastern side to stop up the culvert, and by various means they contrived to effect a stoppage of it which was very nearly though not quite complete, and which, if it had remained, would have kept by far the larger portion of the flood waters which approached the culvert from coming through. But, though no obstruction was made to the stoppage while it was being done, in the day time, the whole of it was removed by some persons at night; and a vast body of water in the

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course of Tuesday night and Wednesday passed through the culvert and reached the plaintiff's land, and extended gradually from the lower to the higher parts until it covered a large part of his farm.

11. On Thursday, the 15th, a larger and more effectual stoppage of the culvert was made by the plaintiff and other occupiers on the east side of the cut, and which was continued on the following days until the further influx of water in any material quantity was effectually prevented; and on the 16th arrangements were made by the plaintiff and some of his neighbours for having the water on the east side of the culvert pumped away by steam-power; but so much water had previously come through the culvert on these lands that it took some weeks before the lands could be relieved from it, and in the meantime much damage was done to the land and the crops.

12. The different persons who so interfered in obstructing the stoppage of the culvert did not act from any intention of producing injury to the owners or occupiers of lands on the east side of the cut, but from a bonâ fide desire of preventing additional mischief to their own lands by having the water penned up on the west side of the cut by the stopping up of the culvert, which in its ordinary state would have constituted an outlet or relief as to some part of the flood waters; and some of the persons who were opposed to and who to a certain extent encouraged the opposition to the closing of the culvert were persons connected with the commissioners of the Marshland Fen district, who, having the charge of the lands in that district both on the west and east sides of the cut, considered that the ordinary state of things with respect to the culvert ought not properly to be altered or interfered with. The defendants neither by themselves nor their agents took any part in regard to the before-mentioned proceedings at the culvert.

13. Under the above circumstances, it was contended before the arbitrators, on the part of the plaintiff, that the defendants, through whose neglect the whole body of the flood waters had been discharged on the fen-lands in the neighbourhood of the plaintiff, were responsible for the whole damage sustained by him in consequence of such flood waters coming upon his lands as before mentioned; but, on the defendants' part, it was contended that they were not so responsible, inasmuch as such damage, or the greater part thereof,

did not proceed directly from the negligence of the defendants, but arose from the acts of other persons, and from causes subsequent to the negligence of the defendants, with which the defendants were unconnected, and for which they were not responsible; and that such damage, or the greater part of it, was too remote to be legally recoverable against the defendants; and both parties requested that the arbitrators should find the amount of the damages, and state a case for the opinion of the Court on this question.

14. The total damage which the plaintiff sustained from the flood waters coming on his lands and destroying his crops amounted to 1180*l.*; but, if he should not be entitled to recover such damages as were consequent on the opposition made by the occupiers of the land on the west side of the defendants' cut to the closing of the culvert, and on the removal of the obstructions placed by the plaintiff and the other occupiers on the east side to the passage of the flood waters through the culvert, the damages sustained and recoverable by him would then be 118*l.* only.

The question for the opinion of the Court was, whether, under the circumstances above mentioned, the plaintiff was entitled to recover in the said action against the defendants the larger or the smaller of the said two sums.

Keane, Q.C. (*Merewether* with him), for the plaintiff. The commissioners were bound to construct the culvert in question, under s. 148 of the statute, for the benefit of the owners of the lands on the east side of the cut. It was also the duty of the commissioners, under s. 137, to construct the walls, gates, and sluices in such a manner as to prevent the tidal waters of the Ouze from overflowing the land to the west of the culvert. Through their negligence that duty was insufficiently performed, and the water overflowed the banks of the cut and flooded the land. The failure of the plaintiff, from whatever cause, to prevent the flood-waters passing through the culvert into his land, does not absolve the defendants for their breach of duty. Nor is it any answer for them to say that the wrongful act of the land-owners on the west of the culvert, in removing the dam which the plaintiff had placed there, caused or contributed to the injury; for that would be apportioning the damage between themselves and other wrong-

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doers, which the law does not allow: per Tindal, C.J., in *Davis* v. *Garrett* (1); per Bramwell, B. in *Bagnall* v. *London and North Western Railway Company*. (2) It is enough for the plaintiff to shew that the primary and proximate cause of the damage was the negligence of the defendants in allowing the water to flow down to the culvert.

Mellish, Q.C. (*O'Malley, Q.C.*, and *Metcalfe*, with him), for the defendants. The question is whether the defendants are to be held responsible for the wrongful act of those who removed the obstruction which the plaintiff had rightfully placed at the lower end of the culvert, and without which wrongful act the damage complained of would have been wholly prevented or materially diminished. No doubt, the bursting of the sluice was attributable to the defendants' negligence: but the lands of the plaintiff never would have been injured, if there had not been an open culvert under the cut to carry the waters from the eastern to the western side to the natural drainage. This culvert having been made for the exclusive benefit of the owners of the land to the east of the cut, they were clearly entitled to stop it up. But the land-owners on the west side of the cut, mistakenly supposing that the stoppage of the culvert would cause the flood to rise higher upon their land, wrongfully removed the obstruction which the plaintiff and his neighbours had placed there. The breach being large enough, the waters must necessarily rise to the level of the tide in the river Ouze on the western lands, whether the lands to the east of the cut were flooded or not. If by adopting reasonable precautions the plaintiff might have avoided the injury, he was bound to adopt them; and, if these failed through the wrongful acts of third parties, the damage resulting therefrom cannot be said to be the proximate consequence of the defendants' negligence.

[BRETT, J. Could the defendants have complained if it had never suggested itself to anybody that the damage to the plaintiff's land might have been prevented or materially diminished by the closing of the culvert?]

That might have raised a question for a jury, the answer to which would depend upon a variety of circumstances.

[BRETT, J. Assuming that those who removed the dam from

(1) 4 M. & P. 540. (2) 7 H. & N. 423, 446.

the mouth of the culvert were wrongdoers, how can the liability be apportioned between them and the defendants, but for whose negligence no damage would have occurred?]

No wrong was done to the plaintiff until the flood-waters reached his land. But for the wrongful act of strangers, the plaintiff would have sustained little or no injury.

Keane, Q.C., in reply. The case of *Scott* v. *Shepherd* (1) is an answer to the argument on the part of the defendants. If the squib had not been originally thrown in that case, or if the defendants in this case had kept the tidal waters of the Ouze penned back, no mischief could have happened.

MONTAGUE SMITH, J. I am of opinion that the plaintiff is entitled to judgment for the larger amount of damages mentioned in the question submitted to us. The misfortune was proximately caused by the defendants' negligence. It appears that there was a culvert under the cut for the purpose of draining the lands of the plaintiff and others on the east side; and that, when the water broke through the bank of the cut, the owners of the land on the west side, imagining that if the neighbouring lands on the east were also overflowed the injury to themselves would be diminished, removed the obstruction which the plaintiff and others had placed at the mouth of the culvert to prevent their lands being flooded. The act of parliament seems to require the culvert to be kept open at all times. It may be that no person had a right to close it. But, at all events, the defendants cannot excuse themselves from the natural consequences of their negligence, by reason of the act, whether rightful or wrongful, of those who removed the obstruction placed in the culvert under the circumstances found in this case.

BRETT, J. The culvert was existing by virtue of the act of parliament, and was to be kept open at all times. No person, therefore, could have a legal right to close it; and consequently the land-owners on the west side of the cut could no more be called wrongdoers for removing the obstruction, than the plaintiff for placing it there. But, assuming that the former were wrongdoers,

(1) 2 W. Bl. 892; 1 Sm. L. C. 343, 4th ed.

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the primary and substantial cause of the injury was the negligence of the defendants; and it is not competent to them to say that they are absolved from the consequence of their wrongful act by what the plaintiff or some one else did. The plaintiff had impeded the passage of the water into the lower end of the culvert; and the owners of land on that side removed the impediment. I cannot see how the defendants can excuse themselves by urging that the plaintiff was prevented by other wrongdoers from preventing a part of the injury. That would be apportioning the consequences of their negligence between themselves and other wrongdoers. I think the plaintiff is entitled to recover the larger sum.

Judgment for the plaintiff.

Attorney for plaintiff: *T. M. Wilkin.*
Attorneys for defendants: *Meredith, Lucas, & Co.*

May 6.

CALLAGHAN, APPELLANT; DOLWIN, RESPONDENT.

Friendly Society—Construction of Rules—Finality of Decision of Arbitrators or Justices—Appeal under 20 *&* 21 *Vict. c.* 43.

No appeal lies against the decision of a magistrate under s. 5 of the Friendly Societies Act, 21 & 22 Vict. c. 101, notwithstanding the general words of 20 & 21 Vict. c. 43, s. 2, that, "after the hearing and determination by a justice or justices of any information or complaint which he or they have power to determine in a summary way by any law now in force *or hereafter to be made*," either party, if dissatisfied with the decision, may demand a case for the opinion of a superior court,—the persons selected by the rules of the society to settle all disputes between the society and its members being, whether justices or other referees, to be regarded as arbitrators, whose decision is to be final and conclusive.

Reg v. *Lambarde* (Law Rep. 1 Q. B. 388), overruled.

CASE for the opinion of the Court, under 20 & 21 Vict. c. 43.

1. At the police-court, Marlborough Street, on the 30th of April, 1868, a complaint was preferred by Richard Dolwin against the secretary of the Loyal King's Lodge Benefit Society.

2. The complaint was made under 21 & 22 Vict. c. 101, s. 5, and charged that the appellant, on the 25th of April, 1868, unlawfully refused to pay the respondent, he being a free member of the society, and having complied with the regulations thereof,

the sum of 10*l.*, being the sum allowed by the 3rd rule of the society for the funeral of the wife of a free member thereof.

3. The respondent produced a copy of the society's rules, and stated that he cleared the books (viz. according to rule 14 of the society, hereinafter set out) on the 8th of April last, that is, he paid on that day the three quarters' money then due, at the office of the society; that his wife died on the 22nd of April last; and that he gave the secretary notice of her death on the 25th, and claimed 10*l.*, which was refused.

4. The rules of the society are certified by Mr. Pratt, the registrar of friendly societies; and by rule 36, disputes under the rules between members and the trustees, treasurer, or other officer shall be referred to justices, pursuant to 21 & 22 Vict. c. 101, s. 5.

5. By rule 13, headed "The regulations of the society in cases of death," notice must be sent to the secretary at his office, and he or his appointee, a free member, shall attend and see that provision is made for a decent funeral; but in no case will the funeral money be paid if the claim be not made within three months of the death of such member or such member's wife.

6. By rule 14, headed "Suspension and expulsion," such member must clear the books on the first meeting night after quarterly night, or be fined according to rule 32. "If such member neglect payment, he shall be suspended from all and every benefit set forth in these rules, until one week after such arrears and fines are paid; such suspension to follow if the member leave such quarter's contribution and pay it when the six months become due: but any member being six months in arrears can pay one quarter's contribution, with the fine, on the quarterly night, but shall be suspended from all and every benefit until one month after such arrears are paid, which can only be on a meeting night. But no member can be erased till the third quarter's contribution is due; but, subject to the foregoing suspension, if any money be paid in the interval, such member cannot claim from the funds until two months have elapsed since the arrears were paid. If any member leaves his six months' contribution until the third quarter becomes due, the whole three quarters' arrears must be paid, or such member shall be erased."

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7. The appellant did not object to the amount claimed, but resisted payment on the ground that, the respondent's wife having died within two months after the payment of the three quarters' arrears, a period of suspension was then in force, and the respondent was not entitled to recover at any time.

8. In the first place, the magistrate thought that the penal consequences of suspension of payment did not apply to any cases not expressly provided for, and that the case was not included in those cases. He also thought that, if the case was within the rule of suspension, the respondent would still be entitled to recover after two months had elapsed from the payment of the three quarters' arrears. Under the whole circumstances, he ordered payment of 10*l.*, and 10*s.* costs.

The opinion of the Court was requested whether in point of law the magistrate's construction of rule 14 was correct; and, if the Court should be of opinion that it was not correct, they were requested to say whether the respondent was in point of law estopped from all remedy to recover 10*l.* after the lapse of two months from the last payment of three quarters' arrears.

Lister (*T. Atkinson, Serjt.*, with him), for the appellant, contended that the magistrate had put a wrong construction on rule 14.

Warton, for the respondent. No appeal lies in this case. The magistrate stood in the position of an arbitrator, and his decision is final. The whole policy of the legislation on the subject was to submit these disputes between members and officers of these societies to an inexpensive domestic tribunal: *Crisp* v. *Bunbury* (1); *Kelsall* v. *Tyler*. (2) Provision was made for the reference of disputes to justices by 4 & 5 Wm. 4, c. 40, s. 7. (3) By 18 & 19 Vict. c. 63, s. 40, it was enacted that "every dispute between any member or members of any society established under this act or any of the acts hereby repealed, or any person claiming through or under a member, or under the rules of such society, and the trustee, treasurer, or other officer, or the committee thereof, shall be decided in manner directed by the rules of such society, and the decision so made shall be binding and conclusive on all

(1) 8 Bing. 394, 401. (2) 11 Ex. 513; 25 L. J. (Ex.) 153.
(3) See *Reg.* v. *Evans*, 23 L. J. (M.C.) 100.

parties, without appeal: Provided that, where the rules of any society established under any of the acts hereby repealed shall have directed disputes to be referred to justices, such disputes shall be referred to and decided by the county-court as hereinafter (s. 41) mentioned." That *proviso* is repealed by 21 & 22 Vict. c. 101, s. 5, and in lieu thereof it is enacted that "where the rules of any society established under the said act or any of the acts thereby repealed shall direct disputes to be referred to justices, then any justice of the peace acting in the county, &c., upon complaint made by any member, his executors, &c., or by any person claiming under the rules of the society, of any matter in dispute between him or them and the society, to summon the person against whom such complaint is made to appear at a time and place to be named in such summons, and any two justices present at the time and place mentioned in such summons shall proceed to hear and determine the said complaint, which complaint shall be heard and determined, in England, in manner directed by the 11 & 12 Vict. c. 43; and such justices may make such order thereupon, either for the payment of money or otherwise, together with costs not exexceeding 10*s.*, as they shall think fit." The object of that enactment was, to take away the jurisdiction of the county-courts, and to restore that of the justices; but the earlier part of 18 & 19 Vict. c. 63, s. 40, is not thereby repealed. The justices remain, as before, arbitrators, whose decision is final and not subject to appeal.

[*Lister* referred to *Reg.* v. *Lambarde and Others, Justices of Kent* (1), where it was held that a proceeding under 21 & 22 Vict. c. 101, s. 5, is one in which the magistrate is bound to state a case under 20 & 21 Vict. c. 43.]

That was a decision of a single judge, and no reasons are given to support the judgment.

[BYLES, J., referred to the wording of 20 & 21 Vict. c. 43, s. 2.]

A special provision in an act of parliament, applicable to a particular subject-matter or a particular class of persons, is not to be affected by general words in a subsequent statute: Dwarris on Statutes, 2nd ed. 668; *Conservators of the River Thames* v. *Hall.* (2) The general words, therefore, in 20 & 21 Vict. c. 43, cannot pre-

(1) Law Rep. 1 Q. B. 388. (2) Law Rep. 3 C. P. 415.

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vail against the special provisions as to friendly societies which are contained in 18 & 19 Vict. c. 63, s. 40, and 21 & 22 Vict. c. 101, s 5. He also contended that the decision of the magistrate was correct.

Lister, in reply. The question of jurisdiction is precluded by authority; and the general words of 20 & 21 Vict. c. 43, s. 2, remove the restriction contained in 18 & 19 Vict. c. 63, s. 40. The justices hear and determine the complaint in their magisterial capacity; and the statement of a case under 20 & 21 Vict. c. 43, is not in strictness an appeal, but a mere submission of a question of law for the opinion of a superior Court.

Cur. adv. vult.

May 6. The judgment of the Court (Byles, Keating, and Montague Smith, JJ.) was delivered by

MONTAGUE SMITH, J. A dispute between a member of the Loyal King's Lodge Friendly Society and one of the officers of the society was decided by a magistrate; but, at the instance of the officer of the society, the magistrate stated a case for the opinion of this Court under 20 & 21 Vict. c. 43, s. 2.

Upon the case coming on to be heard before us, it was objected by the respondent that there was no power in the magistrate to state the case, on the ground that he acted as a referee, and that his decision was without appeal.

By the 36th rule of the society it is provided that disputes arising between members and any officers of the society shall be referred to justices, pursuant to 21 & 22 Vict. c. 101, s. 5.

Upon consideration of the Friendly Societies Acts, we think no appeal lies.

The 18 & 19 Vict. c. 63, s. 40, enacts that every dispute between a member and officers of the society shall be decided in the manner directed by the rules of such society, and expressly enacts that "*the decision so made shall be binding and conclusive on all parties, without appeal.*" Then a proviso is added, that, where the rules of any society shall have directed disputes to be referred to justices, such disputes shall be referred to and decided by the county-court as thereinafter mentioned. The 41st section then provides for the settlement of other disputes, besides those by the rules referred to

justices, by the county-court, and declares that its decisions shall not be subject to appeal.

The county-court was thus by the proviso of the 40th section of 18 & 19 Vict. c. 63, substituted for the justices: but their decision was without appeal. This substitution, however, did not long continue to exist: for, by 21 & 22 Vict. c. 101, s. 5, the proviso of the 40th section of 18 & 19 Vict. was repealed, and, "in lieu thereof," it was enacted that, where the rules of any society shall direct disputes to be referred to justices, then a justice, upon complaint made by any member, &c., may summon the persons against whom complaint is made at a time and place mentioned, and any two justices then present "shall proceed to hear and determine the said complaint, which complaint shall be heard and determined in manner directed by 11 & 12 Vict. c. 43; and such justices may make such order thereupon, either for payment of money or otherwise, together with costs not exceeding 10*s.*, *as they shall think fit.*"

Now, this act, which repealed the proviso of the 40th section of 18 & 19 Vict. c. 63, left unrepealed the body of that section, which enacted that every dispute should be decided in manner directed by the rules of the society, and that the decision so made should be "binding and conclusive on all parties, without appeal."

The act of 20 & 21 Vict. c. 43, impowering justices to state a case for the opinion of the Court, had passed in the interval between the above two Friendly Societies Acts.

It was contended by the appellant that, as the complaint is by 21 & 22 Vict. c. 101 directed to be heard and determined by justices in manner directed by 11 & 12 Vict. c. 43, they hear and determine it as justices; and that the power to state a case under 20 & 21 Vict. c. 43, arises, as in other complaints heard and determined by them.

This contention of the appellant amounts to an assertion that there is an implied repeal of the 40th section of 18 & 19 Vict. c. 63; and it appears to us, on an examination of the statutes, that such an implication cannot be made.

It was further contended that the power to state a case was for the assistance of the magistrate, and was not an appeal. But an examination of the provisions of 20 & 21 Vict. c. 43, does not

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support that contention. No doubt, the proceeding on a case is only upon a determination erroneous in point of law: but in form and substance it is an appeal from the magistrate. It is given, after his determination, to the dissatisfied party, who is called "the appellant," and the proceeding "an appeal." Further, the effect of the 4th and 5th sections is, that the justices are bound to state a case, unless the application be frivolous; and, if they refuse, the Court of Queen's Bench may compel them to do so. Then, by s. 6, the Court to which a case is transmitted may not only reverse, affirm, or amend, but may make such other order in relation to the matter as they may think fit. It seems clear, therefore, that the proceeding by way of case is an appeal from the determination of the justices, and that such a proceeding is opposed to the enactment of s. 40 of 18 & 19 Vict. c. 63, that "the decision" (when made in manner directed by the rules) "shall be binding and conclusive on all parties, without appeal."

The 5th section of 21 & 22 Vict. c. 101, appears to us to do no more than prescribe that the mode of procedure before the justices shall be according to 11 & 12 Vict. c. 43, and that it was not meant to take from them the character of referees, viz. persons selected by the society to decide upon their disputes. The limitation of costs to 10s. shews also that the legislature meant the proceeding to be inexpensive.

If we were to hold that this appeal lies, we should attribute to the legislature an intention opposed to the whole policy upon which, in this respect, the Friendly Societies Acts are founded. Throughout the series of statutes on the subject, it has been provided that disputes between members and the society are to be decided by arbitration only; and the Courts have given effect to this policy by holding that the jurisdiction of the superior Courts in such cases was ousted, although not taken away by express words: see the cases at law, of *Crisp* v. *Bunbury* (1), *Ex parte Payne* (2), and *Reeves* v. *White*. (3) In the last-mentioned case Lord Campbell, C.J., in delivering the judgment of the Court, says: "In *Ex parte Payne* (2), Erle, J., after full argument and great deliberation, put this construction on the 27th section of 10 Geo. 4, c. 56, considering it to be the expressed intention of the

(1) 8 Bing. 394. (2) 5 D. & L. 679. (3) 17 Q. B. 995, 1011.

legislature to protect societies and their members, who are generally persons in an inferior rank of life, with small means, from the vexation and ruin which might be brought upon them by litigation in Courts of law, and to provide for them a domestic tribunal by which all their differences might be speedily decided, and at very small expense."

The Courts of equity have given the same construction to the acts. In *Armitage* v. *Walker* (1), where a question arose under the Benefit Building Societies Act, 6 & 7 Wm. 4, c. 32, Vice-Chancellor Wood says: "The legislature carefully intended to provide that these societies should not be dragged before Courts of law or equity, if it could possibly be avoided, and has taken care to enact that the whole discussion of their affairs shall be disposed of in a cheap and summary manner, by the decision of an arbitrator or justice, as the parties shall choose; and, when they have once made their election, the power of the justice or of the arbitrator, acting always within the rules of the society, is complete, and is not subject to revision by any Court of law or equity. That is the primary matter to which attention must be drawn; and it is necessary to be extremely careful that the jurisdiction of the Court shall not be set up to control the arbitrators so selected, except upon a very clear and distinct case being made out, of the abuse of their office."

The gist of these decisions is, that the persons selected by the rules to settle disputes are, whether justices or other referees, to be regarded as arbitrators; and the exception in Vice-Chancellor Wood's judgment refers to the well-known equitable relief afforded in the cases where arbitrators have misconducted themselves and abused their powers.

There is no authority to be found for the view of the appellant, except a decision of Shee, J., in the Bail Court, where that learned judge held that the justices were bound to grant a case under 20 & 21 Vict. c. 43: *Reg.* v. *Lambarde.* (2) But, in the reports of that case, it does not appear that s. 40 of the 18 & 19 Vict. c. 63, was brought to the attention of the learned judge, nor that the earlier statutes and the decisions upon them were referred to. With every respect, therefore, for the learned judge, we cannot consider that decision binding upon a question of such great practical importance.

(1) 2 K. & J. 211. (2) Law Rep. 1 Q. B. 388.

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In the result, we come to the conclusion that the magistrate, in hearing this dispute, acted in the character of an arbitrator under the rules of the society, and consequently that his decision cannot be reviewed by this Court upon the case stated, and that the appeal should be dismissed.

Appeal dismissed, with costs.

Attorneys for appellant: *Godfrey & Herbert.*
Attorney for respondent: *H. T. Roberts.*

May 6.

ROYSE, PETITIONER; BIRLEY, RESPONDENT.

MANCHESTER ELECTION PETITION.

Parliament—Disqualification—Contract for the Service of the Public— 22 *Geo.* 3, *c.* 45.

The 22 Geo. 3, c. 45, s. 1, enacts that any person who shall contract for the public service, or shall "knowingly and willingly" furnish in pursuance of such contract any wares, &c., to be used in the public service, shall be incapable of being elected or sitting as a member of the House of Commons while he holds the contract.

A contract was entered into in June, 1868, for the supply of goods for the public service of India. The contract was completely executed by the contractors by the delivery and acceptance of the goods by the 23rd of October, 1868; but the contractors did not receive payment from the India Office until the 18th of January, 1869. In the interval, viz., on the 18th of November, 1868, one of the contractors was elected a member of the House of Commons:—

Held, that, assuming the contract to be within 22 Geo. 3, c. 45, s. 1, it did not avoid the election.

Quære, whether a contract for the supply of goods for India, entered into with the Secretary of State for India in Council, is a contract "for the public service," within 22 Geo. 3, c. 45, s. 1.

A firm, in which a member of the House of Commons was a partner, sold and delivered goods for the service of a lunatic asylum which had been appropriated to criminal lunatics under the Royal sign-manual, pursuant to 23 & 24 Vict. c. 75, in ignorance that they were dealing with a government institution:—

Held, not a disqualification within 22 Geo. 3, c. 45, s. 1.

THE following case was stated for the opinion of the Court under s. 11, sub-s. 16, of the Parliamentary Elections Act, 1868, 31 & 32 Vict. c. 125:—

1. Frederick Royse and Charles Wright petitioned against the return of Hugh Birley, Esq., on the ground that the said H. Birley

was a contractor with the commissioners of Her Majesty's Treasury or with some other person or persons for or on account of the public service.

2. The candidates for the representation of the parliamentary borough of Manchester were Thomas Bazley, Esq., Jacob Bright, Esq., Mitchell Henry, Esq., Ernest Jones, Esq., Joseph Hoare, Esq., and Hugh Birley, Esq.

3. The writ for the election of representatives for the parliamentary borough of Manchester was dated the 11th of November, 1868. The nomination took place on the 16th of November, and the polling on the 17th.

4. On the 18th of November the Mayor of Manchester declared that Hugh Birley, Thomas Bazley, and Jacob Bright, Esqs., were elected representatives, and that the following were the numbers polled for each candidate:—Birley, 15,486; Bazley, 14,192; Bright, 13,514; Hoare, 12,684; Jones, 10,662; Henry, 5236.

5. Mr. Birley was during the whole of the year 1868, and still is, a member of the firm of Mackintosh & Co., of 83 Cannon Street, London, and Cambridge Street, Manchester, patentees and manufacturers of the vulcanized India rubber; and, for the purposes of this special case, it is admitted that there have been dealings as hereinafter mentioned by the firm of Mackintosh & Co.,—I. with the Secretary of State for India in Council,—and II. with the Broadmoor Asylum for criminal lunatics, which it is contended on the part of the petitioners are, and on the part of the respondent are not, contracts within the meaning of 22 Geo. 3, c. 45.

I. With the Secretary of State for India in Council.

6. About the 30th of April, 1868, Mackintosh & Co. received at their warehouse in London a printed form from the India Office, signed by H. C. G. Bedford, for director-general of stores, requesting them to say, on or before the 7th of May, 1868, at what prices they could supply certain articles specified in a list, for exportation to India (Madras).

7. The following is a copy of the form:—

"Home Form, No. 2.

"India Office, Westminster, April 29, 1868.

"Gentlemen,—I am directed by the Secretary of State for India in Council to acquaint you that the articles specified in the annexed

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list are required for exportation to India, and to request that you will inform me on or about Monday, the 7th of May, 1868, at 2 o'clock, at what prices you can supply them. The date for delivery is written on the form of tender.

"(2). You will have the goodness to abstain from taking any steps towards the provision of the goods until you shall have been informed by letter that your prices have been approved.

"(3). The goods are to be delivered into the store-depôt, Belvedere Road, Lambeth, London; and no charges are to be made for carriage to the depôt, nor for the cases or wrappers in which the goods may be packed, as the same will be returned to you on application.

"(4). Payment will be made in cash after the examination of the stores has been completed, for which due time must be allowed. Every delivery at the depôt shall be accompanied with a list of the particular articles sent; and the articles shall be therein designated as in the words of the accompanying form of tender, and no other. Forms for such lists may be obtained on application to the inspector of stores.

"(5). In the cases in which patterns exist for any of the articles for which you are invited to tender, they may be seen on application to the inspector of stores at the India store-depôt, Belvedere Road. You are at liberty, as often as you see fit, within the usual hours of business, to inspect the patterns; and the officers of the inspector of stores department will afford you ready assistance in comparing with the said patterns any stores which you may send in as a preliminary delivery, or for your own satisfaction, by way of assuring yourselves of the correctness of your work. The pattern-number of each article is shewn against it in the form of tender.

"(6). The opinion of the inspector of stores as to the quality of the goods shall be final. Notice in writing will be given to you of any rejected goods; and the same must be removed, at your expense, within one month from the date of such rejection being notified to you.

"(7). In case you shall fail to deliver, at the time stipulated in the form of tender, any of the articles which may be ordered of you, power is reserved, according to the circumstances of the case

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and the urgency of the service, either to allow time for making good any deficiencies or to close the account upon the day fixed for delivery, purchasing elsewhere the quantities not supplied, and charging you with the excess of price, if any, paid for the stores so re-purchased over that at which you contracted to furnish them.

"(8). All such articles as may be rejected by the inspector of stores must be replaced with approved goods on or before the day fixed in the annexed form of tender; but the inspector of stores is at liberty to allow you to take away any small quantities of stores having been delivered in time which may require amendment in trifling particulars; and he will receive back the same when amended, although the final delivery of the stores may be delayed a few days after the stipulated time. If, however, the quantity of objectionable stores be considerable, this indulgence will not be allowed, but the account will be closed on the day originally fixed in the order.

"(9). In your reply, I request you will describe the articles and quantities exactly as designated in the annexed form of tender, stating the price against each; and write upon the cover "Tender for India-rubber."

"(10). If there should appear to you to be any omission or deficiency in the description of the articles herein set forth, you will point out the same, in order that this letter may be corrected before you make your tender.

(Signed) "H. C. G. Bedford,
"for Director General of Stores.

"N.B. On the completion of the order, separate claims for the stores for each presidency and department must be forwarded to this office in duplicate, addressed to the director-general of stores. In describing the stores in your claims, the terms of the form of tender must be carefully observed. Printed forms for claims may be obtained on application at this office."

8. On the 7th of May, 1868, Mackintosh & Co. replied to this communication, as follows:—

"To the Secretary of State for India in Council.

"Sir,—We hereby offer to supply the undermentioned stores at the prices quoted. We agree to all and each of the conditions

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mentioned in the letter from the director-general of stores, dated the 29th of April, 1868.

(Signed) "C. Mackintosh & Co."

Here followed a description of the goods, and their prices, amounting to 2*l.* 17*s.*

9. On or about the 4th of June, 1868, Mackintosh & Co. received from the India Office a letter accepting their offer.

10. The goods mentioned in the letter of the 7th of May, 1868, were delivered in accordance with instructions to that effect received from the India Office, into the said India store depôt, Belvedere Road, on the 4th of September, 1868.

11. On the 18th of January, 1869, Mackintosh & Co. received from the India Office the said sum of 2*l.* 17*s.* in payment for the said goods.

12. About the 23rd of May, 1868, Mackintosh & Co. received another order for India in the same form as above mentioned, which they accepted by letter of the 27th of May, 1868.

15. On the 3rd or 4th of June, 1868, Mackintosh & Co. received from the director general a letter accepting their tender of the 27th of May, subject to the conditions in the letter of the 22nd.

16. The goods mentioned in the letter of the 27th of May were delivered in due course into the India store-depôt, and were examined and passed. And on the 17th of July, 1868, Mackintosh & Co. forwarded an invoice of the goods to the proper office.

17. A copy of the invoice was set out, amounting to 12*l.*

18. On the 6th of January, 1869, Mackintosh & Co. received from the India Office a sum of 12*l.*, in payment for the last-mentioned goods.

[The case then set out several other transactions of a similar nature, one in June, 1868, the goods mentioned in which, with an invoice amounting to 288*l.* 18*s.* 5*d.*, were delivered on the 17th of August, 1868.]

27, 28. On the 30th of September, 1868, Mackintosh & Co. received a letter from the India store department objecting to a portion of the goods last delivered, and requesting that they might be replaced as soon as possible.

29. The goods objected to were received back by Mackintosh & Co., and were replaced by other goods, which were delivered at the depôt, and accepted as satisfactory, on the 23rd of October, 1868.

30. On the 18th of January, 1869, Mackintosh & Co. received from the India Office 285*l.* 5*s.* 10*d.* in payment for the last-mentioned goods, a deduction of 3*l.* 12*s.* 7*d.* having been made for difference in weight, &c. 1869 ROYSE v. BIRLEY.

31—36. The case set out another transaction amounting to 1*l.* 5*s.* 9*d.* which commenced on the 29th of June, 1868, and the order completed on the 17th of July, and was closed by payment on the 11th of March, 1869.

II. Broadmoor Asylum for Criminal Lunatics.

37. By 23 & 24 Vict. c. 75, intituled "An Act to make better provision for the custody and care of criminal lunatics," it was among other things provided that it should be lawful for Her Majesty by warrant under her Royal sign-manual to appoint that any asylum or place in England which Her Majesty might have caused to be provided or appropriated, and might deem suitable for that purpose, should be an asylum for criminal lunatics: and accordingly, by a warrant dated the 28th of June, 1861, under the Royal sign-manual, the Broadmoor Asylum, at Wokingham, in Berkshire, was appropriated, and has ever since been used for such purposes.

38. On or about the 10th of November, 1868, Mackintosh & Co. received by post the document hereinafter called a demand order, of which the following is a copy:—

"No. 3389. Demand.

"Broadmoor Asylum, 9th Nov. 1868.

"To Messrs. Mackintosh & Co., London.

"The following articles are required, for the service of the above establishment, to be delivered in accordance with your contract:—

Contract No.	Articles.	Quantity.	Head of service to which chargeable.
	India-rubber chambers unhandled.	3 doz.	Furniture, &c.

"C. T. Phelps, Steward. ——— Superintendent.

"The attention of the contractors, &c., is directed to the instructions on the back."

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39. The instructions on the back of this demand order were as follows:—

"*Note.* Every delivery of goods must be accompanied by a price invoice quoting the No. of the demand and the head of service as specified. At the close of each quarter forms will be sent for rendering the accounts, which must be transmitted without delay. Want of attention to the above will probably cause delay in payment of the accounts."

40. The London agent of Mackintosh & Co. [verbally] accepted the above order before the 16th of November; but, although in the demand order (which was partly printed and partly written) the articles are stated to be required to be delivered "in accordance with your contract," there was not in fact, at the time of the sending of the order, any such contract; and this demand order was the only order or authority for the articles being supplied. Mr. Birley was not aware at the time of the election that the order had been accepted; nor did he or his London agent, Mr. Brown, know until after the presentation of the petition in this case that the Broadmoor Asylum was, as in fact it is, a government institution supported by an annual parliamentary grant, and used for the purposes of the Crown.

41. The goods mentioned in such demand were forwarded by railway on the 26th of November, 1868, together with an invoice, amounting to 7*l.* 11*s.*

42—44. After some demur about the price charged, Mackintosh & Co. received from the steward of the asylum on the 28th of December a letter requesting them to furnish him their account for supplies to the establishment in the quarter ending the 31st.

45. No reply has been made to this application; and the money is still due.

46. At the time of the election the existence of the dealings and transactions hereinbefore set forth were not known to the constituency; and no notice was given that votes given to Mr. *Birley* would be thrown away.

The questions for the opinion of the Court were,—

1. Whether the aforesaid dealings and transactions for goods amounting in value respectively to 2*l.* 17*s.*, 12*l.*, 288*l.* 18*s.* 5*d.*, and 1*l.* 5*s.* 9*d.*, with the Secretary of State for India in Council, or any or

either of them, were or was contracts or a contract for or on account of the public service, within the meaning of the 22 Geo. 3, c. 45.

2. Whether, if the said dealings and transactions, or any or either of them, are or is contracts or a contract within the act, such contracts or contract were or was subsisting contracts or a subsisting contract at the time of the election of Mr. Birley as one of the representatives of the parliamentary borough of Manchester.

3. Whether the aforesaid dealing with the superintendent of the Broadmoor Asylum was a contract within the 22 Geo. 3, c. 45.

4. Whether the election of Mr. Birley was void by reason of the said contracts or any of them.

Manisty, Q.C. (*Bryce* with him), for the petitioners. The first question is whether a contract entered into with the Secretary of State for India in Council causes a disqualification within the first part of s. 1 of 22 Geo. 3, c. 45 (1), where the delivery of the

(1) 22 Geo. 3, c. 45, s. 1, "for further securing the freedom and independence of parliament," enacts that "any person who shall, directly or indirectly, himself, or by any person whatsoever in trust for him, or for his use or benefit, or on his account, undertake, execute, hold, or enjoy, in the whole or in part, any contract, agreement, or commission made or entered into with, under, or from the Commissioners of Her Majesty's Treasury, &c., or with any other person or persons whatsoever, for or on account of the public service, or shall knowingly and willingly furnish or provide, in pursuance of any such agreement, contract, or commission which he or they shall have made or entered into as aforesaid, any money to be remitted abroad, or any wares or merchandize to be used or employed in the service of the public, shall be incapable of being elected, or of sitting or voting as a member of the House of Commons, during the time that he shall execute, hold, or enjoy any such contract, agreement, or commission, or any part or share thereof, or any benefit or emolument arising from the same."

S. 2 vacates the seat of any member who shall accept or continue to hold a contract after the end of the then next session. By s. 4, the act is not to extend to any contract the term whereof would expire within one year; s. 5 provides that, where any contract, &c., has been made with a provision that the same shall continue until a year's notice be given of the intended dissolution thereof, the same shall not disable any person from sitting and voting till one year after such notice shall be given, &c.; s. 7, that then members may be discharged from the execution of existing contracts on giving twelve months' notice of their desire that the same shall cease; s. 9, that, if any person hereby disabled or declared to be incapable to sit or vote in parliament shall be returned, the election and return are declared to be void; and if any person disabled and declared incapable by the act to be elected, shall presume to sit or vote as a member of the House of Commons, such person so sitting or voting shall forfeit 500*l.* for every day in which he shall sit or vote in the said House.

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goods under it is completed before the day of election, but the price is not paid until after that day. Since the passing of 21 & 22 Vict. c. 106, by which the government of India was transferred from the East India Company to the Crown, contracts with the Secretary of State for India are as much within the mischief of the act of 22 Geo. 3 as those made with any other department of the state. The payment is to be made out of the revenues of India, which are by 21 & 22 Vict. c. 106 vested in the Crown. The contractor, therefore, is as much under the influence of the Crown as if the contract was made with either of the other principal Secretaries of State. And the disqualification continues so long as he is entitled to "any benefit or emolument arising from the same." It is the benefit which incapacitates; and it is impossible to say that the receipt of the price is not an essential part of the benefit of the contract.

[MONTAGUE SMITH, J. The contract was completely executed, so far as Mackintosh & Co. were concerned, before the day of election: and the time for the payment of the money had passed, though it had not actually been paid.]

In the *Maidstone Case* (1), Alderman Winchester, who was returned as member at the election in July, 1830, in conjunction with his partners had had a contract, dated the 6th of November, 1828, for the supply of stationery to the commissioners of the navy, to continue in force for twelve months certain, and after that time until after the expiration of three months' warning: and the question was whether or not the alderman had divested himself of all interest in that contract by a valid assignment before the day of election. The committee held that he had, and therefore that his return was valid. A different result was arrived at in the recent case of Sir Sidney Waterlow, who with his partners had a subsisting contract with the stationery-office, the dissolution of partnership not having taken place until after the day of election. In the *Leominster Case* (2), Mr. Bish, who was returned as one of the members, was a lottery contractor. The election took place on the 12th of June, 1826. By the agreement entered into by Mr. Bish and others with the Lords of the Treasury, the day

(1) Rogers on Elections, 10th ed. App. p. iv.

(2) Rogers on Elections, 10th ed. App. p. i.

appointed for the final drawing of the lottery was the 17th of May, 1826, and the day for payment of the last instalment by Mr. Bish was the 29th of April, 1826. The last instalment was paid on that day, and the list of the tickets delivered; but the final drawing was at the contractors' instance postponed until after the day of election, viz. to the 18th of July: and the committee held that Mr. Bish was not duly elected, because something remained to be done by him in order to the full and complete performance of his contract. The *Cambridge Case* (1) is conclusive to shew that a contract with the Secretary of State for India is within the words as well as the spirit of the statute. Mr. Forsyth's election was declared void by reason of his holding the office of standing counsel to the Secretary of State for India; and it was thought necessary to pass an act of parliament in order to relieve him from the penalties which he had incurred by sitting and voting: see 29 & 30 Vict. c. 20. The office of standing counsel to the Secretary of State for India in Council was held to be an office of profit under the Crown, within the 6 Anne, c. 7, s. 25.

Then, as to the contracts with the Broadmoor Asylum,—the case finds that that is a government establishment; and the goods, though ordered before, were forwarded by Mackintosh & Co. to the asylum after the day of the election. This was clearly a contract with the superintendent "for or on account of the public service," within the first part of the 22 Geo. 3, c. 45, s. 1, and the incapacity is not removed by the fact of the candidate being ignorant at the time that the person he was contracting with was an agent of the government. The second part of the clause was intended to meet the case of one who, having made a contract with an agent of the government, has got rid of the contract before the day of election, but who nevertheless supplies the goods, and so has brought himself within the prohibition.

[WILLES, J. Must we not read the 1st and 9th sections together? And, looking at the expression "presume," and at the highly penal nature of the latter section, is not the case brought within the more general principle that a man is not to be held guilty unless his mind concurs in the guilt? If the dealing takes place with one who may or may not be acting for the government, the ques-

(1) May, 6th ed. 596.

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to be done on his part, the statute creates a disqualification or a liability to the penalties imposed by s. 9, because the payment has been delayed. It is difficult to say that the contractor can be within the mischief of the act when he has completely performed the contract on his part before the day of election. It may be that he could not enforce payment. Taking, however, the whole of s. 1, and reading it with the light reflected upon it by the subsequent provisions, it is plain that it has reference only to executory contracts.

Then, as to the dealings with the Broadmoor Lunatic Asylum,—It is impossible to imagine that the legislature meant to make a man liable to such extremely onerous penalties, where he does not know, and has not reasonable means of knowing, at the time of the dealing that he is contracting with an agent of the government or for the service of the public. The words "knowingly and willingly" abundantly shew this. To constitute the offence, there must be the mens rea. Besides the statement in par. 40 of the case, that neither Mr. Birley nor the agent in London who supplied the goods was aware that the Broadmoor Asylum was a government institution, it is to be observed that the nature of the contract was not such as to induce inquiry on the subject, nor were the orders given by a person who primâ facie would appear to be an agent for the government.

Manisty, in reply. The Secretary of State for India is the President of the Council. He goes out with the goverment. He is to all intents and purposes a minister of the Crown. The very object of the statute was to prevent the election of persons who may be supposed to be under the influence of the Crown; and it is impossible to conceive a more direct influence than this. Can it be said that receiving payment is not "enjoying the benefit" of a contract? The circumstance that the source from which the payment comes is the revenue of India can make no difference. The argument that the office of Secretary of State for India was not contemplated by the statute, is disposed of by *Forsyth's Case*. (1)

WILLES, J. This was a petition presented under the Parliamentary Elections Act, 1868 (31 & 32 Vict. c. 125), praying that

(1) May, 6th ed. 596.

the election and return of Mr. Hugh Birley at the last election for the city of Manchester might be determined to be null and void, upon the ground that he was disqualified by the act of 22 Geo. 3, c. 45. The question arose thus:—Mr. Birley is a member of the firm of Mackintosh & Co., who are India-rubber manufacturers, and they had an order from the Secretary of State for India in Council for the supply of goods under a certain contract to the department presided over by that officer. This contract was performed on the 23rd of October, 1868, to this extent, that all the goods had then been delivered and finally accepted as being a complete fulfilment of such contract, and nothing remained to be done under it, except for the government to pay the price, which had then become ascertained. On the 23rd of October, 1868, therefore, Mackintosh & Co. had become creditors of the public, to speak in popular language, in respect of the price of the goods; and, in fact, the only relation which existed between them and the public from that time was that of creditor and debtor. There was another contract relied on by the petitioners; and that arose in this way:—An order was given by an officer of the Broadmoor Asylum, which is an asylum for the reception of criminal lunatics, not established under an act of parliament, which might be considered as notice to all the world that it was a government establishment, but under a warrant bearing the sign-manual, by which it was declared to be a public institution for the reception of criminal lunatics, Her Majesty having the power, under 23 & 24 Vict. c. 75, to issue such warrant. Broadmoor Asylum was not, in fact, known to Mr. Birley or his partners, or to their agent to whom the order was given, as a public institution, until after the election and supply.

Before the election, the asylum being in want of some India-rubber articles, an order was sent to Mackintosh & Co. for three dozen of them. That order was inquired after by a person who came on the part of the asylum to Mackintosh & Co.'s place of business, and he was informed that the goods would be sent. That is the construction to be put upon the statement in the case that the order was accepted; and, the value of the goods being under 10*l.*, it must be taken that this formed a contract for the delivery of the goods. The goods were sent after the election; and, after

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some correspondence, the price appears to have been agreed upon and settled at 7*l.* 11*s.*

These being the facts, the question is whether Mr. Birley, at the time of the election, did fall within the disqualifying statute, 22 Geo. 3, c. 45.

It was insisted on the part of the petitioners that the Secretary of State for India contracting for the Indian service under his control, was contracting for the public service. It was also insisted that a person who had completely performed his contract, so that he had nothing to do but receive the price, and nothing to hope for in respect of that payment except receiving that which was his due, was still a person holding or enjoying a contract within the disqualifying clause of the statute. Each of those propositions was denied on the part of the respondent.

With respect to the second contract, viz. the order for the Broadmoor Lunatic Asylum, there can be no doubt that it was literally a contract for the public service: but the question raised with respect to that was, whether a mere casual, isolated order, given across the counter, so to speak, by a person not known to be contracting for the government or supplying the means for ascertaining at the time whether he was so or not, and accepted by a trader who is not aware that he is dealing with the government, either then or at the time of the election, comes within the prohibition of the statute.

These questions must be disposed of separately.

With regard to the contract with the Secretary of State for India in Council, the first question is one deserving of much consideration, and it might not be useful to express a judicial opinion upon that, except in a case in which it was necessary to dispose of it. Certainly, the impression upon my mind at first, and I do not say that that impression has been entirely removed, was, that a contract with the Secretary of State for India, who is one of Her Majesty's principal Secretaries of State, would be a contract for the public service; but I do not think it necessary to express an opinion upon that, because, upon the second ground, it appears to me that the respondent was not a contractor within 22 Geo. 3, c. 45, inasmuch as before the election, he had ceased to be a person holding or enjoying a contract within the meaning of that statute, and had

been converted into a mere creditor of the government, whose claim had been ascertained, and whose right was to receive his money, and as to whom, as it appears to me, it would be an injustice to say that a mere delay in payment on the part of the government should have the effect of disqualifying him as a candidate. It appears to me very clear, when the terms of the act come to be examined, that it was not the intention of the legislature that the mere relation of debtor and creditor subsisting should of itself create a disqualification. If that were so, it would be impossible to avoid the absurdity suggested by Mr. Mellish, that the mere omission of the government to pay a small sum of money, a trifling balance, to a contractor who had completely fulfilled his contract,—whether by reason of there having been a dispute that was not adjusted until shortly before the election, or even by reason of an accidental omission of a few pounds at the time of payment,—should constitute the status of disability. If that were really the meaning of the act, of course we should have no other duty than to adopt it: but we have the preliminary duty of assuring ourselves that the legislature did intend such a state of things before we pronounce it to be law.

Now, the 22 Geo. 3, c. 45, deals with two classes of persons: it deals with persons to be elected in future elections to parliament; and it also deals with persons who were in the House of Commons at the time. And the first piece of information of what the legislature intended, I think, may be derived from the comparison of the first section, which deals with the first of these classes, with the 2nd section, which deals with the second class. The 6th, 7th, and 10th sections also throw light upon the matter. Reading the 1st section by itself, with the light of the preamble, that this was an act for "securing the freedom and independence of parliament," and finding that the specific provisions in the section seem to point to the execution of a contract with the government, and finding also that the provision for disqualification is limited to the time during which the person contracting should "execute, hold, or enjoy any such contract, agreement, or commission," I think the enactment refers to the case of a man having a contract under which he is to derive some future benefit from dealing with the government, in respect of which they might control him; as, for

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instance, by directing their officers not to look too closely to the sort of goods he sent in, or the like. I should be strongly disposed to come to the conclusion that a person cannot be said to execute, hold, or enjoy a contract, when the only thing he can be said to enjoy is, the not being paid money in respect of something which he has completely done at some former time, and for which he would have been entitled to be paid on the spot and at the instant, if that were the course of business. Looking at the fact that there is no general provision that a public creditor shall not be a member of the House of Commons, I should have thought, if that 1st section stood alone, it would be wrong to come to the conclusion that, because the government owed a person a debt, that person is disqualified by this statute if there had been previously a contract under which such debt accrued.

The 2nd section seems to tend in the same direction. It enacts that, "if any person, being a member of the House of Commons, shall, directly or indirectly, himself, or by any other person whatsoever in trust for him or for his use and benefit, or on his account, accept of, agree for, undertake, or execute, in the whole or in part, any such contract, agreement, or commission as aforesaid; or if any person, being a member of the House of Commons, and having already entered into such contract, agreement, or commission, or part or share of any such contract, agreement, or commission, by himself or by any other person whatsoever in trust for him, or for his use or benefit, or upon his account, shall, after the commencement of the next session of parliament continue to hold, execute, or enjoy the same, or any part thereof,—the seat of every such person in the House of Commons shall be and is hereby declared to be void." It would certainly be a violent conclusion, as it appears to me, to arrive at, if a person who at the time of the passing of this act happened to be a contractor who had fulfilled his contract, and to whom it only remained that the government should pay what was due to him for what he had supplied, should be kept out of his money till the commencement of the next session of parliament, that such a person thereupon, for no fault whatsoever, and in respect only of the delay of payment, should lose his seat. That would tend rather in an opposite direction to what the act intended; for, it would tend to destroy the freedom and independence of par-

liament: because, if such a thing were conceivable, if there happened to be two contractors in the House, the one a supporter of the government and the other not, a delay of the Treasury might cause one of them to be unseated, while the other by being paid would retain his seat. That would be a strange conclusion.

Then, passing over the 3rd and 4th sections, I come to the 5th clause, which provides that, "where any contract, agreement, or commission has been made, entered into, or accepted, with a provision that the same shall continue until a year's notice shall be given of the intended dissolution thereof, the same shall not disable any person from sitting and voting in parliament until one year after the said notice shall be actually given for the determination of the said contract, agreement, or commission, or till twelve calendar months, to be computed from the time of the passing this act." That is quite inapplicable to the case of a mere creditor, unless it were to be supposed that he was to give up his debt as a condition of remaining in the House. Then the 6th section rather alters the language, although it means to express the same idea as the clause as to time in the 1st section, because it is "that nothing herein contained shall extend or be construed to extend to any person on whom, after the passing of this act, the completion of any contract, agreement, or commission shall devolve by descent or limitation, or by marriage, or as devisee, legatee, executor, or administrator, until twelve calendar months after he shall have been in possession of the same." That looks very much like a contract to be completed, and under which something was to be done beyond mere payment, being the sort of contract which was intended by the legislature to be a disqualification. The 7th section of the act, applicable to then members, looks the same way. It enacts that "any person who is now a member of the House of Commons, and holds and enjoys any such contract, agreement, or commission as aforesaid, may be discharged from the execution thereof on giving twelve months' notice to the person or persons with or from whom such contract, agreement, or commission is made, entered into, or accepted, of his desire that the same shall cease and determine; and such contract, agreement, or commission, after the expiration of the term aforesaid, shall be null and void."

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It is unnecessary that I should make any further observations upon the act in order to explain the reasons why I have come in my own mind clearly to the conclusion that Mr. Birley was not disqualified by the act, either in respect of the first contract, because that contract had been completed and fulfilled by his firm, and the debtor was the government, and there is no sensible reason for disqualifying a man simply because he happens to have money due to him which is not paid him; or in respect of the second contract, because there was a total absence of knowledge that the contract was with the government.

I can only add, in conclusion, that I am the more satisfied it must have been the intention of the legislature that the act should apply only to cases where the contract was entered into with knowledge, because one can hardly conceive a substantial case of a government contract not made under circumstances in which the person dealing with the government knew, or had the means of knowing, that he was dealing with the government.

I am desired by the Lord Chief Justice, who, I regret, is unable to attend, to say that he concurs in the judgment I have pronounced.

MONTAGUE SMITH, J. I am of the same opinion. It is contended that Mr. Birley is disqualified from being elected for the city of Manchester because he was a partner in the house of Mackintosh & Co., which, at the time of the election, held two contracts with the government,—one with the Secretary of State for India in Council, and the other with the Broadmoor Lunatic Asylum.

Now, first, as to the contract with the Secretary of State for India in Council, I think it is unnecessary, in the view we take, to decide whether such a contract is a contract for the public service within the meaning of 22 Geo. 3, c. 45. It is a question which will require serious consideration when it becomes necessary to decide it; and I desire to express no opinion upon it on this occasion. I decide this case, so far as regards that contract, upon the ground that at the time of the election the contract was no longer executory, and nothing remained to be done upon it but for the government to pay the price of the goods. Looking at this act of parliament and the general tenor of it, I certainly am strongly of

opinion that the legislature intended it to apply only to contracts of a continuing nature, such as contracts for the building of works, and contracts for a recurring supply of goods, though I do not say that a contract for a single supply of goods is not within the terms which are used. But to my mind it very plainly appears that the statute did not mean to disqualify a contractor unless the contract was in an executory state on his part, that is to say, that something remained to be done by him; and that in no other way can the act of parliament be properly construed. The words "undertake and execute," in s. 1, clearly apply only while the contract is executory; and, though the other words "hold" and "enjoy" are more general, it seems to me they refer to holding a contract or enjoying a contract which is executory, that is, a contract under which something has to be done by the contractor, either one act or recurring acts, and that he is only disqualified "during the time that he shall execute, hold, or enjoy" any such contract. The words "hold and enjoy" may have been inserted to meet cases where a contractor holding a contract did not himself execute it. The words "during the time" clearly shew that parliament was contemplating a contract which would endure for some period of time, and that during that period of time something should remain to be done on the part of the contractor under that contract. The 4th and 5th clauses also point to contracts having some duration in point of time for the performance of that which the contractor was to do under them. I repeat that I do not say that, if there is a contract for a single supply of goods, that contract is not within the act so long as it remains to be performed on the part of the contractor, he having to supply the goods, and the government having a right to find fault with and reject them. But, when the contract is no longer executory on the contractor's part, and he is only a creditor of the government, I do not think he can be said to "execute, hold, or enjoy," within the meaning of this act of parliament. The consequence of holding otherwise would be, that a man might be disqualified from entering parliament by the misfeazance of the government; and more, it would be twisting the act so as to produce the very consequence it was sought to avoid, viz. giving the government a control over a man, and leaving it to their discretion, by paying him or not, whether they would allow

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him to enter parliament or not. I think we ought not to put a construction upon the clause which would lead to such a consequence, unless we are compelled by plain and direct words so to do. On these grounds, therefore, I come to the conclusion that Mr. Birley was not disqualified by reason of Messrs. Mackintosh & Co. being unpaid at the time of the election for the goods they had previously supplied.

With regard to the goods sent to the Broadmoor Asylum, although there was the form gone through of a written order from the superintendent, and an answer sent, the case really comes to no more than if the superintendent of the asylum had gone to the shop of Mackintosh & Co. and ordered three dozen of the articles in question, which were not supplied till after the election. It may be that that is a contract within the terms of this act, though I have said I do not think it was in the contemplation of those who passed this statute that such a transaction should be deemed a contract within the terms of this enactment. However, assuming it is, I am clearly of opinion that, where the order is not given by some recognized government officer, so that the fact of giving the order is itself notice that it is an order on behalf of the government, but where it is consistent with the order that it may be given on the part of a private person, and in point of fact the person of whom the goods are ordered does not know but that that is the case, such last-mentioned person is not disqualified by this statute; for, I think there must be a contract with the government by the person sought to be disqualified, which is known by him, or ought reasonably to be known by him, to be a contract with government. Here, it is found in point of fact that Mr. Birley and his partners did not know that the order was given on the part of the government; and there is every reason, upon the facts, for coming to the conclusion that the order received was not one which upon its face gave any notice to the person receiving it that it was an order on behalf of the government.

I confess I am very glad that, upon this last contract, we are able to come to this conclusion; because it would be monstrous to hold that the representation of one of the largest cities in the kingdom should depend upon the question whether the candidate was a partner in a firm which had taken an order for some articles

of such small value that the contract was not required by the Statute of Frauds to be in writing. I cannot help thinking that it would be very desirable that this act should be revised, because it certainly appears to me to be totally inapplicable to the present state of commerce, and that it really provides a pit-fall into which men who wish to walk uprightly and according to law may unwittingly tumble. I think Mr. Birley is entitled to keep his seat.

BRETT, J. I am of the same opinion. The questions are, what is the construction of the 1st section of 22 Geo. 3, c. 45, and how is that section to be applied to the two cases before the Court. Now, as to the construction of the statute, it seems to me that the first thing to be considered is, what is the canon of construction to be applied? Is it that which is to be applied to a highly penal statute, or is it not? That depends, I think, on the 9th section.

In the 9th section there is disability spoken of twice in the same terms, and there are two results made to follow from that disability. The first part of the section says, "that, if any person hereby disabled or declared to be incapable to sit or vote in parliament shall nevertheless be returned," the election shall be void. And the second part of that section, using exactly the same words as to disability and incapacity, says, "and if any person disabled and declared incapable by this act to be elected shall after the end of this session of parliament presume to sit or vote," he shall be subject to the penalty of 500*l.* for every day he shall sit or vote in the House. Inasmuch as the same words are used, it seems to me that whatever are the necessary incidents in order to make the person liable to the penalty of 500*l.* are also necessary incidents in order to make the election void. For instance, if knowledge is necessary in order to make the person liable to the penalty, and is a necessary incident for that purpose, it is also a necessary incident in order to make the election void. Therefore, the whole section and the whole act are to be construed as of a highly penal character. If that be so, then the points raised in this case on the 1st section are,—first, with whom is it necessary that the disqualifying contract should be made.

On the one side it is said that it must be made with a person who is an agent of the government capable of making contracts

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binding on the government, and the payment for which must be voted by the parliament of Great Britain. On the other side it is contended that it is sufficient if it is made with an agent of the government; and that it is not necessary that the payment should be out of the public funds of Great Britain. I confess I am inclined to think that the latter construction is right, and that the Secretary of State for India is such an agent for the government. He is so much an agent of the government, that, in taking office, he vacates his seat, and is obliged to go to a new election. I should have thought that any contract made with him was within the statute, and that it was immaterial that the money was to be paid out of the revenues of India; because, otherwise, it would seem to me that the mischief pointed at in this act might be committed with impunity, and that government might exercise very considerable influence over the independence of parliament by means of the revenues of India. But I quite agree that it is not necessary to decide that point in the present case.

The next point is, whether it is necessary that, at the time when the person is elected, the contract, even supposing it is made with the government, should be executory. That depends upon the view to be taken of this 1st section. Now, the first part of that section applies to any person who shall "undertake, execute, hold, or enjoy" any contract therein mentioned. To undertake a contract would seem to be to enter into it; the word "execute" would seem to refer to the case of a person who takes on himself the execution of a contract not originally made with him; the word "hold" to the case of a possible transfer of a contract which had been made already with some other person; and the word "enjoy" to the case of a person with whom the contract was not made, but who as cestui que trust is to enjoy the benefit of it. But then the second part of the section says that any such person shall be incapable of being elected "during the time he shall execute, hold, or enjoy any such contract." Now, for such person to be executing, it seems to me he should be in a position to be called upon to execute, and, if so, the words "hold" and "enjoy" would mean hold or enjoy in the same sense, *i.e.* holding or enjoying a contract which the contractor may be called upon to execute, or under which there may be something still to be executed. I think that

such an interpretation may fairly be given, from what appears in the 1st section, by itself. But, when you look at the 2nd section, and interpret that by the 7th section, I think the view indicated becomes much stronger; because the words in the 2nd section are the same as those used in the 1st, though they are applied to the case, not of a person entering into these contracts before he is elected, but after he is elected and has become a member of parliament. The 2nd section says that, if any person, being a member of parliament, shall "enter into, accept of, agree for, undertake, or execute" any such contract, or if he shall after the commencement of the next session of parliament "continue to hold, execute, or enjoy the same," his seat is to be void. Therefore, there are the same words as in the 1st section; and, if the contract in the 2nd must be executory, it does seem to me that the contract contemplated by the 1st section must also be an executory contract. Now, the 7th section deals with the case of persons who, being in parliament at the time this act was passed, were disabled by reason of the words used in the 2nd section, and provides a mode by which such persons might get discharged from the execution of such contracts, and so get rid of the disability. The 7th section clearly contemplates that the contract from the disability under which the members could escape was still an executory contract. It seems to me, therefore, strong to shew that the contracts in the 2nd section are contracts still executory. And the 10th section would seem also to carry out the same view. If that be so, then, for the reasons I have already mentioned, it seems to me that contracts under the first part of this section must also be considered executory.

The next question is, whether, under the first part of the 1st section, the contract there mentioned must be entered into with knowledge that it is with the government. It was argued that it was not necessary that there should be such knowledge, because, it was said, there were no words to that effect in the first part of the section, whereas the second part of the section is introduced by the words "knowingly and willingly." But the first part of that section seems to me to be pointed to the case of entering into a contract, and the second part to the case of carrying out a contract. Mr. Manisty argued that that second part was intended to apply

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only to the case where a person, having entered into a contract, and given it up, should nevertheless afterwards go on with it again. But, considering how highly penal this statute is, it seems to me rather the more favourable construction to say that the first part applies to contracts knowingly entered into with the government, and that the second part applies to the case where a contract has been entered into with the government in fact, but without the knowledge of the contractor, but afterwards, upon its coming to his knowledge that the contract was with the government, he nevertheless goes on and insists upon executing it. If that be so, knowledge is required under the first part of the section just as well as under the second part.

Then we come to the facts of the present case. In the first contract brought to the notice of the Court, it must be considered that it was a contract for the supply of goods to be paid for by cash payment. There was no credit. There was power, indeed, under the contract, for the government to object to the goods when delivered; but before the election the goods had been supplied, and the government had accepted them as satisfactory, so that there was nothing to do but to pay the money; and, the time for payment having arrived, it would not be necessary for the creditor to sue upon the contract, but he could sue as for goods sold and delivered. It seems to me, under these circumstances, that at the time of the election, the contract was executed, and was therefore not within the statute.

Then, as to the case of the contract with the Broadmoor Lunatic Asylum, I think the objection fails, because it is distinctly stated in the case that not only Mr. Birley did not know there was a contract with an agent of the government, but he actually did not know that any contract had been made.

I must say that, when one considers the result of a contrary decision, it does seem almost impossible that the Court could hold otherwise than it is about to do; because, with respect to the contract in the first case, if the Court held differently, the government, when it had been supplied with goods, and had nothing to do but to perform the simple duty of payment, might be able to keep a person out of parliament for ever, simply by not paying him his debt; and, with respect to the contract in the second case, as was

pointed out by Mr. Mellish, if the traveller of some large firm received an order from a person whom he did not know was an agent of the government, yet if he was such agent, although none of the principals of that traveller knew at the time of the election even that a contract had been entered into, and certainly not that it had been entered into with the government, then any one of the principals who should be elected to parliament, although he knew nothing of the matter until after he was elected, or perhaps until after he had sat in parliament for six months, would find his election void, and, according to my view of the matter, would find himself fixed with a penalty of 500*l.* for every day he sat or voted in parliament during those six months. The injustice of such a construction of a penal act seems to me fully to justify the Court in the interpretation of it to which they have come.

I will further say that the view which the Court now takes is not at all inconsistent with the decisions of the committees of the House of Commons in the case of Sir Sidney Waterlow and in the *Leominster Case* (1), because in both those cases there was at the time of the election something remaining to be done under the contract by the contractors; whereas here the contract was, as it appears to me, no longer executory.

Judgment for the respondent, with costs.

Agents for petitioners: *Reed, Phelps, & Sidgwick, for Sale & Co., Manchester.*

Agents for respondent: *Milne & Co.*

(1) Rogers on Elections, 10th ed. App. p. 1.

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May 4.

FLYNN *v.* ROBERTSON.

Arbitration—Mistake—Reference back to Arbitrator.

An action and all matters in difference having been referred to the master, he made, by mistake, an award in favour of the defendant. The mistake arose from his omitting to take account of an advance by the plaintiff to the defendant, which had been duly proved before him, but which, at the time of making the award, he overlooked. The mistake was admitted by both parties, and the master stated to the Court the circumstances under which it arose. On a motion by the plaintiff:—

Held, that the Court had power to refer the award back to the master.

THIS was a rule to refer back to the master an award that had been made by him.

It appeared from the affidavits that the plaintiff being indebted to the defendant as her attorney, to the amount of between 70*l.* and 80*l.*, paid to him 60*l.* on account. Subsequently the defendant being in want of money, the plaintiff advanced to him 50*l.* on his promissory note. The note having become due, the plaintiff sued the defendant on it, and the defendant pleaded a set-off, and the cause and all matters in difference was referred to one of the masters by order of a judge. The above facts were duly proved before the master, but at the time of making the award, he forgot the payment of 60*l.* on account and found for the defendant. The defendant, being aware that it was an error, sent the next day to the plaintiff and offered to pay her 40*l.* This the plaintiff declined, and on a subsequent day this rule was obtained on her behalf, the master stating to the Court that the facts were as above stated.

Willis shewed cause. The Court cannot send back an award to the arbitrator, except for error on its face.

[BOVILL, C.J. I understand the arbitrator has made a mistake in drawing up his award, not that he has come to a wrong judgment on the case.]

The same may be said of the facts in *Phillips* v. *Evans* (1), which were precisely similar to those of the present case. There the earlier case of *In re Hall & Hinds* (2), in which an award had been set aside in consequence of an admitted error in the nume-

(1) 12 M. & W. 309. (2) 2 Man. & G. 847.

rical calculations, was cited and not followed. The next case was *Hutchinson* v. *Shepperton*. (1) There the arbitrator had omitted to include an admitted sum, thinking that the parties had agreed on it, and therefore withdrawn it from his consideration, and the Court set aside the award; but it was on the ground that the arbitrator had not, in fact, decided on all the matters submitted to him. It is true that Lord Denman says in that case that the Court have a discretion in the matter; but the cases shew that the Court will only exercise that discretion when there are other grounds for doing so than mere mistake. In *Hodgkinson* v. *Fernie* (2), which was a decision of the Exchequer Chamber, all these cases were cited, and the Court there held that the award of an arbitrator was binding both in law and fact, and the Court had no power to interfere except where there had been fraud, or where there was error of law appearing on the face of the award. No doubt, in that case the error was not admitted, but the principle of the decision would extend to a case such as the present. The question was recently fully considered by the Irish courts in *Godfrey* v. *Broderick* (3), where Pigott, C.B., in giving judgment, says:—"We must refuse this motion, though there is a clerical error in the award . . . . . we cannot depart from the established rule. In *Phillips* v. *Evans* (4), palpable injustice was done, but the Court would not interfere. If parties select the tribunal of arbitration, they must accept all its consequences." The case of *Baggalay* v. *Borthwick* (5), shews that the Court will not remit a matter back to the master except where there is ground for setting aside his certificate.

Marriott, in support of the rule. The case of *In re Hall & Hinds* (6), is an authority for this application, and the case of *Phillips* v. *Evans* (4), is distinguishable, for there there was no affidavit of the arbitrator, while here the master has stated to the Court the facts of the case, which is equivalent to an affidavit by an arbitrator. [He was stopped by the Court.]

BOVILL, C.J. In this case it is admitted by both parties that there has been a mistake in the award. The defendant, in fact,

(1) 13 Q. B. 955.
(2) 3 C. B. (N. S.) 189.
(3) 14 Ir. C. L. Rep. (App.) xxxiii., xxxv.
(4) 12 M. & W. 309.
(5) 10 C. B. (N.S.) 61.
(6) 2 Man. & G. 847.

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has since offered to pay 40*l.*, and the master has stated to us how the error arose, and in the words of Tindal, C.J., in *In re Hall & Hinds* (1), "it would really bring the administration of justice in this particular instance into scandal and contempt if a remedy were wanting, or, if existing, were not applied." In that case the award was set aside on the ground that the facts shewed what amounted to misconduct on the part of the arbitrator; but in *Hutchinson* v. *Shepperton* (2), Lord Denman said, in delivering the judgment of the Court, after taking time to consider: "Their (the defendants) learned counsel relied upon some strong expressions used by my Brother Parke in *Phillips* v. *Evans* (3), which seem to indicate that no mistake of an arbitrator can ever be a sufficient ground for setting aside an award. Though fully sensible of the propriety of observing the greatest caution with regard to this subject to avoid inquiries which would unravel bygone transactions, and keep alive the litigation which the parties had hoped to terminate by reference, we cannot think the rule universal and subject to no exception. It is at most one for guiding our discretion, which cannot be so absolutely fettered and rendered powerless. If awards are allowed to be questioned under any circumstances, it may be difficult to draw a line, but a line must be drawn somewhere, and this case will certainly not be found to fall within it wherever drawn. If the Court might with propriety have refused that application in the first instance, yet the rule having been granted on affidavits clearly setting forth without contradiction a case of gross injustice which the Court has power to remedy, we ought not to sanction that injustice." It seems to me that judgment lays down the correct rule, and that the Court has a discretion to send back an award to the arbitrator where the mistake is clear, and especially if it is admitted by the arbitrator as it is here; indeed, in such a case the Court are bound to do so. A similar question came before the present Lord Chancellor in *Mills* v. *Master, Wardens, and Society of the Mystery of Bowyers* (4), and he there held that he was bound to send back the award, the mistake being admitted by the arbitrator, and I think we are also bound to refer this matter back to the master.

(1) 2 Man. & G. at p. 852.
(2) 13 Q. B. 955, 958.
(3) 12 M. & W. 309, 312.
(4) 3 K. & J. 66.

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MONTAGUE SMITH, J. I am of the same opinion. I do not wish to shake the general rule that courts will not review the judgment of an arbitrator either in fact or law: but I think this rule should be made absolute, not on the ground that the master's judgment was erroneous, but because there was a mistake in the conduct of the reference on his part which has prevented his giving expression to his judgment on the matter, and led to an error which is clearly proved, and is admitted by both parties. In such a case I think the Court can send an award back to the arbitrator to be corrected. The consequences, otherwise, would be so inequitable that it is impossible that the Court could act upon a rule to the contrary, even if it was laid down in the authorities, but I think, on being looked at closely, they bear out our conclusion in this matter.

BRETT, J. It is admitted in this case that the arbitrator has made a mistake as to the facts before him, and I think *Mills* v. *Master, Warden, and Society of the Mystery of Bowyers* (1), is an authority that, under such circumstances, we can send the award back to be corrected. I think it may fairly be said that the arbitrator has not applied his mind to the facts before him, and so not really adjudicated on them, and the case then falls within the decision of *Hutchinson* v. *Shepperton* (2), and all that Lord Denman says applies, and *Whitmore* v. *Smith* (3) seems to be an authority to the same effect. I think, therefore, the rule should be made absolute.

Rule absolute.

Attorneys for plaintiff: *Roscoe & Hincks.*
Attorney for defendant: *C. Robertson.*

(1) 3 K. & J. 66. (2) 13 Q. B. 955.
(3) 7 H. & N. 509; 31 L. J. (Ex.) 107.

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May 6.

JACOBS *v.* SEWARD.

Tenants in common—Trespass—Right to Crops—Landlord and Tenant.

One tenant in common cannot maintain trespass against another tenant in common for cutting in due season and carrying away the whole produce of the common property, a crop of hay.

DECLARATION: 1st count, that defendant broke and entered land of the plaintiff, and ousted the plaintiff from possession, and cut and removed the plaintiff's crop of grass then growing on the land, and converted it to his own use. 2nd count, trover for grass and hay.

Pleas: 1. To the whole declaration, not guilty. 2. To the first count, not possessed. 3. To the same, that the land was the soil and freehold of G. M. Senior, and that defendant, as her servant and by her command, broke and entered, &c. 4. To the same, that G. M. Senior, being seised in fee, demised to defendant, and defendant during the term in his own right committed the alleged trespasses. 5. To the second count, not possessed. Issues thereon.

At the trial, before Brett, J., at the sittings for Middlesex after last Michaelmas Term, it appeared that the land in question, which was pasture, was the property of two ladies, Miss Lawrence and Miss G. M. Senior, as tenants in common. The plaintiff, who had occupied the land for many years under a former owner, received a notice to quit from the two tenants in common, which expired at Michaelmas, 1867, but the agent of Miss Lawrence, without communication with Miss Senior or her agent, then re-let the land to the plaintiff at an increased rent, and the plaintiff continued in possession, and in due course prepared the land for hay. In March, 1868, the agent of Miss Senior, in ignorance that the land had been re-let to the plaintiff, let it to the defendant, and he, without the knowledge of the plaintiff, as soon as the hay was ripe, entered and cut and carried the whole crop away. Upon these facts, the defendant's counsel claimed a nonsuit; but upon the plaintiff's counsel citing the case of *Benington* v. *Benington* (1) from Roscoe on

(1) Cro. Eliz. 157.

Evidence, 11th ed. p. 567 (1), to shew that the action was maintainable, the learned judge refused to nonsuit; and a verdict was entered for the plaintiff for the value of the crop, leave being reserved to the defendant to move to enter a nonsuit, or to reduce the damages.

Bulwer, Q.C., having obtained a rule nisi accordingly,

Gibbons shewed cause. It must be admitted that the case relied on at the trial is wrongly quoted in Roscoe on Evidence, and is against the plaintiff, but the plaintiff is, at any rate, entitled to recover half the value of the hay. If the action ought to have been brought in any other form, as for an account, the Court will amend the pleadings, so as to do justice between the parties.

Bulwer, Q.C., and *Lumley Smith*, in support of the rule, were not called on.

WILLES, J. The plaintiff and defendant were tenants in common, one under a demise from Miss Lawrence, and the other under a demise from Miss Senior. It appears that all the defendant did was to take, in the ordinary course, the profits of the land; but for that no action of wrong can be brought; for if such an action could be maintained, the result would be that if two persons were tenants in common of two fields, and each took the whole profits of one, they would each have a right of action against the other for trespass in taking the whole profits of one field. It is laid down, sometimes on the ground of public policy, and sometimes as ex necessitate rei, that the only remedy of a tenant in common who has not had his share of the profits of the common property, is by an action for account. But such a proceeding is so distinct from the present action that no amendment would do justice between the parties, and the rule therefore must be absolute to enter a nonsuit.

MONTAGUE SMITH, J. I am of the same opinion. The law is perfectly clear that one tenant in common cannot be treated as a wrongdoer by another, except for some act which amounts to an

(1) *Benington* v. *Benington*, really decided that the defendant was entitled to judgment. In Roscoe, it is quoted as deciding that the plaintiff was entitled to judgment.

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ouster of his co-tenant or to a destruction of the common property. In *Martyn* v. *Knowllys* (1), it was held that a tenant in common might cut down trees which were fit for cutting, and no action of tort would lie, and à fortiori an action will not lie for taking a crop of grass. I think we cannot either allow a verdict to be entered for one half the value of the hay, for the reason that the plaintiff has no cause of action on account of the defendant's conduct; and we cannot tell what would be due from one to the other on taking accounts between them.

BRETT, J. The whole damages were given by the jury for the defendant's entrance on the land after he had become tenant in common of it by the demise from Miss Senior, and for cutting and carrying away grass which was grown on the land after he became tenant. The plaintiff therefore cannot treat him as a wrongdoer, and I ought to have nonsuited the plaintiff, as I should have done, but for the incorrect report of the case of *Benington* v. *Benington* (2), which was shewn to me in Roscoe on Evidence.

Rule absolute to enter a nonsuit.

Attorney for plaintiff: *T. Heydon.*
Attorney for defendant: *H. H Lawrence.*

May 8.

BUTTON *v.* THOMPSON.

Shipping—Construction of Ship's Articles—Wages; Forfeiture for Misconduct during the Voyage—Merchant Shipping Act, 1854 (17 & 18 *Vict. c.* 104).

The plaintiff shipped on board the defendant's vessel, as mate, at wages of 5*l.* 10*s.* per calendar month, under articles in the form sanctioned by the Board of Trade in pursuance of the Merchant Shipping Act, 1854, for a voyage from Shields to Alexandria, and, if required, to any port or ports in the Mediterranean, Black Sea, Danube, &c., and home to the ship's final port of discharge in the United Kingdom or continent of Europe; the voyage not expected to exceed twelve months. During the voyage out there was evidence that the plaintiff had been guilty of drunkenness and violent and insubordinate conduct; and, being on shore at Sulina, a port in the Danube, he was left behind, and the vessel came home without him.

In an action for wages for the time the plaintiff actually served on board, the

(1) 8 T. R. 145. (2) Cro. Eliz. 157.

jury found that he had been guilty of drunkenness and abusive language subversive of discipline, and that he was not left behind by the wilful misconduct or negligence of the captain, but through his own negligence and misconduct. They, however, negatived desertion:—

Held, by Byles and Montague Smith, JJ., that, notwithstanding this finding of the jury, the plaintiff was entitled to recover wages up to the time of his being left behind at Sulina,—the contract being for a succession of voyages of indefinite duration, though "not expected to exceed twelve months," and the wages being vested and a debt at the end of each month of service, subject, it might be, to forfeiture in an event which had not happened, though perhaps not recoverable until the expiration of the period of service stipulated for.

Held, by Brett, J., that the consideration for the stipulated wages was the mate's services for the whole voyage out and home; and that, having by his own misconduct made it impossible that such services should be rendered, he had forfeited his claim to any part of the stipulated wages.

THE first count of the declaration was for wages due to the plaintiff as a seaman on board a vessel of the defendant called the *Sea Skimmer*. The second was for alleged breach of the ship's articles.

Pleas, to the first count: 1. Never indebted. 2. Payment. 3. Set-off. 4. That it was agreed by and between the defendant and the plaintiff, that, in consideration that the plaintiff would serve the defendant on board his ship as a seaman and mate, and as such seaman and mate would continue on board his said ship to serve him on and during a voyage from Shields to Alexandria, and to ports in the Mediterranean, Black Sea, Danube, and elsewhere as in the agreement was contained, and home to her final port of discharge in the United Kingdom or the continent of Europe, the defendant would pay the plaintiff wages as in the agreement was contained, which wages were the moneys alleged to be payable to the plaintiff and sued for in the first count; and the defendant received the plaintiff into his employment, to serve the defendant as such seaman and mate on board his ship for and during the voyage until the ship should arrive at her final port of discharge as aforesaid; but the plaintiff did not continue to serve the defendant on board his ship, and did during and in the course of the voyage, and before the termination thereof, to wit, at Sulina, which was not the final port of the ship's discharge, without the permission and against the will of the defendant, quit, abandon, and desert the ship and the defendant's service on board thereof, with intent not to return to the same, and never afterwards did re

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turn to the ship and the service of the defendant on board the same.

5. That it was agreed by and between the defendant and the plaintiff, that, in consideration that the plaintiff would serve the defendant on board his ship as a seaman and mate on and during a voyage from Shields to Alexandria, and to ports in the Mediterranean, Black Sea, Danube, and elsewhere as in the agreement was contained, and home to her final port of discharge in the United Kingdom or the continent of Europe, and would continue to serve him as such seaman and mate on board the ship until the termination of the voyage at the ship's final port of discharge as aforesaid, and would, as such seaman and mate, during all the time of the voyage, conduct himself in an orderly, faithful, honest, and sober manner in all his duties as such seaman and mate, and be at all times diligent in his duties as aforesaid, and be obedient, as such seaman and mate, to the lawful commands of the master of the ship, the defendant would pay the plaintiff wages as in the agreement was contained, which wages were the moneys alleged to be payable to the plaintiff and sued for in the first count; and the defendant received the plaintiff into his employment to serve the defendant as such seaman and mate on board his ship for and during the voyage until the ship should arrive at her final port of discharge as aforesaid; but the plaintiff did not continue to serve the defendant on board the ship until her arrival at her final port of discharge as aforesaid, and did not conduct himself in an orderly, faithful, honest, and sober manner in all his duties as such seaman and mate as aforesaid, nor was diligent in his duties as such seaman and mate, nor was obedient, as such seaman and mate, to the lawful commands of the master as aforesaid, and did habitually while on board the said ship curse and swear and use profane, foul, and abominable language in the hearing of the master and crew of the ship, and did use such language as aforesaid to the master of the ship in the hearing of the crew, and was insolent and insubordinate while on board the ship, answering the master with insolence and threats in the presence of the crew, and thereby endangering the order and subordination of the crew and the safety of the ship, both at sea and while in port, and did disobey the lawful commands of the master,

and did quit the vessel whilst in a foreign port, without leave of the defendant or the master, at a time when he knew the master was absent from the ship on shore, and left the ship and crew for a long time without any one in command of the same, and did frequently quit the ship and go on shore without leave and against the will of the defendant or the master, and for the purpose of getting intoxicating liquors, and, when permitted to go on shore, did frequently remain on shore and continue absent from the ship a long time after the period fixed for his return, and was habitually intoxicated while on board the ship, and during the times when he was required and lawfully ought to be on duty, and did in the course of the voyage, and before the termination thereof, to wit, at Sulina, the same not being the port of the ship's final discharge, quit, abandon, and desert, as in the fourth plea was alleged, the ship, and the defendant's service on board the same, with intent not to return, and did not afterwards return to the ship and service.

6. Repeating the averments contained in the fifth plea,—that the agreement was made under and by virtue of the Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104), and that the provisions of the same applied to the agreement and to the breaches of the same committed by the plaintiff, as in the fifth plea were particularly set forth, and in this plea were repeated.

To the second count there was a plea of not guilty, and two special pleas. Issue.

At the trial before Hannen, J., at the last Liverpool summer assizes, it appeared that the plaintiff was engaged to serve as mate on board the defendant's vessel the *Sea Skimmer*, a British foreign-going ship, under articles in the form sanctioned by the Board of Trade for foreign-going vessels, in pursuance of the Merchant Shipping Act, 1854, 17 & 18 Vict. c. 104. The articles stated that "The several persons whose names are hereto subscribed, and whose descriptions are contained below, and of whom sixteen are engaged as sailors, hereby agree to serve on board the said ship in the several capacities expressed against their respective names, on a voyage from Shields to Alexandria, and, if required, to any port or ports in the Mediterranean, Black Sea, Danube, Sea of Azoff, France, Spain, Portugal, South or Central America, West Indies, United States, British North America, or Baltic, and home to her final port of

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discharge in the United Kingdom or continent of Europe. Liberty to call for orders. Voyage not expected to exceed twelve months. And the said crew agree to conduct themselves in an orderly, faithful, honest, and sober manner, and to be at all times diligent in their respective duties, and to be obedient to the lawful commands of the said master, or of any person who shall lawfully succeed him, and of their superior officers, in everything relating to the said ship and the stores and cargo thereof, whether on board, in boats, or on shore; in consideration of which services to be duly performed, the said master hereby agrees to pay to the said crew as wages the sums against their names respectively expressed, and to supply them with provisions according to the annexed scale," &c.

In the column of the schedule headed "Amount of wages per calendar month, share, or voyage," the plaintiff's wages were inserted as being 5*l.* 10*s.*, the words "share or voyage" in the printed form being struck out; and in the column headed "Amount of monthly allotment," was inserted 2*l.* 15*s.*

The *Sea Skimmer* sailed from Shields on the 6th of January, 1866, and proceeded to Alexandria, and thence to Sulina. There was evidence that whilst the ship was at Sulina the plaintiff was guilty of drunkenness and of using violent and abusive language to the captain and crew; and it appeared that, on the day the vessel sailed from Sulina, the plaintiff was ashore, and that, though he arrived on the quay, with intent to get on board, after the vessel had sailed and when she was still in sight, and though he followed her to Constantinople, he was unable to overtake her, and she came to England without him, and there discharged her homeward cargo.

On the part of the defendant it was contended that the contract was an entire contract for the voyage, that the plaintiff's absence from the ship at Sulina amounted to desertion, and that for any misconduct during any part of the voyage the plaintiff forfeited all that would otherwise have become due to him for wages. For the plaintiff it was insisted that the wages were earned month by month, though possibly no action could be maintained for them until after the expiration of the voyage.

In answer to questions put to them by the learned judge, the jury found that the plaintiff had been guilty of drunkenness and

abusive language subversive of discipline, and that he was not left behind at Sulina by the wilful misconduct or negligence of the captain, but through his own negligence and misconduct. They however declined to find that the plaintiff had been guilty of desertion.

The learned judge directed a verdict to be entered for the defendant on the second count, and for the plaintiff on the first count, damages 13*l.* 1*s.*, being the balance of wages due to him to the time of the sailing of the ship from Sulina, less the allotment-money which had been paid to the plaintiff's wife; and he reserved leave to the defendant to move to enter a verdict for him on the first count, or a nonsuit.

Manisty, Q.C., in Michaelmas Term last obtained a rule nisi.

Quain, Q.C., and *Crompton*, shewed cause. The material pleas are, not guilty, and the fourth plea to the common count, which is in substance a plea of desertion, and is framed to raise the question in *Cutter* v. *Powell.* (1) That case, however, has no application here, because the contract was to pay the seaman (as second mate) 30 guineas for the run from Jamaica to Liverpool; whereas here the contract is to pay wages 5*l.* 10*s.* per calendar month. By the express terms of the ship's articles, therefore, the wages are earned and due at the end of each month; though it may be that he could not sue for them until the end of the voyage, and in the Courts in this country only. This seems to be the general effect of the provisions in 17 & 18 Vict. c. 104, ss. 181—191. And there can be no forfeiture of wages already earned, except for desertion, s. 243; and this the jury have negatived. At common law, where the seaman died on the voyage, and the terms of the contract did not preclude a claim for wages, his representatives were entitled to whatever had been actually earned; that is to say, where the wages were not payable de die in diem, to wages up to the last period of payment before the death: Maude & P. 3rd ed. p. 169. And s. 194 of the statute adopts that law. In *Taylor* v. *Laird* (2), where the plaintiff was engaged to command a vessel on an exploring and trading voyage up the river Niger

(1) 6 T. R. 320; 2 Smith's L. C. 1.

(2) 1 H. & N. 266; 25 L. J. (Ex.) 329.

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and its tributaries, at a fixed pay of 50*l.* per month and 20 per cent. on the net proceeds of the goods obtained, it was held that this was not an entire contract for the whole voyage, but a contract which gave a cause of action for the salary as each month arose, and which, when once vested, was not subject to be lost or divested by the plaintiff's desertion or abandonment of the contract. That was an infinitely stronger case than the present.

[BRETT, J. There was no voyage described there; and the only measure of the plaintiff's service was monthly. Here, the voyage is out to the places named and home to a port of final discharge.]

Stubbs v. *Holywell Railway Company* (1) is also an authority to shew that a right to a periodical payment once vested, is not destroyed by death. In Maude & P. 3rd ed. p. 166, speaking of the ancient rule that "freight is the mother of wages," it is said: "In earlier times the Courts of common law and the Courts of Admiralty differed in the effect which they attributed to this rule. The Court of Admiralty upheld so strongly the right of the seamen to claim wages if freight was earned, that all stipulations by which seamen consented to forego their claim to wages, although freight might be earned on part of the voyage, if the ship did not return to her port of discharge, were in that Court held to be invalid; whilst, on the other hand, the Courts of law gave effect to contracts of this description, acting upon the ordinary rule that the parties were bound by their express bargain, without reference to its improvidence or hardship. (2) This question is now, however, settled by the legislature; and all contracts by which any seaman consents to forego any claim to wages in the case of the loss of the ship are wholly void: 17 & 18 Vict. c. 104, s. 182. It is not, however, to be supposed that all contracts under which the wages *may* not become payable, although freight may have been earned, are invalid; for, except where the legislature has interfered, such contracts are binding: and where by the terms of the agreement the payment of wages is made to depend upon the performance of the service until the completion of the voyage, or upon the arrival of

(1) Law Rep. 2 Ex. 311.

(2) Citing *Appleby* v. *Dods*, 8 East. 300; *The Juliana*, 2 Dods, 504, 510; *Jesse* v. *Roy*, 1 C. M. & R. 316; and the American cases cited in the note to the last-mentioned case.

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the ship at a particular port of discharge, the contract is entire, and, if the seaman dies during the voyage, or the ship is lost before her arrival at the port in question, no wages can be claimed in respect of the services actually performed." The consideration for the defendant's promise here is, the undertaking to perform the whole voyage, not the actual performance.

The next question is, whether the wages, if earned, were forfeited by subsequent misconduct not amounting to desertion.

[BYLES, J. We wish to hear Mr. Manisty on the other point first.]

Manisty, Q.C., and *Maclachlan*, in support of the rule. The first question depends upon the construction of the contract, regard being had to the general scope and object of the Merchant Shipping Act, 1854. This is an entire contract for the voyage, wages to be paid at the rate of 5*l.* 10*s.* per month at the end of the voyage, subject to the payment of 2*l.* 15*s.* monthly to the mate's wife under the allotment-note. The payment is regulated by ss. 170—175 of the act. The decision in *Taylor* v. *Laird* (1) proceeded on the ground that the stipulated sum was a fixed pay earned month by month. In Abbot on Shipping, 11th ed. 498, it is said: "The wages of seamen, whether hired by the month or for the voyage, are sometimes lost without any fault on their part, and sometimes forfeited by their misconduct .... In order to stimulate the zeal and attention of this class of persons, who are often engaged in very perilous services, the policy of all maritime states has made the payment of their wages to depend generally on the successful termination of the voyage." Many exceptions have been engrafted by the legislature. The observations relied on in Maude & Pollock had reference to a state of things which no longer exists. The 185th section of the Merchant Shipping Act, 1854, enacts that, "in cases where the service of any seaman terminates before the period contemplated in the agreement by reason of the wreck or loss of the ship, and also in cases where such service terminates before such period as aforesaid by reason of his being left on shore at any place abroad under a certificate of his unfitness or inability to proceed on the voyage, granted as hereinafter [s. 205] mentioned, such seaman shall be entitled to wages for the time of service prior to such termination as aforesaid, but not for any

(1) 1 H. & N. 266; 25 L. J. (Ex.) 329.

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further period." That implies, that, except in the cases mentioned, the seaman, if he quits the service before the period stipulated for, shall be entitled to no wages. The enactments in ss. 182—185, no doubt resulted from the observations of Lord Stowell upon the subject of the then-existing mariners' contract, in *The Minerva.* (1)

[BYLES, J. The clearest and most satisfactory exposition of this subject and of the difference between the Admiralty and the common law decisions that I am aware of, is to be found in Machlachlan on Shipping, pp. 198—200, where Lord Stowell's judgments in the case last cited, and also in *The Juliana* (2), are observed upon.]

The question of the entirety of the contract incidentally arose in *Robins* v. *Power* (3): but, though the Court did not decide it, there was a strong expression of opinion by Cockburn, C.J., and Willes, J., that the contract for wages was entire.

The jury have not found that the plaintiff was guilty of desertion, but that he was guilty of drunkenness and abusive language subversive of discipline, and that he was left at Sulina through his own negligence and misconduct. Such conduct as this works a forfeiture by the maritime law: Abbott on Shipping, 11th ed. 152. In the case of a mate, whose position on board imposes on him duties of a higher order than are expected from the common seaman, drunkenness, neglect of duty, and disobedience, are certainly offences of a grave nature, fully sufficient to justify the forfeiture of his wages: per Lord Stowell, in *Robinet* v. *The Exeter* (4); per Dr. Lushington, in *The Duchess of Kent.* (5)

[BYLES, J. If the conduct of the mate was such as to entitle the captain at once to discharge him, does that cause a forfeiture of by-gone wages?]

If this Court has jurisdiction to administer the maritime law, there are abundant authorities to shew that that result will follow: see *The Lima* (6); *Robinet* v. *The Exeter* (7); *The Blake* (8); *The Westmoreland* (9); *The Duchess of Kent* (10); *The Two Sisters* (11);

(1) 1 Hagg. Adm. 347, 352.
(2) 2 Dods. Ad. 504.
(3) 4 C. B. (N.S.) 778; 27 L. J. (C.P.) 257.
(4) 2 C. Rob. Ad. 261, 263.
(5) 1 W. Rob. Ad. 283, 285.
(6) 3 Hagg. Ad. 346.
(7) 2 C. Rob. Ad. 261.
(8) 1 W. Rob. Ad. 73.
(9) 1 W. Rob. Ad. 216, 221, 222.
(10) 1 W. Rob. Ad. 283.
(11) 2 W. Rob. Ad. 125, 137.

The Atlantic. (1) The maritime law is not excluded by the statute.

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Cur. adv. vult.

May 8. The following judgments were delivered:—

MONTAGUE SMITH, J. In this case I have to deliver a judgment in which my Brother Byles concurs.

The question in this case is, whether the plaintiff is entitled to recover wages at the stipulated amount per month for the months during which he actually served, although he did not complete the whole term of his service, in consequence of his own negligence in being left behind at a foreign port.

It is contended by the defendant, that the contract was for an entire service, terminating on the arrival of the ship "home" at her final port of discharge; and that, the plaintiff having been left behind at Sulina through his own negligence, he cannot recover.

The contract is for a succession of voyages of indefinite duration, although "not expected to exceed twelve months;" and the wages in the articles are thus provided for—"Amount of wages per calendar month, 5*l.* 10*s.*," the words "share or voyage" in the printed heading being struck through. The defendant relies on the words, "in consideration of which services to be duly performed," the master agrees to pay the wages, as controlling the whole contract, and creating a condition precedent to the right to recover any wages the due performance of the entire service contracted for. But we think that, upon articles in the present form, such a condition is not created; and that the monthly wages become vested and a debt at the end of each month of service, liable, it may be, to forfeiture under certain circumstances provided for by the Merchant Shipping Act, 1854.

It is unnecessary to decide whether and in what events the monthly wages, though a debt, would be presently payable and recoverable by action as they became due, or would be payable only at the end of the period of service stipulated for; for, in this case, the action was not brought until the termination of the voyage. But the Merchant Shipping Act, 1854, assumes that

(1) 1 Lush. 566.

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there may be cases in which a right to sue for wages before the completion of a voyage would arise, because it enacts by s. 190 "that no seaman who is engaged for a voyage or engagement which is to terminate in the United Kingdom shall be entitled to sue in any Court abroad for wages," unless under certain circumstances. Provision is thus made to protect ship-owners from being harassed by suits brought in foreign Courts.

The Merchant Shipping Act contains regulations with regard to the contracts of seamen for wages, some of which are of a protective, and others of a restrictive kind. Seamen are entitled to the benefit of the protective clauses, and must submit to the restrictive clauses, whatever their contracts may be. But the act does not prevent masters and seamen making what contracts they please not inconsistent with these provisions. This contract is, no doubt, in the form sanctioned by the Board of Trade, and must be read with regard to the provisions of the Merchant Shipping Act. There is clearly nothing in the act which prevents contracts being entered into making the wages due monthly or at other fixed times during the voyage. On the contrary, many of the provisions of the act appear to be founded on the assumption that contracts may be and are so made: and the main question in this case is whether, on the true construction of these articles, the wages do become due at the end of each month. Sect. 94, and following sections, which provide what shall be done in the case of seamen dying during a voyage, assume that wages may be due before a voyage is complete. So also the 207th and following clauses, which make provision for the case of seamen being left behind on the voyage, and especially clause 209, are founded on this assumption. The clauses relating to forfeiture of wages for desertion and other misconduct appear also to assume that there may be a right to them before the end of the voyage. If the defendant's construction of this and similar contracts is correct, no right to wages capable of forfeiture could in case of desertion ever arise.

The decisions appear to us to support the construction we are disposed to put on this contract. In the leading case of *Cutter* v. *Powell* (1), the promissory note was for the payment of wages to the seaman ten days after the arrival of the ship at Liverpool,

(1) 6 T. R. 320; 2 Smith's L. C. 1.

"provided he proceeds, continues, and does his duty as second mate in the said ship from hence to the port of Liverpool." These words constitute an express condition; and so the Court construed them, holding that the death of the mate before the arrival of the ship prevented any claim to wages from arising. The Court ordered the case to stand over, in order to ascertain if there was any usage on the subject; but, finding the practice to be variable, they held themselves bound by the express terms of the contract. And it is difficult to see, even if a contrary usage had prevailed, how it could have controlled the plain words of the express condition. In the cases of *Hulle* v. *Heightman* (1), *Beale* v. *Thompson* (2), *Appleby* v. *Dods* (3), and *Jesse* v. *Roy* (4), the agreements contained express provisions in still more explicit terms than in the articles in *Cutter* v. *Powell* (5), that the seamen should not be entitled to wages until the arrival of the ship; and the decisions proceeded upon these express conditions. In *Appleby* v. *Dods* (3), the voyage was from London "for the ports of Madeira, any of the West India Islands, and to return to London," at monthly wages; and there was this stipulation in the articles, "that no seaman shall demand or be entitled to his wages, or any part thereof, until the arrival of the ship at the port of discharge, and her cargo delivered." The vessel took out and delivered cargo at different places in the West Indies, and was lost on her homeward voyage. Lord Lyndhurst, in commenting upon this case in his judgment in *Jesse* v. *Roy* (6), says: "It was clear that, independently of any express stipulation, freight having been earned at the intermediate ports, the mariners would be entitled to their wages pro ratâ: and the question was whether they were entitled to their wages, notwithstanding that stipulation was contained in the articles." And he adds: "Lord Ellenborough was of opinion that the language of the stipulation was so express and precise that it was impossible the plaintiff could maintain the action." It may therefore be inferred, not only that the cases were decided against the seamen on these express stipulations, but that, in the absence of them, the decisions would have been the other way.

(1) 2 East, 145.
(2) 4 East, 546.
(3) 8 East, 300.
(4) 1 C. M. & R. 316.
(5) 6 T. R. 320.
(6) 1 C. M. & R. 316, 341.

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The recent case of *Taylor* v. *Laird* (1) was relied on as an authority in favour of the plaintiff. There, it was part of the engagement of the plaintiff that he should remain in charge of the vessel, which was to sail on a trading and exploring expedition to the Niger, during the whole voyage. The pay was to be "a fixed pay of 50*l.* per month." The plaintiff in the middle of the voyage refused to proceed: but the Court held that he was entitled to recover the monthly wages which accrued before his refusal. Pollock, C.B., in giving the judgment of the Court, says (2): "There, 'per month,' means 'each month,' or 'monthly,' and gives a cause of action as each month accrues, which, once vested, is not subsequently lost or divested by the plaintiff's desertion or abandonment of his contract. The words are plain; and no mercantile man could doubt what was meant. But, further, if this meaning is not given, the result would be, that, had the plaintiff died, or the voyage failed at the last moment, nothing would be payable by the defendant, because, according to his contention, the performance of the entire work contracted for was a condition precedent to the right to receive anything." In the present articles, the same words occur as those relied on in the case just cited. "per calendar month;" and we put the same construction upon them as the Court of Exchequer did.

If the defendant's contention were to prevail, notwithstanding the seaman had faithfully served in the ship during the intermediate voyages mentioned in the articles, yet if, being ashore at the last port at which the ship touched, he was unable to rejoin her from some negligence, however slight, or even from accident or mistake, he would be unable to recover any part of his wages. Contracts may be so made; but they require plain words to shew that such a bargain was really intended: and we think the engagement to serve during the voyage was not a condition to the defendant's whole agreement, so that the failure for one day to complete the service should deprive the plaintiff of the right to all wages. The words relied on by the defendant, "in consideration of *which services* to be *duly* performed," refer to the agreement of the crew, not only to serve, but to be honest, faithful, and at all times diligent and obedient in their service; so that, if these words be read as a con-

(1) 1 H. & N. 266; 25 L. J. (Ex.) 329. (2) 1 H. & N. at p. 273.

dition, they would involve a loss of all wages for non-performance of small and trivial acts, which cannot, we think, have been the intention of the parties, construing the instrument according to the ordinary rules of construction applicable to agreements of this kind: see note to *Pordage* v. *Cole*. (1) So also it would follow, on the defendant's construction of these words, not only that wages could not be recovered, but that provisions need not be supplied, in the event of any failure, however slight, in the performance of the service; for, the promise of the master to pay wages and to supply provisions is expressed to be upon the same consideration.

It was not contended for the defendant that he could rely on any forfeiture under the 243rd section of the Merchant Shipping Act. But it was argued that, upon the findings of the jury, so much of the pleas was proved as to constitute a defence to the action, independently of the statute. We think, however, that the findings of the jury do not enable us to enter the verdict for the defendant on any of the pleas.

The jury negatived desertion by the plaintiff, but found he was left at Sulina by his own negligence. It is consistent with this finding that the plaintiff remained behind without any disobedience of orders, and even without knowing that the ship was going to sail: and we think this finding is not sufficient to establish a defence, if the view we have taken of the contract is correct.

The jury further found that the plaintiff, who was second mate of the ship, was guilty of drunkenness and of abusive language subversive of discipline. But they have not found to what extent and degree this misconduct prevailed, nor whether it was habitual or such as to endanger the safety or discipline of the ship: and, comparing these express findings with the averments in the pleas, we think they are insufficient to support either of the pleas. They do not amount to a sufficient justification for discharging the plaintiff from the service; and he was not in fact discharged; but, on the contrary, his services were rendered and accepted up to the time of his being left behind at Sulina: nor, under these circumstances, was there in our opinion a forfeiture of the wages, within the decisions founded on the general maritime law, independently of the statute.

(1) 1 Wms. Saund. 320 *a*, n. (4).

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We think, therefore, that the verdict found for the plaintiff should stand, and that this rule should be discharged.

BRETT, J. I have the misfortune to differ from the rest of the Court in this case. I therefore proceed to deliver the opinion at which I have after much consideration arrived.

The plaintiff, a seaman, sued the defendant, a ship-owner, in a common count for wages earned, and in a special count for an improper dismissal. To the first count the defendant pleaded never indebted, payment, set-off, and two special pleas setting out the contract contained in ship's articles, and stating in the first that, during the voyage the plaintiff did quit, abandon, and desert the ship, with intent not to return to the same; and in the second, that the plaintiff was insubordinate and insolent, and did thereby endanger the order and subordination of the crew and the safety of the ship, and did quit the ship without leave, and did desert with intent not to return. To the second count the defendant pleaded not guilty.

It appeared in evidence that the plaintiff shipped as mate on board the defendant's ship *The Sea Skimmer*, under articles signed on the 2nd of January, 1866. By the articles, which were in the form sanctioned by the Board of Trade for foreign-going British ships, "the several persons whose names were thereto subscribed did thereby agree to serve on board the said ship on a voyage from Shields to Alexandria, and, if required, to any port or ports in the Mediterranean, Black Sea, Danube, Sea of Azoff, France, Spain, Portugal, South or Central America, West Indies, United States, British North America, or Baltic, and home to her final port of discharge in the United Kingdom or continent of Europe. Liberty to call for orders. Voyage not expected to exceed twelve months." "And the said crew agreed to conduct themselves, &c., and to be at all times diligent, &c. And, *in consideration of which services to be duly performed*, the master thereby agreed to pay the said crew, as wages, the sums against their names," &c. In these articles the plaintiff's name was inserted, to serve in the capacity of mate; and his wages were inserted as 5*l.* 10*s.* in the column headed "Amount of wages per calendar month;" 2*l.* 15*s.* being entered in the column headed "Amount of monthly allotment."

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The ship sailed from Shields on the 6th of January, 1866, and went to Alexandria and Sulina. Whilst the ship was at Sulina, there was evidence that the plaintiff was drunken and insolent, On the day on which the ship sailed from Sulina the plaintiff was ashore, and was left behind. There was evidence that he arrived on the quay, with intent to embark, after the ship had sailed, and before she was out of sight; and that he followed the ship to Constantinople. The ship, however, came to England without the plaintiff, and delivered her homeward cargo.

The jury found that the plaintiff had been guilty of drunkenness and abusive language subversive of discipline, and that he was not left behind by the wilful misconduct or negligence of the captain, but through his own negligence and misconduct. They declined to find, and did not find, that he had been guilty of desertion. The learned judge who tried the cause directed a verdict to be entered for the defendant on the second count, and for the plaintiff on the first count for the balance of wages due to the time of the sailing of the ship from Sulina; but gave leave to the defendant to move to enter a nonsuit or a verdict for the defendant.

Upon the argument on a rule obtained accordingly, it was contended on behalf of the plaintiff that he was entitled to keep the verdict, because the special pleas were not proved, and because, according to the construction of the articles, wages were earned and due at the end of each month. It was contended on behalf of the defendant, that, even assuming the plaintiff's construction of the contract to be correct, there was a forfeiture of all wages; and that the plaintiff's construction was not correct, but that the contract was an entire contract, under which the plaintiff could not, even though there was no forfeiture, recover any wages until the end of the voyage, and unless he could shew either that he had performed the stipulated services more or less efficiently during the whole voyage, or was ready and willing to perform them, and only prevented by certain recognized fatalities; whereas the plaintiff had in fact rendered it impossible that he should perform any further services, by his own default and misconduct.

The question thus raised upon articles drawn up in a form recognized by the Board of Trade, and in general use in hundreds of voyages, is evidently of great importance. If the plaintiff be cor-

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rect, it seems that seamen, under the temptations of foreign ports, or from mere recklessness, if only they stop short of absolute desertion, may be guilty of any amount of negligence or misconduct—even of such as may oblige the captain to employ further hands or to sail with a deficient crew—and yet may recover all or the greater part of by-gone wages; leaving the ship-owner to a barren cross-action for damages. If the defendant be correct, seamen may by improper conduct of short duration practically lose the wages of months of previous faithful service. Setting aside these opposite hardships, the only safe and proper rule of decision, as it seems to me, is, to endeavour to construe the articles according to law. Those articles, being drawn up on a printed form sanctioned by the Board of Trade, and referring to the Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104), which is an act evidently intended to be applied generally to the ordinary contracts between ship-owners and seamen, should, according to the language of Lord Ellenborough in *Beale* v. *Thompson* (1), be construed, I think, with reference to the statute; by which I understand the learned judge to mean that, where there is no inconsistency between the stipulations of the articles and the provisions in the statute with regard to the terms of hiring, and the respective rights and duties of seamen and owners under the hiring, the provisions of the statute may be considered as incorporated into the agreement set forth in the articles. If that be so, the articles in this case set forth a voyage out and home to a final port of discharge, and contain a promise by the crew to be at all times, *i.e.* at all times during that voyage, diligent in their respective duties; *in consideration of which services to be duly performed* the master agrees to pay to the said crew, as wages, the sums against their names, *i.e.* in this case 5*l.* 10*s.* per calendar month. But by s. 187 of the statute the master or owner shall pay to every seaman, in the case of all ships other than home-trade ships, his wages *within three days after the cargo has been delivered, or within five days after the seaman's discharge, whichever first happens.* And by s. 190 no seaman who is engaged for a voyage or engagement which is to terminate in the United Kingdom, shall be entitled to sue in any court abroad. By ss. 170 to 175 inclusive, it seems to be clearly

(1) 4 East, 546.

implied that the discharge mentioned in s. 187 is a discharge after the completion of the voyage, and in the United Kingdom. And s. 185, by expressly saving to the seaman wages for the time of service prior to the terminations of service therein mentioned, which are by reason of the wreck or loss of the ship, and also by reason of being left on shore at any place abroad under a certificate of unfitness or inability to proceed on the voyage, seems to afford a strong inference that, in other cases of termination of service before the completion of the voyage, there would, in the absence of express stipulation, be no such saving of by-gone wages. By s. 183, the old condition that the right to wages shall be dependent on the earning of freight, is abrogated: but, if there was and is a further condition in the agreement that the right to wages depends on the performance of, or on readiness and willingness to perform, the stipulated services throughout the voyage, such condition is left untouched, by reason of the words, "subject to all other rules of law and conditions applicable to the case." Sect. 167 speaks, no doubt, of one month's wages being earned. It seems, however, pointed to a recovery of a sum *as if it were wages duly earned;* it is to be applied to a time even before the sailing of the ship. Sect. 186 applies to the case of a seaman coming home in the ship, who may therefore have substantially fulfilled the service, or who in consequence of his misconduct has been prevented from fulfilling it by authority of the master. Sect. 209 is applicable to the case previously indicated in s. 185, viz. the case of a seaman left abroad under certificate of sickness or inability. Sect. 194 refers to the right to by-gone wages, in case of the death of a seaman during the voyage. Sect. 243 does not deal with rights under the contract, but gives a summary punishment for offences, *i.e.* power to a magistrate to inflict forfeiture of rights earned under contract. It is applicable to a contract in which by express terms wages may be earned and due at different stages or different periods of a voyage. Inasmuch as it gives power to override a contract, it gives no assistance as to the construction of a contract. Sect. 253 contemplates the case of desertion, but a subsequent return, by force or otherwise, to the ship and to duty.

Having thus considered the terms of the articles, and the different provisions of the statute, which are to be read with the

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articles, it is necessary to consider what is the exact question to be solved.

Inasmuch as the jury declined to find that the plaintiff deserted, it is clear that neither of the special pleas to the first count was wholly proved: and it seems to me that nothing was proved which would involve a forfeiture of by-gone wages, if such were earned or due. But, as pointed out by Lord Tenterden in Abbott on Shipping, Part V. ch. 3 (11 ed. p. 498), wages are sometimes *lost* and sometimes *forfeited*; by the first of which I understand, are sometimes not due, though there has been no misconduct amounting to a cause of forfeiture if they had been due.

The question in this case, therefore, seems to be whether, according to the terms of these articles, interpreted in accordance with the statute 17 & 18 Vict. c. 104, the plaintiff can recover wages for the earlier months of the voyage when he did serve on board the ship, after having by his own misconduct and consequent absence from the ship during the remainder of the voyage, rendered it impossible that he should perform any services, whether more or less efficient, for the remainder of the voyage.

In the great case of *Cutter* v. *Powell* (1), such a seaman's contract for a voyage was held to be an entire contract, so that the seaman could not recover upon a quantum meruit for part service, but must prove that he had wholly fulfilled the contract on his part, before he could recover the wages stipulated in the contract. In *Hulle* v. *Heightman* (2), the voyage was from Altona to London and back. The agreement, no doubt, contained a specific clause that no wages should be due until the ship was back. The Court of Queen's Bench held that the plaintiff could not recover wages calculated to London, without shewing that he was ready and willing to serve back to Altona. In *Beale* v. *Thompson* (3), it was specially pointed out that the plaintiff's right must depend, *not* only upon the earning of freight, *but also upon the performance by him of the service he had agreed to perform.* And the assumption throughout that case is, that, unless the proof was equivalent to proof of a performance or readiness and willingness to perform the whole service, the plaintiff could not recover. In *Appleby* v.

(1) 6 T. R. 320; 2 Smith's L. C. 1. (2) 2 East, 145.
(3) 4 East, 546.

Dods (1), the same doctrine is fully maintained: and in *Jesse* v. *Roy* (2) Lord Lyndhurst seems even more strongly to enforce the same conclusion. It should here be remarked that Lord Lyndhurst also points out how impossible it is to derive assistance from the decisions in the Court of Admiralty, where these questions have constantly been treated as if there was no written contract in existence.

It is true that, in all the cases thus quoted, there were in the articles of agreement themselves express stipulations that the wages should not be due until the arrival of the ship at her home port, and that the seamen should not sue for wages whilst abroad; and that such stipulations were relied upon in order to determine what or how much services were to be performed as consideration for the wages to be paid. And it is true that, in the present articles themselves, these express stipulations are wanting. But, in *Jesse* v. *Roy* (3), Lord Lyndhurst says that the articles are adopted from the act then in force (4); and "it is therefore," he says, "reasonable to conclude that the parties intended them to bear the same construction as that which has been put upon the form given by the statute." This, and the language of Lord Ellenborough in *Beale* v. *Thompson* (5), above referred to, seems to me to be authority to shew that, in the present case, the articles should be read in concurrence with ss. 187 and 190 of the statute, as if those sections were in the articles; and, if so, the present contract is equivalent to the articles on which the cited cases were determined, and should therefore be decided in the same way.

It follows that, in my opinion, the plaintiff ought not to succeed, because by his own misconduct he failed to perform in any way, and made it impossible that he could perform in any way, the services which he had stipulated to perform for the whole voyage, and the performance of which, according to the cases above cited, was by the articles to be the consideration for the payment of wages, which were to be wages for a voyage out and home, calculated at 5*l.* 10*s.* per month. The judgment, therefore, in my opinion, should be that the rule to enter a nonsuit or a verdict for the

(1) 8 East, 300.
(2) 1 C. M. & R. 316.
(3) 1 C. M. & R. 316, 337.
(4) 37 Geo. 3, c. 73.
(5) 4 East, 546.

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defendant should be made absolute. The majority of the Court, however, entertaining a different opinion, the rule will be discharged.

The case of *Taylor* v. *Laird* (1) is not, in my opinion, an authority against the view I have expressed; because, in that case, there are no such stipulations as are contained in the cases I have cited, or in ss. 187 and 190 of the Merchant Shipping Act, 1854, which, in my opinion, are to be read as if they were inserted in the present articles.

Rule discharged.

Attorney for plaintiff: *John Rae.*
Attorney for defendant: *J. W. Hickin.*

May 8.

IN RE W. S. POOLE.

Attorney—Condition of restoring to the Roll, where struck off for Misappropriation of Moneys of a Client.

Where an attorney has been struck off the roll for a fraudulent misappropriation of moneys of a client intrusted to him for investment, it is a condition precedent to his being restored that he should have made full restitution, or, at least, all the restitution in his power.

THIS was an application to restore an attorney to the roll.

In the year 1863, complaint was made that W. S. Poole, an attorney, had been guilty of fraudulently misappropriating moneys intrusted to him by a client for investment. On cause being shewn, the matter was referred to one of the masters, who investigated the matter; and upon his report W. S. Poole was struck off the roll.

A bill in Chancery was afterwards filed against his partners for an account of the moneys so intrusted to the firm (through a member of it) and misapplied; and in the result a decree was pronounced against them at the suit of the client, for 2000*l.* W. S. Poole became bankrupt, and it did not appear that his estate paid any dividend. The other members of the firm compromised the client's claim under the decree for 1500*l.*

(1) 1 H. & N. 266; 25 L. J. (Ex.) 329.

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W. S. Poole being coroner for the county of Warwick at the time, an application was made to Lord Westbury, the then Chancellor, to remove him from that office: but his Lordship dismissed the application.

Shortly after his removal from the roll, W. S. Poole was engaged as managing-clerk to attorneys of great respectability in Warwickshire, where he still remained. He also continued to be coroner for the county: and his income arising from both these sources was said to be 250*l.* a year.

May 8. *F. M. White* moved that W. S. Poole might be restored to the roll, upon affidavits which disclosed some facts which were alleged to have recently come to his knowledge, which, if brought forward at the time, might possibly have somewhat mitigated the severity of the report and the decision upon it; and also upon numerous affidavits by clergymen, magistrates, attorneys, and others, all of whom spoke of his conduct since the transactions in question as having been most exemplary.

[WILLES, J. We must assume the report of the master to be true, and cannot hear anything now to impeach it.]

The applicant does not seek to impeach the report: he merely suggests matters of palliation or excuse which he had not an opportunity of fully urging before the master or the Court upon the former occasion.

[WILLES, J. Unless he has confessed, expressed contrition, and made satisfaction, he is not in a condition to ask for absolution.]

Garth, Q.C., and *Murray*, shewed cause in the first instance, on behalf of the Incorporated Law Society. They contended that,—considering the nature of the charge proved against the applicant, viz., the fraudulent appropriation of moneys of a client,—he ought not, in the interests of the public, to be replaced in a position in which he might be enabled again to commit the same offence; and that, unless it was shewn, at the very least, that the applicant had done all in his power to make reparation for his misconduct, the Court ought not to restore him to the roll; and that the affidavits did not shew that he had done even this. They referred

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to *In re Oldknow, In re Pyke* (1); *In re Robins* (2); *In re Chandler*, and *Anonymous*. (3)

F. M. White, in support of the application. The client's claim has been compromised, during the proceedings in Chancery, by the firm of which the applicant was a member, and it appears that the conduct of the applicant since the transaction has been exemplary.

WILLES, J. I regret that, after full consideration of all the circumstances of this case, I find it impossible to accede to this application. It appears that in 1863, complaint was made to the Court that the applicant, an attorney of the Court, had been guilty of a fraudulent appropriation of moneys of a client to a large amount. The matter was referred to one of the masters, and the applicant had ample opportunity to attend before the master to explain or excuse his conduct. A report was made to the Court by the master, that the applicant had been guilty of the fraudulent conduct charged against him. It then became the duty of the Court to consider whether the justice of the case would be satisfied by suspending him from practice, or whether he should not be struck off the roll,—the extreme course usually adopted by this Court in cases where grave misconduct is made out. In the result, acting upon the precedent of *Wright's Case* (4), the Court came to the conclusion that he should be struck off the roll absolutely. We are now called upon, after a lapse of six years, to restore him to the roll of attorneys; and we are called upon to do so on the ground that since he was so struck off he has by his assiduity and good conduct earned and retained the high character spoken of in the numerous testimonials which have been produced before us. Without adverting to the loose way in which testimonials are commonly given, I must observe that, assuming the testimonials in this case to have been truly and honestly given, the fact they speak to is the only one which has been made out in the applicant's favour. There are, it is true, suggestions in the affidavits of circumstances which are said to have newly come to his knowledge which ought to weigh with the Court on his behalf. Far be it

(1) 6 B. & S. 703; 34 L. J. (Q.B.) 121, 220. (2) 34 L. J. (Q.B.) 121.
(3) 17 Beav. 475. (4) 12 C. B. (N. S.) 705.

from us to desire to shut out any matter that might operate favourably to him which has newly come to his knowledge. But, with respect to one of these, it is to be observed that it is contained in an affidavit which was made in the year 1865; and that this application is delayed until after the deponent's death. As to the others, one of them depends upon a statement of something heard from the applicant's brother and not brought forward until after his death; and the other has reference to a person who has since become a lunatic. We are thus called upon to review the former decision of the Court upon grounds the most unsatisfactory. Being so called upon, what course are we to pursue? If the character of the applicant be such as is represented, what ought his conduct to have been? A man who comes to ask to have his offence condoned, should manifest his contrition and make reparation, or at least shew that he is earnestly and sincerely desirous to do his best towards that purpose. Has he made any reparation? A bill was filed by the client against his two partners, and they were compelled to consent to a decree against them for 2000*l.*, part of the sum of which the client had been defrauded; which sum the client ultimately agreed to reduce to 1500*l.* The applicant had become bankrupt. It does not appear that any dividend was received from his estate. And he does not now state that he has made any endeavours by prudence and economy to scrape together something towards paying off the claim of the man he has injured; though his position as managing-clerk to an attorney and as coroner for the county, with an income, as we are informed, of 250*l.* a year, does not shew a state of entire inability to make some restitution.

Upon the whole, looking at the power vested in this Court of admitting to the responsible position of attorneys and officers of the Court persons who thus have the sanction of the Court for saying that, primâ facie at least, they are worthy to stand in the ranks of an honourable profession, to whose members ignorant people are frequently obliged to resort for assistance in the conduct and management of their affairs, and in whom they are in the habit of reposing unbounded confidence; and looking to the fact that in restoring this person to the roll we should be sanctioning the conclusion that he is in our judgment a fit and proper person to be so trusted; I think we ought not to do so, except upon some solid

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and substantial grounds. And I further think it ought to be made a condition precedent to the restoration of the applicant to his former position that he should have made full restitution if of ability, or at least that he should have shewn that he has made the best efforts in his power to do so. To require less would be a perversion of our duty, and would in effect be offering a premium to evil-doers, to the discouragement of those who toil honourably and faithfully in their profession. I am by no means prepared to say that, in this case, even if the condition I have suggested had been duly performed, I should have been prepared to yield to the application.

MONTAGUE SMITH, J. I entirely concur with my Brother Willes in the grounds upon which he has stated that the discretion of the Court ought to be exercised in cases of this sort.

BRETT, J., concurred.

Rule discharged.

Attorneys for applicant: *Rickards & Walker.*

May 7.

HEILBUT AND OTHERS *v.* NEVILL.

Bankruptcy—Partnership—Misjoinder of Plaintiffs.

A. and B. were partners, and B. fraudulently indorsed certain bills of exchange belonging to the partnership to C. in payment of a private debt, C. being aware of the fraud. B. having become bankrupt, his assignees disaffirmed the transaction as a fraudulent preference, and joined with A. in an action against C.:—

Held, that B.'s assignees represented the partnership, as well as the personal, creditors of B., and were entitled to disaffirm B.'s act, though dealing only with partnership property; and that they could rightly join with A. in the action.

DECLARATION by Heilbut and Rocca (as assignees of Spill, a bankrupt), & Briggs against the defendant, for the conversion of the goods of Spill & Briggs, and for money received to the use of Spill & Briggs. In other counts, the property was laid in the three plaintiffs, and the money alleged to have been received to their use. There was also a count on accounts stated with the plaintiffs. Pleas: Not guilty, not possessed, and never indebted.

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The cause was tried before Montague Smith, J., at the sittings in Middlesex, after last Michaelmas Term, when it appeared that Spill & Briggs were partners, and in December, 1866, Spill being in difficulties, and indebted amongst others to the defendant Nevill, indorsed to him in payment of his private debt, and in fraud of the partnership, certain bills of exchange belonging and payable to the partnership amounting to 314*l.* 5*s.* 4*d.*, the defendant being aware at the time that Spill had no right to do so. Judgments were shortly afterward obtained against Spill by other creditors, and he was arrested in March, 1867, and taken to Whitecross Street Prison, where he remained till the 18th of April, when he was declared bankrupt by the visiting registrar under the provisions of the Bankruptcy Act, 1861, s. 101. Two of the plaintiffs, Heilbut & Rocca, were appointed assignees of Spill, and having elected to disaffirm the transaction between Spill and the defendant as a fraudulent preference, they brought this action in conjunction with Spill's former partner, Briggs, to recover back the amount of the bills. Upon these facts the plaintiffs were nonsuited, leave being given to them to move to enter the verdict for 314*l.* 5*s.* 4*d.*; the defendant admitting that the payment to him amounted to a fraudulent preference; the Court to have power to draw inferences of fact, and all the powers of amendment of a judge at Nisi Prius. A rule having been obtained accordingly to enter the verdict for the plaintiffs for 314*l.* 5*s.* 4*d.*,

Keane, *Q.C.*, and *Barnard* shewed cause. The title of Spill's assignees relates back only to March, 1867, the date of his commitment, such being the express provision of the Bankruptcy Act, 1861 (24 & 25 Vict. c. 134), s. 103. At that date no one could have sued the defendant for the conversion of these goods. Briggs could not have sued alone, because the property converted was partnership property, nor could he have sued with Spill, because Spill would have been estopped from disaffirming his own act. The bankruptcy of Spill cannot have given Briggs any fresh rights: *Jones* v. *Yates*. (1) Briggs might, perhaps, have been entitled to bring an action in the nature of an action for conspiracy against Spill and the defendant for their fraud, but the damages to be

(1) 9 B. & C. 532.

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recovered in that action would have been only the actual damages sustained by him, depending on the state of the partnership accounts.

It is true that the assignees of Spill might have disaffirmed the transaction between Spill and the defendant as a fraudulent preference, if the bills had been part of Spill's private estate; or the assignees of the partnership might have disaffirmed it, if the partnership property had been used to pay one partnership creditor: but it has never been decided that the assignees of Spill's private estate can interfere with any disposition of the partnership property as a fraudulent preference. Even, however, if the assignees of Spill are entitled to his interest in these bills they have a wholly *different* right of action in respect of them from that which Briggs has in respect of his interest in the goods, and they cannot join their rights with his so as to bring trover for the whole bills. In *Thomason* v. *Frere* (1), the title of the assignees related back to a period prior to the fraudulent transfer of the bill of exchange; *the* title to the bill was therefore in the assignees and the solvent partner at the time it was received by the defendant, and they could, therefore, join to recover it back. That is the very ground of the decision, and shews that the present plaintiffs are not entitled to succeed.

Butt, Q.C. (*Archibald* with him), in support of the rule. If the only right existing in Briggs was that of bringing an *action* for conspiracy, he might not be able to join that right to the rights of Spill's assignees; but in fact, the fraudulent act of Spill, being done with the knowledge of the defendant, could not affect Briggs' interest in the bills though it was sufficient to pass Spill's interest, and though Briggs would have been prevented *from* bringing an action against the defendant, because a man cannot sue a tenant in common to recover the common property.

[WILLES, J. It may be doubted whether even Spill's property passed, because by the law merchant a bill belonging to two can only be endorsed by authority of the two, and, if one indorse it for himself alone, it is only an authority to the person to whom he endorses it to receive the amount due to him.]

That is a further reason why the plaintiffs may succeed, but in

(1) 10 East, 418.

dependently of that, when the assignees have elected to disaffirm Spill's act as a fraudulent preference, it becomes void as against them from the very commencement, and has no effect in respect of Spill's interest, any more than it otherwise had in respect of that of Briggs. The defendant, therefore, has acquired no interest in the bills; but Briggs and Spill's assignees are tenants in common, and as such are entitled to bring a joint action to recover them from the defendant who has no title to them. The assignees of Spill's private estate are entitled to disaffirm the act, because any misappropriation of the partnership property is an injury to the private creditors. The authorities, too, are in favour of the plaintiffs. In *Jones* v. *Yates* (1) it is said that the assignees could not join with the solvent partner to sue in such a case as the present, unless the bankrupt's act amounted to a fraudulent preference, implying that in that case they could. *Thomason* v. *Frere* (2), shews that where the assignment by a bankrupt is invalid his assignees can join with the solvent partner in suing, and here the assignment, being by way of fraudulent preference and disaffirmed by the assignees, was invalid. *Burt* v. *Moult* (3), is to the same effect.

WILLES, J. This case raises a question of considerable nicety with respect to the rights of the assignees of a bankrupt partner and the solvent partner to join in an action for the recovery of partnership property. In the circumstances of the present case the question is rather one as to joinder of parties than as to the substantive rights of the plaintiffs. It appears that Briggs & Spill were in partnership, and that Spill owed the defendant Nevill a personal debt. The firm possessed at the time a quantity of bills payable to them, and to apply those bills to private purposes was a fraud on the firm. Spill, however, did profess to indorse those bills to the defendant in payment of his private debt, in the form in which they would have been indorsed if he had indorsed them for the firm, and the defendant took them, knowing that the transaction was a fraud upon the firm. The effect of this transaction, therefore, would have been, if Spill had not subsequently become bankrupt, that one partner had paid his debt with property belonging to both.

(1) 9 B. & C. 532. (2) 10 East, 418. (3) 1 C. & M. 525.

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That being the case, if the partners had brought a joint action to recover the bills, a difficulty would have arisen, because Spill would have been estopped by his own act from saying he had not authority to indorse the bills. Whether there would have been an answer to a separate action by Briggs it is not necessary now to say. There is no doubt that Briggs could have maintained some action or suit, by which to reimburse himself for his loss in respect of the fraud practised upon him by Spill and the defendant, but there would have been the difficulty I have mentioned in the way of any joint action by Briggs & Spill. The same difficulty would have existed in full force in respect of an action brought by Briggs and the assignees of Spill after Spill's bankruptcy if nothing else had appeared, since the assignees have no better title than the bankrupt; and unless it can be shewn that a case of fraudulent preference constitutes an exception, the plaintiffs cannot recover. That makes it necessary to consider the exact nature of the difficulty in the way of a joint action by Briggs & Spill. That difficulty appears to arise from the rule, that two persons cannot maintain an action where there is a good ground of defence against one of them. It seems in this case rather to arise from the law of estoppel than from the fact that any property in the bills had passed to the defendant, for the indorsements must be taken not to have professed to pass anything beyond Spill's interest, since the defendant knew the circumstances under which they were made, and therefore, according to *Johnson* v. *Kennion* (1), they would not amount to a transfer even of the bills, because by the law merchant an indorsement must be of the whole of a bill. I should be inclined, if it were necessary, to decide in the plaintiffs' favour on that ground; but even if it is looked upon as if it were a transfer of goods instead of bills, and put upon the ground which Mr. Butt has principally argued, the difficulty would still arise from Spill having transferred his interest in the chattels, and Briggs being unable to sue as tenant in common, for no one would suppose that Spill could transfer more than his own interest. What, then, is the effect of Spill's bankruptcy? It is that the assignees have become entitled to Spill's property, and are bound to distribute it. They would be entitled to Spill's partnership property, if any, and would be trustees of his partnership

(1) 2 Wils. 262.

creditors as well as of his private creditors, since the property would have to be distributed amongst them all, only in different orders, and it is a disadvantage to the assignees, as representing both classes of creditors, to be deprived of any part of Spill's share in the partnership property. I apprehend, therefore, that the law of fraudulent preference does apply to the present case. The law of fraudulent preference is quite distinct from any relation back of the assignees' title. It entitles them to say where the bankrupt has made an assignment of any of his property to one of his creditors, as was done in the present case, that the transaction as against them shall be void. Applying that rule here, Spill's assignees may say, and they have said, that the handing over of the bills to the defendant shall be void, i.e., shall be considered as if it had never taken place, the effect of which is to defeat the estoppel. In respect of passing the property, likewise, the election of the assignees has made the transaction null. The result is, that Spill's assignees are not joined in this action to enforce a right which was possessed by Spill before his bankruptcy, but in respect of a right of property which is subject to no difficulty, and which is founded on the law of fraudulent preference. Mr. Keane's objection that Spill's assignees and Briggs were suing in respect of different rights was certainly ingenious. In truth, they are really suing in respect of one right, viz., that of property, though the difficulties in their way are got rid of by different means. Apart, therefore, from authorities which are, I think, however, in accordance with our decision, I have come to the conclusion that the rule ought to be made absolute.

MONTAGUE SMITH, J. I am of the same opinion. No doubt, on the merits, the plaintiffs ought to succeed, and I am glad we are able to sustain this action. I have been much assisted by Mr. Butt's argument, and am satisfied that the plaintiffs have such a property in the bills as gives them a joint right of action. The transfer at the time was a fraud both on Briggs and on the creditors of Spill; on the latter because it amounted to a fraudulent preference. It is plain, however, that the defendant could have held the bills if he had not been a party to the fraud; but, as he knew the nature of the transaction at the time he took them, he would

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have no title in equity as against Briggs, although before Spill's bankruptcy Briggs could have brought no action such as this founded on his property in the bills, either in his own name or by joining Spill. He would, perhaps, have been able to maintain an action of a different nature founded on conspiracy and fraud. That being the state of things up to the time of Spill's bankruptcy, the assignees acting for the creditors were entitled after the bankruptcy to take advantage of the fraud against them, which was such at the time of the transaction, and treat the indorsement as utterly void. The assignees have done so, and therefore are entitled to Spill's interest in the bills as representing the creditors, and are tenants in common with Briggs, and, as such, they may with him bring trover to recover the bills, the property in which has not passed to the defendant as against either of them, on account of the fraud as already stated.

BRETT, J. The plaintiffs claim in this case as being entitled to the bills as partnership property, which they say has been wrongfully converted. The defendant says he is indorsee of the bills, but I think he must be taken at the time of action brought never to have been indorsee as against either of the plaintiffs. He was not so as against Briggs, because the bills being partnership property they could not be indorsed except by both partners, or by one having the authority of the others, or acting under circumstances which would entitle the defendant to say that that one had been held out as having such authority. The defendant, however, knew that Spill had no authority from Briggs when he made the indorsement. I think, for the same reason, there was no valid indorsement as against Spill, but he, however, would have been estopped from saying so in any action which he brought against the defendant; and if that were all, I think his assignees would be estopped also. But the transaction amounted also to a fraudulent preference, and his assignees had a right to disaffirm it, and to say that it was void as against them. They have a right, therefore, as well as Briggs, to say that there has never been any valid indorsement. I think it is quite right to take notice that they were trustees for the partnership creditors as well as for Spill's private creditors, for the partnership creditors are also creditors of the private estate.

I have a strong opinion that the result would be the same if it had not been bills, but goods or money, which Spill had given to the defendant. It is sufficient here, however, to say that there was no valid indorsement as against either of the plaintiffs, and that the bills, therefore, remain their property.

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Rule absolute.

Attorneys for plaintiffs: *Venning, Robins, & Venning.*
Attorney for defendant: *J. Godwin.*

WAYGOOD AND ANOTHER, PETITIONERS; JAMES, RESPONDENT.

May 4.

TAUNTON ELECTION PETITION.

*Parliament—Election Petition—Effect of the Decision of a Judge at an Election Trial—*31 *&* 32 *Vict. c.* 125.

Where an election petition claims the seat for one of the defeated candidates, and the judge on the trial of the petition decides that such candidate was duly elected, the judge's decision is final, and a petition against the return of such candidate cannot subsequently be presented under the provisions of 31 & 32 Vict. c. 125.

THIS was a rule obtained by the respondent to take an election petition off the file of the Court. It appeared from the affidavits that the election for the borough of Taunton took place on the 18th of November, 1868, when there were three candidates, Cox, Barclay, and James. The returning officer returned Cox and Barclay as duly elected, and a petition was thereupon presented by two voters against the return of Cox, and claiming the seat for James. Before the trial Cox gave notice to the petitioners that he intended to object to James's return on the ground of bribery and treating. At the trial the counsel for Cox called no witnesses, but he cross-examined the petitioners' witnesses with a view to prove bribery and treating by James's agents, and contended in his speech that such bribery and treating had been proved. The judge decided that Cox had been guilty of bribery by his agents, and that James had not been guilty of bribery or treating, and after a scrutiny he further decided on the 5th of March, 1869, that James had been duly elected, and he certified the same to the

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speaker. On the 9th of March the clerk of the Crown attended at the bar of the House of Commons with the return, and by order of the House he erased from it the name of Cox, and on the erasure wrote the name of James, but made no alteration in the date of the return. On the 29th of March, being less than twenty-one days after the 5th, omitting Sundays and Good Friday, the petitioners, being two voters, presented the petition now in question against the return of James, alleging that he had been guilty of bribery and treating by himself and his agents.

Manisty, Q.C., and *Cohen*, shewed cause. The 5th section of 31 & 32 Vict. c. 125, gives the right to present a petition complaining of the undue return of a member, and is quite general and absolute in its terms. The 6th section imposes the condition that the petition shall be presented within twenty-one days after the return of the member. When, then, was James returned? He certainly had not been returned before the 5th of March. The clerk of the Crown is, by 7 & 8 Wm. 3, c. 7, s. 5, required to keep a book in which he is to enter all the returns, and James's name clearly could not have appeared therein before that time: as certainly he has been returned now. It is clear, therefore, that either the date of the decision of the judge at the trial, or of the amendment of the return by order of the House of Commons, was the date of James's return; and it is unimportant for the present purpose which was really the date, as in either case the petition was presented in time. If this were all, the petitioners would clearly be in the right; but certain sections are relied on to shew that under the circumstances of this case the petition cannot be received. The 13th paragraph of the 11th section provides that the determination of the judge shall be final to all intents and purposes. The 37th and 38th sections provide for the substitution of other petitioners or respondents if those at first filling those positions withdraw; and the 53rd section gives the right to the respondent, when the petition claims the seat for any candidate, to shew that the election of the latter was void in the same way as if he had presented a cross-petition against him. Unless, however, any voter may also petition against the return of a person so declared by an election judge to have been duly elected, the whole constituency will be at the mercy

of the member first petitioned against, who, when the judge has once expressed an opinion adverse to him, will have no motive for pressing the recriminatory charges. Indeed, by this means any candidate might obtain a seat by collusion with the sitting member. Any number of petitions may be presented against the return of a member in the first instance, and the 2nd section provides for their consolidation, and thus renders impossible the evil of a collusive or feebly fought petition. But if the respondent's view of the act be correct, there is no such protection when a member has been seated on a scrutiny. The fact of several petitions against the same member being contemplated by the act shews that each petitioner is not supposed to represent the whole constituency. Under the old practice there was a sessional order limiting the term within which petitions should be presented; but the House would grant special leave to persons to be heard subsequently, if they had not had an opportunity of being heard before. No such discretion is vested in this Court, which renders it probable that the legislature considered that the right to petition under such circumstances was already given under the act.

[WILLES, J. There is no precedent for a second inquiry into the conduct of a member whose conduct has already been inquired into on a previous petition. In the *Southampton Case*, quoted in the 8th ed. of Rogers on Elections, p. 470, the speaker, Mr. M. Sutton, stated that a petition could not be received against a member who had been seated, as the charges alleged in it might have been brought forward on the former petition.

BRETT, J. Was not s. 32 expressly inserted to meet the case of one of the parties failing to press the case as strongly as he might against the other party?]

That section was more probably intended to meet the case where both parties are afraid to call a witness who might yet be able to throw much light on the case. The 11th section will probably be after all the one most strongly relied on by the respondent, but that must be taken with some qualification, because if a corrupt payment was made by a sitting member, after a petition had been tried against him, there can be no doubt, from the terms of the 6th section, that a fresh petition might be presented against him;

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the word final need only mean that there is no appeal from the judge's decision to the House of Commons or otherwise.

Mellish, *Q.C.*, *Giffard*, *Q.C.*, and *Griffits*, in support of the rule. An election petition is not a suit between two parties, but an inquiry in rem as to who was elected, and it does not, therefore, make any difference whether the respondent, on the first petition, has, or has not, in fact, gone into the question whether the candidate, for whom the seat was claimed, had been guilty of corrupt practices, if he was entitled to do so. The provision of ss. 37 and 38, for the change of the parties to the petition, and the right of the judge, under s. 32, to proceed, even if both parties withdraw, shew clearly that the nature of the proceeding is as above described, and if this view be adopted, the whole act is consistent; while, under the construction presented by the other side, the very same question that has been already fully heard and decided, may be tried a second time before a different judge, though there is nothing in the act to shew what the House of Commons is to do in such a case. Such a thing was never allowed by the House under the old practice, though they had a discretion in the matter, yet it is now claimed as a right. The judge may, on the first trial, decide either of three ways, and in two of such cases his decision is certainly final, viz., if he decides that the sitting member was duly elected, or that neither the member nor the candidate for whom the seat is claimed were so; there is no reason why his decision should not be equally final, if he decides in favour of the candidate for whom the seat is claimed. No practical hardship results from there being no right to petition against the person so seated, for if the respondent abandon the petition, an elector may come in and conduct the recriminatory case, as if he had presented a petition, and if the respondent does not actually withdraw, he would doubtless be always willing to fight the case to the last, if his party were willing to supply the funds. The words of s. 6, though not perhaps absolutely conclusive, seem more consistent with this interpretation, for James cannot strictly be said to have been returned at all. The 13th paragraph of the 11th section, is, however, quite plain, and enacts that there shall be a final determination at the trial of the question who has been elected, and s. 13 confirms this by rendering it obligatory on the House of

Commons to carry out the judge's decision. There is no discretion given to the House as in s. 14. The provisions of s. 32 may not be any great protection to the public, but they were evidently so intended, and would prevent any gross injustice occurring; s. 19 shews that, even if the respondent refuses to defend his seat, there is to be an inquiry as to the election, and it is clear, therefore, that the decision of the judge is to be treated as a judgment in rem. The 53rd section alters the former law by giving the respondent a right to make recriminatory charges in all cases where the seat is claimed, and thus renders the due return of the person, for whom the seat is claimed, in all cases one of the matters to be inquired into. The present petition, therefore, has been improperly presented, and should be struck off the file.

BOVILL, C.J. In this case the petition, which was presented by two voters, sought to avoid the election of Mr. Serjeant Cox, and also claimed the seat on behalf of Mr. Henry James, who was a candidate at the election. Upon such a petition it is clear, according to the terms of the act of parliament, that a distinct issue was raised on each of the points involved in that petition. The 53rd section of the act distinctly authorizes and gives jurisdiction to the judge to try the issues with respect to the candidate on whose behalf the seat is claimed, or who is alleged by the electors or the voters to have been the person returned as their representative; and, according to rule 7 of the rules framed by the election judges, provision has been made for carrying into complete effect the intention of the legislature, and for the trial of all the issues which are raised on such a petition. It is true that the candidate is no party to the petition, but that was well known to the legislature, and from the nature of things the probability is, that the matter will be fairly and properly conducted without collusion; and there are some provisions in the act for the purpose of preventing collusion under certain circumstances. The inquiry is one not as between party and party, but one affecting the rights of the electors, the persons who are or may be members or candidates, and the House of Commons itself and its privileges; and this inquiry is to take place before one of the election judges, who is to inquire into and decide the questions raised for his determination. One of

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those issues, undoubtedly, must be on such a petition as this, whether the candidate, for whom the seat is claimed, was or was not duly elected at the election; that is an issue distinctly raised, and the parties may go into it if they please, or may abstain from so doing, and the opportunity is therefore afforded of having the question discussed and absolutely and finally determined by the election judge. If the decision on such a petition be against the candidate, then, under the Bribery Act of 1854, he becomes disqualified, whilst if the decision be in his favour then the consequence follows that the return is amended, the provisions of the act are carried out, and by the decision of the judge he becomes the sitting member. In the present case, of all others this matter seems to me to have become res judicata. Not only was the issue raised by the petition, but the question so raised was gone into, and it matters not that affirmative evidence was not offered on behalf of the sitting member, and that he contented himself with the cross-examination of the witnesses who were offered by the petitioners, for in that way evidence was obtained and was submitted to the consideration of the judge, and the learned counsel who appeared for the sitting member argued the case as to the disqualification of the gentleman who is now the sitting member, Mr. James. The issue having been raised, the evidence gone into, and the arguments of counsel heard, the judge has decided, and I am at a loss to distinguish this case from one where witnesses have been examined in any number, a scrutiny has been gone into which has continued for days, possibly for weeks, and ultimately a decision given in favour of the candidate who claims the seat. In such a case as that, it cannot be contended for a moment that the intention of the legislature was that after the fullest inquiry has been made, ample evidence given, arguments adduced on either side, and the matter finally determined by the judge, exactly the same question might be brought under discussion before another judge, and the whole inquiry gone into again. That would be nothing more nor less than an appeal against the decision of the judge who decided in the first instance, and notwithstanding that no power of appeal is to be found anywhere in the act. So far from its being the intention of the legislature that there should be any appeal, or that the decision of the judge should be questioned on a matter of

fact, parliament, by the 13th paragraph of the 11th section of the act, expressly declares that the decision of the judge shall be final to all intents and purposes. If it is to be final to all intents and purposes, can it be said to be final unless it is to conclude the parties in a matter which was in issue, and on which the decision of the judge has been pronounced? The argument on the other side would go to defeat the very express enactment, as it seems to me, contained in the act. That the decision is to be final is further shewn not only by the absence of any power of appeal, or of questioning the decision of the judge, but by the 13th section, which declares that upon the certificate of the judge being communicated to the House of Commons by the Speaker, it shall give the necessary directions for confirming or altering the return, or issuing a writ for a new election, or carrying the determination of the judge into execution, as circumstances may require. In this view of the case, it would seem that in every instance where the seat is claimed by the petition, and the matter distinctly raised, then, whether the matter is gone into or not, as it is raised and is a point in issue which the judge may determine, and which he would determine in the absence of evidence in favour of the one side or the other, the decision is equally conclusive whether the evidence is given or not. The consequence is that in every case where the seat is claimed there can be no new petition; and that if there be an alteration of the return the sitting member will be unseated and the other candidate declared duly elected. I can quite understand why the present act so provides, as this is exactly the practice which prevailed in parliament before the recent legislation. The practice was that where a seat was claimed, and there was an opportunity of contesting the validity of the election of the party claiming the seat, the House of Commons would not allow the matter to be gone into afterwards, or allow any further time for the presentation of a petition; and, a fortiori, it would be so, in a case like the present, where not only was the question raised, but the matter was gone into by argument and evidence, and a decision pronounced by the judge. In former times, where a petition proceeded on some technical ground, as to the form of the return, the mode of adding up the figures, or the like, it seems that it was the practice of the House to relax its rules, and by a special resolution to allow a fresh

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petition to be presented, but there is no such provision in this case, nor can any such doctrine apply to the case now under consideration. It is sufficient to say that there is no clause in this act which authorizes any new petition where a matter has been already inquired into, and solemnly determined by the judge. The status of the member is declared by the judgment of the election judge. By that decision Mr. James was declared duly elected, and that decision becomes binding on every person, on every elector, on the candidate, on the sitting member, and also on the House of Commons. Under these circumstances, I am of opinion that the present rule must be made absolute, not however to take the petition off the file, but to stay all further proceedings on the petition, which, in the opinion of the Court, is the proper course to be adopted.

WILLES, J. I am of the same opinion, both on the principal point, and also that it is better that the form of the rule should be as suggested by my Lord, if only that we may retain control over the money deposited on the petition. On the main question, what crossed my mind is this: unquestionably James has been subject to assaults from a less numerous body of persons than might have assailed him if returned in the first instance, for then any voter might have petitioned against him, or Cox might have done so: whereas it turns out he has only been exposed to a recriminatory charge in the nature of a petition at the suit of Cox.

It is said that he has therefore gone through a less searching ordeal, but when looked at I think that is no practical objection, because though each voter and candidate may present a petition against the return of a member, he is not entitled to do so in respect of any private claim of his own, and the object of the legislature in dealing with the question who should be entitled to present a petition was only to secure ample opportunity of the matter being investigated. Against any member, therefore, who is elected in the first instance, any one directly interested may petition: if the petition does not claim the seat there is no recrimination allowed, but if the petition does claim it the respondent is entitled to protect himself, and before the scrutiny prove a recriminatory case, and so that the election of the other candidate

could not stand. It is true that even if he proves it the petitioner may still go into the scrutiny to turn out the sitting member; but the interest of the person who claims the seat and the person who holds it are usually sufficient to insure a full inquiry, and there is sufficient difference between persons who are and who are not in possession of the seat to induce the legislature to trust the former to raise all proper objections to any person claiming it. Further, the respondent who actually proceeds to trial gives proof of the sincerity and good faith with which he is actuated, and if the respondent chooses to cry craven the act allows of his doing so at a proper time when the chief part of the costs have not been incurred, and the act then also provides for proper notices being given, and that any one interested may take his place. All this seems to shew that, the only proceeding which the legislature has substituted for what might be done if the candidate had been at first elected, is the recriminatory charge. We cannot add to what the legislature has provided, and there may be strong reasons why an inquiry which may involve a criminal charge should not be gone into a second time.

If a case should arise in which there was collusion between the claimant and the member, as suggested by Mr. Manisty, though it be not in our competency, it might be in the competency of the House of Commons to allow a second investigation of the matter, under the general jurisdiction over returns of members established in *Goodwin's Case.* (1)

MONTAGUE SMITH, J. I am of the same opinion. There was an inquiry before one of the election judges on a petition claiming the seat, which involved not only the question whether the member who had been returned had been duly elected, but whether the person for whom the seat was claimed was duly elected. That is an issue raised when the seat is claimed; on that issue the decision of the judge must be given, and when given I think that the decision was final. I should have thought, on general principles, that where a judge has jurisdiction over an issue, and where no appeal to any other tribunal is given from his decision, such decision would be final. But it further appears to me that upon the plain words of

(1) 2 State Trials, p. 91.

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the 13th sub-section of the 11th section of the act the certificate of the judge is made by virtue of the statute final and conclusive. Language could hardly be stronger than the words used in that section. It is enacted that "at the conclusion of the trial," i.e., the trial of the petition under which by the 53rd section of the act the issue may be raised whether or no the candidate claiming the seat was duly elected, "the judge who tried the petition shall determine whether the member whose return or election is complained of, or any or what other person, was duly returned or elected, or whether the election was void, and shall forthwith certify in writing such determination to the speaker," so that the judge is bound on such a petition to determine who was duly elected at the election, and to certify his decision to the speaker, and "upon such certificate being given, such determination shall be final to all intents and purposes." It seems to me exceedingly difficult to say after this express enactment that the determination of the judge, that Mr. James was duly elected, can be in any way impugned. Certainly the statute does not shew any mode by which it could be impugned. The statute gives no appeal, but, on the contrary, contains the very words that are to be found in statutes in like cases when it is intended that there should not be an appeal—"the determination shall be final to all intents and purposes." The learned counsel, Mr. Manisty, pointed out some consequences that might arise from the inability of the electors to question the proceedings of a candidate claiming the seat at an election; but consequences still more serious might follow if under the scheme of this act a second petition were to be allowed, because in that case the candidate might be put to all the anxiety, vexation, and expense of a second inquiry, and public justice might be open to the scandal of having a different judgment in the same issue, even upon the same evidence, from two judges of co-ordinate jurisdiction. I think that the consequence which would arise from our holding that there might be a second petition are much more serious than those which would occur from our holding that such a petition cannot be presented. The consequence suggested by Mr. Manisty was this, that the respondent might collude with the petitioner, and so stifle an inquiry into any corrupt practices committed by the candidate for whom the seat was claimed.. Collusion of this kind may possibly occur,

but it may also occur in many other cases for which the act makes no provision, and if such an evil is found hereafter to arise, the legislature may supply the remedy very easily, by enacting that in cases where the candidate claims the seat or any voter claims it for him, electors may come in within a certain time and present a counter petition against him which might be tried with the original petition. There would then still be but one inquiry. It seems to me that the whole scheme of the act is founded on this, that there shall be but one inquiry into the election, and that the whole inquiry shall take place upon the original petition, with such substitutions as are allowed by the act. The decision given on such inquiry is a decision in rem, and the intention of the act is expressed in very plain terms, that the determination of the judge upon it shall be final, and put an end to all further investigation into the election.

BRETT, J. There are two questions raised, as it seems to me; first, whether the petition can properly be presented? Secondly, if it can properly be presented, is it one which ought to be entertained? In my view of the case neither question can arise except in the case where the seat is claimed by an unsuccessful candidate, because, if the successful candidate does not claim the seat, there can be no reasonable ground for petitioning against him; neither can there be a judgment as to his status or position. As respects the first question, until the decision of the judge has been given the unsuccessful candidate has not been returned to the clerk of the Crown in chancery; and after that decision it is enacted by the 13th section, not that a new return is to be made, but that the old return is to be altered; and then the name of the successful candidate is inserted in the return which bears the original date. So that it seems to me, both from the facts and the construction of the statute, that there can be no valid petition against an unsuccessful candidate who claims the seat. That was put forward by Mr. Manisty as an invincible objection; but it does not seem to me to be so; for it does not lead to any injustice, as by the 53rd section the candidate who does claim the seat lays himself open to all the consequences to which a successful candidate is liable on petition. I therefore think that a petition cannot be properly presented to

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this Court, and that in the case of a candidate claiming the seat there can be no valid petition, and that no such petition is required. Supposing this, however, not to be so, then arises the next question, viz., whether on such a petition there can be a second trial with regard to the election. It seems to me that there cannot, because upon the true construction of this act the first judgment is a judgment upon the status of the person originally elected, and is binding against all the world. Section 11, subs. 13, states in terms that the judgment is to be final and conclusive, and the meaning of the words there used is to be construed by reference to s. 13, which shews that it is not only to be binding as between the parties, but it is to be binding upon the House of Commons. It is made obligatory on the House of Commons to carry out the decision of the judge's certificate ministerially, without any discretion on their part. This is strong to shew that the meaning of the words in s. 13 is that the judgment there mentioned is to be final. And ss. 38 and 39, which allow a change of parties, go to shew that the judgment is to be a judgment on the status of the person originally elected—a judgment in rem binding against all the world. Two objections have been made to this view. First, there was a powerful objection made by Mr. Manisty, the effect of which was, that, assuming the sitting member to conduct the case against the claimant without sufficient energy yet without fraud, the constituency is practically barred by the present decision of the Court. That to a certain extent is true; but it seems to me that s. 32 is the means by which the legislature intended to meet that difficulty. It is obvious that the legislature might, if they pleased, have given power to any one to intervene or have appointed an officer to intervene in these cases, as the Queen's Proctor does in cases of divorce, but they have not done so; and the only meaning that I can give to s. 32 is that the judge is to act in a more mitigated manner in the same way. It may be that the section may not carry out the intention of the legislature, but up to the present time it has not been tried, and however that may be I can give no meaning to it, unless it was passed in order to meet the difficulty pointed out. The other objection was that the sitting member and the candidate may fraudulently collude; but it is to be noticed that a judgment in rem may be challenged and set aside on the ground

of fraud between the parties to the deception of the Court; and if it could be shewn that a judgment had been so obtained it might well be argued that the judgment was not final. What would be the proper means of re-opening the question, I can hardly say; whether there might be a fresh trial on the old petition, I know not; or it may be, as was suggested by my Brother Willes, that the House of Commons in such a case would not be barred by the section which makes them bound to carry out the certificate, and that it would be null and void; so that by the instrumentality of the House a new trial under those circumstances might take place. But suppose that were not so, and that this is a casus omissus, still it does not to my mind alter the determination to be arrived at from the construction of the Act itself. For these reasons, therefore, I am of opinion that such a petition as is now before us cannot properly be presented to this Court, which is only authorized to receive petitions presented according to the Act; and that even if properly presented, yet that there cannot be a second trial, which practically would be an appeal from the first.

Rule absolute, that all proceedings should be stayed, with costs.

Attorney for petitioners: *W. A. Boyle.*
Attorneys for respondent: *Wyatt & Hoskins.*

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Nov. 9.

[REGISTRATION CASES.]*

CHORLTON, APPELLANT; LINGS, RESPONDENT.

Parliament—Borough Vote—Woman—Representation of the People Act, 1867 (30 & 31 *Vict. c.* 102), *s.* 3—"*Legal Incapacity*"—*Lord Brougham's Act* (13 & 14 *Vict. c.* 21), *s.* 4.

The Representation of the People Act, 1867, s. 3, enacts that every "man" shall, in and after the year 1868, be entitled to be registered as a voter, and when registered to vote for a member or members to serve in parliament for a borough who is qualified as follows, first, is of full age, and not subject to any legal incapacity.

By Lord Brougham's Act, s. 4, in all Acts words importing the masculine gender shall be deemed and taken to include females, unless the contrary is expressly provided:—

Held, that women are subject to a legal incapacity from voting at the election of members of parliament.

Held, also, that the word "man" in the Representation of the People Act does not include women.

APPEAL from the Revising Barrister for the borough of Manchester.

Mary Abbott claimed to be put upon the list of voters for the township of Manchester in the following manner:—"Abbott, Mary —51, Edward Street—House—51, Edward Street."

It was admitted that Abbott was a woman, of the age of twenty-one years, and unmarried, and that she had for twelve months previously to the last day of July, 1868, occupied the dwelling house stated in the claim within the township, and had in all respects complied with the requirements of the Registration Acts.

On behalf of the claimant it was contended that under the existing statutes the claimant was duly qualified and entitled to be registered as a voter, and when registered to vote in the election of a member of parliament, and that women for the purpose of being registered electors, and voting in election for members of parliament, are not subject to any legal incapacity.

It was maintained, on the part of the objector, that, under the existing statutes, the claimant was disqualified on account of her sex.

* For convenience of reference, the Registration Cases for this year are all collected here, irrespective of the Term in which they were decided.

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The revising barrister held that Mary Abbott, being a woman, was not entitled to be placed on the register. Appeals of 5346 other women were consolidated.

The question for the Court was whether Abbott was or was not entitled to have her name inserted in the list of voters for the borough of Manchester.

Nov. 7. *Coleridge, Q.C.* (*Dr. Pankhurst* with him), for the appellant. The question in this case is, whether women are entitled to vote in the election of members of parliament. The appellant contends, first, that there was originally no distinction between men and women in this matter, and that subsequent legislation has not introduced any such distinction; and secondly, that the Representation of the People Act, 1867 (30 & 31 Vict. c. 102), as explained by Lord Brougham's Act (13 & 14 Vict. c. 21), s. 4 (1), confers a right of voting upon women, even if they did not possess it before. The vote claimed by the appellant is a borough vote; but it will be necessary to consider the right of women to vote in counties, because if they can be proved to possess such a right, it will at once afford an answer to all the arguments derived from the supposed incapacity of women to exercise the franchise. The first statute respecting the county franchise is 7 Hen. 4, c. 15, that enacts that all they that be present at the county court, as well suitors duly summoned for the same cause as others, shall attend to the election of the knights for the parliament. Mr. Hallam's comments on this branch of the law are to be found in his Constitutional History (ch. 13); and he there points out that the principle of representation was supposed to be that all who were liable to taxation should have a voice in choosing the representatives by whom the taxes were granted. If it can be shewn that under that law women voted as well as men, it will be for the respondent to shew by what statute their right has been taken away. The nature of the county court at which the election was held is stated in Blackstone's Commentaries, vol. i., p. 178, and Reeve's History of the English Law, vol. i., p. 47, and it would

(1) This Act was called throughout the argument Lord Romilly's Act. It was, however, introduced into the House of Lords by Lord Brougham, and Lord Romilly was in no way connected with it.

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appear to have been attended no less by women than men. This, in fact, is shewn conclusively by the Statute of Marlbridge, 52 Hen. 3, c. 10, which exempts amongst others from attendance at the tourn, which was one of the divisions of the county court, "viri religiosi et mulieres," unless specially summoned. If religiosi applies to the mulieres as well as viri, as would appear from the English translation of the statute, this will shew that women in general were required to attend, while in any case it is clear that women were under no legal incapacity since they were to attend if specially summoned, and were only excused on ordinary occasions as a matter of privilege. It must be remembered that at that time sending a representative to parliament was looked upon as a burden, not as a privilege, and the chief object of the attendance of a representative was to grant, on the part of his constituents, those contributions to the king's revenues which were paid alike by women and men. Early in parliamentary history the practice arose of evidencing the return of a member by indentures entered into between the Crown and certain of the electors in the name of the rest. (1) Two instances will be found in Prynne's Brevia Parliamentaria Rediviva, pp. 152, 153, of such indentures for the county of York, which were signed by women. The earliest is dated 13 Hen. 4, and is signed by an attorney of Lucy, Countess of Kent. Another, in 2 Hen. 5, is signed by the attorney of Margaret, widow of Sir H. Vavaseur. In 7 Edw. 6, the return for the borough of Gatton was made by the Lady Elizabeth Copley, widow of Roger Copley, and all the inhabitants of the borough. In a later return for the same borough, 1 & 2 Ph. & M., the same lady made the return in her own name alone, and there is a similar return in 2 & 3 Ph. & M., in which the writ is said to have been directed to her.

[WILLES, J. It would seem, then, as if she was only the returning officer.]

That will not account for the first return, to which her seal is attached, along with those of the other inhabitants. A return for the borough of Aylesbury, in 14 Eliz., given in Heywood on County

(1) By 7 Henry 4, s. 15, it was provided that the indenture should be under the seals of all them that did choose the knights; this, however, appears never to have been carried out in practice. Copies of the indentures referred to were in court.

Elections, p. 256, 2nd ed., is signed by Dame Dorothy Packington, widow; and in the *Lyme Case* (1) there is a list of burgesses of the town of Lyme Regis in the 19 Eliz. which includes the names of three women.

[WILLES, J. Their names may have been placed upon the roll because, if they married, their husbands would have the privileges of burgesses in their right.]

It is evident, therefore, that in early times women did, at any rate, sometimes take part in elections. No doubt modern books all state that women are legally incapable of voting; but they all quote as their authority a passage in 4 Inst. p. 5. That volume of the Institutes is not of such high authority as the others, not having been published till after Lord Coke's death, and may at most be taken only to shew what was the practice at that time. That being the state of the evidence with respect to the law as originally framed in relation to the franchise, a succession of Acts have been subsequently passed, none of which contain any provision which would deprive women of the right of voting if they really possessed it; though neither would they be sufficient to confer upon them that right, if they had not previously possessed it. Some, indeed, use the word "man," and not "person," in speaking of those who are the subjects of the enactment; but apart from the provisions of Lord Brougham's Act (13 & 14 Vict. c. 21), s. 4, the generic "man" is sufficiently general to include women if the subject of the Act concerns both sexes equally. In many penal statutes it is provided that any "man" who commits the offence shall suffer the penalty, and there can be no doubt that women are equally subject to the provisions of such Acts. The question, therefore, really comes to this: is the evidence that has been adduced sufficient to shew that women originally possessed and exercised the franchise? and that evidence, though undoubtedly scanty, is subject to two observations—First, the franchise was originally considered as a burden and not a privilege, and therefore if really possessed by women, would not have been often exercised; and, secondly, the long period that has elapsed has rendered scanty the traces of the mode in which elections were conducted in the fifteenth century.

(1) 2 Luders, 18.

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Coming to the Reform Act, 2 Wm. 4, c. 45, all the rights of the 40*s.* freeholders are reserved; but in s. 18 a limitation is imposed in respect of freeholds for life, and by s. 19 the franchise is conferred upon copyholders. A very significant difference, however, is to be observed in the wording of the two sections; in the former, referring to the old rights, the general word "person" is used throughout; but in the latter the new franchise is conferred only on every "male person" possessing the named qualifications. This seems at least to recognize the fact that the right of women to vote under the old franchise was at the time an open question; and that it was a right which, if it existed, the framers of the Act did not intend to take away. The Act of 1867 preserves all existing rights, and cannot affect the question, therefore, respecting the votes of 40*s.* freeholders. The great difficulty which the appellant has to meet is no doubt the broad fact, that the exercise of this right, if it exists, has been discontinued for centuries. It will be admitted on all hands, however, that this disuse will not have destroyed the right, if it really existed; while the fact of its disuse may be in some degree explained, as has been pointed out, by the franchise having in early times been regarded as a burden.

Turning now to the case of boroughs, to which the present appeal more especially relates, we find that the origin of the franchise is obscure. Mr. Hallam, in his Constitutional History, ch. 13, vol. ii. p. 384, gives four different theories that have been put forward on the subject, and the authorities in favour of each. Whether the election originally rested with the inhabitant householders or the burgesses—and in non-corporate boroughs it must have been by one or the other—the original electors would seem to have included women, for that women could be burgesses appears from the list of burgesses of Lyme Regis in the 14 Eliz. above referred to. With respect to boroughs as well as counties, it may be said that none of the Acts regulating the franchise have taken away the right of women to vote, if it ever existed. The appellant, therefore, is entitled to her vote at common law.

But, secondly, the Representation of the People Act, 1867 (30 & 31 Vict. c. 102), has conferred upon women the right of voting, if they had it not before. Previous to the passing of that Act, Lord Brougham's Act (13 & 14 Vict. c. 21), s. 4, had been passed;

and we must interpret the late Act, therefore, according to the provisions existing when it passed. If the legislature had intended to exclude women from the new franchise, they might have used the words "male persons," as was done in the Reform Act (2 Wm. 4, c. 45). That Act, moreover, is to be read as one with the Act we are considering, which renders the absence of the words "male person" the more marked. The legislature, however, have used the word "man," which, by the express provision of Lord Brougham's Act, includes women. The Act, therefore, in terms confers the franchise upon women who possess the new qualifications, unless they are excluded by the words "under any legal incapacity." The reasons for saying, independently of authority, that women are not legally incapable of voting have already been given, but, moreover, the matter is not entirely without authority. There is a case of *Olive* v. *Ingram* (1), in 7 Modern Reports, which, though that volume of reports is not of high authority, is supported by the judgment given in 2 Strange. The case only decides that a woman may hold the office of a sexton; but in the course of the argument, Lee, C.J., is reported to have cited a case in a manuscript collection of Hakewell's, *Catherine* v. *Surry* (2), in which it was expressly decided that a feme sole, if she had a freehold, might vote for members of parliament; and also a case of *Holt* v. *Lyle* (3), to the same effect. Two other cases may be referred to: in *Rex* v. *Stubbs* (4) it was decided that a woman could be an overseer of the poor, the statute only requiring that overseers should be "substantial householders;" and in *Reg.* v. *Crosthwaite* (5) it was held by all the judges of the Court of Queen's Bench in Ireland that women could vote under the Towns Improvement (Ireland) Act, 1854 (17 & 18 Vict. c. 103), and though the judgment was reversed in the Exchequer Chamber, this was only by four judges to three, so that seven of the Irish judges, including the three chiefs, were in favour of the right of women to vote under that statute, and only four against it. In *Reg.* v. *Mayor of Aberavon* (6) there is a dictum of Cockburn, C.J., that the votes of women may be included under 2 & 3 Vict. c. 78, s. 49.

(1) 7 Mod. 263; 2 Str. 1114.
(2) 7 Mod. at p. 264.
(3) 7 Mod. at p. 271.
(4) 2 T. R. 395.
(5) 17 Ir. C. L. Rep. 157, 463.
(6) 13 W. R. 90.

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It is unnecessary to go into the general question whether it is desirable or not that women should have the franchise. Constitutional writers, however, all make the freedom of England to consist in the right of representation being joined to the liability to taxation. And the women themselves are the best judges of the circumstances under which they could wisely exercise the right, if it exists. The case, however, must be decided by what the law is, and not by what it is desirable that it should be.

Mellish, Q.C. (*R. G. Williams* with him), for the respondent. This case must be decided by the construction of s. 3 of the Representation of the People Act, 1867 (30 & 31 Vict. c. 102): for the city of Manchester, for which the appellant claims to vote, first returned a member under the Reform Act (2 Wm. 4, c. 45, s. 3), and that Act, it is admitted, conferred the franchise only upon males. The argument on the early exercise of the franchise is only useful therefore as aiding in the interpretation of the recent statute; for that purpose, however, it is most important, since the words of the statute are in themselves capable of either interpretation. In considering what was the common law, the *greatest* weight is due to the evidence of modern user; and though the inference from such user might no doubt be rebutted if sufficient proof existed to the contrary, yet when the course of conduct has been uniform as far back as living memory goes, the Court will not set it aside for anything less than the strictest demonstration. It is admitted that for three centuries past women have not voted, and this raises the strongest inference that they have had no right to do so by law.

There are two questions which arise on the construction of the 3rd section of the late statute, first, whether the word "man" includes woman, and secondly, if so, whether women are not "subject to a legal incapacity." With respect to the first question the appellant relies upon the provisions of Lord Brougham's Act (13 & 14 Vict. c. 21), but in the first place the Act to be construed is not that but the Representation of the People Act, 1867, and if the Court can see that it was the intention of the legislature not to enfranchise women they must give effect to that intention, notwithstanding the previous statute, for no Act can be binding on future parliaments; if two statutes are inconsistent, the latter one will prevail. It is im-

possible to suppose that the legislature intended to work so great a change in the constitution as that now contended for, by the use of the word man; such an intention, if it had existed, would undoubtedly have been expressed in distinct words. Some light is thrown on the matter by ss. 56 and 59 of the statute (30 & 31 Vict. c. 102), which in a manner incorporate with it the previous statutes on the same subject, and many incongruities would result if the new franchises created by the late Act, and those only, were to be exercised by women. Moreover, the word man, though sometimes used generically, as opposed to angels and beasts, is also used specifically, as opposed to infants and women, and here it appears evidently to be used in the latter sense; the statute does therefore "expressly provide to the contrary" in the words of Lord Brougham's Act, and "man" does not include woman.

But, secondly, women come within the exception of persons subject to legal incapacity. The early statutes, it is agreed, were in general terms, which might or might not have included women, but they have been interpreted by a usage which goes back far beyond living memory, as applying only to men. All the text books are unanimous to the same effect from the time of Lord Coke, who so lays it down in 4 Inst. p. 5, to the present time; and Lee, C.J. in *Olive* v. *Ingram* (1), notwithstanding what he said in the course of the argument, grounds his decision that a woman could hold the office of a sexton on the fact that it was not a thing of public consideration. The affirmative evidence relied on by the appellant is wholly insufficient to rebut the presumption from modern user and concurrent modern authorities. And first, the Statute of Marlbridge (52 Hen 3, c. 10), does not shew that women attended the court as suitors; it would appear from Lord Coke, that all persons were bound to attend the court to take the oath of allegiance, and it is from such attendance, probably, that particular persons were excused; it is impossible that "viri religiosi," who in the eyes of the common law were dead, can have been entitled to vote. Then certain indentures are relied on, but, if they prove anything, they prove that a married woman can appoint an attorney, and that a vote by attorney is good. It is plain that they were irregular, the lady in most cases being the patron,

(1) 7 Mod. 263.

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and in some the returning officer of the place to which the return referred; and the irregularity would not invalidate the return, as it has been decided that a return is good if some of the parties to the indenture are duly qualified. The elections do not appear to have been contested. The only other authority relied on was the case of *Olive* v. *Ingram* (1), and there Probyn, J., in his judgment, seems to imply that he thought women were not entitled to vote at elections, and Lee, C.J., notwithstanding some contrary dicta, expressly distinguishes the case of a sexton from that of other officers, and appears to think that it is only on the special grounds he refers to that women can hold that office. No weight, therefore can be attached to the manuscript case referred to by him, since he did not even yield to its authority himself. In conclusion, this very question has been decided by the Court of Session in Scotland, on the similar words of the Scotch Act (31 & 32 Vict. c. 48), in the case of *Brown* v. *Ingram*. (2)

Coleridge, Q.C., in reply. The common law of Scotland is different from that of England, and is founded on the canon law; no decision on it, therefore, can be any authority upon the present case.

Cur. adv. vult.

Nov. 9. The following judgments were delivered:—

BOVILL, C.J. It is quite unnecessary to consider the general question of whether it is desirable that women should possess the franchise of voting at the election of members of parliament. What we have to determine is, whether by law they now possess that right. In the present case, it is agreed that the right of the appellant to be placed on the list of voters for the borough of Manchester must depend on the construction to be placed upon the Representation of the People Act, 1867; and under that statute two questions arise,—one, whether women are included under the words "every man;" and the other, whether women are "subject to legal incapacity." If women are not included in the terms of the Act, or are so incapacitated, our judgment must be in favour of the respondent.

Upon the question of whether they are incapacitated, Mr. Coleridge, on the part of the appellant, contended that women had a

(1) 7 Mod. 263. (2) 7 Court of Sess. Cases, 3rd series, 281.

right to the franchise at common law, that nothing had taken it away from them, and that they were therefore not incapacitated from voting. Indeed, in the first instance, I rather understood him to contend that women are now entitled to the franchise as a common-law right; and he fully argued that question. The appellant has failed to produce before us the reported decision of any Court in favour of the right of women to exercise the franchise of voting for members of parliament, with the exception of the notes of certain cases which were referred to in 7 Modern Reports: and Mr. Coleridge was obliged to admit that, for several hundred years, no instance is to be found of the exercise by women of any such right. This alone is sufficient to raise a very strong presumption against the existence of the right in point of law. It is quite true that a few instances have been brought before us where in ancient times, viz. in the reigns of Henry IV., Henry V., and Edward VI., women appear to have been parties to the returns of members to parliament; and possibly other instances may be found in early times, not only of women having voted, but also of their having assisted in the deliberations of the legislature. Indeed, it is mentioned by Selden in his "England's Epinomis," c. 2, s. 19, that they did so. But these instances are of comparatively little weight, as opposed to uninterrupted usage to the contrary for several centuries; and what has been commonly received and acquiesced in as the law raises a strong presumption of what the law is, and at least throws upon those who question it the burthen of proving that it is not what it has been so understood to be. The statute 52 Hen. 3, c. 10, in relieving women from attending at the sheriff's tourn, and the fact of their being included in the books of the borough of Lyme Regis, under the head of "liberi homines" and "liberi burgenses," or "liberi tenentes," by no means prove that they were entitled to or did vote at the elections. The records which were produced of the time of Philip and Mary shew that Dame Elizabeth Copley was a party to an indenture as *returning officer:* and this may possibly be the explanation of the previous return from Gatton, in the reign of Edward VI. The same observation applies to the instance of Lady Packington joining in a return from Aylesbury, as appears from 7 Mod. at page 268, for the precept was directed to her as *lady of*

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the manor to return two members to parliament. With regard to the two cases mentioned in the report of *Olive* v. *Ingram* (1), they appear to have been cited from a manuscript treatise by Mr. Hakewell; the statement of them varies in different parts of the report; and, though the argument was several times adjourned, it does not appear that any reliable information could be discovered respecting them. They are not even mentioned in the report of the same case by Sir John Strange (2); and I think there is very little weight to be attached to them. If there were any such decisions,—and one of the cases is said to have been decided in 14 Jac. 1,—it is difficult to understand why no further notice or trace of them is to be found, or why they should not have been acted upon. At this distance of time we have not the means of ascertaining accurately the particulars of those cases, or under what circumstances the returns which have been produced to us were made, or whether any question was ever raised respecting them. The decisions as to what offices women may hold, and whether they come within the description of particular statutes, do not materially assist us in this case.

On the other hand, Lord Coke, in the 4th Institute, p. 5, treats it as clear law in the time of James I., that women were incapacitated from voting: and in the case of *Olive* v. *Ingram* (1), 12th Geo. 2, the majority at least of the judges, notwithstanding the two cases referred to, seem to have been of the same opinion.

In the work of Mr. Serjeant Heywood, who was well acquainted with election law, published in 1812, women are classed among those who are incapacitated from voting. (3) The same view has been accepted by Mr. Hallam and others in modern times, and was to some extent recognized in the Act of 1832 by the legislature confining the franchise in boroughs to *male* persons. There can be no doubt that, at the time of the passing of the Act of 1867, the common understanding of both lawyers and laymen was that women were incapacitated from voting; and the legislature must, I think, be presumed to have acted under that impression. The 56th section of the Act also expressly preserves all laws, customs, and enactments then in force.

(1) 7 Mod. 263. (2) 2 Str. 1114.

(3) Heywood's County Elections, p. 255.

Mr. Coleridge has very forcibly contended that, if women were ever entitled to the franchise, nothing has occurred to take it away. But, if no legislative enactment has taken it away, the fact of its not having been asserted or acted upon for many centuries, raises a strong presumption against its having legally existed; and, considering that no reported decision or authority can be produced in favour of the right, that there are the opinions against it to which I have referred, and that there has been so long and uninterrupted an usage to the contrary, I come to the conclusion that there is no such right, and that women are legally incapacitated from voting, within the meaning of the 3rd section of the Representation of the People Act, 1867.

Assuming, however, that the claimant was not legally incapacitated, within the meaning of the late statute, the question would then arise, whether the franchise has been conferred upon women by that Act and by force of the provisions of Lord Brougham's Act. This depends upon the proper construction to be placed upon the language of the legislature in s. 3 of the Representation of the People Act, 1867. It enacts that every "man" with certain qualifications shall be entitled to the franchise. In the Act of 13 & 14 Vict. c. 21, s. 4, it is enacted that, "in all Acts, words importing the masculine gender shall be deemed and taken to include females, and the singular to include the plural, and the plural the singular, unless the contrary as to gender or number is expressly provided." In construing the 3rd section of the Representation of the People Act, 1867, regard must be had to the whole of the enactment, with a view to ascertain whether the word "man" is there used in the sense of a "person," or as equivalent to the expression "male person." By the 56th section of the Act, it is provided that "the franchises conferred by this Act shall be in addition to and not in substitution for any existing franchises," &c.; "and, subject to the provisions of this Act, all laws, customs, and enactments now in force conferring any right to vote, or otherwise relating to the representation of the people in England and Wales, and the registration of persons entitled to vote, shall remain in full force, and shall apply, as nearly as circumstances admit, to any person hereby authorized to vote, and shall also apply to any constituency hereby authorized to return a member or members to

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parliament, as if it had heretofore returned such members to parliament, and to the franchises hereby conferred, and to the registers of voters hereby required to be formed." By the 59th section it is enacted that "this Act, so far as is consistent with the tenor thereof, shall be construed as one with the enactments for the time being in force relating to the representation of the people, and with the Registration Acts; and, in construing the provisions of ss. 24 and 25 of 2 Wm. 4, c. 45, the expressions, 'the provisions hereinafter contained,' and 'as aforesaid,' shall be deemed to refer to the provisions of this Act conferring rights to vote, as well as to the provisions of the said Act."

Now by the Reform Act of 1832, the occupation franchise in boroughs is expressly given to *male persons* who shall be qualified as therein mentioned. By the 33rd section it is enacted that no other person is to be entitled to vote for a borough, except in respect of some right conferred by that Act, "or as a burgess or freeman, or as a freeman and liveryman, or, in the case of a city or town being a county of itself, as a freeholder or burgage-tenant, as hereinbefore (s. 31) mentioned." It is perfectly clear, therefore, that women would not be entitled to the franchise under that Act; and as the two Acts are to be construed as one, we should endeavour as far as possible to put such a construction upon the later Act as will make it consistent with the provisions of the former statute.

There is no doubt that, in many statutes, "men" may be properly held to include women, whilst in others it would be ridiculous to suppose that the word was used in any other sense than as designating the male sex: and we must look at the subject-matter as well as to the general scope and language of the provisions of the later Act in order to ascertain the meaning of the legislature. I do not collect, from the language of this Act, that there was any intention to alter the description of the *persons* who were to vote, but rather conclude that the object was, to deal with their *qualification*; and, if so important an alteration of the personal qualification was intended to be made as to extend the franchise to women, who did not then enjoy it, and were in fact excluded from it by the terms of the former Act, I can hardly suppose that the legislature would have made it by using the term "man." Indeed, in

the very next Act (1) in the Statute Book, where it was intended to extend the Factory Acts to them, "women" and "females" are expressly mentioned.

The conclusion at which I have arrived is, that the legislature used the word "man" in the Act of 1867 in the same sense as "male person" in the former Act; that this word was intentionally used, in order to designate expressly the male sex; and that it amounts to an express enactment and provision that every man, as distinguished from women, possessing the qualification, is to have the franchise. In that view, Lord Brougham's Act does not apply to the present case, and does not extend the meaning of the word "man," so as to include women. Upon this part of the case, the decision of the Court of Session in Scotland is also in point; and in that decision I entirely concur. (2)

Upon both grounds, therefore,—first, that women are legally incapacitated from voting for members of parliament, and, secondly, that s. 3 of the Representation of the People Act, 1867, is limited to men, and does not extend to women,—I think that women are not entitled to the franchise, and that the decisions of the revising barrister in this and the other cases which depend upon it must be affirmed. It is not, however, a case in which costs should be given.

WILLES, J. I am of the same opinion. The application of the Act, 13 & 14 Vict. c. 21, contended for by the appellant is a strained one. It is not easy to conceive that the framer of that Act, when he used the word "expressly," meant to suggest that what is necessarily or properly implied by language is not expressed by such language. It is quite clear that whatever the language used necessarily or even naturally implies is expressed thereby. Still less did the framer of the Act intend to exclude the rule alike of good sense and grammar and law, that general words are to be restrained to the subject-matter with which the speaker or writer is dealing.

Apply these conclusions, and remember that the Act to be construed is not only to be interpreted according to these general

(1) 30 & 31 Vict. c. 103.

(2) *Brown* v. *Ingram*, 7 Court of Sess. Cases, 3rd series, 281.

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rules, but that it expressly enacts (ss. 56 and 59) that it is to be construed together with the previous Acts on the same subject, and especially the great Act of 2 Wm. 4, c. 45,—what is the result? It is that the legislature, up to the passing of the Act of 1867, was unquestionably dealing with qualifications to vote of men in the sense of male persons, and was providing what should entitle such individuals of mankind to vote at parliamentary elections: and, without going through the Act of 1867, I may say that there is nothing, unless it be the section now in question, to shew that the intention of the legislature was ever diverted from the question what should be the qualification entitling male persons to vote, to the question whether the personal incapacity of other persons to vote should be removed. The Act throughout is dealing, not with the capacity of individuals, but with their qualification. Assuming, therefore, that women would have had a right to vote, by the common law, apart from the statutes, it would require something further to establish that more modern legislation has done away with the restriction (if it was a restriction) imposed by the Reform Act, which in terms confines the right of voting in the new constituencies to male persons.

It further appears to me that the Lord Chief Justice is right in holding that, assuming Brougham's Act to apply, it would not have worked the change that is desired in favour of women, because the Act of 1867 does "expressly" in every sense exclude persons under a legal incapacity, and women are under a legal incapacity to vote at elections. What was the cause of it, it is not necessary to go into: but, admitting that fickleness of judgment and liability to influence have sometimes been suggested as the ground of exclusion, I must protest against its being supposed to arise in this country from any underrating of the sex either in point of intellect or worth. That would be quite inconsistent with one of the glories of our civilization,—the respect and honour in which women are held. This is not a mere fancy of my own, but will be found in Selden, de Synedriis Veterum Ebræorum, in the discussion of the origin of the exclusion of women from judicial and like public functions, where the author gives preference to this reason, that the exemption was founded upon motives of decorum, and was a privilege of the sex (honestatis privilegium): Selden's Works, vol. i.,

pp. 1083—1085. Selden refers to many systems of law in which this exclusion prevailed, including the civil law and the canon law, which latter, as we know, excluded women from public functions in some remarkable instances. With respect to the civil law, I may add a reference to the learned and original work of Sir Patrick Colquhon on the Roman Law, vol. i. p. 580, where he compares the Roman system with ours, and states that a woman "cannot vote for members of parliament, or sit in either the House of Lords or Commons."

As to this country in particular, there is the passage referred to by the Lord Chief Justice from England's Epinomis, Selden's Works, vol. iii. p. 10, which has reference to the ancient Britons, whose custom was that women "had prerogative in deliberative sessions touching either peace-government or martial affairs." But this is stated as a peculiarity of the Britons; and, coming down to the time of the Saxons (p. 13), of whom no such custom is recorded, it appears that women cannot have been admitted to their councils, where no one took part unless entitled to bear arms and invested with them in the public assembly, which investiture Tacitus (1) likened to the assumption of the toga virilis, and Selden to being knighted. It is true that abroad the order of knighthood was sometimes conferred upon women: but this does not appear ever to have been the case in England; for, Littleton, s. 96, and Co. Litt. 70. b., shew that a woman could not perform knight's service in person, and, when land held by military tenure came to her by descent, she had to perform the duty by deputy. And here I may observe that, in the cases of constable and sheriff, which latter is the highest authority produced by the appellant for the exercise of public functions by a woman, the reason given in the authority referred to as to the constable was, that she could appoint a deputy (2 Hawk. c. 10, s. 37), which a voter or member of the House of Commons could not do; and in the solitary and exceptional case of the shrievalty of Westmoreland, Ann Countess of Pembroke took by descent

(1) Nihil neque publicæ neque privatæ rei nisi armati agunt, sed arma sumere non ante cuiquam moris quam civitas suffecturum probaverit. Tum in ipso concilio vel principum aliquis vel pater vel propinquus scuto framêaque juvenem ornant. Hæc apud illos toga, hic primus juventæ honos: ante hoc domus pars videntur, mox reipublicæ. Tacit. Germ. c. 13.

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pursuant to the grant to her ancestor de Vipont and his heirs general, an office which could have been and usually is discharged by deputy; although the countess, being a person of unusual gifts both of body and mind, thought fit to discharge the duties in person.

Mr. Kemble, in his "Saxons in England," in which work he had the assistance of the invaluable labours of the record commissioners, at pp. 185—196 of the 2nd volume, discusses the constitution of the Witena Gemot in Anglo-Saxon times; and in p. 198 he refers to one or two charters, somewhat analogous to the returns referred to by Mr. Coleridge, signed by the Queen and other women, always, as Mr. Kemble believes, ecclesiastics of rank and wealth: but he by no means draws the conclusion that women could regularly take part in the public councils of the Anglo-Saxons; and he considers that the abbesses who signed, if present at the Gemot, were so for the purpose of watching matters affecting the interests of their convents, and attesting its acts in such matters, without forming part of the regular body,—just, it may be observed, as the judges have at present a right to be in the House of Lords, in order to advise, but not to vote. And, as to the other women of distinction present, he suggests the probability of their names being put in by way of compliment,—an explanation not unlikely if, as I believe, it has not been uncommon in modern times (I know of one instance in which it was done) for persons who happened to be present when the indenture of return was being signed to be asked to sign, even though they were not electors. Indeed, it has been questioned whether indentures so signed were good, and decided that they were if properly signed by the returning officer.

Coming now to a more recent period, it is said that women might be suitors of the county court, and must therefore have been among the voters for the election of knights of the shire. But, even supposing that women could be present, could they act as suitors, who were in fact the judges of the questions which came before the court? Apparently not; for, we know from authority, as well as experience, that, except matrons, in the case of a writ de ventre inspiciendo, or of an inquiry as to pregnancy upon a plea in stay of execution by a woman capitally convicted, women could not sit

on juries: Lambard, Eirenarcha, p. 397; and they could not be judges: 2 Inst. 119. It seems, therefore, that women, save when suitors, were excluded, or rather excused, by the common law from exercising the public functions of suitors, in which capacity it was suggested that they must have had the right of voting.

The Lord Chief Justice has gone through the authorities against the alleged right; to which must be added that, on the other hand, no authority within those limits to which we ought to confine ourselves, as lawyers, has ever laid down the contrary, because, in the course of the discussion of *Olive* v. *Ingram* (1), Lee, C.J., appears to have at last satisfied himself that women could not vote for members of parliament.

And now let us see if no light can be thrown on the question from a neighbouring quarter. We have been dealing with the question whether women can be represented in the House of Commons. But, take the case of a peeress in her own right, who, if of the other sex, would have a seat and vote in the House of Lords, can she appear and take her seat there? No; it is unquestionable that she can neither sit herself nor vote by proxy. She has most of the other privileges of her peerage; but, what is her case with respect to her being represented in parliament? It appears to have been supposed at one time that she could appoint a proxy; but this soon died out; and until still later times it was thought that, if married, she could be represented by her husband, who should be a peer in her right. Co. Litt. 29. b. refers to a record favouring that opinion, and adds that readers must form their own judgment whether the law is so or not. Lord Hale's notes to that passage shew that he thought that, after issue born, the husband would, or might, have the right. However, that was questioned in a note of Mr. Hargreave, Co. Litt. 28. b., n. (1); and in a note of Mr. Butler, Co. Litt. 326. a., n. (2), it is shewn that, though both in this country and also in France it was once thought that there could have been such a right of representation, yet, to use Mr. Butler's expression, the right must now be considered as "extinct," or perhaps, inasmuch as in our system there is no negative prescription against a law, it may be more correct to say that the right never existed. Can there be any difference in the case of women,

(1) 7 Mod. 273.

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whose right to take part in the public councils, if it ever existed, would in modern times, of necessity, have taken the form of choosing some one to represent them there? Can there be any more reason why a woman not a peeress should have a right to choose her representative in the House of Commons, than why a peeress should have a right to be represented in the other House, where the power of voting by proxy might even suggest a favourable distinction? It is clear that a woman has no such right in either case; and that the absence of such right is referable to the fact that in this country, in modern times, chiefly out of respect to women, and a sense of decorum, and not from their want of intellect, or their being for any other such reason unfit to take part in the government of the country, they have been excused from taking any share in this department of public affairs.

In either point of view, therefore, whether looking at the true construction of the system of Acts founded upon 2 Wm. 4, c. 45, or construing the Act of 1867 by itself, excluding, as it does, persons under a legal incapacity, and therefore unaffected by Brougham's Act, I am obliged to come to the conclusion that this appeal ought not to prevail.

BYLES, J. I am of opinion that the revising barrister was right in expunging this lady's name from the list.

I arrive at that conclusion in several ways. First, I think it clear from the words of the Act 30 & 31 Vict. c. 102, that the word "man" in s. 3 does not include a woman, but is confined to a man in the ordinary and popular signification of that word.

No doubt, the word "man," in a scientific treatise on zoology or fossil organic remains, would include men, women, and children, as constituting the highest order of vertebrate animals. It is also used in an abstract and general sense in philosophical or religious disquisitions. But, in almost every other connection, the word "man" is used in contradistinction to "woman." Certainly this restricted sense is its ordinary and popular sense.

Now, it is a well-known rule in the construction of statutes, that as they are framed for the guidance of the people, their language is to be construed in its ordinary and popular sense.

But all doubt is removed by reference to the Reform Act of

1832, 2 Wm. 4, c. 45, where, in a similar connection, instead of the word "man," we find the expression "male person;" for, another rule of construction is, that Acts in pari materiâ are to be construed together, and to receive the like construction. And this is not only the general rule of construction, but it is by s. 59 of the late Act expressly applied to the two Acts now under consideration; for, s. 59 expressly enacts that this Act shall be construed as one with the enactments for the time being in force relating to the representation of the people. And, though we are not at liberty to construe an Act of Parliament by reference to the debates upon it in the legislature, yet it is impossible to suppose that parliament, while dealing with qualification, and qualification only, by the variation of a phrase (which at the least *may* convey the same meaning as its predecessor in the Reform Act), intended to admit to the poll another half of the population.

Lastly, the consequence of such a construction would be that women would in many cases be admitted to the newly-created franchises, but not to the old ones, without any reason for the distinction.

Independently, therefore, of Lord Brougham's Act (13 & 14 Vict. c. 21), it is plain that the word "man" does not in the recent Reform Act comprehend woman.

But the statute 13 & 14 Vict. c. 21 does not, as it appears to me, create any insuperable difficulty. It enacts, in s. 4, that, in all Acts of Parliament, words importing the masculine gender shall be deemed to include females, unless the contrary be *expressly provided.* This statute, on the appellant's construction, would have created the same difficulty if the expression "male person" had been continued to be used. The difficulty, if any, is created by the use of the word "*expressly.*" But that word does not necessarily mean "expressly excluded by words." On the contrary, where that is meant by the statute, the statute says so; as in the next sentence, where it is enacted that the word "county" shall include county of a city or town, unless the extended meaning is expressly excluded *by words.* And, accordingly, it is so excluded by s. 61 of the last Reform Act. The word "expressly" often means no more than plainly, clearly, or the like; as will appear on reference to any English dictionary. And, reading the

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the legal right of women to vote being recognized: whereas, it is absolutely inconceivable that women should ever have possessed the franchise, and yet should have immemorially ceased from its exercise for so long a time, without a trace being found of any Act to deprive them of their right of voting, or a suggestion in history or elsewhere of any cause why they should have been disfranchised, or of the fact that they ever had been disfranchised.

We were also referred to the report in 7 Mod. 263, of the case of *Olive* v. *Ingram*, in which it was supposed there were dicta favourable to the notion that in antient times women voted for members of parliament. The case, however, when examined, is an authority the other way. It was a question as to whether a woman could vote in the election of a sexton; and Lord Chief Justice Lee, who is said to have referred to a manuscript case of Hakewell's, as shewing that a feme sole freeholder could vote for a member of parliament, afterwards, at one of the many adjournments of the case, distinctly wished it should not be understood that such was his own opinion (1): and the case was ultimately decided upon the ground that, "a sexton's duty being in the nature of a *private trust*," a woman might vote at the election. According to the report of the case in 2 Strange, 1115, the ground of the decision is stated to have been that the office of sexton "did not concern the public;" and the judges expressly guarded themselves from creating any precedent or authority for women having a right to vote in matters concerning the public.

On the other hand, the opinion of Lord Coke (2), who clearly considered the law to be that women were disqualified at common law, would under any circumstances be of great authority: but, when it is supported by centuries of usage quite in accordance with his statement, the authority becomes such as it would be impossible for this Court to disregard.

Mr. Coleridge, who ably argued the case for the appellant, made an eloquent appeal as to the injustice of excluding females from the exercise of the franchise. This, however, is not a matter within our province. It is for the legislature to consider whether the existing incapacity ought to be removed. But, should Parliament in its wisdom determine to do so, doubtless it will be done by the

(1) 7 Mod. at p. 271. (2) 4 Inst. 5.

use of language very different from anything that is to be found in the present Act of Parliament.

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I think the revising barrister was right, and that his decision ought to be affirmed.

Decision affirmed.

Attorney for appellant: *P. H. Lawrence, for Blain & Chorlton, Manchester.*

Attorneys for respondent: *Johnson & Weatheralls, for Sudlow & Hinde, Manchester.*

CHORLTON, APPELLANT; KESSLER AND ANOTHER, RESPONDENTS.

Nov. 9.

Parliament—County Vote—Woman—40s. Freehold—8 Hen. 6, *c.* 7.

A woman, though possessed of a 40s. freehold in a county, is not entitled to vote at the election of knights of the shire.

APPEAL from the Revising Barrister for the south eastern division of the county of Lancaster.

Phillipine Kyllman, on the list of claimants, was duly objected to by Thomas Webster.

It was proved that Kyllman was a feme sole of full age, and seised of an estate of inheritance in fee simple of a dwelling house which was free land or tenement of the value of 40*s.* by the year within the meaning of 8 Hen. 6, c. 7.

It was objected on behalf of Webster, that Kyllman, being a woman, was incapacitated by law from being entitled to vote, or to have her name placed on the list of voters for the county. It was contended on behalf of Kyllman, that she was entitled to be registered as a voter and to vote.

The revising barrister held that Kyllman was not legally entitled to vote or to be so registered, and erased her name from the list of claimants.

If the Court should be of opinion that he was wrong, and that Kyllman was legally entitled to vote and to be registered as a voter, the name of Kyllman was to be inserted in the list of voters for the county.

Coleridge, Q.C., and *Dr. Pankhurst*, for the appellant.

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BOVILL, C.J. The case is concluded by the case of *Chorlton v. Lings* (1) just decided. The Court in that case purposely gave judgment on the question whether women could in any case be entitled to vote in the election of members of parliament, and did not confine themselves to the particular question of elections for boroughs.

WILLES, BYLES, and KEATING, JJ., concurred.

Decision affirmed.

Attorney for appellant: *P. H. Lawrence, for Blain & Chorlton, Manchester.*

Nov. 9.

WILSON, APPELLANT; THE TOWN CLERK OF SALFORD, RESPONDENT.

Parliament—Women—Right to Appeal—Consolidated Appeals—6 Vict. c. 18, *ss.* 42, 44.

A woman, not being a person within the meaning of 6 Vict. c. 18, cannot appeal from the decision of a revising barrister under the provisions of s. 42.

Where appeals had been consolidated in which some of the respondents were women, the Court dismissed the appeals as improperly consolidated under s. 44.

APPEAL from the Revising Barrister for the borough of Salford.

The overseers of the township of Salford placed the name of Martha Wilson on the list of voters for the borough of Salford as follows: "Wilson, Martha—26, Wilburn street—House—26, Wilburn street."

Wilson was not objected to, and her qualification as stated in the list of voters appeared to be sufficient in point of law, but the revising barrister held that the overseers had mistaken their duty in placing her name on the list of voters, as she was disqualified on account of her sex, and her name was expunged from the list. Wilson gave due notice in writing that she was desirous to appeal against this decision, and the barrister stated this case.

The names of 134 other women were expunged under similar circumstances, and their appeals were consolidated.

If the Court were of opinion that the revising barrister was wrong in expunging the names of Wilson, and the other persons, they were to be restored.

(1) Ante, p. 374.

J. A. Russell, Q.C. (*R. G. Williams* with him), for the appellant, contended that the revising barrister had no power to strike off the name of the appellant, as it was not objected to; but, as the Court expressed no opinion on the point, the arguments are omitted.

Manisty, Q.C. (*C. Crompton* with him), for the respondent, contended that the word "person" in 6 Vict. c. 18, s. 42, which gives the right to appeal, must be confined, as in other parts of the registration acts, to male persons, and that the appellant, being a woman, had no locus standi.

Russell, in reply, contended that such an objection to the jurisdiction of the Court ought to have been urged before, and had been waived by the respondent allowing the argument of the case, on its merits, to proceed.

BOVILL, C.J. If we have no jurisdiction we cannot acquire it by the respondent having delayed his objection. It is clear that only males are "persons" within the meaning of 6 Vict. c. 18, and have a right to appeal under the provisions of that Act, and that we have therefore no authority to hear this case.

BYLES, and KEATING, J.J., concurred.

Appeal dismissed. (1)

Attorney for appellant: *E. K. Randell, for Cobbett, Wheeler, & Cobbett, Manchester.*

Attorneys for respondent: *Chester & Urquhart, for Brett, Hankinson, & Kearsley, Manchester.*

(1) BENNETT, APPELLANT; BRUMFITT, RESPONDENT.

ASHCROFT'S CASE.

Nov. 9, 1868. The revising barrister had consolidated appeals, as to the validity of notices of objection to county voters which did not state the grounds of objection.

The barrister held the notices bad, and retained the names of the persons objected to on the list. Some of them were women; the Court dismissed these appeals as improperly consolidated.

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Nov. 10.

CHORLTON, APPELLANT; JOHNSON, RESPONDENT.

REE'S CASE.

Parliament—County Vote—Notice of Objection—6 *Vict. c.* 18, *s.* 7; 30 & 31 *Vict. c.* 102, *ss.* 30, 59; 31 & 32 *Vict. c.* 58, *ss.* 17, 19.

The notices of objection to a county voter, sent to the overseers and the voter respectively, need not state whether the name of the voter is on the list of voters entitled to vote in respect of the franchises existing before the Representation of the People Act, 1867, or on the list of 12*l.* occupiers made out by the overseers under the provisions of that Act.

APPEAL from the Revising Barrister for the south eastern division of the county of Lancaster.

Herman Philip Ree was described on the register of voters for the township of Moss Side, in the above-named division of Lancashire, as follows:—

"Ree, Herman Philip—Whalley Range, Moss Side—Freehold house and land—The Holme Whalley Range."

It appeared that there were the following lists for the township of Moss Side:—

1. A list of persons entitled to vote in respect of the franchises conferred by or existing previously to 2 Wm. 4, c. 45, being the list upon which the name of Ree appeared, prepared according to the provisions of the Registration Act, 6 Vict. c. 18.

2. A list of persons claiming to vote in respect of the franchises conferred by or existing previously to 2 Wm. 4, c. 45, and made out pursuant to 6 Vict. c. 18, s. 5, and form No. 3 in schedule A.

3. A list of persons entitled to vote under and by virtue of the Representation of the People Act, 1867, and the Parliamentary Electors Registration Act, 1868, in respect of the occupation of lands and tenements within the township of the rateable value of 12*l.* and upwards.

4. A list of persons omitted by the overseers from such list of occupiers, and who claimed to vote in respect of occupation of lands and tenements within the said township, of the rateable value of 12*l.* and upwards, and made out pursuant to the Representation of

the People Act, 1867, and the Parliamentary Electors Registration Act, 1868, s. 17. (1)

The name of Ree appeared only on the list No. 1 above referred to.

The notice of objection given by the objector Webster to the overseers against the name of Ree, was in the following form:—

NOTICE OF OBJECTION.

To the Overseers of the township of Moss Side, in the south eastern division of the county of Lancaster,—I hereby give you notice that I object to the name of the person mentioned and described below, being retained on the list of voters for the south eastern division of the county of Lancaster.

Christian name and surname of the voter objected to as described in the list or register . .	Ree, Herman Philip.
Place of abode as described	Whalley Range, Moss Side.
Nature of qualification as described . . .	Freehold house and land.
Street, lane, or other like place where the qualifying property is situate, &c., as described in the list or register	The Holme, Whalley Range.

And the notice to the person objected to was in the form following:—

NOTICE OF OBJECTION.

To Mr. Herman Philip Ree, of Whalley Range, Moss Side.

Take notice that I object to your name being retained on the Moss Side list of voters for the south eastern division of the county of Lancaster, and I ground my objection on the third column of the register.

And the objection so far as grounded on the third column relates—

To the nature of your interest in the qualifying property, and

To the value of the qualifying property.

It was contended on behalf of Ree, the person objected to, that the notice to the overseers, and the notice to Ree, were, respectively, invalid for the following reasons: 1. That inasmuch as there were two separate and distinct lists of persons entitled to vote for the division of the county of Lancaster, viz., the lists above referred to as Nos. 1 and 3 respectively, and also two separate and distinct lists of persons claiming to vote, viz., the lists above referred to as Nos. 2 and 4 respectively, the notice to the overseers and the notice to the person objected to respectively, ought to have specified the list to which the objections referred, as directed in the note to form No. 10 in schedule B. to 6 Vict. c. 18, and in

(1) This is not a "list" in the sense that the other three lists are, viz., a list which is to be revised by the barrister and as to which a notice of objection can be sent.

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the Representation of the People Act, 1867, ss. 59 and 61, and the Parliamentary Electors Registration Act, 1868, s. 19.

It was contended on behalf of the objector that it was not necessary to specify the list to which the objection referred, and that the notices of objection respectively were valid, they being respectively in accordance with the forms given in schedule A, to 6 Vict. c. 18, forms Nos. 4 and 5, and the schedule to 28 Vict. c. 36, and the objection being to a county vote.

The revising barrister decided that both notices were valid, and as Ree did not appear, erased his name.

Appeals in respect of nineteen other voters were consolidated.

The question for the Court was whether the notices respectively were valid.

Mellish, Q.C. (*Wills* with him), for the appellant. The question is, whether the notices of objection to a county voter ought to state the list on which the voter's name is. This is certainly necessary in the case of a borough voter, being required by a note to the form 10 in schedule B to 6 Vict. c. 18, which has been held to be imperative: *Barton* v. *Ashley*. (1) Prior to the passing of the Representation of the People Act, 1867 (30 & 31 Vict. c. 102), there was only one list of voters for each township or parish in a county, the old register and the list of claimants forming only one list of voters (6 Vict. c. 18, s. 6); and accordingly s. 7 of that Act, and form 4 in schedule A, referred to in it, speak of *the list;* while s. 17 of the same Act, which refers to boroughs, speaks of *lists*, and form 10 of schedule B, referred to in it, contains the note requiring the particular list referred to to be mentioned. It is, however, provided by 30 & 31 Vict. c. 102, s. 30, that the overseers shall prepare a list of persons entitled to vote as 12*l.* occupiers; and by s. 19 of 31 & 32 Vict. c. 58, their names are to appear in a separate list, forming part of the *lists* of county voters. There are, therefore, now two lists of voters for counties, exactly as there are in the case of boroughs, in which there are lists of rated occupiers and of voters under the reserved franchises. The 30 & 31 Vict. c. 102, s. 56, provides that all laws, customs, and enactments, relating to the registration of persons entitled to vote, shall apply, as

(1) 2 C. B. 4; 15 L. J. (C.P.) 36.

nearly as circumstances admit, to any person by that Act authorized to vote; and in s. 59 that the Act shall be construed as one with the Registration Acts. Although, therefore, there is no direct enactment obliging the notice of objection to a county voter to specify the list in which his name appears, the Court will apply the rules relating to the notices to be given in the precisely similar case of borough voters to the notices of objection to county voters. This is the more desirable, because the same voter's name will often appear on both lists; and in such case if he knows the list in respect of which the objection is made, he may often be spared the trouble of appearing, his other qualification being sufficient.

Quain, Q.C. (*C. H. Hopwood* with him), for the respondent. The Registration Act (6 Vict. c. 18), regulates in ss. 7 and 17 the forms of notice to be given to the overseers in the case of counties and boroughs respectively. The question in this case really is, whether there is anything in the recent Acts to oblige an objector to use the form given by the Act for use in boroughs in the case of a county voter. There can be no doubt in respect of the notice to be given to the voter, because that need not specify the list on which his name appears, even in the case of boroughs. The 30th section of 30 & 31 Vict. c. 102, and the 17th section of 31 & 32 Vict. c. 58, do not make any reference to notices of objection or the sections of the former Acts relating to them, though they apply other parts of the machinery used in boroughs to the new county list. Nor is there any need to state the list in which the voter's name appears in the case of county voters, because the form of notice used in counties, and which is given by 6 Vict. c. 18, s. 7, schedule A, No. 4, states the qualification of the voter, and will thus at once shew on which list his name is; that is not the case in boroughs, where the form of notice is general.

[KEATING, J. If the voter be on both lists, must the objector give two notices?]

He would probably only have to state both qualifications.

Wills, in reply. The object of the rule in the case of borough voters is to save the overseers trouble and ensure accuracy, and this would equally be gained in the case of counties by adopting the same rule. The 17th section of 31 & 32 Vict. c. 58, is only declaratory; the provisions respecting the mode of claiming to be

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put upon the list of borough voters are, in fact, declared by it to *have been* enacted with respect to the 12*l.* occupiers in counties by the effect of the 56th section of 30 & 31 Vict. c. 102, and it is thus shewn what is the meaning of that section, and that it was intended to apply all the necessary provisions respecting borough voters to the case of the 12*l.* occupiers in counties.

BOVILL, C.J. Throughout the Acts of Parliament relating to the representation of the people and the registration of voters, a marked distinction is made between counties and boroughs: not only are the sections relating to the two separate, but there are separate schedules containing the forms to be used in the two cases.

This was the case in the Reform Act (2 Wm. 4, c. 45), with regard to notices of objection, but the forms given by that Act were very general, both for boroughs and counties, and did not point out such particulars as would direct the attention of the parties objected to, or of the overseers, either to the particular list or to the grounds of objection relied on. When the Registration Act, 1843 (6 Vict. c. 18), was passed, the distinction was preserved between counties and boroughs both in the body of the Act and in the schedules, but the notices in each case were made more definite; in the form of notice to be given to the overseers in the case of counties, the nature of the qualification of the voter as described on the list is stated; this is not given in the form for boroughs, but there is, on the other hand, a note requiring the objector to specify the list to which the objection refers, if there be more than one, and if the list contains two or more persons of the same name, to distinguish the person intended to be objected to. Again, when it was thought right by the legislature in 1865 to make fresh provision with regard to the registration of voters, the Act then passed (28 Vict. c. 36), related chiefly to counties; and the provisions of that Act made no difference with respect to the notice to be given to the overseers. It is quite true, as has been said, that there are now separate lists of voters in counties much as there have always been in some boroughs; but I can find nothing in the Representation of the People Act, 1867 (30 & 31 Vict. c. 102), giving full effect to ss. 56 and 59, which would make it right for the Court to mix up

the forms of notice of objection for counties and boroughs, and if we did it would lead to incalculable confusion.

Nor is there any necessity to specify the list, for as the notice of objection given to the overseers in the case of a county voter mentions the nature of the qualification of the party objected to, it will indicate most clearly to the overseers who have made out the lists, in which list his name will be found. In the present case the notice of objection states the nature of the qualification of the person objected to as "freehold house and land," so that the overseers could not have been in any doubt in which list the name was to be found. The notice, therefore, cannot in this case have misled the overseers, though it is not necessary to rest our decision on that ground, but it may serve to shew that there is no need to mix up the forms laid down by the Acts of Parliament for counties and boroughs. The notice here was in the form, and the only form, given in the statute; and I am of opinion that the revising barrister was right, and that the appeal must be dismissed with costs.

BYLES, J. I entirely agree with all that has fallen from the Lord Chief Justice, and that the decision of the revising barrister should be affirmed.

KEATING, J. If since the introduction of the new list of county voters the old form of notice would, if retained, tend to mislead the overseers, or would not afford them sufficient information, I think the words of the 56th section of the Representation of the People Act, 1867 (30 & 31 Vict. c. 102), would be sufficient to introduce any fresh machinery which might be required from the parallel case of borough voters. But I think Mr. Quain has successfully shewn that the old form of notice will enable the overseers to perform their duties without difficulty, and will give them all the information they require. It is observable, that in the form No. 10 of schedule B to 6 Vict. c. 18, only the name of the voter is mentioned; but in the list of claimants to be published by the overseers for the information of the public, form No. 8 in the same schedule, the nature of the qualification is given, and it is not specified in the heading to that form to what list of voters the claim refers; the statement of the qualification seems there-

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fore to be treated as a sufficient notification of the particular list. I agree, therefore, with my Lord and my Brother Byles, that this appeal should be dismissed, and as the objection was not on the merits, with costs.

BRETT, J. As far as I have heard the arguments in this case, I agree with the judgments which have just been given; and I think that s. 17 of 31 & 32 Vict. c. 58, is against, and not in favour of the appellant's contention. Formerly the overseers in counties had quite different duties from those in boroughs, the latter having to use their discretion in making out the lists, while the former only acted ministerially; under the new law, part of the borough system is introduced into counties, and it seemed only just that, in respect of the new list so formed, persons omitted should have an opportunity of sending in their claims in the same manner as in the case of boroughs. It was doubted, however, whether the 15th section of the old Registration Act (6 Vict. c. 18), which referred only to boroughs, applied to the new 12*l.* list in counties; and in order to remove this difficulty, the legislature has said (31 & 32 Vict. c. 58, s. 17), that s. 15 shall apply to the new class of voters in counties as well as to borough voters; but, although the attention of the legislature must therefore have been called to the question now before us, nothing is said in the Act respecting notices of objection, the forms of which, therefore, must remain unaltered; and there is very good reason for no alteration, inasmuch as the form of notice of objection to a county voter, already given in the previous Act, by specifying the qualification of the party objected to, gave all the information required.

Decision affirmed.

Attorney for appellant: *P. H. Lawrence, for Blain & Chorlton, Manchester.*

Attorneys for respondent: *Milne & Co., for Sudlow & Hinde, Manchester.*

BENNETT, APPELLANT; BRUMFITT, RESPONDENT. 1868
Nov. 11.

ALDERSON'S CASE.

Parliament—County Vote—Notice of Objection to 12l. Occupier—28 Vict. c. 36, s. 6.

A notice of objection sent to a voter on the list of 12*l.* occupiers for a county, must specify the grounds of objection according to the provisions of 28 Vict. c. 36, s. 6.

APPEAL from the Revising Barrister for the south west division of the county of Lancaster.

The name of John Alderson was inserted in the list, published by the overseers of the township of Bootle-cum-Linacre, of persons entitled to vote as occupiers, as owners or tenants, of lands or tenements of the rateable value of 12*l.* or upwards, in respect of a house occupied by him in Derby Road in the township.

The appellant objected to the name being retained on the list.

A notice of objection had been duly served by the appellant on the overseers, and one in the following form on Alderson:—

"To Mr. John Alderson, Derby Road,—I hereby give you notice that I object to your name being retained on the list of voters for the south west division of the county of Lancaster."

It was objected on behalf of Alderson, that such a notice of objection was bad in law, because the ground or grounds of objection were not specifically stated therein by naming the column or columns of the list on which the objector grounded his objection, pursuant to the 6th section of the County Voters Registration Act, 1865 (28 Vict. c. 36). (1)

(1) 28 Vict. c. 36, s. 6:—"Any notice of objection to any person on the list of claimants for any parish or township may be given according to the provisions of the 7th section of the principal Act (6 Vict. c. 18), but with that exception no notice of objection given under the provision of the said 7th section, other than a notice to the overseers, shall be valid, unless the ground or grounds of objection be specifically stated therein; and this provision shall be deemed to be sufficiently satisfied by naming the column or columns of the list on which the objector grounds his objection. Provided always, that if the objection be grounded on the third column, then it shall be necessary to state in the notice whether the objection relates to the nature of the voter's interest in the qualifying property or to the value of the qualifying property, or to both; and each of such last mentioned grounds of objection shall be deemed a separate

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On the other hand, it was contended by the appellant, that the form of notice of objection given in No. 2, schedule A. of the County Voters Registration Act, 1865, clearly pointed out that the notices, wherein the grounds of objection were required to be specifically stated, were only those to be given to parties already on the register, and that although the list of 12*l.* occupiers might not strictly be a "list of claimants," it was in the nature of a "list of claimants," whilst it was most certainly not the register, and that therefore a general notice of objection given to such occupier, in the form directed by the 7th section of the principal Act, 6 Vict. c. 18, was a valid notice of objection.

The revising barrister decided that Alderson was not a claimant within the meaning of the Representation of the People Act, 1867, and the Registration Acts therein referred to, and that therefore the general notice of objection was bad, and retained the name of Alderson on the list of voters.

If the Court should be of that opinion, the list was to stand without amendment; but if the Court should be of a contrary opinion, then the register was to be amended by expunging the name of Alderson.

Appeals in respect of thirty-seven other persons were consolidated.

McIntyre (*Charley* with him), for the appellant. There are two grounds on which the appellant rests his contention that a notice of objection to a voter on the 12*l.* list of occupiers, need not contain a statement of the grounds of objection under the provisions of 28 Vict. c. 36, s. 6. First, the 12*l.* occupiers, if not literally "claimants," are in the nature of claimants, and therefore come within the exception in that section; and secondly, if this contention be wrong, the section cannot apply to the new voters at all, and the notices of objection must be regulated by the same rules which govern notices of objection to voters in boroughs to which they are akin. At the time of the passing of 28 Vict. c. 36, there

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ground of objection, as well as any objection grounded on any one of the other columns; and such last mentioned notice may be according to the form numbered 2, in schedule A. to this Act, or to the like effect in substitution for the form numbered 5, in schedule A. to the principal Act."

were two classes of county voters, those who were on the register and those who had claimed to be put upon it, who were included in a list of claimants made out by the overseers. The real distinction between those two classes was that those who were on the register had already been revised, and, as neither payment of rates nor, in general, occupation for the previous year was required of a county voter, he would, if once upon the register, be entitled to remain there in the absence of any special circumstance, such as his parting with the qualifying property. This explains the provisions of the 6th section of 28 Vict. c. 36, requiring notice of the specific objection to be given to a voter already on the register, and of ss. 7 and 8 which permitted the voter to confine his proof to the specific objections stated in the notice, and enabled the revising barrister to give costs against the objector if the objection were frivolous. This being the case respecting the lists, the Representation of the People Act, 1867, was passed, by which a new class of voters is created, viz., the 12*l.* occupiers, and the overseers are directed to make a list of such voters for the barrister to revise. Now, the persons on this list have never had their claims revised, for a new list is to be made out each year, the qualification depending on the occupation and payment of rates during the previous year. They have no resemblance, therefore, to persons on the old register, and none of the reasons for the protection afforded by 28 Vict. c. 36, ss. 6, 7, and 8 apply to them. It is true that they are not literally claimants, as they send in no claim themselves, but the overseers in effect make the claim for them, and they are really in the same position as the persons on the old list of claimants. It is also true that there are claimants to be put on the 12*l.* list, but they are not entitled to any notice, and may be objected to at the time their claim is heard, and they closely correspond to persons omitted by the overseers from the list of claimants, whose case is provided for by 6 Vict. c. 18, ss. 37, 39.

If the above contention be not correct, and the list of 12*l.* occupiers cannot be considered as a list of claimants, then the 6th section of 28 Vict. c. 36, cannot apply at all to the new list, and the form of notice must then be taken from those used in the case of similar lists in boroughs. The whole of the latter part of the section can only apply to the old register; it cannot be necessary to

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state whether the objection relates to the nature of the voter's interest in the property or to the value of the qualifying property, which is interpreted by s. 17 to mean amount of rental, neither objection being applicable to the new list. On the other hand, there is no column by reference to which you could point out the objection that the voter had not paid his rates, or that the premises were not of the required rateable value. Further, form 2 given in schedule A. (28 Vict. c. 36), is expressly stated in the heading to be a form of notice to be given to persons on the register, which 12*l.* occupiers are not. If the 28 Vict. c. 36, s. 6, does not apply, the form of notice will naturally be taken from that given in the case of occupiers under the borough franchise, which is a general notice; this appears from 30 & 31 Vict. c. 102, s. 30, and 31 & 32 Vict. c. 58, ss. 17, 19.

[BOVILL, C.J. We decided in the case of *Chorlton* v. *Johnson*, *Ree's Case* (1), that the forms of notices for counties and boroughs could not be mixed together.

BRETT, J. The fact that s. 17 expressly states that the 15th section of 6 Vict. c. 18 shall apply to county lists, rather implies that the other provisions respecting borough lists, including the forms of notices of objection, should not apply.]

Section 17 is declaratory, not enacting, and there is no reason why if the 15th section was incorporated, independently of it, by the effect of ss. 56 and 59 of the Representation of the People Act, 1867, the other sections of the old Act relating to borough voters should not have been so also. By s. 19 the overseers are to make out a fresh list every year. The way in which they are to do so is to be supplied from the provisions of 6 Vict. c. 18, respecting boroughs.

C. Crompton, for the respondent. The question depends entirely on 28 Vict. c. 36, s. 6. That section is perfectly general, requiring a specific notice in the case of all county voters, with one single exception, viz., that of claimants, and within that the appellant has failed to bring Alderson. The Representation of the People Act, 1867, s. 56, provides expressly that the Registration Acts shall apply to the new franchises *as nearly as circumstances admit*. If, therefore, the form of notice in the schedule to 28 Vict. c. 36, is

(1) Ante, p. 400.

not strictly applicable, it must be altered as far as is necessary. [He was then stopped by the Court.]

BOVILL, C.J. I am of opinion that the decision of the revising barrister was right, and that the notice was insufficient, because the ground of objection was not specifically stated. The express object of 28 Vict. c. 36, was to require specific objections in every case but that of a person described as a "claimant," and looking to the legislation as to lists of voters, I think that Alderson was not a claimant. If this had been the case of a borough voter, he certainly would not have been a claimant, but a person placed on the list by the overseers, who are in a position to be likely to know who are entitled to the franchise; and by 30 & 31 Vict. c. 102, s. 30, the same machinery that was provided for forming the register of occupiers in boroughs is to apply to the case of 12*l.* occupiers in counties. That being so, there are also express enactments as to what is to be the list of voters for counties. According to the earlier Acts, it was the copy of the old register and the list of voters who sent in their claims. The 30 & 31 Vict. c. 102, added a new class, viz., the 12*l.* occupiers, and by s. 17 of 31 & 32 Vict. c. 58, express provision was made that persons omitted by the overseers might claim to be inserted like persons omitted from a borough list; and by s. 19 of 31 & 32 Vict. c. 58, it is enacted that there is to be a separate list of the county voters qualified by 30 & 31 Vict. c. 102, which is to be deemed part of the lists of voters. When this Act had passed, the list of county voters consisted of the copy of the old register and the list of claimants prepared by the overseers from the claims sent to them, with the addition of the 12*l.* occupiers; but it is not said that the list of persons claiming to be placed on the 12*l.* list is to be part of the lists of voters, and the very fact that this section, containing an express enactment as to the list made out by the overseers being part of the lists of voters, is entirely silent as to persons who send in claims shews that the latter are only claimants. Again, as respects persons strictly claimants, the objection in boroughs was not necessary for the purpose of compelling them to prove their qualification (for they were obliged to do so), but in order to let in the objector, and therefore a general notice was allowed; whether there

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be an objection or not, the claim in either case in a borough is to be proved. That being so, the object of the statutes is to put the formation of the list of 12*l.* occupiers in counties on the same footing as that of 10*l.* occupiers in boroughs. By s. 59 of 30 & 31 Vict. c. 102, that Act, so far as is consistent with it, is to be construed as one with the Registration Acts, and we must endeavour to put a consistent interpretation on the whole. The question in this particular case arises on s. 6 of 28 Vict. c. 36, which provides, that "any notice of objection to any person on the list of *claimants* . . . . may be given according to the provisions of the 7th section of the principal Act; but with that exception, no notice of objection given under the provisions of the said 7th section, other than a notice to the overseers, shall be valid unless the ground or grounds of objection be specifically stated therein." We ought to give effect to this useful section if we can; and, in my opinion, it is applicable to this case. I think Alderson was not a claimant, and that a specific objection was required. It is true that the words used in the section for shewing what is sufficient in stating the grounds are not applicable, but we ought not to reject what is applicable because another part of the section does not apply, especially as "*no* notice of objection" (unless within the exceptions) is to be valid unless the grounds are specifically stated. It has also been contended that form 2 in the schedule A. to 28 Vict. c. 36, is to control s. 6 of the Act; but I think it has not that effect. I am therefore of opinion that Alderson was not a claimant, and that the revising barrister was right.

BYLES, J. I am of the same opinion. The interpretation of these Acts is full of difficulty, and I cannot trust myself to make any remarks but such as are absolutely requisite to the case before us. It seems to me that Mr. Crompton is right in saying that this case entirely depends on the 6th section of the Act of 1865 (28 Vict. c. 36). The voter had been put on the list by the overseers, but not through his having claimed at all, and he was therefore not a claimant. If he had been a claimant, the exception would have applied to him: not being within the exception, he must be within the otherwise universal clause, and the notice to him therefore must be specific. The only difficulty arises

from the form No. 2 in schedule A, which undoubtedly is strictly applicable only to persons on the old register, but the particularity of the notice is required by the section, not by the form in the schedule, which, moreover, is not repugnant to, though it may not be in all respects suitable to, the present case.

KEATING, J. I quite agree that it is not easy to find one's way through these enactments, and I have had considerable doubts in this case whether the voter, though not in terms a claimant, was not such within the meaning of the 6th section of 28 Vict. c. 36. I cannot say that my doubts are wholly removed, but the rest of the Court have a clear opinion the other way, and my doubts are not sufficient to make me dissent from their judgment, the most important thing being that some rule should be laid down.

BRETT, J. Three questions are raised in this case. First, what was the law at the passing of the new statutes of 1867 and 1868? Secondly, how far has it been altered by those statutes? Thirdly, how is the old law, if unaltered, to be applied in the present case? Now, at the time of the passing of the new statutes, the form of notices of objection in counties was regulated by 6 Vict. c. 18, and 28 Vict. c. 36; and taking those Acts together, it may be said, generally, that persons on the register were to have specific notice given them of the nature of the objection to their vote, but that persons who claimed to be put on the register were only entitled to a general notice. The only two classes at that time were persons on the register and claimants; therefore the form of specific notice, which was not applicable to claimants, was given in the schedule with details applicable to persons on the register. Then, has this law been altered? It was contended in *Chorlton* v. *Johnson, Ree's Case* (1), that the form of the notice to be given to a county voter was altered by the 17th section of the Registration Act of 1868 (31 & 32 Vict. c. 58). I then explained why I thought that that section rather shewed that the legislature had not intended to alter the form of notices of objection in counties. The 19th section of the same Act has also been relied on to day, but that section does

(1) Ante, p. 400, 406.

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not affect the form of notice, but refers only to the mode of making out the list of voters and the mode of correcting it. The same may be said of the 30th section of the Representation of the People Act, 1867. The only remaining question is, how the old law is to be applied to the new list. It is clear to me that persons on the new list are not claimants. The act of the overseers in making out the list is not ministerial but discretionary, and there are to be claimants distinct from the voters whose names are placed on the overseers' list.

The 56th section of the Act of 1867 says that all laws relating to the registration of persons entitled to vote shall apply as nearly as circumstances admit to the new voters. Since therefore the 6th section of the Act of 1865 provides that the general notice shall be sufficient only in the case of claimants, and the voter in this case was not a claimant, it is clear that he was entitled to a specific notice, and if the form given in the schedule be not strictly applicable, a form as like it as may be must be used.

Decision affirmed.

Attorneys for appellant: *Gregory, Rowcliffes, & Rawle.*
Attorneys for respondent: *Field, Roscoe, & Co.*

Nov. 12.

JONES, APPELLANT; PRITCHARD, RESPONDENT.

Parliament—County Vote—Notice of Objection—Place of Abode of Objector— 6 *Vict. c.* 18, *s.* 7, *sch. A, forms* 4, 5.

The sufficiency of the description of an objector's place of abode in a notice of objection to a county voter, is a question of fact for the revising barrister, to be decided after hearing evidence, if necessary.

APPEAL from the Revising Barrister for the county of Merioneth.

Thomas Pritchard, on the list of voters for the county, was objected to, and the notices of objection to the overseers and to the voter, were signed respectively "Walter Butler Clough Jones (place of abode), Bronygraig," and "Walter Butler Clough Jones, of Bronygraig," "on the register of voters for the parish of Corwen."

Jones was described in the register as residing at Plasyndre Corwen; but he had left that house for some months, and had

resided at Bronygraig, distant about one mile from the town of Corwen.

It was argued on the part of Thomas Pritchard, that the description of the place of abode of the objector was insufficient on its face, and would not be deemed in point of law a good description of the place of abode, without adding Corwen, the nearest town, to the place called Bronygraig, Corwen being also the name of the parish. On the part of the objector it was argued that evidence was admissible to shew that the notice gave reasonable information to the person objected to. It was accordingly proved and admitted that if Thomas Pritchard went to Corwen, the town and parish in which the qualifying property of the objector was situate, the objector would be easily found on inquiry there, and that Bronygraig was well known there and could be found without any difficulty.

The revising barrister decided that the notice was bad in law on its face, and could not be affected by such evidence, or by the fact that under the particular circumstances the notice gave the requisite information.

The appeals in thirteen other cases were consolidated.

If the Court should be of opinion that the decision of the revising barrister as to the insufficiency in law of the description of the place of abode of the objector was wrong, the names of Thomas Pritchard and the thirteen other persons were to be expunged from the register of voters.

Dowdeswell, Q.C., for the appellant. The forms Nos. 4 and 5 in schedule A, 6 Vict. c. 18, only require that the place of abode of the objector should be given; they do not require the parish to be stated or give any particular mode of describing his place of abode. What is a sufficient description is a matter of fact to be decided by the revising barrister after hearing evidence. The case of *Thackway* v. *Pilcher* (1), is conclusive in the appellant's favour. [He was then stopped by the Court.]

R. E. Turner, for the respondent. If it is a question of fact for the revising barrister to determine, the Court will not reverse the decision which he has given that the notice is insufficient.

(1) Law Rep. 2 C. P. 100.

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[BOVILL, C.J. The barrister here held that evidence was not receivable, and decided on that ground, and has submitted that as a point of law for our decision.]

In *Woollett* v. *Davis* (1), the description "The Oaks," accompanied by a statement that the objector was on the register of voters for the parish of St. Woollos, was held insufficient, though the full address might have been found by reference to the list of voters for that parish.

[KEATING, J. There the revising barrister had decided that the description was as a fact insufficient unless recourse were had to the register, and the Court held that that could not be done.]

BOVILL, C.J. The decision of the revising barrister in this case was that the notice was bad in law on its face, and could not be affected by evidence or by the fact that, under the particular circumstances, the notice gave the requisite information. We must take it therefore, that the notice did in fact give the requisite information. I can find no authority for saying that such a description is necessarily insufficient. If there is any doubt as to the sufficiency of the description of the objector's place of abode, it is matter of evidence, and to be decided by the revising barrister. A description of the place of abode of the objector may give all the information required to a person on the spot, though it may convey no information to us sitting here. I think, therefore, the appeal must be allowed.

BYLES, J. I am of the same opinion. According to the decision of the revising barrister, if the objector described himself as living at Alton Towers, the notice would be bad on the face of it, and no evidence could make it good.

KEATING and BRETT, JJ., concurred.

Decision reversed.

Attorneys for appellant: *McLeod & Cann.*

Attorney for respondent: *C. Wilkin, for David Pugh, Dolgelly.*

(1) 4 C. B. 115; 16 L. J. (C.P.) 185.

NORRIS, APPELLANT; PILCHER, RESPONDENT. 1868 Nov. 18.

Parliament—County Vote—Notice of Objection—Sufficiency of Proof—6 Vict. c. 18, ss. 100, 101—Place of Abode of Objector.

The objector, in proof of the service of a notice of objection on P., produced an alleged duplicate, stamped by a postmaster, in accordance with the provisions of 6 Vict. c. 18, s. 100. P., in answer, produced the notice he had actually received, which he admitted he had received in due time, but which differed from the alleged duplicate :—

Held, that the objector might rely on the notice so produced by P. and his admission as proof of due service of a notice of objection.

The notice so produced by P. was signed :—"F. N. (Place of abode as described on the register): 22, Southampton Street, Bloomsbury, London, W.C. (Present place of abode): 110, Guildford Street, Russell Street, W.C." There is only one Guildford Street in the Western Central Postal District of London, and the objector lived there, but there is no Russell Street near it :—

Held, that "London "might be supplied in the second address from the preceding one, and "Russell Street" rejected as surplusage, and that the notice was therefore sufficient.

APPEAL from the Revising Barrister for the eastern division of the county of Kent.

The name of Edward Appleton on the list of voters for the parish of Deal was objected to.

The objector Norris produced a document purporting to be a duplicate of a notice sent by him by post to Appleton, under 6 Vict. c. 18, s. 100, stamped by the postmaster at Charing Cross, which duplicate notice was regular in all respects, and in it the place of abode of the objector, as stated on the register, and his true then present place of abode, were described thus :—

(Signed) "Frederic Norris,
(Place of abode as described on the register)
"22, Southampton Street, Bloomsbury, London, W.C.
(Present place of abode)
"110, Guildford Street, Russell Square, W.C."

Whereupon, in disproof of such service, the agent for Appleton produced the original notice which had been actually received by Appleton in due time by post, and it corresponded in all respects with the alleged duplicate except as to the places of abode of the objector, which were as follows :—

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(Signed) "Frederic Norris,
(Place of abode described on the register)
"22, Southampton Street, Bloomsbury, London, W.C.
(Present place of abode)
"110, Guildford Street, Russell Street, W.C."

The revising barrister decided that due service of the notice of objection had not been proved, inasmuch as the stamped document produced by the objector in proof of such service was not a duplicate of the original notice as required by 6 Vict. c. 18, ss. 100, 101. but differed therefrom in an essential particular, namely, the true then present place of abode of the said objector, which was held necessary to be stated therein by the Court of Common Pleas in the cases of *Melbourne* v. *Greenfield* (1) and *Curtis* v. *Blight* (2); and that consequently the objector had not complied with the regulations prescribed by the statute for service through the post-office.

Upon such decision being given, the objector claimed to take up the notice, produced by the agent for Appleton in disproof of due service of a notice of objection upon him, and to make it evidence on his, the objector's, behalf that a proper formal notice of objection had been duly served upon and received by Appleton; and he contended that the words "Russell Street" were surplusage, and that there was no other No. 110 in Guildford Street in London.

Upon such contention, the revising barrister decided, first, that such original notice could not under the circumstances be made evidence to prove due service of a notice of objection; because the objector having elected to adopt the particular mode of service of notices by post pointed out by s. 100, and having failed in proving the same, had no longer any locus standi in the court of revision; and because no mode of service of any notice of objection by post is provided by the said statute, except in conformity to the regulations prescribed by the 100th and 101st sections. Secondly, he further decided that the notice was upon the merits informal and invalid, inasmuch as the description therein of the objector's then true present place of abode was incorrect, defective, misleading, and not set forth so as commonly to be understood, especially by persons resident at a distance from London; because

(1) 7 C. B. (N.S.) 1; 29 L. J. (C.P.) 81.

(2) 11 C. B. (N.S.) 95; 31 L. J. (C.P.) 48.

the same did not state in what city, town, or place Guildford Street, Russell Street, W.C., was situate; because in fact there was, in ordinary parlance, no such street, within the western central postal district of London, as Guildford Street, Russell Street, there being only one Russell Street simpliciter therein, namely, Russell Street, Covent Garden, which is a long distance from Guildford Street, and has no connection therewith, and another street called Great Russell Street, which is also a considerable distance from Guildford Street, and does not adjoin thereto, and is in another parish.

On these grounds the barrister decided that the said notice of objection was wholly invalid, and he retained the name of Appleton on the list of voters.

If the Court should be of the contrary opinion, the names of Appleton, and of another person whose case was consolidated, were to be struck out of the register.

Manisty, Q.C. (*Lumley Smith* with him), for the appellant. The appellant was entitled to prove in any way he chose that the voter had duly received the notice of objection, and his failing to prove it in the way he first intended could be no reason for refusing to allow him to prove it in another.

[BOVILL, C.J. There seems to us to have been sufficient proof of the due service of the notice, if it was a good notice.]

There are two grounds on which the revising barrister held the address of the objector insufficient as stated in the notice served; first, that it omitted London, and secondly, that Russell Street was put instead of Russell Square; but London appears just above in the address of the objector as taken from the register, with "W.C." And this was in itself sufficient to shew that the places of abode were both in London. Russell Street may clearly be treated as surplusage, as there is only one Guildford Street in the western central postal district. In *Sheldon* v. *Flatcher* (1), John Flatcher, of No. 5, Sherborne Street, on the list of voters for the parish of Cheltenham, was held a sufficient address. [He was then stopped by the Court.]

Tindal Atkinson, Serjt., for the respondent. The notice was only produced to answer the objector's case.

(1) 5 C.B. 14; 17 L.J.(C.P.) 34.

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[BRETT, J. But the voter produces a notice which he admits was received by him in due time; how can we say that is not proof of the notice having been duly served on him?]

If the Court think that there was sufficient evidence of the service of the notice, it was at any rate insufficient; the notice was sent to a country village of Kent, and there is nothing on its face to shew that the objector was living in London rather than Canterbury or Deal. The cases shew that the objector must state his actual place of abode when, as in this case, it is different from his place of abode on the register: *Knowles* v. *Brooking* (1); *Melbourne* v. *Greenfield.* (2) In *Sheldon* v. *Flatcher* (3), the address was the same as in the register, and therefore clearly applied to the borough. The word "London" cannot be supplied from the preceding line: *Woollett* v. *Davis.* (4) There the revising barrister held that the address was sufficient, as the full address was given on the register, but the Court overruled the decision.

[KEATING, J. That was on the ground that the voter ought not to be obliged to go to the list and search, in order to find out the address; here, the word London appears on the face of the notice.]

The barrister has found as a fact that the address was defective and misleading, and the question is not the less one of fact because he has stated some reasons for his opinion.

Manisty, Q.C., in reply. In *Thackway* v. *Pilcher* (5) it was held that the address was sufficient if the voter could have easily found the objector by going to the place described, and here the objector could have found Guildford Street at once by inquiry in the western central district.

BOVILL, C.J. It is perfectly plain that as a general rule the revising barrister must decide all questions of fact, and that upon a pure question of fact the Court cannot review his decision; but in this case the barrister has stated his reasons for arriving at his conclusion, and as I understand it, has referred to the Court whether those reasons ought, in law, to have led him to the conclusion at which he arrived. Taking the case in this view, I think his decision cannot be supported on either of the grounds sug-

(1) 2 C. B. 226; 15 L. J. (C.P.) 197.
(2) 7 C. B. (N.S.) 1; 29 L. J. (C.P.) 81.
(3) 5 C. B. 14; 17 L. J. (C.P.) 34.
(4) 4 C. B. 115; 16 L. J. (C.P.) 185.
(5) Law Rep. 2 C. P. 100.

gested. We must consider the notice with reference only to what appears on its face, and not by reference to the register or any other document, as was held in *Woollett* v. *Davis*. (1) But immediately above the objector's present address, is his address as appearing on the register, 22, Southampton Street, Bloomsbury, London, W.C., and I think the ordinary intendment from that would be that the second address equally with the first was in London. That being so, the case cannot be distinguished from *Sheldon* v. *Flatcher* (2), which decided distinctly that the different parts of the notice may be read together. With respect to the second objection that was urged, it is admitted that there is only one 110, Guildford Street in the western central postal district, and "110, Guildford Street, W.C.," would therefore be sufficient, and it cannot in any way affect the validity of the notice that the words "Russell Street" are added. Both the grounds for the decision of the revising barrister are bad, and it must therefore be reversed.

BYLES, J. I am of the same opinion. In the case of *Sheldon* v. *Flatcher* (2), Coltman, J., says, "The revising barrister has found as a matter of fact that the notice was sufficient; he was not bound to state his reasons for coming to that conclusion, nor does he in fact intimate that his decision was influenced by the preceding facts. If we could see that the notice was such that no reasonable man could find it sufficient, then we might deal with it as a question of law." Here, the barrister has given his reasons, and requested our opinion on their validity; and I think that they are invalid, and that on the authority of that case his decision must be reversed.

KEATING, J. I am of the same opinion. If this notice had not contained the objector's address upon the register, I should have felt some difficulty in saying that 110, Guildford Street, Russell Street, W.C., was a sufficient address without the addition of London; but we are to look at the notice practically to see whether any difficulty would be occasioned to the voter, and I agree with the rest of the Court that we may take into consideration the other matters appearing on the notice, and that here it sufficiently appears, taking

(1) 4 C.B. 115; 16 L.J. (C.P.) 185. (2) 5 C.B. 14; 17 L.J. (C.P.) 34.

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the two addresses together, that Guildford Street is in London. I think, therefore, that without infringing the rule, that the revising barrister is to be the sole judge of questions of fact, as he has here stated his reasons, on which he thought the address was misleading, we may say as a matter of law that we think those reasons were insufficient, and that the notice was good.

BRETT, J. In *Woollett* v. *Davis* (1) the revising barrister held that the defect in the address could be cured by referring to the register on which the full address appeared, and the Court held that that could not be done; but in *Sheldon* v. *Flatcher* (2) the Court held that a deficient address might be aided by reference to another part of the notice, and that is what the appellant contends for in this case. In *Sheldon* v. *Flatcher* (2) also it was decided that though the sufficiency of the address is usually a question of fact to be decided by the revising barrister, yet that if the Court can see that the address in the notice is sufficient, it will decide it to be so. I agree, therefore, with the rest of the Court, that the decision of the revising barrister should be reversed.

Decision reversed.

Attorneys for appellant: *Hughes & Muskett.*
Attorney for respondent: *T. Hoskins.*

Nov. 11.

JONES, APPELLANT; JONES, RESPONDENT.

*Parliament—County Vote—Description of Qualification—"Leasehold" sufficient Description of Lease for Life—Inaccurate Description—*6 *Vict. c.* 18, *s.* 101.

The nature of the qualification of J. was stated, in the list of persons entitled to vote for a county, as leasehold house and garden. J. was the owner of a house and garden held on a lease for life:—

Held, that the description of J.'s qualification was sufficient.

APPEAL from the Revising Barrister for the county of Merioneth.

John Humphrey Jones duly objected to the name of John Jones being retained in the list of voters for the county.

The name and qualification of John Jones appeared on the list

(1) 4 C. B. 115; 16 L. J. (C.P.) 185. (2) 5 C. B. 14; 17 L. J. (C.P.) 34.

of claimants as follows:—"Jones, John—Caerffynon—Leasehold house and garden—Caerffynon, self tenant."

The objector contended that the description of the qualification in the third column was not correct.

John Jones, in support of his claim, produced a lease of the qualifying property, dated the 7th of November, 1865, granted to him by Hugh Beaver Roberts; the habendum of which was as follows: "To hold the said premises hereby demised unto the said lessee, his executors, administrators, and assigns, from the 29th day of September last past, for and during the term of the natural life of the said lessee; but in the event of his dying within sixty years from the 29th day of September last, then for and during the remainder of a term of sixty years, to be computed from the 29th day of September, 1865, at the yearly rent of 10*s.*"

The objector contended that John Jones (for whose life the qualifying property had been demised), had a present freehold interest in the premises, and that the interest in the term of years did not accrue till the death of the lessee.

The revising barrister decided that John Jones had, under the lease, a sufficient present interest in the term of years to entitle him to a vote in respect thereof, and therefore retained his name on the list of voters.

If the Court should be of opinion that the decision of the revising barrister, as to the interest of John Jones in the premises under the said lease was wrong, the name of John Jones was to be expunged from the register.

Dowdeswell, Q.C., for the appellant. Before the Reform Act (2 Wm. 4, c. 45), only persons possessing 40*s.* freeholds were entitled to a vote for the county; but by that statute, s. 20, a right to vote was given to persons possessing leaseholds for sixty years, and of the value of 10*l.*, reduced by 30 & 31 Vict. c. 102, s. 5, to 5*l.*, and also to persons holding lands for a shorter term if of the value of 50*l.* The franchises in respect of freeholds and leaseholds, therefore, are quite distinct. In this case the qualification was certainly freehold; the interest in the term of sixty years was at most a contingent interest, which could in no case vest in the

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respondent himself. The interest in the lease for his life, and in the term of sixty years, could not exist at the same time, or there would be a merger.

R. E. Turner, for the respondent. The voter had a present interest in the term of years: Co. Lit. 54 b.; Williams on Executors, p. 637, 6th ed.

[BYLES, J. It is clear that the interest which the respondent had in the land was a freehold interest.]

In any case he had a right to describe it as leasehold, inasmuch as he held the premises on a lease for his life; and even if that description be not perfectly accurate the revising barrister could amend, and the Court will do so. Indeed, without amendment, it would be sufficient under 6 Vict. c. 18, s. 101, as a description to be commonly understood.

Dowdeswell, in reply. The object of the statement of the qualification in the list was to give the objector an opportunity of objecting if he knew the voter not to possess it. Here the objector may have known that the land was worth less than 5*l.* a year, and may have, therefore, objected to the name, and he is then met by the fact that the qualification is freehold. The description of the qualification is, at any rate, bad as being ambiguous. The 101st section of 6 Vict. c. 18, cannot have been intended to apply to a misstatement of the qualification, or authorize a misleading description such as this.

BOVILL, C.J. I am of opinion that the decision of the revising barrister must be affirmed. Objection was duly taken to the qualification of the claimant, which was stated as "leasehold house and garden." The claimant produced a deed which gave the premises to him, his executors, administrators, and assigns, from the 29th of September, 1865, during the term of his natural life, and in the event of his dying within sixty years, for the remainder of a term of sixty years to be computed from that date, at the yearly rent of 10*s.* Most persons who hold property on a lease for lives consider it as leasehold, and it is only the strict law which calls it freehold. Then the 101st section of the Registration Act, 6 Vict. c. 18, provides that "no inaccurate description of any place or thing described in any list shall in anywise prevent or

abridge the operation of the Act with respect to such place or thing, provided that such place or thing be so denominated as to be commonly understood;" the meaning of the words "inaccurate description" in this section was explained by Tindal, C.J., in *Flounders* v. *Donner* (1), as "some clumsy description which, though inaccurate, sufficiently pointed to the house or other thing described;" in this case the description can hardly be called a clumsy description, it is, rather, a popular one, and clearly comes within the provision of the section. It is, therefore, sufficient.

BYLES, J. I think we should be doing what would be very dangerous, if we were to require illiterate persons to insert in their notices a strictly legal description of their qualification; it would oblige them always to employ a solicitor before giving a notice of objection or making a claim to vote; but here the description is really correct, for leasehold means property held either under a lease for life or for years. That the ambiguity of the description is not fatal is shewn by form No. 3, in schedule H, to the Reform Act (2 Wm. 4, c. 45), in which the nature of the qualification is given as lease of warehouse for years, without stating what is the length of the lease on which the property is held, although upon that depends the amount of the qualifying value.

KEATING, J. I am of the same opinion. I think the claimant was entitled under this description to prove his right to property held either under a lease for lives or for years.

BRETT, J. I am of the same opinion. Assuming this property to be freehold it was held under a lease; the description of it therefore was, if not accurate, at any rate sufficient under s. 101 of 6 Vict. c. 18.

Decision affirmed.

Attorneys for appellant: *McLeod & Cann, for J. H. Jones, Portmadoc.*

Attorney for respondent: *C. Wilkin, for David Pugh, Dolgelly.*

(1) 2 C. B. 63; 15 L. J. (C.P.) 81.

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Nov. 11.

CHORLTON, APPELLANT; JOHNSON, RESPONDENT.

BUNTING'S CASE.

Parliament—County Vote—Right of Lessee of Dwelling Houses in a Borough to have his name retained on the Register—2 Wm. 4, c. 45, s. 25—30 & 31 Vict. c. 102, ss. 56, 59.

By 2 Wm. 4, c. 45, s. 25, it is enacted that no person shall be entitled to vote in the election of knights of the shire in respect of his interest . . . as such lessee as aforesaid . . . in any house . . . of such value as would according to the provisions hereinafter contained confer on him or any other person the right of voting for any city or borough; by 30 & 31 Vict. c. 102, s. 59, the expressions "as aforesaid" and "hereinafter contained" are to apply to the provisions of the later Act.

A. was, at the time of the passing of 30 & 31 Vict. c. 102, properly on the list of voters for the county of L., as lessee for a term of sixty years of two dwelling houses, which were situate within the borough of M., the yearly value of neither of them being 10*l.* By that Act, the borough franchise was extended to all inhabitant householders paying rates, and the occupiers of the houses then became entitled to vote for the borough:—

Held, that A. was not entitled to have his name retained on the county list.

APPEAL from the Revising Barrister for the south eastern division of the county of Lancaster.

Henry Bunting, described on the list of voters for the township of Ardwick as follows:—"Bunting, Henry—18, Ashton Road, Ardwick—Leasehold houses, term over sixty years—Nos. 33 and 35, Hyde Street," was duly objected to.

It was admitted that Bunting was lessee for 999 years of two dwelling houses situate within the borough of Manchester, but inasmuch as the clear yearly value of neither of the dwelling houses amounted to 10*l.* it was admitted that he was, before the passing of the Representation of the People Act, 1867 (30 & 31 Vict. c. 102), entitled to be on the register of voters for the southern division of the county. It was also admitted that, since the passing of that Act, Bunting would not have been entitled to be put on the list of voters for the south eastern division of the county (now by 31 & 32 Vict. c. 46, a separate division of the county), in respect of any new claim for such a qualification, inasmuch as under that Act mere occupation and payment of rates, irrespective of any amount in value of the house occupied, gave a vote for the borough.

It was objected, that by reason of the 25th section of 2 Wm. 4, c. 45 (1), Bunting was not entitled to have his name retained on the list of voters for either of the dwelling houses referred to in column No. 4, as they were now sufficient to confer on the tenant, or occupier thereof, the right of voting for the borough of Manchester.

On behalf of Bunting, it was contended, that inasmuch as his name was upon the register of voters for the southern division of Lancashire, at the time of the passing of the Representation of the People Act, 1867 (30 & 31 Vict. c. 102), his right to have his name retained on the list of voters for the county was reserved by the 56th section of that Act (2), and that the operation of the 2 Wm. 4, c. 45, s. 25, was limited, and applied only to leaseholders claiming to be placed upon the register after the passing of that Act.

The revising barrister decided that Bunting was not entitled to have his name retained on the list of voters for the county, and his name was accordingly erased.

The names of several other persons were struck off the list of voters for the county, on the same grounds, and the appeals were consolidated.

If the Court should be of opinion that Bunting was not entitled to have his name retained on the list for the reasons before given, his name and those of the other persons were to remain erased, but if the Court should be of opinion that the name of Bunting should be retained on the list, then the names of Bunting and the other persons were to be restored.

Mellish, Q.C. (*C. H. Hopwood* with him), for the appellant. The provision of the Reform Act (2 Wm. 4, c. 45), s. 25, applies only

(1) 2 Wm. 4, c. 45, s. 25:—"Notwithstanding anything hereinbefore contained, no person shall be entitled to vote in an election of a knight or knights of a shire to serve in any future parliament in respect of his estate or interest . . . as such lessee as aforesaid . . . in any house . . . of such value as would, according to the provisions hereinafter contained, confer on him or on any other person, the right of voting for any city or borough, whether he or any other person shall or shall not have actually acquired the right to vote for such city or borough in respect thereof."

(2) 30 & 31 Vict. c. 102, s. 56:—"The franchises conferred by this Act shall be in addition to, and not in substitution for, any existing franchises, but so that no person shall be entitled to vote for the same place in respect of more than one qualification."

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to fresh claims and not to voters already on the register; the rights of existing voters were, for the most part, preserved under that Act by s. 33, and have been similarly preserved by s. 56 of the Representation of the People Act, 1867 (30 & 31 Vict. c. 102).

[BOVILL, C.J. The provisions of s. 24 of the Reform Act, which are very similar to those of s. 25, applied to persons then already on the register.

BYLES, J. I cannot see how the express words of s. 59 of the Act of 1867 (1), can possibly be got over.]

Quain, Q.C. (*C. Crompton* with him), for the respondent, was not called upon.

BOVILL, C.J. We are all of opinion that the revising barrister was right, and that the distinction contended for by Mr. Mellish cannot be maintained, as the two Acts of 1832 and 1867 are to be read together according to the provisions of s. 59 of the latter Act.

BYLES and KEATING, JJ., concurred.

Decision affirmed.

Attorney for appellant: *P. H. Lawrence.*

Attorneys for respondent: *Milne & Co., for Sudlow & Hinde, Manchester.*

(1) 30 & 31 Vict. c. 102, s. 59:—"This Act so far as is consistent with the tenor thereof, shall be construed as one with the enactments for the time being in force relating to the representation of the people and with the registration acts, and in construing the provisions of the 24th and 25th sections of 2 Wm. 4, c. 45, the expressions 'the provisions hereinafter contained' and 'as aforesaid' shall be deemed to refer to the provisions of this Act conferring rights to vote as well as to the provisions of the said Act."

ROBINSON, APPELLANT; AINGE, RESPONDENT.

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Jan. 16.

Parliament—County Vote—Friendly Society—Interest in Land—30 & 31 Vict. c. 102, s. 5, subs. 1; 6 Vict. c. 18, s. 74.

A., being a member of a benefit society, was entitled to an annuity of more than 10*l.* a year "out of the funds of the society," if the property were sufficient to admit of it. The income of the society arose partly from real property vested in trustees, and partly from contributions and fines paid by the members. The funds of the society were sufficient to pay all the annuities in the current year, and if each annuity were apportioned between the income derived from the real property and from other sources, the part payable out of income derived from real property would be more than 5*l.*:—

Held, that the claimant had no direct interest, legal or equitable, in the lands belonging to the society, and was not entitled to a county vote, as a freeholder for life under 30 & 31 Vict. c. 102, s. 5, subs. 1.

APPEAL from the Revising Barrister for the southern division of the county of Northampton.

F. Robinson duly objected to the name of T. Ainge being retained in the list of voters for the parish of St. Peter's, Northampton.

The nature of the qualification was stated in the third column to be "interest arising from freehold houses."

There is a benefit society, called the Friend in Need, established at Northampton for the purpose of raising from time to time by subscription a stock or fund for the mutual relief and maintenance of all the members in old age, sickness, or infirmity. The society was instituted in the year 1817, and its rules were enrolled on the 2nd of June, 1852, and were to be taken as part of the case. It appeared that the funds of the society had been partly laid out in the purchase of landed property previous to the 23rd of July, 1855, and that the revenues of such land at the present time amounted annually to the sum of 500*l.*, subject to a mortgage at 5 per cent. of 1000*l.*, thereby reducing the net revenue from land to the sum of 435*l.* or thereabouts. In the preceding January the society consisted of forty-eight members, only twenty of whom were annuitants. The freehold property has been conveyed by different purchase deeds to the trustees of the society. The other funds of the society consist of monthly payments of 1*s.* 6*d.* from every member, whether in receipt of relief or not. The society is managed by a

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treasurer, secretary, trustees, president, stewards, and a committee consisting of not less than eleven members. The members of the society meet once every month to pay their contributions into the hands of the treasurer, and are liable to certain penalties on default, and the rules authorize different payments on stated scales for the relief of sick members. The rules also contain powers by which any offending member can be excluded from the society altogether. The funds of the society so derived, partly from rents and partly from contributions and fines, are all held by the treasurer as forming one general stock, out of which the expenses incidental to the collection of rents, rates, repairs, and the funerals of members are paid, and allowances are made to sick members and the annuitants. Members of the society have a claim on the property of the society founded on the 31st and 32nd rules of the society, of which the following are copies:—

"31. That every member who has belonged to this society and paid up all and every his contributions, fines, arrears, &c., full thirty-five years or more, shall be entitled to and receive the sum of 4*s.* per week as an annuity for life (if the funds will admit) on his attaining the age of sixty years, the aforesaid annuities arising and to be paid out of the property of the society. The annuities to commence after the 12th of May, 1852. The annuitants to pay their contributions and fulfil all offices and duties the same as other members. They shall also produce a certificate of their birth for the satisfaction of the society before they shall be entitled to receive such annuity.

"32. Provided always that if the annuities at any time interfere with or reduce the present stock belonging to the society more than 50*l.*, then a reduction of the annuity shall immediately take place and continue as long as the exigency of the case may require. Should the annuitant fall sick, his annuity shall be made up to the full amount out of the general stock or fund belonging to the society, and shall come under the same rules and regulations as other sick members; but should he remain on the fund of the society for twelve months, he shall then retire upon his annuity and be considered a neutral member."

It was proved that Ainge was in the preceding January, and had been for several years by virtue of the said rules, in receipt of

an annuity of 10*l.* 8*s.*, payable by weekly instalments of 4*s.* The accounts of the society were produced and shewed that there were sufficient means from the rents of the freeholds claimed for to pay such 10*l.* 8*s.* by such instalments to Ainge for each year, and if the funds or property of the society are in future years, during the life of Ainge, sufficient to meet the charge, he will, under the rules of the society, be entitled to such money during] his life, he paying back 1*s.* 6*d.* per month into the funds of the society as his monthly payment, like other members.

The revising barrister was of opinion that Ainge had, under the above circumstances, a freehold interest of sufficient value in the hereditaments and premises vested in the trustees of the society, and allowed the vote accordingly.

If he was wrong, the claimant's name was to be expunged from the register.

Macnamara, for the appellant. The annuity is not charged specifically upon the real property, but may be paid out of any part of the funds the trustees choose. The respondent would have had only a personal remedy against the trustees if the annuity had not been paid, he would have had no remedy against the land. The shareholder of a company, of which the property consists partly of land, has been held not entitled to vote: a recent case on that point is *Bennett* v. *Blain* (1), where the previous cases were all cited and commented on; there it was held that the claimant must have a legal or equitable *estate*, or an interest of a direct and certain kind in the land to entitle him to vote.

[BYLES, J. If a trustee holds land for the benefit of partners who use it for the purpose of their business, and derive no emolument from it except in the form of increased receipts from their business, would not the partners be entitled to vote?]

There they would have a direct and certain interest in the land.

[BYLES, J. I only wish to guard against being supposed to hold that the fact of the profits of the land being mixed with other funds before the claimant receives his share would deprive him of his vote in respect of it.]

(1) 15 C. B. (N.S.) 518; 33 L. J. (C.P.) 63.

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That might come under 6 Vict. c. 18, s. 74. (1) The other principal decisions on this subject are: *Freeman* v. *Gainsford* (2); *Steele* v. *Bosworth* (3); *Bulmer* v. *Norris* (4); *Myers* v. *Perigal* (5)

Hensman, for the respondent. The funds of the society are derived from two sources, viz. land and certain weekly payments. The whole, no doubt, is mixed together in the hands of the treasurer, but the annuitants have a direct interest in the land. The word "property" in rule 31 must be there taken to mean real property, since the word used in reference to the reserve fund possessed by the society elsewhere is stock or funds, and this is confirmed by the wording of rule 32. But secondly, if the respondent has only a claim on the general funds of the society, he has still a sufficient interest in their real estate. In *Freeman* v. *Gainsford* (2), and *Bennett* v. *Blain* (6), the claimant was not entitled to any specific sum. Here the respondent is entitled to 10*l.*

[BOVILL, C.J. Only if the funds will admit.]

The rents of the land alone are far more than sufficient to pay the annuitants. *Baxter* v. *Brown* (7), has never been overruled, and is in favour of the respondent's contention. The annuity must at any rate be considered to arise proportionally from the real and personal property, and the amount derived from land will then be far more than the required amount, since the whole of the weekly payments only amount to about 50*l.* a year, while the rent of the real property is 435*l.* The nearest case on the subject of apportionment is *Mills* v. *Cobb.* (8)

Macnamara, in reply, was not called upon.

BOVILL, C.J. In this case it is not contended that the claimant has any legal interest in land, but it is said that he has an equit-

(1) 6 Vict. c. 18, s. 74:— . . . "No trustee of any lands or tenements shall in any case have a right to vote in any such election for or by reason of any trust estate therein, but the cestui que trust in actual possession or in the receipt of the rents and profits thereof, though he may receive the same through the hands of the trustee, shall and may vote for the same, notwithstanding such trust."

(2) 18 C. B. (N.S.) 185; 34 L. J. (C.P.) 95.

(3) 18 C. B. (N.S.) 22; 34 L. J. (C.P.) 57.

(4) 9 C. B. (N.S.) 19; 30 L. J. (C.P.) 25.

(5) 11 C. B. 90; 21 L. J. (C.P.) 217.

(6) 15 C. B. (N.S.) 518; 33 L. J. (C.P.) 63.

(7) 7 Man. & G. 198.

(8) Law Rep. 2 C. P. 95.

able interest in the real estate of the society sufficient to entitle him to vote. It is clear that he is entitled to an annuity of 10*l.*, to be paid to him as long as the funds will allow, which it appears from the case they will at present. If the contention were correct, that the word "property" in the rules meant real property, and that the annuity was to be paid in the first instance out of the rents of the real property of the society, I should think that the claim would be one that ought to be allowed: but I think that is not the case. All that can be said, therefore, is that the claimant must be paid the annuity out of some of the funds of the society; he has no certain or direct interest in the land, nor any right to any fixed proportion of the rents. The case, therefore, falls within the authority of *Bennett* v. *Blain* (1), and the other cases cited by Mr. Macnamara, and the decision of the revising barrister must be reversed.

BYLES, J. I feel that I am concluded by the authorities; whether I should otherwise have held the claimant not entitled to a vote, it is unnecessary to say. Our decisions on these Acts would be of little value if we did not follow the authorities that have gone before, almost implicitly.

KEATING, J. I am of the same opinion. I cannot find anything which will entitle the claimant to compel the trustees to pay him any portion of his annuity out of the real property of the society; if the other funds had been sufficient, the trustees might have accumulated the rents of the lands, in which the claimant would then evidently have had no interest; in any case, the authorities seem to conclude this question.

MONTAGUE SMITH, J. I am of the same opinion. I think the claimant has no equitable estate or interest in the land; if the annuity had been charged on it, he would have had such an interest; or if this land had been set apart under the rules for the payment of the annuity, supposing that to have been legal, the claimant would have been entitled to vote, or if the word "property" in rule 31 really meant real property only. In fact, however, there is, no more charge on the land in respect of the annuitants than in respect

(1) 15 C. B. (N.S.) 518; 33 L. J. (C.P.) 63.

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of the sick persons. Now the words of 6 Vict. c. 18, s. 74, are that the cestui que trust "in actual possession, or in the receipt of the rents and profits of" any lands or tenements may vote; I think that means persons who receive the rent and profits of the land themselves, and not persons who only receive an annuity out of a mixed fund, into which other persons may dip their hands so as not to leave sufficient to pay the annuities.

Decision reversed.

Attorney for appellant: *J. Whitehouse.*

Attorneys for respondent: *Hensman & Nicholson, for J. & J. B. Hensman, Northampton.*

Jan. 18.

TROTTER, APPELLANT; WATSON, RESPONDENT.

Parliament—County Vote—Representation of the People Act, 1867 (30 & 31 *Vict. c.* 102), *s.* 5—*Lessee or Assignee for "the unexpired Residue of a Term originally created for not less than Sixty Years"—Inchoate Agreement.*

By agreement of May 1st, 1863, the owners in fee of the first part, the trustees of a building society, of the second part, and C. of the third part,—reciting that the land had been laid out as the sites for 100 workmen's dwelling houses, and that it was intended that such dwelling houses should be built by means of the monthly contributions of 100 workmen, to be selected by the parties of the second part, and that in the meantime and until such contributions should have been fully paid up, such sums, not exceeding 7000*l.*, as should be required for the completion of the dwelling houses, over and above the contributions from time to time accruing, should be advanced by C., and should be repaid to him, with 5 per cent. interest, out of such contributions, and that a lease for 99 years from the date, at the rent of 9*s.* 6*d.* per annum, should be granted to each workman of the site of each dwelling house, when and as soon as C., with the consent in writing of the parties of the second part, should require the same to be granted,—it was agreed that in the meantime and until such leases should be granted, the land and buildings thereon should be a security to C. for the money to be advanced by him and remaining unpaid, with interest.

By an agreement of June 18th, 1864, between the trustees of the one part and A. of the other part, the trustees agreed to sell and A. to purchase one of the sites in question, to be held for a term of 99 years (subject to an annual ground-rent of 9*s.* 6*d.* to be paid to the owner in fee) for 74*l.*, to be paid by fortnightly instalments of 5*s.* 6*d.* to be applied in payment of the purchase-money and interest. It was provided that "the purchaser" should have possession of the premises from the signing of the agreement; and that, within three months after all the moneys due or payable under the agreement and the rules of the society had been satisfied, and provided the purchaser should have performed all the conditions and agreements therein contained, and also all and every the rules

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and regulations of the society for the time being on his part to be performed, the trustees should at the request and cost of the purchaser give him a proper conveyance of the premises, subject to the ground-rent, &c.

A. was let into possession upon the signing of this agreement, and had paid all instalments due, and observed all the rules and regulations of the society; but there still remained due to C. in respect of his advances a sum of about 5000*l.*, and no lease had been granted to A.:—

Held, that A. was not entitled, either at law or in equity, as lessee "for the unexpired residue of any term originally created for a period of not less than sixty years," within s. 5 of the Representation of the People Act, 1867.

APPEAL from the Revising Barrister for the northern division of the county of Durham.

George Stillman duly objected to the name of Robert Anderson being retained in the list of voters for the township of Hedworth Monkton and Jarrow.

The name of Anderson appeared as a claimant on the list published by the overseers, in respect of a "leasehold house, 16 Clayton Street, Jarrow."

The following facts were established by the evidence:—

1. By memorandum of agreement dated the 1st of May, 1863, and made between Sir Walter C. James, Bart., and Dame Sarah Caroline his wife, of the first part, John M'Intyre and three others of the second part, and John Clayton of the third part,—after reciting that certain parcels of ground, part of the Jarrow Grange estate, over which the said Dame S. C. James had an absolute power of appointment, had been laid out as the sites for one hundred workmen's dwelling houses; and that it was intended that the said hundred dwelling houses should be built by means of the monthly contributions of one hundred workmen, who should be selected by the parties thereto of the second part; and that, in the meantime until such contributions should have been fully paid up, such sum and sums of money, not exceeding in the whole 7000*l.*, as should be required for the completion of the said dwelling houses over and above the contributions from time to time accruing, should be advanced by Clayton, and should be repaid to him, with interest at 5 per cent. per annum, out of such contributions; *and that a lease for ninety-nine years from that day, at the rent of* 9*s.* 6*d. per annum, should be granted to each of such workmen of the site of each such dwelling house when and so soon as Clayton, with the consent in*

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writing of the parties thereto of the second part, should require the same to be granted,—It was declared and agreed, that, in the meantime and until such leases should be granted, the said parcels of land, and the houses and buildings which should from time to time be erected thereon, should be a security to Clayton for so much of the money, which should be advanced by him from time to time as aforesaid, as should from time to time remain due and unpaid, with interest thereon at 5 per cent. per annum; and that such further instruments necessary to give effect to such security should be executed on the request of Clayton. And the several persons parties thereto of the second part agreed to superintend the erection of the said dwelling houses, collect the contributions of the workmen for whom the same were intended to be built, and pay the amount monthly to Clayton until the amount of his advances should be repaid, with interest at 5 per cent. per annum.

2. Leases of six or seven of the sites, with dwelling houses erected thereon, had actually been granted to workmen who had fully paid to the parties of the second part the sums agreed on between them as the price of such sites and houses respectively, which sums had been handed over by the parties of the second part to Clayton, in part-payment of his loan and interest.

3. The remainder of the sites had been sold by the parties of the second part to workmen; and agreements in the form and of the tenor and effect of the agreement between the parties of the second part and the claimant, Robert Anderson, as next hereinafter mentioned, were entered into with them; *but leases of the same have not yet been actually granted.* At the date of these agreements respectively, the houses were in some cases not built, and in other cases only partially so. Where not actually built, they were subsequently completed by the respective purchasers; the cost being defrayed out of money which was part of the 7000*l.* hereinbefore mentioned and agreed to be advanced by Clayton, and which sum has been partly repaid by the contributions aforesaid.

4. By memorandum of agreement dated the 18th of June, 1864, and made between John M'Intyre and the three others, therein described as trustees to the Jarrow Building Company (and who and their successors are thereinafter referred to as "the said trustees"), of the one part, and the claimant, Robert Anderson (therein-

after referred to as "the said purchaser"), of the other part, the trustees agreed to sell, and the purchaser agreed to purchase, the leasehold piece of ground, dwelling house, and premises situate in No. 16 Clayton Street, on the Jarrow Grange estate aforesaid, to be held for a term of ninety-nine years, subject to an annual ground-rent of 9*s.* 6*d.*, to be paid thereout to Sir W. C. James or his agents, at or for the price of 74*l.* And it was agreed that the purchase-money of 74*l.* should be paid by fortnightly instalments of 5*s.* 6*d.*, being after the rate of 10 per cent. per annum on the contract-price of each house, 5 per cent. per annum to be deducted therefrom for interest on the debt standing against the said purchaser at the commencement of each twelve months, the remainder to be applied to the reduction of the debt standing against the purchaser at the commencement of each succeeding twelve months: And, if the purchaser should neglect or refuse to make any of the said fortnightly payments when the same respectively should become due, he should forfeit and pay to the trustees as and for liquidated damages 3*d.* for the first neglect or default, 6*d.* for the second, 1*s.* for the third, and so on, the sums increasing in the same ratio for each succeeding neglect or default until such sums should be equal to the amount the purchaser had paid to the trustees as regular subscriptions: And that, if at any time such should be the case, the trustees should have full power to enter on the ground, house, and premises, and hold the same as if the now-reciting agreement had not been made, and forcibly to expel the purchaser, without any ejectment or other legal process, and to plead the now-reciting agreement as conclusive evidence of leave and licence: And it was also agreed that the purchaser should have possession of the premises from and after the signing of the now-reciting agreement, and should pay all ground-rent, taxes, rates, cesses, and outgoings in respect thereof; and that the purchaser, his heirs and assigns, should keep and maintain the said dwelling house and premises in good condition and repair; and that, until all moneys which might be due or payable to the trustees or their successors under the now-reciting agreement or the rules of the Jarrow Building Society aforesaid should have been duly satisfied, the trustees should have full power to insure the said dwelling house and premises against loss or damage by fire in

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such name and for such sums as they might think necessary, and all moneys which the trustees should pay in so doing should be repaid by the purchaser on demand, and should until and in default of payment thereof be a charge on the premises; and that the purchaser should not sell or transfer his interest in the house and premises to any person or persons whomsoever without the consent or approval of the trustees; and that, within three months after all the moneys due or payable under the now-reciting agreement and the rules of the Jarrow Building Company aforesaid had been duly satisfied, and provided the purchaser should have observed and performed all and every the conditions and agreements therein contained, and also all and every the rules and regulations for the time being of the company and on his part to be observed and performed, the trustees or their successors should at the request and costs of the said purchaser give him a proper conveyance in duplicate of the said leasehold premises, subject to the annual ground-rent and the powers for raising the same.

5. Upon the execution of this agreement, the claimant was let into possession of the said dwelling house and premises therein comprised.

6. Since the making of the contract he has duly paid all instalments according to the contract, and has observed all the rules and regulations of the building company.

7. All the houses referred to in the firstly-recited agreement had been erected on the land by the trustees, money having been advanced from time to time for that purpose by Clayton to the amount of 7000*l.*; which amount, together with the monthly contributions of the said workmen from time to time made, covered the whole cost to the trustees of the erection of the houses. Since the houses were built, the agreed ground-rent of 9*s.* 6*d.* has been yearly paid by each individual purchaser to Sir W. C. James in respect of each house.

Out of the monthly payments of the persons for whom the dwelling houses were built, the interest upon the said sum of 7000*l.*, together with part of the principal, had been repaid, so that only the sum of 5000*l.* was on the 31st of July, 1867, due to Clayton for principal and interest on account of his loan. Since that date, the amount due to him had at no time exceeded that sum;

and on the 31st of July, 1868, and at the time of the revision, was less.

8. The part of the parcels of ground mentioned in the agreement of the 1st of May, 1863, and the houses built thereon, not included in the leases already granted, were on the 31st of July, 1867, and have since continued a sufficient security for the amount due to Clayton for principal and interest.

9. The aggregate amount of the respective balances of purchase-money and interest due and unpaid from the respective purchasers to the trustees for sites and houses not yet actually leased, has always exceeded the amount due at any time to Clayton.

10. With respect to many of the sites and the houses thereon, the annual value of the same, after deducting interest at 5 per cent. on the unpaid balance of purchase-money, the ground-rent of 9*s.* 6*d.*, and insurance, appeared to be less than 5*l.*: and the revising barrister disallowed the claims of the purchasers of such sites and houses to be registered.

11. With respect to other of the sites, the houses thereon, after being built by the trustees, had been added to and improved by the expenditure of capital and labour thereon by the respective purchasers thereof, among whom was the claimant, Anderson. House property in the neighbourhood had also generally increased in value. And the revising barrister found as a fact, that, after deducting from the annual value of the claimant's house interest at 5 per cent. upon the balance of purchase-money due on the 31st of July, 1867, to the trustees, the agreed ground-rent of 9*s.* 6*d.*, the cost of repairs, and premium for fire-insurance, there remained 5*l.* clear.

12. If the whole of the fortnightly instalments of 5*s.* 6*d.* were to be considered as an annual charge upon the house, then its clear yearly value was less than 5*l.*

13. If the yearly value of the claimant's estate and interest was to be measured by and consist of only a fair rate of interest, having regard to the nature of the property, upon so much of the instalments of price as consisted of principal paid to the trustees, plus any increased value by reason of improvements made by the purchaser and any general rise in the value of house property, but excluding the difference between the contract price and the

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amount thereof actually paid, then the clear annual value would be less than 5*l*.

14. Upon these facts, it was contended on behalf of the objector,—first, that the claimant was not entitled, either as lessee or assignee, to the house, for the unexpired residue of any term originally created for a period of not less than sixty years, so as to entitle him to be placed on the register,—secondly, that the clear value of the claimant's interest (if any) in the house was less than 5*l*. over and above all rents and charges payable out of or in respect of the same.

15. On the other hand, it was contended on behalf of the claimant,—first, that, although no term had actually been created at law, yet there was a valid and binding contract partly performed between Sir W. and Lady James, their mortgagee, Clayton, and the trustees of the building company, for the granting of leases to their nominees of sites and houses thereon for ninety-nine years from the 1st of May, 1863; and that the claimant, having contracted with the trustees that he should be named as one of such lessees, and having paid part of the purchase-money, and been let into possession of the premises to be demised to him, was entitled in equity to have the lease granted to him on Clayton's debt being paid off, and was therefore cestui que trust in actual possession, and had a sufficient equitable estate as lessee for the residue of an unexpired term of not less than sixty years;—secondly, that Clayton's mortgage-debt must be treated as apportioned upon and borne by the various unleased sites and the houses thereon in proportion to the balance of price remaining due and unpaid for the same; and that a court of equity would so apportion such debt;—thirdly, that deducting, together with ground-rent, fire-insurance, and cost of repairs, interest at 5 per cent. upon such unpaid balance of price, the yearly value of the claimant's estate and interest in the house in question was not less than 5*l*.

16. The revising barrister was of opinion that the arguments on behalf of the claimant were sound, and allowed the name to remain on the register.

The questions for the Court were,—1. Whether the claimant had such an estate and interest in the house and premises in his

possession as to entitle him to be registered;—2. Whether the annual charge upon his premises in respect of the balance of price unpaid to the trustees of the building company, or in respect of Clayton's mortgage-debt, was properly held not to exceed 5 per cent. upon such unpaid balance of price;—3. Is the yearly value of the claimant's equitable leasehold estate and interest (if any) in the site and the house thereon to be estimated as consisting only of interest upon the part of the price paid on the 31st of July, 1867, to the trustees, plus any increased yearly value of the premises owing to improvements made by the claimant, and any general rise in the value of house property, but excluding the balance of the principal of the purchase-money, constituting the difference between the contract price and the portion thereof paid?—4. Or, is the yearly value of the claimant's said estate and interest to be estimated at the whole present yearly value of the premises, subject to the agreed ground-rent and fire-insurance (upon whatever facts such value depends), less interest at 5 per cent. on the unpaid balance of the agreed purchase-money?

If the Court should be of opinion that the first, second, and fourth of these questions should be answered in the affirmative, and the third in the negative, then the name of the claimant was to remain upon the register. But, if the Court decide any one or more of these first, second, and fourth questions in the negative, or the third in the affirmative, then the name of the claimant was to be erased from the register.

The cases of sixty-seven other persons were consolidated with the principal case.

Manisty, Q.C. (*Lovesy* with him), for the appellant. The first question is whether the claimant, Anderson, was entitled, as lessee or assignee, to the premises occupied by him for the unexpired residue of a *term* originally created for a period of not less than sixty years, so as to entitle him to be placed upon the register: and this depends upon the construction which is to be put upon the 5th section of the Representation of the People Act, 30 & 31 Vict. c. 102. (1) It is submitted that he has no estate or interest

(1) 30 & 31 Vict. c. 102, s. 5:—"Every man shall, in and after the year 1868, be entitled to be registered as a voter, and, when registered, to vote for a mem-

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purchaser, and the vendor has only a lien for any balance of the purchase-money which may remain unpaid. In Sugden's Vendors and Purchasers, 13th ed. 146 (14th ed. p. 175), it is said: "Equity looks upon things agreed to be done as actually performed; consequently, when a contract is made for sale of an estate, equity considers the vendor as a trustee for the purchaser of the estate sold, and the purchaser as a trustee of the purchase-money for the vendor." And the learned author adds in a note: "A lessee insured his house; the lease expired, and he contracted for a new lease. Then the house was burned, and the office insisted that at the time of burning it was not the plaintiff's house: but it was held otherwise: Printed Cases, D. P. 1730."

[BOVILL, C.J. In the case there put there was insurable interest enough. A carrier or a wharfinger can insure goods, though he has no property in them. So, if a man rents a furnished house, though he has no property in the goods, he yet has an insurable interest. The question here is whether the claimant had any estate.]

The rule of equity as to a contract passing an estate has been clearly laid down in a variety of cases. In *Paine* v. *Mellor* (1), where, the property having been destroyed by fire, the question was at whose risk it was, Lord Eldon, C., said: "As to the mere effect of the accident itself, no solid objection can be founded upon that simply; for, if the party by the contract has become in equity the owner of the premises, they are his to all intents and purposes. They are vendible as his, chargeable as his, capable of being incumbered as his: they may be devised as his; they may be assets; and they would descend to the heir."

[BOVILL, C.J. There was an existing estate there in respect of which the contract was made.]

In *Seton* v. *Slade* (2), which arose upon a bill filed for a specific performance, Lord Eldon, C., again says: "The effect of a contract for purchase is very different at law and in equity. At law the estate remains the estate of the vendor, and the money that of the vendee. It is not so here. The estate from the sealing of the contract is the real property of the vendee. It descends to his heirs. It is devisable by his will: and the question whose it is, is

(1) 6 Ves. 349, 352. (2) 7 Ves. 265, 274.

not to be discussed merely between the vendor and vendee; but may be to be discussed between [the former and] the representatives of the vendee." The cases of *Rex* v. *Geddington* (1) and *Rex* v. *Llantillio Grossenny* (2) are not cited in Lord St. Leonards' book, probably because they were thought to depend wholly upon the words of 9 Geo. 1, c. 7. What estate has the claimant here? Is he a trespasser? He must have an estate in equity, if not at law: and he has the protection of the court of equity in the enjoyment of his estate, and a right to remain therein provided he performs his part of the agreement.

[BYLES, J. Had he a right to call for a lease?]

Not until the whole of the purchase-money is paid. It is like the case of a mortgagor in possession, or a vendee under a contract of purchase, where part of the purchase-money has been paid. He is in possession, though he has no immediate right to claim a conveyance. (3) In *Holroyd* v. *Marshall* (4), T. was the owner of certain machinery in a mill: it was purchased by H., but not removed, and T. continued in possession. T. executed a deed (which was duly registered) by which it was declared that the machinery was the property of H., and that T. desired to repurchase it for 5000*l*., but had not the money to pay for it, wherefore it was conveyed to B. in trust when T. should pay the money to transfer it to him, and if he did not pay the money to hold it absolutely for H. The deed contained a covenant by T. to insure the machinery, and also a covenant that all the machinery which during the continuance of the deed should be placed in the mill in addition to or substitution for the original machinery should be subject to the same trusts. T. sold some of the original machinery, purchased new machinery, and sent to H. accounts of these sales and purchases; but nothing was done by or on behalf of H. to take possession of the newly-purchased machinery. On the 2nd of April, 1860, H. served T. with notice of a demand for pay-

(1) 2 B. & C. 129.

(2) 5 B. & C. 461.

(3) In *Anelay* v. *Lewis* (17 C. B. 316; 25 L. J. (C.P.) 121), it was held that a purchaser of freehold land (sufficient in value to confer a qualification to vote), to whom no conveyance has been made, and who has not been let into possession, does not acquire a right to be registered, under 6 Vict. c. 18, s. 74, although he has paid the whole purchase-money.

(4) 10 H. L. C. 191.

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ment of the 5000*l*. An execution against T. was afterwards put in by a creditor: and it was held by the House of Lords (1), reversing the decree of Lord Campbell, C. (2), that, though there had been no novus actus interveniens, the title of H. was preferable to that of the execution-creditor, as to the new as well as the old machinery. Lord Westbury, C., in giving judgment, says (3): "The question may be easily decided by the application of a few elementary principles long settled in courts of equity. In equity it is not necessary for the alienation of property that there should be a formal deed of conveyance. A contract for valuable consideration, by which it is agreed to make a present transfer of property, passes at once the beneficial interest, provided the contract is one of which a court of equity will decree specific performance. In the language of Lord Hardwicke, the vendor becomes a trustee for the vendee; subject, of course, to the contract being one to be specifically performed. And this is true not only of contracts relating to real estate but also of contracts relating to personal property, provided that the latter are such as a court of equity would direct to be specifically performed. A contract for the sale of goods, as, for example, of five hundred chests of tea, is not a contract which would be specifically performed, because it does not relate to any chests of tea in particular: but a contract to sell five hundred chests of the particular kind of tea which is now in my warehouse in Gloucester, is a contract relating to specific property, and which would be specifically performed. The buyer may maintain a suit in equity for the delivery of a specific chattel when it is the subject of a contract, and for an injunction (if necessary) to restrain the seller from delivering it to any other person. The effect in equity of a mere contract as amounting to an alienation, may be illustrated by the law relating to the revocation of wills. If the owner of an estate devises it by will, and afterwards contracts to sell it to a purchaser, but dies before the contract is performed, the will is revoked as to the beneficial or equitable interest in the estate, for, the contract converted the testator into a trustee for the purchaser; and, in like manner, if the purchaser dies intestate before performance of the contract, the equitable estate descends

(1) 10 H. L. C. 191. (2) 2 De G. F. & J. 596.
(3) 10 H. L. C. at p. 209.

to his heir-at-law, who may require the personal representative to pay the purchase-money." . . . "Apply these familiar principles to the present case; it follows that immediately on the new machinery and effects being fixed or placed in the mill, they became subject to the operation of the contract, and passed in equity to the mortgagees, to whom Taylor was bound to make a legal conveyance, and for whom he in the meantime was a trustee of the property in question." The general rule as laid down by Lord St. Leonards is confirmed in Dart's Vendors and Purchasers, 3rd ed. 161, where it is said: "From the time of the owner of an estate having entered into a binding contract for its sale, he holds the same in trust for the purchaser, subject to payment of the purchase-money: and, if the agreement be binding on the purchaser, he, on the other hand, is, as a general rule, under a personal equitable as well as legal liability to the vendor for payment of the purchase-money." The claimant here has an estate in equity. The question is whether there is any difference in this respect between an estate in fee or a term. If I contract to sell a term, in equity the term passes.

[BOVILL, C.J. Possibly, provided the time has passed for having the term granted or assigned. In the case of a freehold, the thing exists. But, where there is a mere contract for a lease to be granted at some future time, the term has no existence until the time arrives when the intended lessee is entitled to demand it.]

Being in possession under the contract, whether it be for the fee or for a term, the purchaser is in either as mortgagor or cestui que trust: *Moore* v. *Carisbrooke*. (1) In *Nunn* v. *Fabian* (2), a landlord having verbally agreed with his tenant to grant him a lease for twenty-one years, at an increased rent, with the option of purchasing the freehold, died before the execution of the lease. Before his death the tenant had paid one quarter's rent at the increased rate: and it was held that this constituted a sufficient part-performance of the agreement to take the case out of the Statute of Frauds, and specific performance was decreed.

[BOVILL, C.J. The claimant here must have made all the payments and performed all the conditions in the agreement and in the rules before he could obtain a lease, either at law or in equity.]

(1) 12 C. B. 661; 22 L. J. (C.P.) 64. (2) Law Rep. 1 Ch. Ap. 35.

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He has still an equitable estate. The Court will not presume that he will make default. The rights of the respective parties under the two agreements are these: The trustees are entitled to receive the 74*l.* purchase-money; Clayton is entitled to be paid the balance of his 7000*l.* and interest; Sir W. James and wife are entitled to the fee-simple subject to the equitable interest in the claimant; and the claimant has an equitable right to have a lease on payment of the purchase-money. The conditions imposed are merely for the purpose of securing the payment of the instalments. Specific performance of a parol contract to grant a lease was decreed in *Reddin* v. *Jarman* (1), there having been part-performance. Great hardship will be imposed in many cases if the Court should hold that the claimant has not a sufficient interest to sustain a vote.

[BOVILL, C.J. We have only to deal with the words of the Act of Parliament, and to put upon them the best construction we can.]

The Representation of the People Act, 1867, incorporates all the other statutes upon the subject. Upon the whole, it is submitted that the claimant has a sufficient equitable interest to sustain his right to vote, though it may be defeasible in certain events.

Manisty, Q.C., was not called upon to reply.

BOVILL, C.J. The question in this case is whether the claimant is entitled to be registered under s. 5 of the Representation of the People Act, 1867. [The Lord Chief Justice read the clause in question.] The statute seems to make a distinction between freeholds and copyholds and leaseholds. As to the former, the words are "is seised at law or in equity;" but the words "or in equity" are not found in that part of the clause which deals with leaseholds. Giving, however, a liberal interpretation to the language used, and assuming that an equitable as well as a legal interest in a term of the required length and value will do, does this case come within that extended meaning? Mr. Williams contends that there is an equitable estate in the present claimant; and he has cited several authorities for the purpose of shewing that,

(1) 16 L. T. (N.S.) 449.

where there is an agreement to grant a lease, equity considers that the lease is actually granted, and that the intended lessee has an equitable right or interest in the thing contracted for. The present case, however, does not fall within the general principle for which he has contended. Here, the freehold is in the parties of the first part to the agreement of the 1st of May, 1863, viz. Sir Walter and Lady James; any right, therefore, or claim must be derived from them; and they have never entered into any agreement with the claimant. By the first agreement Sir Walter and Lady James contract with Clayton and the trustees of the society to do certain things. Clayton engages to advance 7000*l.* Sir Walter and Lady James are to become mortgagors and Clayton mortgagee of the property. The money to be advanced is to be laid out in building the houses; and Sir Walter and Lady James agree to grant leases of the site of each house for ninety-nine years, at the rent of 9*s.* 6*d.* per annum, "when and so soon as Clayton, with the consent in writing of the parties of the second part (the trustees of the building society) should require the same to be granted." By the second agreement, of the 18th of June, 1864, entered into between the trustees of the building society of the one part and the claimant of the other part, the trustees agree in substance to create a term of ninety-nine years. But, before the claimant can be entitled to have a lease granted to him, he must have paid all the moneys due or payable from him under the agreement and the rules of the society, and have observed and performed all the conditions and agreements therein contained, and also all and every the rules and regulations of the society on his part to be observed and performed. What is the position of the claimant at the present time? The money has not been paid; and, even assuming that the rules and regulations of the society have been duly observed, Clayton has not asked for a lease, nor have the trustees consented in writing to his so doing. It is clear, therefore, that no term has been granted. It was not, indeed, disputed that no legal term had been created for a period of not less than sixty years. But Mr. Williams has contended that there was an equitable interest in a term. I am utterly at a loss to understand what equitable interest the claimant can have in the contemplated term until the time for granting him a lease has arrived,

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and when there are various conditions and stipulations to be performed before he can be entitled to claim a lease. He is in possession, no doubt; but not of a term of ninety-nine years. His possession is similar to that of a purchaser who is let in pending the investigation of the title; he is a mere tenant at sufferance until the purchase is completed. So, in the case of an agreement for a lease of premises, with the usual stipulation that a complete lease shall be granted, though entitled to a lease, the party is not in the interim possessed of a term. The fact of his being in possession, or even paying rent, does not entitle him presently to a lease, or make him lessee or assignee of a term. The cases cited by Mr. Manisty seem to me to be in point to shew that the claimant has no equitable estate, but a mere inchoate right to have a lease upon the happening of certain things which have not yet happened. The argument of Mr. Williams was mainly founded upon some expressions in the books where, as between vendor and purchaser, the latter is said in equity to be deemed the owner of the estate from the signing of the contract; and he has strongly urged that therefore the purchaser must be considered to have an equitable estate for the purposes of this Act of Parliament. But the cases cited, and also another case before the Master of the Rolls, *Wall* v. *Bright* (1), shew that the argument cannot be pressed to the extent urged by Mr. Williams. In the case last mentioned the Master of the Rolls says: "The contract to sell is a disposition of the estate, and by it the purchaser [vendor?] parts with his right and dominion over it. It is in equity no longer his: he is considered constructively to be a trustee of the estate for the purchaser, and the latter as a trustee of the purchase-money for him. They are so considered by construction only." And in another part of his judgment, he says: "Before it is known whether the agreement will be performed, he (the vendor) *is not* even in the situation of a constructive trustee; he is only a trustee sub modo, and provided nothing happens to prevent it. It may turn out that the title is not good, or the purchaser may be unable to pay: he may become bankrupt, then the contract is not performed, and the vendor again becomes the absolute owner: here he differs from a naked trustee, who can never be beneficially entitled.

(1) 1 Jac. & W. 494; 500, 501.

We must not, therefore, pursue the analogy between them too far. The agreement is not for all purposes considered to be completed. Thus, the purchaser is not entitled to possession unless stipulated for; and, if he should take possession, it would be a waiver of any of the objections to the title. The vendor has a right to retain the estate in the meantime, liable to account if the purchase is completed, but not otherwise. Till then it is uncertain whether he may not again become sole owner; *the ownership of the purchaser is inchoate and imperfect: it is in the way to pass, but it has not yet passed.*" And though the general doctrine of courts of equity may be as stated by the learned counsel, it falls far short of shewing that the purchaser has an equitable estate, as distinguished from an equitable interest. It seems to me that there was here no term subsisting at law or in equity, and that, in following the decisions of the Court of Queen's Bench (1), we shall be laying down the correct rule. It may be that the time will come, when, having complied with all the stipulations of the two agreements with which he is incumbered, the claimant may be in a condition to demand a lease. But at present, as it seems to me, he is not, within the meaning of this Act of Parliament, a person who is entitled either at law or in equity, to a tenement, as lessee or assignee, for the unexpired residue of a term of not less than sixty years. For these reasons, I am of opinion that the decision of the revising barrister should be reversed.

BYLES, J. I am of the same opinion; and, though I have listened with the attention and instruction with which I always do listen to the arguments of Mr. Williams, I can entertain no doubt. The statute confers the franchise upon every man who is entitled, either as lessee or assignee, to any lands or tenements of freehold or of any other tenure whatever, for the unexpired residue, whatever it may be, of any term originally created for a period of not less than sixty years, whether determinable on a life or lives or not, of the clear yearly value of not less than 5*l*. Before the enactment can be applicable, there must have been a term created. Here there is none, either legal or equitable. There must at least be a power to call for it or its creation. It is, therefore, an insurmountable obstacle to the claim here that Clayton must be

(1) In *Rex* v. *Geddington* (2 P. & C. 129), and *Rex* v. *Llantillio Grossenny* (5 B. & C. 461).

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a party to the creation of the term, and that he may refuse to require the owners of the fee to grant a lease until the whole of his advance, with interest, shall have been paid off.

KEATING, J. I am of the same opinion. The claimant has not, I think, brought himself within the terms of the Act of Parliament. This particular franchise was first given by the Reform Act, 2 Wm. 4, c. 45, s. 20. The 5th section of the Representation of the People Act, 1867 (30 & 31 Vict. c. 102), extends it to terms of a less value. Looking at the difference of the language used in the two branches of the section, I should have doubted whether an equitable interest in a term of years was enough. But, finding it to have been decided by an Irish judge of great authority that an equitable interest in a leasehold legally created is enough to satisfy the similar enactments of the Irish Reform Act, 2 & 3 Wm. 4, c. 88 (1), I yield to the opinion that an equitable interest in an ascertained legal term of the required length and value will give the franchise. But, whether a mere equitable leasehold would satisfy the words of the Act, I doubt considerably. It is unnecessary, however, to decide that upon the present occasion, because I agree with my Lord and my Brother Byles that the circumstances of this case do not bring the claimant within that extended construction. I will not repeat what has already been so clearly put by my Lord: it is enough to say that I agree that, where a man has only a contract for the grant of a lease which he cannot call for until a variety of acts have been done by himself and others, the case is not within the section. The question was no doubt a very nice and difficult one, and the revising barrister was not without reason in taking the view he did. I cannot, however, agree in the conclusion he arrived at.

MONTAGUE SMITH, J. I am of the same opinion. The claimant clearly is not entitled as lessee or assignee to an unexpired residue of a term, within the meaning of s. 5 of the Representation of the People Act, 1867. It is necessary, as it seems to me, in order to establish a right to vote under that section, that there should be a term created of which the party claiming was either lessee or assignee. Mr. Williams has contended that an equitable term will

(1) By Crampton, J., in *Vance's Case* (Alcock, 269).

do, if the party is either lessee or assignee. However that may be, the claimant here, if anything, must be entitled as lessee; but I think it is impossible to say that he is lessee of a term. Nobody disputes what Lord Westbury calls the elementary principles of equity, as between vendor and purchaser, on a sale of property; and it may be that, where there is an agreement to grant a term on payment of a sum of money simpliciter, the party may have an equitable interest in a term, and possibly be within the enactment. But, when there are other conditions to be performed before the term is created, I think he cannot be said to have a term even in equity; at all events, not such a term as is contemplated by the Reform Act and the Representation of the People Act, 1867. The lease here could not be granted until the conditions of the two agreements had been performed and the rules of the society complied with, and, further, until Clayton should have asked for it. Now, I apprehend that Clayton would not be bound to ask for a lease until all the houses had been erected and paid for, and the conditions had been performed by all the other persons contracted with, as well as by the claimant. (1) Although, therefore, the contract between the trustees of the building society and the claimant may ultimately result in a lease, I cannot say that a term has been created of which the claimant is either lessee or assignee. The complicated arrangements contemplated by the two agreements preclude us from coming to that conclusion. The decision of the revising barrister must be reversed; but I entirely concur with my Brother Keating in saying that he was quite right in raising the question for the decision of this Court.

Decision reversed.

Attorney for appellant: *James Crowdy, for W. D. Trotter, Bishop Auckland.*

Attorney for respondent: *Harle, for John Watson, Durham.*

(1) It was stated in the course of the argument that the *whole* of the agreements was not set out in the case.

1869
April 23.

TRENFIELD, APPELLANT; LOWE, RESPONDENT.

Parliament—County Vote—Equitable Freehold—Occupation—2 *Wm.* 4, *c.* 45, *s.* 18.

The bailiff and bailiff burgesses of C. possessed certain land divided into portions called acres which they had held from time immemorial, and by immemorial custom, as each acre became vacant, they invested some inhabitant of C. with the possession of it, to hold for his life, if he should continue to reside in C. subject to all the rules and orders of the bailiff and bailiff burgesses of C. The holder of each acre manured and mowed it; but by the custom the bailiff and burgesses granted the after-grass of the acres, at a meeting held each year for the purpose, to other inhabitants, who were thereby entitled to depasture one cow each for five weeks from the 10th of September, after which the whole were thrown open to all the inhabitants of C. to depasture sheep and cattle therein till the 15th of December. The holder of each acre was separately rated to the poor and church rates. Each acre was of an annual value above 40*s.* and under 5*l.*:—

Held, that the holder of each acre had an equitable freehold estate, and was in actual and bonâ fide occupation, within 2 Wm. 4, c. 45, s. 18, and was therefore entitled to vote in respect of it.

APPEAL from the Revising Barrister for the western division of the county of Gloucester.

John Lowe duly objected to the name of John Trenfield being retained on the list of voters for the parish of Old Sodbury.

The following facts were established by the evidence:—

The bailiff and bailiff burgesses of the town or borough of Chipping Sodbury is a body of very ancient origin, and existed, as appears by the records of the town and court rolls of the manor of Chipping Sodbury, long previous to 1681. In that year a charter was granted by Charles II. (1); but the charter was annulled by proclamation at the request of the inhabitants in 1688. (2) Whether the charter was formally annulled or not, it fell into complete disuse, and from 1688 down to the present time the borough or town has been under the government of the bailiff and bailiff burgesses as prior to the charter.

The vacancies of the bailiff and bailiff burgesses are filled up from time to time at the annual court of the lord of the manor. The

(1) A translation of the charter, given in Atkyns's Gloucestershire, p. 348, was to be referred to as part of the case.

(2) See the statement in Rudder's Gloucestershire, p. 672, which was to be referred to as part of the case.

bailiff being appointed by the lord of the manor or his steward out of three persons presented to serve the office for the ensuing year by the jury of the court leet, and the bailiff burgesses being elected in case of vacancies by the same jury.

The bailiff and bailiff burgesses, among other property, are entitled to a piece of inclosed pasture land situate in the adjoining parish of Old Sodbury, called "The Mead Riding," and containing by admeasurement ninety acres. The origin of the title of the bailiff and bailiff burgesses to this piece of land was not shewn, but they have held it for centuries; and in Rudder's History of Gloucestershire, p. 672, this and other property is referred to as derived from ancient grants made in the reigns of King Henry II. and King John. The piece of land called the Mead Riding is divided by metes, and bounds, and trenches into eighty-one allotments, none less than an acre in extent, and many of them from an acre to an acre and a half, but all are called acres. The bailiff and bailiff burgess have from time immemorial given these acres to the inhabitants in the following manner. On an acre falling vacant, a meeting of the bailiff and bailiff burgesses is convened and held at the usual place of meeting in the town hall of the town of Chipping Sodbury, and such meeting decides by a majority of votes to whom, being an inhabitant of the town or borough of Chipping Sodbury, such vacant acre shall be given. After such decision has been made, one or more of the bailiff burgesses and the inhabitant to whom the acre has been given enter upon the acre in question, and a sod or turf is then cut from the acre by the hayward of the riding (an officer appointed in court leet of the manor), and a twig stuck in it, and thereupon one of the bailiff burgesses, acting on behalf of the bailiff and bailiff burgesses, gives possession of the acre by delivering the twig and turf to the donee, at the same time reading the following formula, which is called the investiture:—"The piece of land on which we are now standing (commonly called an acre) has lately fallen into the possession of the bailiff and bailiff burgesses of Chipping Sodbury, and in pursuance of their direction, I invest you therewith by delivering to you this twig and turf, to hold the said piece of land for your life, and the life of any woman that may be your lawful wife and survive you, so long as you and your wife shall reside in this town, subject and

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chargeable with all manner of waste, particularly waste in felling or cutting any tree or trees whatsoever growing, or that may hereafter grow, on the said piece of land; and also subject to all the present rules and orders of the said bailiff and bailiff burgesses respecting the grounds called 'The Ridings,' as well as those that may be from time to time relating thereto." This completes the ceremony, and a minute is usually recorded in the minute book of the bailiff and bailiff burgesses, to the effect that the acre which fell in on the death of A was given to B.

The acre thus obtained is held by the donee according to the terms of the investiture, and is drained, manured, and mown by the holder, who at spring and fall pays to the bailiff in respect thereof, for what are called dues, the sum of 2*s.*, which go to the bailiff in aid of his expenses of office, which are considerable.

With regard to the Mead Riding, the following custom has prevailed from time immemorial. After the crop of grass has been mown and taken off by the several parties who, for the time being, are the holders of acres as aforesaid, the bailiff and bailiff burgesses convene a meeting of themselves, and grant out the after-grass in what are called stems to such of the inhabitants of Chipping Sodbury as they think fit, to the number of eighty-two, this being the number of acres of which the riding is considered to consist; each such stem confers the right to depasture a cow in the riding for five weeks from the 10th of September; at the expiration of such five weeks the riding is thrown open by the bailiff and bailiff burgesses according to custom, to all the inhabitants of Chipping Sodbury to depasture sheep and cattle therein until the 15th of December, when it is closed; but manure may be taken out on the acres after the grass is cut and carried, until the 1st of August, and also from the 5th of January to the 14th of February in each year.

Each holder of an acre is separately rated to and pays the poor and church rates of Old Sodbury, and is also separately assessed to the income tax for that parish in respect of such acre, and no instance has been known of a person once elected as the holder of an acre being dispossessed or ceasing to hold such acre, except upon his death, or his ceasing to reside in the town of Chipping Sodbury. In no case is the clear annual value of an acre in the Mead Riding less than 3*l.*, but it does not amount to 5*l.*

Trenfield, being an inhabitant of the town of Chipping Sodbury, was in the year 1847 duly elected by the bailiff and bailiff burgesses to an acre in the Mead Riding, and was thereupon duly invested with the possession of the acre according to the form of investiture above stated. Trenfield had ever since been and still is an inhabitant, and in the enjoyment and possession of such acre. The clear annual value of the acre was more than 3*l.* but less than 5*l.*

Trenfield's claim was in respect of the acre so held by him, and it was objected to on the ground that his interest in the land was not such an estate of freehold as would confer a county vote.

The revising barrister decided that Trenfield had not such an estate of freehold in the land in question as would confer a vote for the county, and struck his name out of the list of claimants.

Appeals in respect of twenty-nine other persons were consolidated with this appeal.

If the Court should be of opinion that the decision was wrong, the register was to be amended by inserting therein the names of Trenfield and of the twenty-nine other persons.

Pickering, Q.C. (*C. G. Edwards* with him), for the appellant. The appellant had an equitable life estate in the land similar to that of the bedesmen in *Roberts* v. *Percival.* (1) The custom of investiture is evidence of the trusts of some lost grant, under which it must be presumed the burgesses held the land. Similar holdings to that of the claimant will be found in the case of the parish clerk in *Roberts* v. *Drewitt* (2), and of Benchers' Chambers in the Inns of Court: see *Chambers in Lincoln's Inn.* (3) The limitation of residence does not make the holding less a holding for life, for an estate for an uncertain term not terminable by the will of the grantor is an estate for life: Co. Litt. 42 a.; *Davis* v. *Waddington* (4); *Beeson* v. *Burton.* (5) The remaining question is, whether the claimant was in the actual and bonâ fide occupation of the land, as required by s. 18 of the Reform Act, 2 Wm. 4, c. 45, the annual value being less than 5*l.* He was clearly put in possession of it at the time of the investiture, and the grant of the after-grass to other

(1) 18 C. B. (N.S.) 36; 34 L. J. (C.P.) 84.

(2) 18 C. B. (N.S.) 48.

(3) 2 Peck. 109.

(4) 7 M. & G. 45, n.

(5) 22 L. J. (C.P.) 33.

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plated by the Act, but I have come to the conclusion on the whole case, that we may reasonably find that it was so; the claimant was rated as occupier, and, indeed, no one else could be so rated, and I think, under the circumstances, the claimant was entitled to his vote. I may add, that I entertain great doubts whether the revising barrister intended to raise this point, but as the case has been argued on that ground, we have thought it best to give a decision upon it.

MONTAGUE SMITH, J. I am of the same opinion; I think this case was placed by Mr. Pickering on the right ground, viz., that the giving of the turf and twig did not pass any legal estate, but invested the claimant with an equitable freehold for life in the land; and I think, that he was in the actual occupation and enjoyment of it. I share the doubt of my Brother Keating whether any other question was intended to be raised in this case, than whether the claimant was entitled to a freehold interest in the land, but it was scarcely argued by Mr. Williams that the claimant was not entitled to be registered as a voter, if the condition imposed by the 18th section of the Reform Act had been complied with. He contends, however, that that condition had not been complied with, but I think that the facts shew that the appellant had such an actual occupation as was contemplated by the Act. It is stated in the case that the claimant was put into possession of the land, and it is plain that he was in the actual beneficial occupation of it during part of the year, though during another part of the year other persons, no doubt, had a right to come upon the land for certain purposes. It seems to me, however, that what those other persons had was in truth only a stinted right of common, and that that did not prevent the claimant having the actual occupation of the land. I see nothing that would have hindered his going upon it at any time of the year, and doing anything there not inconsistent with the right of pasture possessed by the other persons under the rules. The form of investiture is not unimportant; it is "to hold the said piece of land for your life, and the life of any woman that may be your lawful wife and survive you, so long as you and your wife shall reside in this town, subject and chargeable with all manner of waste, particularly waste in felling or cutting

any tree or trees, whatsoever, growing, or that may hereafter grow, on the said piece of land." It clearly treats the claimant, therefore, as the person in possession of the land, and liable for waste. I think, therefore, the point, if really raised by the case, must be decided for the claimant, and that the decision of the revising barrister must be reversed.

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Decision reversed.

Attorneys for appellant: *Baxter, Rose, Norton, & Co.*

Attorneys for respondents: *Hayes, Twisden, & Parker, for W. Gaisford, Berkeley.*

MOON, APPELLANT; ANDREW, RESPONDENT.

1868

Nov. 10.

Parliament—Borough Vote—Notice of Objection—Description of Objector— 6 *Vict. c.* 18, *s.* 17, *Sch. B., Form* 11.

The parliamentary borough of Penryn consists of six several places, having separate overseers and lists of voters, one of such places being called "the borough of Penryn;" the objector being on the list for that place, sent a notice of objection to a voter in which he described himself as "on the list of voters for the borough of Penryn":—

Held, that the notice of objection sufficiently indicated on which of the six lists the objector was.

APPEAL from the Revising Barrister for the borough of Penryn.

William Andrew was objected to by Charles Moon, and the notice of objection sent to him was in the following form:—

"To Mr. William Andrew, of Porham Street, in the town of Falmouth. I hereby give you notice that I object to your name being retained on the list for the town of Falmouth, of persons entitled to vote in the election of members for the borough of Penryn.

"Dated this 24th day of August, 1868.

"Charles Moon, of St. Thomas Street, Penryn,
on the list of voters for the borough of Penryn."

The borough of Penryn, for parliamentary purposes, consists of six several places having separate overseers and rates, and separate lists, namely:—The borough of Penryn, the parish of St. Gluvias, the parish of Myler, the town of Falmouth, the parish of Falmouth,

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and the parish of Budock. In the first of these places, there were two separate lists published by the overseers of the poor, one containing the scot and lot voters, and the other the 10*l.* householders and inhabitant occupiers—this latter list included all the names on the scot and lot list. The name of Charles Moon appeared on both these lists, and his residence also appeared thereon, as mentioned in the notice.

The revising barrister held that the description of the objector, Moon, as being "of St. Thomas Street, Penryn, on the list of voters for the borough of Penryn," did not sufficiently describe on which of the six lists of the parliamentary borough of Penryn, Moon's name was to be found, and decided, therefore, that the notice was bad, and he retained on the list the name of the person objected to.

The names of forty-five other persons were retained on the list under similar circumstances, and the appeals were consolidated.

If the Court should be of opinion that the notices of objection were invalid, the register was to remain without amendment; but if the Court should be of opinion that the notices were not invalid, then the names of the persons were to be expunged from the register.

O'Malley, Q.C. (*Horne Payne* with him), for the appellant. The parliamentary borough is properly called the borough of Penryn and Falmouth; it is so named in the schedule to the Boundary Act of 1832 (1), and again in the schedule to the Boundary Act of 1868. (2) The "list for the borough of Penryn," therefore, could only mean the list for the old borough. The objector could not follow the exact form No. 11 in schedule B to 6 Vict. c. 18, because there is no "parish" of Penryn, and he has followed the form sufficiently: *Gadsby* v. *Warburton* (3); *Bright* v. *Devenish*. (4)

Atkinson, Serjt. (*Lumley Smith* with him), for the respondent. The parliamentary borough is usually and properly called the borough of Penryn (5), and the notice must be such as would be commonly understood; the objector himself uses "borough of Penryn" in the larger sense in the former part of the notice. In *Crowther* v. *Bradney* (6), it was held that the objector must specify the list on

(1) 2 & 3 Wm. 4, c. 64, schedule O. 6.
(2) 31 & 32 Vict. c. 46, schedule 1.
(3) 7 M. & G. 11; 14 L. J. (C.P.) 41.
(4) Law Rep. 2 C. P. 102.
(5) See 2 Wm. 4, c. 45, ss. 6, 7.
(6) 15 C. B. (N. S.) 536; 33 L. J. (C.P.) 70.

which his name is. Secondly, there are two lists for the old borough of Penryn, and the objector has at any rate omitted to state upon which of those lists he is.

[BRETT, J. The revising barrister says that he decided the case on the ground that the notice did not sufficiently specify on which of the six lists the objector's name was.

BOVILL, C.J. We cannot go into the second point. (1)]

BOVILL, C.J. It seems to me that the notice in this case was in fact sufficient; it is clear that the name "borough of Penryn" is sometimes used to signify the parliamentary borough of Penryn, and sometimes to signify the old borough of Penryn; the first part of the notice speaks of the town of Falmouth in the borough of Penryn, and there it must certainly be used for the parliamentary borough; but the meaning must be decided by the context; and at the close of the notice the expression used is "on the *list* of voters for the borough of Penryn;" there is no list of voters for the parliamentary borough, but six different lists for the different parts of it. I think the expression "borough of Penryn" must, therefore, there mean the old borough, the words being used in a different sense in the different parts of the notice, and the decision of the revising barrister must be reversed.

BYLES, J. I am of the same opinion. Though the objection is a very small one, a number of votes depend upon it. I think the description of the list in which the objector's name was to be found was strictly accurate, the words used being properly applicable only to the old borough.

KEATING and BRETT, JJ., concurred.

Decision reversed.

Attorneys for appellant: *Baxter, Rose, Norton, & Co.*
Attorneys for respondent: *Travers Smith, & De Gex.*

(1) It was decided in *Samuel* v. *Hitchmough* (13 C. B. (N.S.) 3; 32 L. J. (C.P.) 55), that where there are two lists for the same parish, the objector need not specify on which of the two lists he is.

1868
Nov. 17.

ALDRIDGE, APPELLANT; MEDWIN, RESPONDENT.

Parliament — Borough Vote — Notice of Objection to the Overseers — Omission to state the List on which Name of Voter appeared — 6 *Vict. c.* 18, *s.* 17, *Sch. B., No.* 10, *s.* 101.

In the Borough of A. there were two lists of voters, one of rated occupiers and the other of voters under the reserved rights, but the latter list contained only one name, which was that of the objector. A notice of objection sent to the overseers omitted to state, pursuant to 6 Vict. c. 18, sch. B., No. 10, on which list the name of the person objected to appeared. The overseers knew to which list the notice applied, and were not misled or delayed by the omission. The revising barrister held that the notice was sufficient:—

Held, that, under the peculiar circumstances of the case, the Court could not say that he was wrong.

APPEAL from the Revising Barrister for the borough of Horsham.

Pitfold Medwin objected to the name of John Aldridge being retained on the list of persons entitled to vote in the election of a member for the borough.

There is only one parish within the borough, viz., the parish of Horsham.

The objector proved due service on the overseers of the parish of a notice of objection to the name of Aldridge in the following form:—

"To the overseers of the parish of Horsham,—I hereby give you notice that I object to the name of John Aldridge being retained on the list of persons entitled to vote in the election of a member for the borough of Horsham.

"Dated this 25th day of August, 1868.

(Signed) "Pitfold Medwin,

of Horsham, on the list of persons entitled to vote in the election of a member for the borough of Horsham in respect of property occupied within the parish of Horsham."

In the borough of Horsham it is the duty of the overseers to make out and publish two separate lists of persons entitled to vote in the election of a member for the borough, viz., one in respect of property occupied within the parish of Horsham, and the other of persons (not being freemen) entitled to vote in such election in respect of any rights other than those conferred by 2 Wm. 4, c. 45.

The overseers accordingly on the 31st of July, 1868, made out and duly published two such lists. The name of Aldridge

appeared only in the first mentioned list. At the time the two lists were made out and published there was, and for some time previously there had been, only one person entitled to vote in the election of a member for the borough in respect of such reserved ancient rights, viz., the said Pitfold Medwin, and the list made out and published by the overseers of the persons entitled to vote in respect of such reserved ancient rights contained the name of Pitfold Medwin only.

It was objected on the part of Aldridge that the notice of objection served on the overseers was informal and insufficient, inasmuch as it did not specify the particular list to which the objection referred, pursuant to the directions given in Schedule B., No. 10, of 6 Vict. c. 18, and that Aldridge ought not to be called on to prove his title to vote.

It was proved on the part of the overseers that they knew perfectly well that the objection was intended to apply only to the list of persons entitled to vote in respect of the occupation of property, and not to the list of persons entitled to vote in respect of the reserved ancient rights, and that they were not in any manner misled by the notice.

The revising barrister held, upon the facts proved, that the notice of objection served on the overseers was sufficient, and called upon Aldridge to prove his title to vote in respect of the occupation of property within the parish, which he failed to do, and the revising barrister therefore expunged his name from the list.

The question for the opinion of the Court was, whether upon the facts stated, the notice of objection served on the overseers was or was not sufficient in law.

Appeals in respect of several other persons were consolidated.

Nov. 10. *Pickering, Q.C.*, for the appellant. It has been decided that the note to form 10, sch. B., of 6 Vict. c. 18, is imperative, and not merely directory, and that the circumstance that there was not in fact any confusion caused by an omission to specify the list does not affect the question: *Barton* v. *Ashley*. (1) [He was then stopped by the Court.]

Keane, Q.C. (*Lumley Smith* with him), for the respondent. It is

(1) 2 C. B. 4; 15 L. J. (C.P.) 36.

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ALDRIDGE v. MEDWIN.

extraordinary that there should be a series of decisions that a man must be helped where he does not need help, for that is what the appellant's contention amounts to, as it is found in the case that the overseers knew, in fact, to what list the notice referred. This Court, being a court of final appeal, should reconsider the question. In *Huggett* v. *Lewis* (1), Maule, J., one of the judges who had decided the case of *Barton* v. *Ashley* (2), said that he did not see what right a voter had to take the objection. The note has no reference to a notice of objection sent to the parties; and the Court in *Godsell* v. *Innous* (3) said that they would not decide whether the overseers might not waive a notice being sent in too late. Here, if the objection to the notice had any force, the omission has been waived by the overseers. The note to the form must be read according to its meaning, and it can only mean that the list shall be specified unless the notice gives sufficient information without it, which it does here. But further, if there is any inaccuracy in not specifying the list, it is cured by s. 101 of 6 Vict. c. 18.

[BRETT, J. The objector has not misnamed the list, but omitted to name it altogether.]

Lambert v. *Overseers of St. Thomas, New Sarum* (4), shews that an omission of this kind falls within the section; and *Bright* v. *Devenish* (5) shews that even the literal following of the form given in the Act may be incorrect. That case followed *Tudball* v. *Town Clerk of Bristol.* (6)

Pickering, Q.C., in reply. Those cases shew that, even apart from the note in form 10, a misdescription that causes confusion renders the notice bad. In those cases the Court did not consider the defect was cured by 6 Vict. c. 18, s. 101. Here there is no description of the list at all. Unless it can be treated as a mere question of fact, the Court will set right the barrister's decision; and it is too late now to alter the law that has been laid down by a succession of cases.

Cur. adv. vult.

Nov. 17. The judgment of the Court (Bovill, C.J., Byles, Keating, and Brett, JJ.), was delivered by

BOVILL, C.J. In this case the notice of objection did not specify

(1) K. & G. 1; 24 L. J. (C.P.) 38.
(2) 2 C. B. 4; 15 L. J. (C.P.) 36.
(3) 17 C. B. 295; 25 L. J. (C.P.) 79.
(4) 12 C. B. 642; 22 L. J. (C.P.) 31.
(5) Law Rep. 2 C. P. 102.
(6) 5 M. & G. 5; 13 L. J. (C.P.) 49.

the list on which the voter's name appeared. The statute (6 Vict. c. 18, s. 17, Sch. B., No. 10), no doubt, directs that if there be more than one list of voters for a parish the notice of objection should specify the list to which the objection refers, and it was decided in *Barton* v. *Ashley* (1) that this is obligatory; see also *Crowther* v. *Bradney* (2), with respect to the list on which the objector's name appears. By s. 101 it is provided that no misnomer or inaccurate description of any person, place, or thing named or described in any notice required by the Act, shall in anywise prevent or abridge the operation of the Act in respect of such person, place, or thing, provided that such person, place, or thing shall be so denominated in such notice as to be commonly understood. The circumstances of this case are very peculiar, there was in fact a list of voters containing the 10*l.* occupiers and rated householders, and also a paper, which might be called a list of voters under the old franchises, but which contained only one name, viz., that of the objector, and this had been so for some time previously; the overseers expressly state that they knew quite well that the list intended in the notice was the list of occupiers, and not the list which contained only the objector's name. We have found some difficulty in deciding the notice to be sufficient; but looking at the very peculiar circumstances of the case and the evidence of the overseers, we cannot say that there was not evidence enough to satisfy the revising barrister that the description of the list in the notice was such as to be commonly understood to apply to the list of occupiers, and he having found in effect that it was so, we cannot say that he was wrong in so deciding on the facts; neither can we say that in point of law the notice was bad; and the decision of the revising barrister must be affirmed, but without costs. This is a very peculiar case, and will not be a precedent in any other.

Decision affirmed.

Attorneys for appellant: *Baxter, Rose, & Norton.*

Attorney for respondent: *T. H. Strangways, for P. Medwin, Horsham.*

(1) 2 C. B. 4; 15 L. J. (C.P.) 36. (2) 15 C. B. (N.S.) 536; 33 L. J. (C.P.) 70.

1868
Nov. 13.

JONES, APPELLANT; BUBB, RESPONDENT.

Parliament—Borough Vote—Rating—Rate "made"—Representation of the People Act, 1867 (30 & 31 *Vict. c.* 102), *s.* 3.

A poor rate is not "made" during the qualifying twelve months, within the meaning of the Representation of the People Act, 1867, s. 3, unless it was both signed by the parish officers and allowed by the justices during those twelve months.

APPEAL from the Revising Barrister for the borough of Malmesbury.

William Stephens Jones duly objected to the name of William Bubb being retained upon the list of voters for the borough, in respect of his occupation of a dwelling house in the parish of Somerford Magna.

The ground of objection was that the respondent had not been duly rated.

A rate made for the relief of the poor of the parish was produced by the overseer. By its "heading" this rate purported to have been made by the overseers on the 18th day of July, 1867, and on each page of it, in the usual form, there were the words "Rate made the 18th day of July, 1867." The rate was duly allowed on the 4th of September, 1867, and that date appeared in the entry of such allowance as the date thereof. The rate was duly published on the 8th of September, 1867. The respondent was not rated to this rate.

The objector contended that this was a rate made during the twelve calendar months preceding the 31st day of July, 1868, that the date in the heading of the rate was not the time when it was "made" within the meaning of s. 3, of "the Representation of the People Act, 1867" (30 & 31 Vict. c. 102), (1) and that the rate was not so "made" until the day of the allowance thereof, or until the day of the publication thereof; and that not being rated therein the respondent was not entitled to be registered under s. 3.

(1) 30 & 31 Vict. c. 102, s. 3, gives the borough franchise to every man who, 2. has occupied a dwelling for the whole of the twelve months preceding the last day of July; and, 3. "has during the time of such occupation been rated as an ordinary occupier in respect of the premises" . . . "to all rates (if any) made for the relief of the poor in respect of such premises."

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Apart from the question raised by this objection the voter's qualification was proved to the satisfaction of the revising barrister.

The revising barrister decided that although a rate is of no force until it has been allowed and published, yet that, after allowance and publication it is to be deemed to have been "made" on the day on which it purports to have been made by the overseers upon whom the duty of making it devolves; that the word "made" in s. 3 is to be thus construed, and as such day in respect of the rate in question was prior to the qualifying twelve months occupation of the voter, he disallowed the objection and retained the name on the list.

Appeals in the case of eleven other persons were consolidated.

The question for the opinion of the Court was, whether the rate was a rate "made" during the twelve calendar months preceding the last day of July, 1868, within the meaning of s. 3 of the Representation of the People Act, 1867; and if the Court should be of opinion that it was, the names of Bubb and of the eleven other persons were to be expunged from the list.

Dowdeswell, Q.C. (*Greville Howard* with him), for the appellant. A rate cannot be said to have been made till it becomes an operative thing, and this is not till it has been allowed by the justices. Publication is also rendered necessary by 17 Geo. 2, c. 3, but it is unnecessary in the present case to say whether this is also to be considered part of the making of a rate. Poor-rates are still collected under the authority of 43 Eliz. c. 2; that Act created a statutory power of taxation to be exercised by the major part of the parish officers with the consent of two justices of the peace, and it is clear that till the whole of the provisions of the statute have been complied with there can be no effectual charge on the public, and though in common parlance the inchoate rate prepared by the parish officers may be called a rate before it has been allowed by the justices, it is not in law a rate any more than an escrow, though often called a deed, is so in law before the condition has been performed. The rate book when signed by the parish officers is, in truth, a document which it may be convenient for them to have by them, and which they can make into a rate at any time by obtaining the allowance of the justices, but it is of no effect whatever till it has been so allowed. [He was then stopped by the Court.]

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Macnamara (*Sir J. B. Karslake, A. G.*, and *Keane, Q.C.*, with him), for the respondent. The making, allowing, and publishing a rate are perfectly distinct; thus, a mandamus will lie to the churchwardens and overseers alone to compel them to *make* a rate, the word "make" has in fact acquired a technical signification in relation to rates, and applies only to the act of the parish officers. In the form of rate given in 6 & 7 Wm. 4, c. 96, the heading speaks of the rate as made on the date of its signature by the overseers, and section 2 of that Act provides that the churchwardens and overseers or other person whose duty it may be to "make" or levy the rate shall sign the declaration at the foot of the form before it is allowed by the justices, otherwise the rate shall be of no force or validity; these latter words have been held to refer only to the signature by the parish officers: *Reg.* v. *Fordham* (1); and it is their signature therefore which makes it a valid rate, though allowance by two justices and also publication are necessary before it can be enforced. The same use of the word "make" is to be found in the form of mandamus to the parish officers given in *Reg.* v. *Gadsby.* (2) The 43 Eliz. c. 2. requires the consent of the justices to the "raising" of a rate, which is a word that implies the actual collection of the money, but this does not affect the meaning of the expression "to make a rate."

[BOVILL, C.J. No doubt the term making a rate has been popularly used for its preparation and signature by the parish officers; it is so used in the Highway Act, 5 & 6 Wm. 4, c. 50, and in many law books; but it may also have a stricter legal meaning, and if so, the question will be in which sense is it used in the Representation of the People Act, 1867?]

Language must be interpreted in its ordinary sense in an Act which is intended to direct the actions of persons of little education in legal knowledge. In *Reg.* v. *St. Mary Kalendar* (3) it was decided that when payment of rates for a whole year is material, it is no excuse for the nonpayment of the last rate, that such rate, though made during the year, was not published till after its expiration; in that case the allowance was within the year, but allowance and publication stand on the same footing. The allow-

(1) 11 Ad. & E. 73. (2) 1 Nev. & P. 572.
(3) 9 Ad. & E. 626.

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ance by the justices is in fact a merely ministerial act which they cannot refuse to do. This was decided in *Rex* v. *Justices of Dorchester* (1), and though this decision is said in *Reg.* v. *Lord Yarborough* (2) to have created at first some surprise, it was expressly confirmed in *Reg.* v. *Lord Godolphin.* (3) Even, therefore, if a rate is not complete till it is allowed by the justices, the allowance will relate back to the time when the rate was made by the parish officers, which will be the date of the making of the rate; this view, at all events, will remove the difficulty arising from the statute of Elizabeth.

[BOVILL, C.J. Such a relation back might seriously affect the rights of parties.]

Still greater difficulties will arise if the date when the rate is allowed is to be considered as the date of the making of the rate, for if it were not allowed till some months after it was made out and signed by the parish officers, it would be retrospective, and therefore void. So, too, in this view a voter who is omitted from a rate which was prepared before and allowed after the commencement of the qualifying year, will lose his vote through an omission which took place out of the qualifying period. Moreover, rates could not be recovered from persons who had come into occupation between the signing and allowance of the rate, for they would not have come into occupation in the place of persons who had been assessed to the rate as required by 17 Geo. 2, c. 38, s. 12. The relation back of the allowance by the justices to the date of the making of the rate would be in strict accordance with the ordinary law of ratification. There are two Irish cases which support this view; in both, the making of the rate was assumed to be the time when it was struck, which appears to correspond to the signing of the parish officers: *Agnew* v. *Reilly* (4), and *Muldowney* v. *Malcolmson.* (5) The date at the head of the rate in the form given in the schedule to 6 & 7 Wm. 4, c. 96, is the only date necessarily appearing on the face of the rate; no form is given for the allowance by the justices, and there is no need that it should be dated. No doubt if this date be incorrect it may be shewn to be so, but it must be

(1) 1 Str. 393.
(2) 12 Ad. & E. 416.
(3) 13 L. J. (M.C.) 57; 1 D. & L. 830.
(4) 2 Ir. C. L. Rep. 560.
(5) 15 Ir. C. L. Rep. 375.

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intended by the Act to be primâ facie evidence of the date of the rate. The object in requiring voters to be rated was to afford additional evidence of their occupation; this was said by Tindal, C.J., in *Wright* v. *Town Clerk of Stockport* (1), and appears still more clearly in the words in s. 6 of 30 & 31 Vict. c. 102, "has during such occupation been rated." But the occupation is determined only with reference to the time when the rate is signed by the parish officers; if any one comes into occupation after it has been so signed, his name cannot be inserted by the justices when they allow it.

[BOVILL, C.J. Could not the parish officers alter the rate till it has been allowed?]

There does not appear to be any decision on the subject, but the signing of the parish officers is in the nature of a judicial act which under 6 & 7 Wm. 4, c. 96, is necessary to render it valid; it is not merely a ministerial act, and when the rate has been so authenticated it surely cannot be altered. *Lorant* v. *Scadding* (2), is a strong authority in the respondent's favour. There it was held that a rate was made at the time when it was voted at a meeting of the vestry that it should be made.

[BOVILL, C.J. That turned on the words of a local statute, and it only shews that there is a recognized distinction between the use of the terms "making" and "allowing" a rate.]

The appellant will rely on *Bushell* v. *Luckett* (3), but that only decides that a rate before it is allowed and published is not the rate for the time being within the meaning of 2 Wm. 4, c. 45, s. 30; that would make the publication the date of the making the rate if the appellant is right, which the case of *Reg.* v. *St. Mary Kalendar* (4) shews it is not. That decision is quite consistent with the view that when the rate is allowed the allowance relates back to the date of the making; and, moreover, it is a decision on s. 3 of 2 Wm. 4, c. 45, which uses the expression "the rate for the time being," not on the words "rate made," and has relation only to rates which are payable, since the claimant must tender the amount payable in respect of the rate, and no rate is payable till it is

(1) 5 M. & G. 33, 51.
(2) 13 Q. B. 706; 19 L. J. (M.C.) 5; and on appeal, 3 H. L. C. 418.
(3) 2 C. B. 111; 15 L. J. (C.P.) 69.
(4) 9 Ad. & E. 626.

allowed. The 27th section, like the 6th section of the Act of 1867, may well use the word rate in a different sense when it speaks of all rates "made."

Dowdeswell, Q.C., in reply. There is no reason why the allowance by the justices should relate back. The law of ratification only applies when the original act has been done in the name of the person who subsequently ratifies it. The allowance is a substantial part of the making of the rate, for a mandamus may be obtained to oblige justices to allow a rate. The intention of the statute of Elizabeth was that, when money was to be raised, the persons for the time being occupying in the parish should be rated, whereas the respondent's construction would render those who had occupied when the rate-book was signed (which might be months earlier) liable. The 17 Geo. 2, c. 3, requires the rate to be published on the next Sunday after allowance, and if not published then it is invalid: *Sibbald* v. *Roderick*. (1) This was certainly in order that persons might be informed as soon as ever they are rated; but if the rate is made when it is signed by the overseers, a person may have been rated for months, and not know it. There will, of course, occur at times some changes of occupation between the making and allowing of the rate, and the persons who leave before the rate is allowed cannot be liable to it. The hardship on a voter might be very great if the allowance is to relate back. Thus, if a rate were made by the overseers in June, and not allowed till August, after the qualifying year, any voter who was omitted could not claim to be put on it, for the preceding rate would be the rate for the time being till the new rate had been made, allowed, and published: *Bushell* v. *Luckett*. (2) Nor would he indeed know of his omission from the rate till after the qualifying year. Yet the absence of his name from it, if the respondent's view be correct, would deprive him of his vote. The wording of 6 & 7 Wm. 4, c. 96, affords no clue to the meaning of the late Act, for statutes must be construed with reference to their subject matter, and that Act had reference only to the mode of preparing a rate, and had no reference to the circumstances under which it should be enforceable. The word "make" would be naturally used in such an Act, in a popular sense, for the making out of the rate ready to be rendered

(1) 11 Ad. & E. 38. (2) 2 C. B. 111; 15 L. J. (C.P.) 89.

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valid by the act of the justices. Moreover, the form in the schedule to the Act is only directory, and it is not stated what date is to be filled in in the heading, and it may have been intended to be the date when the rate was allowed. There is no authority for saying that overseers may not alter a rate after they have signed it; there is no reason why they should not do so, or even destroy it and make a new one till it has been allowed by the justices. In *Fox* v. *Davies* (1), Maule, J., says that a rate, which is not made by the major part of the parish officers and allowed by two justices, and duly published at the church on the Sunday next after such allowance, is no more than waste paper.

[KEATING, J. Does not that carry the argument too far, and show that publication is part of the making of the rate?]

Maule, J., probably forgot that publication is not required by the statute of Elizabeth, but is only required by a subsequent statute before the rate can be enforced.

[BRETT, J. In *Fox* v. *Davies* (1) the voter had been rated, but had not paid the rate, and that case therefore only decides that the rate was not payable.

BOVILL, C.J. There are difficulties in either interpretation. May it not be necessary that the rate should be both made and allowed within the year?]

In places where there is only one rate a year, if the 31st of July falls between the making and allowance of the rate, voters need never be rated at all or pay rates, and yet will be entitled to vote.

[BOVILL, C.J. We must assume, in construing the Act, that the overseers will do their duty, and rate all the persons who ought to be rated.]

The Act specially recognizes that persons may have to claim to be put on the rate. In the case of *Reg.* v. *St. Mary Kalendar* (2), the only point decided was that a person occupying for a year, and rated within the year, acquired a settlement; there is not a word in the judgment adopting the argument that a person must be rated to a rate not published till after the expiration of the year.

BOVILL, C.J. In this case, which has been fully and ably

(1) 6 C. B. 11, 17; 18 L. J. (C.P.) 48. (2) 9 Ad. & E. 626.

argued, I am of opinion that the decision of the revising barrister should be affirmed. There is no doubt that in many Acts of Parliament, as well as in the language used by the judges in several cases, the making of a rate has been treated as a different thing from its allowance; but whatever be the true meaning of the word making as applied to a rate in the Acts relating to the poor law, we have here to consider only what is its meaning as used in the Representation of the People Act, 1867. There is great difficulty in giving to it either of the meanings contended for by the appellant and respondent respectively, and there is scarcely any view which does not present some difficulty, if extreme cases be taken; it is impossible, however, to deal with extreme cases; we must rather presume that the legislature had in view the cases which would usually arise, when all things are properly done. The conclusion at which we have arrived is, that when the legislature used the language "has during the time of such occupation been rated in respect of the premises so occupied by him to all rates (if any) *made* for the relief of the poor in respect of such premises," they must have meant completely made during the year; and that therefore the signing by the overseers and the allowance by the justices must both be during that period in order to bring the rate within the section. It is not necessary in this case to determine the other question, whether the publication of the rate must also be during the year; the rate was signed by the overseers before the commencement of the year. The voter was therefore not required to be on this rate.

BYLES, J. I think the meaning of the Act must be either that the rate should be begun by the signing by the overseers, or both begun by such signing and completed by the allowance by the justices during the qualifying year, and in either case the revising barrister was right.

KEATING, J., concurred.

BRETT, J. I have had great difficulty in coming to a conclusion on this case; but comparing the section under consideration with the 27th section of the Reform Act, 2 Wm. 4, c. 45, I think it must be taken to mean that the voter must have been rated to all

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rates made during the twelve months immediately preceding the last day of July in any year; and the question therefore is, what is the meaning of the rate being *made* during the year; and I agree with my Lord that the only safe way of construing this section is to hold that it means, that the rate on which the voter's name must appear should have been completely made during the year; that is, that each step, both the signing by the overseers and the allowance by the justices, should have been taken during that period.

Decision affirmed.

Attorneys for appellant: *Bower & Cotton.*

Attorneys for respondent: *Deane & Chubb, for Chubb & Son, Malmesbury.*

Nov. 20.

AINSWORTH, APPELLANT; CREEKE, RESPONDENT.

Parliament—Borough Vote—Rating—Time of making a Rate—Claim to be Rated—Ratification—Representation of the People Act, 1867 (30 & 31 Vict. c. 102), *s.* 3—*Reform Act*, 2 *Wm.* 4, *c.* 45, *s.* 30.

A poor-rate for a parish in a borough, was dated at its head April, 1867, but it was not in fact signed by the parish officers till August, 1867, in which month it was also duly allowed by two justices and published. A. occupied a dwelling-house in the parish for the twelve months preceding the 31st of July, 1868, but his name was not included in the rate when it was signed, allowed, and published. A.'s landlord had for some years paid the rates of A. and of his other tenants in full, they paying a higher rent in consequence. After the publication of the rate, and without any communication with A., his landlord requested the overseer to put the names of his tenants on the rate, and the overseer accordingly inserted A.'s name amongst those of the other tenants on the rate. The landlord subsequently gave a cheque for the amount of all his tenants' rates. A.'s name, having been inserted in the list of voters, was objected to, and he appeared before the revising barrister to support his vote:—

Held, that the rate was "made" during the twelve months preceding the 31st of July, 1868, within the meaning of 30 & 31 Vict. c. 102, s. 3; and was therefore a rate to which A. ought to have been rated.

Held, also, that his landlord had not any implied authority from A. to make a claim to have his name inserted on the rate; and that, if there could be a ratification, A.'s conduct in appearing before the revising barrister was too late to be a ratification; and that therefore A. had not claimed to be rated within 2 Wm. 4, c. 45, s. 30; and that he was not entitled to have his name retained on the list of voters.

APPEAL from the Revising Barrister for the borough of Burnley.

Harry Creeke duly objected to the name of Thomas Ainsworth

being retained on the list of voters for the township of Habergham Eaves.

The qualification of Ainsworth was proved in every respect, except as regarded rating and payment of rates. (1) With respect to those two points, the facts as established by the evidence were as follows:—

A rate for the relief of the poor in the township of Habergham Eaves, was signed and allowed by two justices on the 16th of August, 1867, and was duly published on the following Sunday, the 18th of August.

At the head of this rate in the rate-book were the following words:—"An assessment for the relief of the poor of the township of Habergham Eaves, in the county of Lancaster, and for other purposes chargeable thereon according to law, made this 18th day of April, in the year of our Lord, 1867, after the rate of 1*s.* 8*d.* in the pound." The heading at the top of each page of the rate book was in these words and figures:—"Township of Habergham Eaves. Poor-rate made the day of 186 ." At the end of the names in the rate book was this declaration by the overseers:—"We, the undersigned, do hereby declare, that one of us, or some person in our behalf, has examined and compared the several particulars in the respective columns of the within rate with the valuation list made under the authority of the Union Assessment Committee Act of 1862, in force in this township, and the several hereditaments are, to the best of our belief, rated according to the value appearing in such valuation list. We do also declare, that the within rate amounts in the whole to the sum of 4835*l.* 15*s.* 10*d.*"

This declaration was not dated, but it was signed by the overseers within a week before the signature and allowance of the rate by the justices.

The rate book containing this rate was put in evidence for the purpose of proving that Ainsworth was duly rated in respect of premises occupied by him in Low Water Street, in the said town-

(1) It was not stated in the case what the qualification was; but it would appear from the rest of the case that it was in respect of the occupation of a "dwelling house," and that the qualification was under 30 & 31 Vict. c. 102, s. 3, which, as to the rating required, see ante p. 468, n.

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ship, during the twelve months immediately preceding the last day of July, 1868; and in respect of which premises, so far as rating and payment of rates were concerned, his qualification was in dispute. In the rate book the name of Thomas Ainsworth appeared in the column headed "Arrears," and the name of John Holmes in the column headed "Name of Occupier;" the latter name had been struck through with a pen, but was still legible.

The rate book thus disclosing an ambiguity on the face of it, the revising barrister instituted an inquiry into the circumstances under which the name of John Holmes had been struck through, and the name of Thomas Ainsworth inserted. In the course of that inquiry the following facts were established by the evidence:—Ainsworth was a tenant of John Dugdale & Brothers, a firm carrying on business in the borough of Burnley, and had occupied as such tenant for more than twelve months previous to the 31st of July, 1868, the premises No. 14, Low Water Street, which appeared in the rate book on the same line with his name and the name of John Holmes. Sometime after the 18th of August, 1867, the day on which the rate was published, Mr. Shaw, a partner in the firm of John Dugdale & Brothers, without mentioning the name of Ainsworth, and without in any way communicating with him, or with any other of the tenants of the firm, on the subject, requested the assistant overseer for the township of Habergham Eaves, in general terms, to insert the names of the tenants of John Dugdale & Brothers in the rate book containing the rate of the 16th of August, 1867. The assistant overseer anticipating some difficulty in ascertaining the names of the said tenants, acted upon a suggestion made by Mr. Shaw, and sent the rate book above mentioned to the office of John Dugdale & Brothers. The names of Ainsworth, and other tenants of Messrs. Dugdale were inserted in pencil in the rate book whilst it thus remained in the office of the firm by one of their clerks, and when that had been done the rate book was returned to the assistant overseer. The name of Ainsworth and the names of the other tenants, which had been written in, as above stated, in pencil, were then written in ink at the assistant overseer's office by his clerks, and the names of John Holmes and others, which stood in the occupier's column in the rate book when the rate was signed,

allowed, and published, were struck through with a pen as stated above.

On the 10th of December, 1867, the rate due in respect of the premises occupied by Ainsworth, and also the rates due in respect of the other tenants of John Dugdale & Brothers, were demanded by the overseer, and paid by Mr. Shaw, by a cheque in the name of the firm for the sum of 350*l.*; in return for the above cheque, receipts were handed over to the firm made out in the name of each tenant separately, and amongst them one in the name of Thomas Ainsworth. Messrs. Dugdale had paid their tenants' rates in a similar manner in full and without any composition for nearly forty years past; and there was a clear understanding between the tenants, when they entered into occupation, and the firm, that the rates were included in the rent, and the tenants had to pay an additional rent in consideration of the firm undertaking to pay the rates. The overseer, thus looking to the Messrs. Dugdale for payment, had been indifferent as to what names appeared in the rate book as occupiers of the several premises belonging to the firm.

Upon this state of facts it was contended on behalf of the objector, first: that the rate signed and allowed by the justices on the 16th of August, and published on Sunday, the 18th of August, 1867, was "made" when it was signed, allowed, and published, and not before, and that consequently it was a rate "made" during the twelve months immediately preceding the 31st day of July, 1868, and that it was necessary that the name of Ainsworth should have been inserted in it before it was signed, allowed, and published, as having been rated in respect of the qualifying premises, No. 14, Low Water Street, so occupied by him during the twelve months immediately preceding the last day of July in the year 1868, in order to entitle him (in the absence of any sufficient claim and payment or tender of rates due) to have his name inserted in the list of voters. Secondly: that the request of Mr. Shaw to the assistant-overseer to insert the names of his tenants in the rate-book, made as it was in general terms, and without any communication with Ainsworth, was not a sufficient claim to be rated on behalf of Ainsworth within the meaning of 2 Wm. 4, c. 45, s. 30. (1)

(1) By 2 Wm. 4, c. 45, s. 30, the occupiers of any house, &c., may claim to be rated; and upon such occupier so claiming, and actually paying and

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Thirdly: that even if it were a sufficient claim to be rated on behalf of Ainsworth within the meaning of that section; nevertheless, the subsequent payment of the rates on the 10th of December, 1867, in a gross sum by Mr. Shaw, was not an actual payment, or a sufficient payment, within the meaning of that section, to render such claim valid.

It was, on the other hand, contended, amongst other matters, on behalf of Ainsworth, that the rate in question was "made," within 30 & 31 Vict. c. 102, s. 3, subs. 3, on the 18th of April, 1867, and not when it was signed, allowed, and published in the month of August; that three acts are necessary in order to complete the "making" of a rate: first, the assessment at a rate of so much in the pound; secondly, the signatures by the overseers, and the signature and allowance by the justices; and, thirdly, the publication in due course according to law; that two only of the above three requisite acts for the making of a rate were done after the 31st of July, 1867, within the twelve months immediately preceding the last day of July, 1868; and that the other requisite act—namely, the assessment at so much in the pound—having been done before the 31st of July, 1867, the rate in question was not altogether and entirely "made" within the twelve months aforesaid; that the signature of the overseers and justices in the month of August, 1867, must be taken as relating back to the date of the assessment, viz., the 18th day of April, 1867, and that consequently it was not necessary that Ainsworth should have been rated to the rate in question at all, or should have paid any rates in respect of it. Secondly: that supposing the rate in question was a rate to which Ainsworth ought to have been rated, then the request of Mr. Shaw to the assistant overseer to insert the names of Messrs. Dugdale's tenants in the rate book was, under the circumstances, a sufficient claim to be rated on behalf of Ainsworth, and that no rates being payable until they became due on

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tendering the full amount of the rates, if any, then due in respect of the premises, the overseers are required to put the name of such occupier upon the rate for the time being; and in case such overseers shall neglect or refuse so to do, such occupier shall nevertheless be deemed to have been rated from the period at which the rate shall have been made, in respect of which he shall have claimed. See also 14 & 15 Vict. c. 14, s. 1.

demand on the 10th of December, 1867, no payment or tender was necessary till that day. Thirdly: that supposing the rates became due on the publication of the rate in August, and not on demand, the subsequent payment of the tenants' rates on the 10th of December by Mr. Shaw was a sufficient payment by Ainsworth within the meaning of 2 Wm. 4, c. 45, s. 30, to render the claim to be rated a valid claim, and to justify the overseers in putting the name of Thomas Ainsworth on the rate.

The names of 132 other persons were objected to under similar circumstances, and the appeals were consolidated.

The revising barrister decided: First, that the rate in question was made when it was signed, allowed, and published in the month of August, 1867, and not on the 18th of April in that year, as was contended on behalf of Ainsworth, that therefore it was a rate made during the twelve months immediately preceding the 31st of July, 1868, and that Ainsworth ought to have been rated to it, in respect of the premises occupied by him, before the rate was signed, allowed, and published, in order to entitle him (in the absence of a sufficient claim to be rated and an actual payment or tender there and then of the rates due) to have his name inserted in the list of voters. Secondly: that the request of Mr. Shaw to the assistant overseer to insert the names of the tenants of John Dugdale & Brothers in the rate book was not, under the circumstances, a sufficient claim to be rated on behalf of Ainsworth. Thirdly: that the rate became due on the publication thereof, and before demand by the overseer, and that even if the request of Mr. Shaw to the overseer, to insert the names of the tenants of John Dugdale & Brothers, in the rate book, amounted in law to a sufficient claim to be rated, nevertheless the subsequent payment of the tenants' rates by Mr. Shaw, by cheque on the 10th of December, was not under all the circumstances a sufficient payment within the meaning of 2 Wm. 4, c. 45, s. 30, to render such claim to be rated a valid claim. The revising barrister accordingly expunged the name of Ainsworth and of the other 132 persons from the list.

If the Court should be of opinion that his decision on the first point was wrong, and that the rate in question was made on the 18th of April, 1867, and not when it was allowed, signed, and published in the month of August in the same year, then the register

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was to be amended by restoring the name of Ainsworth and of the 132 other persons. If the Court should be of opinion that his decision on the above point was right, then the opinion of the Court was further requested,—First: Whether under the circumstances as stated there was any sufficient claim on behalf of Ainsworth to be rated to the rate of the 16th of August, 1867, within the meaning of 2 Wm. 4, c. 45, s. 30. Secondly: Whether the payment by Mr. Shaw of the tenants' rates and of the rates of Ainsworth amongst the number was under the circumstances stated above a sufficient payment within the meaning of 2 Wm. 4, c. 45, s. 30, to render such claim to be rated valid.

Quain, Q.C. (*Shield* with him), for the appellant. It was decided in *Jones* v. *Bubb* (1) that a rate must have been both signed by the overseers and allowed by the justices within the qualifying year in order to be a rate to which a voter is required to be rated by 30 & 31 Vict. c. 102, s. 3; and similar reasoning will shew that the writing out of the rate must also have been within the year. The declaration at the foot of the rate signed by the overseers was introduced by 6 & 7 Wm. 4, c. 96, and signing that declaration cannot be the making of the rate. The declaration does not state that the within is the rate, but that the within rate, treating it as existing, is correct. It stands in precisely the same position as the publishing of the rate, which is also made necessary by statute, and is something wholly distinct from the making of the rate, as appears from the words of s. 2, which requires it. In *Lorant* v. *Scadding* (2) which was decided on a local Act, 59 Geo. 3, c. xxxix., the question was whether the rate was made before it was signed, and it was held that it was.

[BOVILL, C.J. It was held that under the wording of that Act, the rate was made when a resolution of the vestry, that there should be a rate, was passed.]

The rate can hardly have been made till the rate book was made out. There is no reason why a rate should not be altered after it is made; the declaration may, if necessary, be struck out and re-written, that will not make it a different rate. *Rex* v. *Barrett* (3)

(1) Ante, p. 468. (2) 13 Q. B. 706; 19 L. J. (M.C.) 5; 3 H. L. C. 418.
(3) 2 Dougl. 465.

was a criminal information for altering a rate after it was allowed, and it is there rather implied that it could be altered before being allowed. There must have been some date, independent of the signature of the parish officers, at which a rate was made before the passing of 6 & 7 Wm. 4, c. 96, for they were not bound to sign the rate at all before the passing of that Act, though in practice they may have usually done so.

[BOVILL, C.J. What then is the interpretation to be put on the words of 6 & 7 Wm. 4, c. 96, s. 2, which say that if the rate be not signed it shall be null and void?]

They shew, like the similar words relating to publication, that the rate exists distinctly and independently of the declaration, the absence of which deprives it of legal force.

The next point is, whether on the facts the appellant's name was properly put upon the rate. It is clear that his name, though in the column of arrears, was meant for a correction of the name originally appearing on the rate, and the question is, whether it was properly put there. The request by Mr. Shaw, and the payment of the rates by him in the appellant's name, amounted to a claim on the appellant's behalf to have his name put on the rate, for though the appellant's name had been written in before, when the overseer had no authority to do it for want of a tender of the amount due, the subsequent payment of the rates amounted to a renewal of the claim under circumstances which come within the terms of 2 Wm. 4, c. 45, s. 30. The agreement with his landlords that they should pay the rates for him was an authority to them to make such a claim.

[KEATING, J. A man may wish his rates to be paid, and yet may not wish to be a voter.]

In any case the appellant ratified Mr. Shaw's act by appearing before the revising barrister to support his claim.

[BYLES, J. That would be a ratification after the close of the qualifying year. The revising barrister has to decide whether the voter was qualified on the 31st of July.].

The ratification will relate back to the time of the claim, which was before the 31st of July.

[BOVILL, C.J. The ratification of an act must be at a time when the act itself could have been done by the person proposing to ratify it.]

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There is no authority for that, except *Bird* v. *Brown* (1), and there the rights of third parties had intervened.

Manisty, Q.C., for the respondent, was directed by the Court to confine his arguments to the question of ratification. The appellant was not rated during any part of the qualifying year; he might at any time have gone and objected to his name appearing on the rate, and the rate could not have been enforced against him.

Quain, Q.C., in reply.

BOVILL, C.J. I am of opinion that the revising barrister was right on both points. The first question is, whether the appellant had been rated to all rates (if any) made for the relief of the poor in respect of the premises occupied by him within the qualifying year. This depends on whether the rate, which was signed by the overseers allowed by the justices and published during the qualifying year, was "made" during that year, within the meaning of the Representation of the People Act, 1867, s. 3. Mr. Quain contended that it was not, because the only date which appeared on the face of it was the date at its head stating that it was made in April. In a former case, *Jones* v. *Bubb* (2), we have decided that a rate, in order to come within the provisions of that section, must be completely made within the year, and the question raised here is whether it was not partly made before the declaration by the overseers was signed. It is extremely difficult to follow the distinction made by Mr. Quain, and to say on what day it can have been made if it was not made on the day when it was signed by the parish officers. Was it made on the day when the overseers began to put down the names of the persons to be included in the rate, or when they had completed the first sheet, or when they had completed ten sheets, or when they thought they had completed the whole list? Whatever difficulty there may have been before the passing of 6 & 7 Wm. 4, c. 96, which first rendered imperative the signature of the rate by the parish officers, I think the question as regards the meaning of the expression, "making a rate," in the Representation of the People Act, 1867, is set at rest by the Act of Wm. 4, which expressly enacts (s. 2) that "the churchwardens and overseers, or other officers whose duty it may be to make or

(1) 4 Ex. 786; 19 L. J. (Ex.) 154. (2) Ante, p. 468.

levy the rate," or a competent number of them shall, before the rate is allowed by the justices, sign the declaration at the foot of the form given in the schedule, and that otherwise the rate shall be of no force or validity. And though, in *Reg.* v. *Inhabitants of Fordham* (1), the Court held that the form given in the Act need not be followed, they appeared to consider that if the declaration by the parish officers were omitted, the rate would be a nullity. I am of opinion, therefore, that this rate cannot be said to have been made within the meaning of the Representation of the People Act, 1867, till it was signed by the parish officers.

Then it was contended that the signature would relate back to the date at the head of the rate. I agree that, when there is only one date on the face of a rate, prima facie it must be taken that the rate was made at that date, but if such was not really the case it may be shewn not to have been so: if the rate was not made till August, the mere fact of the heading stating that it was made in April would not affect the question: *Lorant* v. *Scadding* (2) was relied on for the appellant, but that case depended on the special provisions of a local Act and has no bearing on the present question.

The next question is whether, assuming the rate to have been made within the qualifying year, the appellant duly claimed to be rated, and paid the rates. The appellant's name was not on the rate when it was made, allowed, and published, but it is contended that he complied with the provisions of 2 Wm. 4, c. 45, s. 30, and that his name therefore was properly put upon the rate. There is no doubt that one of the partners in the firm, who were the appellant's landlords, did in some sense make a claim on his behalf; but the question remains whether the appellant had authorized him to make such a claim on his behalf. It is not contended that he gave him any express authority; as the landlords were to pay the rates it did not matter to the tenant whether his name was on the rate book or not, except for the sake of the franchise, and no authority to the landlords to take the necessary steps for having his name inserted in the rate could be implied from an agreement that they were to pay the rates. It is further contended that the appellant subsequently ratified the claim which had been made on his behalf.

(1) 11 Ad. & E. 73. (2) 13 Q. B. 706; 19 L. J. (M.C.) 5; 3 H. L. C. 418.

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The act relied on as a ratification however took place after the qualifying year had elapsed, and I think the law is as was laid down in *Bird* v. *Brown* (1), that a ratification must be made at a time and under circumstances when the ratifying party might himself have effectually done the act which he has ratified. It is not necessary therefore to decide whether there could have been a ratification at any time after the name had been inserted. I am clearly of opinion that in the present case there was no ratification of the claim at a time when the claim could have been made by the appellant himself, and the decision of the revising barrister must therefore be affirmed with costs.

BYLES, J. I am of the same opinion. I agree with my Lord that this rate was void till signed by the overseers. Whether in any case such signature might relate back to a former date, we need not determine, but there is no reason to say that it did so here. With all that has been said by my Lord on the subject of ratification I entirely agree; and I may further say that the duty of the revising barrister is expressly limited by 6 Vict. c. 18, s. 40, to retaining persons in the list who are proved to have been entitled to be inserted on the 31st of July preceding.

KEATING, J. I am entirely of the same opinion on both points. I think this rate cannot be considered to have been "made," within the Representation of the People Act, 1867, before the day when it was first authenticated by the signature of the overseers. My own opinion is, that the intention of the legislature was that the dating and signature of the rate by the overseers should be contemporaneous, but it is not necessary to decide that here. Many inconveniences have been suggested as likely to arise from the date of the rate being earlier than the day on which it is rendered valid by the signature of the overseers, and it is very probable that from our decision in this case the parish officers will for the future be careful that the dating and signature of rates should be as nearly contemporaneous as possible, and that the allowance and publication of them should follow as soon as may be. I quite share in the difficulty that is felt by my Lord in adopting any other date, for if

(1) 4 Ex. 786; 19 L. J. (Ex.) 154.

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the date were the time at which the name of the particular person was entered, it would follow that different persons would be rated at different times, and great confusion would arise.

I also entirely agree with my Lord on the second part of the case. The legislature has provided as clearly as possible that the claim to be made under the 30th section of the Reform Act (2 Wm. 4, c. 45) should be by the will in some way of the party making it. It is not necessary now to decide whether any ratification could render valid a claim after the name of the person had been once inserted. I am clearly of opinion that a ratification after the qualifying year would not be sufficient. It would have been easy for the appellant to have claimed if he had really wished to have acquired the franchise; but he has not adopted the method pointed out by the legislature, and is therefore not entitled to have his name on the list of voters.

BRETT, J. I am also of opinion that the revising barrister was right on both points. It is clear to me that, within the meaning of the Representation of the People Act, 1867, and our decision in *Jones* v. *Bubb* (1), this rate was made during the qualifying year, and that being so, I am also of opinion there was no claim made by the appellant, or ratification by him of the claim made on his behalf by his landlord. It may be that no ratification would be sufficient, but it is clear that no ratification after the 31st of July would be so, and that this case comes within the rule that a person cannot effectually ratify an act at a time when he could not do the act himself.

Decision affirmed.

Attorneys for appellant: *Johnson & Weatheralls.*
Attorney for respondent: *F. J. Jeyes, for J. Southern, Burnley.*

(1) Ante, p. 468.

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Jan. 18.

MEDWIN, APPELLANT; STREETER, RESPONDENT.

Parliament—Borough Vote—Representation of the People Act, 1867 (30 & 31 *Vict. c.* 102), *s.* 3—*Claim to be rated, under* 2 *Wm.* 4, *c.* 45, *s.* 30, *and* 14 & 15 *Vict. c.* 14, *s.* 1.

A. had occupied a dwelling house in a borough for the requisite twelve months, but had not been rated; he had before the 20th of July, 1868, paid all poor-rates which had become payable for the house previously to the 5th of January. A rate was made on the 15th of January, 1868, in which A. was not rated; and on the 24th of August he claimed to be rated "to all rates made since the 31st of July, 1867":—

Held, that, inasmuch as the qualification under s. 3 of the Representation of the People Act, 1867, must be complete by the 31st of July of the qualifying year, the claim was too late.

Agnew v. *Reilly* (2 Ir. C. L. Rep. 560), and *Muldowney* v. *Malcolmson* (15 Ir. C. L. Rep. 375), discussed.

APPEAL from the Revising Barrister for the borough of Horsham.

Henry Russell Streeter claimed to have his name inserted in the list of persons entitled to vote in respect of the occupation of a house No. 9 Park Terrace West, in the parish of Horsham.

Streeter had never been rated in respect of the house; but he paid, prior to the 20th of July, all the rates due in respect thereof up to the 5th of January, 1868. On the 24th of August, 1868, Streeter served on the overseers a claim to be rated, as follows:—

"To the overseers of the parish of Horsham.

"I hereby give you notice that I claim to be rated to all rates made by you for the relief of the poor since the 31st of July, 1867, in respect of a house situate in Park Terrace West, and numbered 9, in the parish of Horsham, in my occupation; and I hereby tender payment of the full amount of all rates made previously to the 5th of January last and now due (if any). Dated this 24th of August, 1868."

At the time of the service on the overseers of this notice there was only one poor-rate in force within the borough, which was made on the 15th of January, 1868.

It was contended, on behalf of the objector, that the claim to be rated served by Streeter upon the overseers on the 24th of August, 1868, was invalid and insufficient; that the claimant was bound to prove that he was entitled to vote on the 31st of July,

1868; and that a claim to be rated, dated and served subsequently to the 31st of July, was too late, and invalid, and did not entitle the claimant to have his name inserted in the list.

The revising barrister thought the claim to be rated was too late, and invalid. But, the Court of Common Pleas in Ireland having decided in two cases, of *Agnew* v. *Reilly* (1) and *Muldowney* v. *Malcolmson* (2), under provisions contained in the Irish Registration Act (13 & 14 Vict. c. 69), s. 110, that a claim to be rated, dated and served in August, was sufficient and valid, and related back to the previous 20th of July, and also had relation to the time when the rate was made, he held the claim of Streeter to be valid; and, Streeter having in other respects proved his title to vote, the barrister inserted Streeter's name in the list.

The question for the opinion of the Court was, whether the claim to be rated, dated and served by the claimant on the overseers on the 24th of August, 1868, was valid and sufficient to entitle him to have his name inserted in the list of voters.

Nov. 20, 24. *Keane, Q.C.* (*Lumley Smith* with him), for the appellant. The claim to be rated, under 2 Wm. 4, c. 45, s. 30, applies to the rate for the time being,—the then-existing rate: *Bushell* v. *Luckett* (3): that in the present case would be the rate which was made on the 15th of January, 1868. The claim, however, was not made until after the expiration of the qualifying period, viz. the year ending on the 31st of July. Reliance will be placed upon the two Irish cases, of *Agnew* v. *Reilly* (1), and *Muldowney* v. *Malcolmson* (2), to shew that the claim has relation back, by force of the statute, to the time of the making of the rate. *Muldowney* v. *Malcolmson* (2) was a mere confirmation of *Agnew* v. *Reilly* (1); and that proceeded upon the construction of the 54th and 110th sections of the Irish Act, 13 & 14 Vict. c. 69, the language of which differs substantially from that of the 30th section of the English Reform Act, 2 Wm. 4, c. 45. The enactment in 13 & 14 Vict. c. 69, s. 110, is: "and, upon such occupier so claiming, and actually paying or tendering the full amount of the rate or rates (if any) then due in respect of such premises, the guardians of the union

(1) 2 Ir. C. L. Rep. 560. (2) 15 Ir. C. L. Rep. 875.
(3) 2 C. B. 111; 15 L. J. (C.P.) 89.

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shall insert the name of such occupier in such rate in respect of such premises as aforesaid; and, in case such guardians shall neglect or refuse so to do, such occupier shall, for the purposes of this act, be deemed to have been rated in respect of such premises *in the rate in respect of which he shall have claimed to be rated as aforesaid.*" And the language of s. 30 of the English Reform Act is: "and, upon such occupier so claiming, and actually paying or tendering the full amount of the rate or rates, if any, then due in respect of such premises, the overseers of the parish or township in which such premises are situate are hereby required to put the name of such occupier upon the rate for the time being; and, in case such overseers shall neglect or refuse so to do, such occupier shall nevertheless for the purposes of this Act be deemed to have been rated to the relief of the poor in respect of such premises *from the period at which the rate shall have been made* in respect of which he shall have so claimed to be rated as aforesaid." So far as these two Irish cases decide that the claim is to have relation back generally to the time when the rate was made, they are opposed to the decision of this Court in *Ainsworth* v. *Creeke*. (1)

[BOVILL, C.J. Our decision in *Ainsworth* v. *Creeke* (1) is not necessarily inconsistent with the Irish cases. The claim there,—or rather the ratification by the tenant, the claim having been made by the landlord,—was on the day of revision; whereas, one of the Irish cases seems to imply that it must be before that day. I agree, however, that the reasons we gave for holding that the claim must be within the qualifying year conflict with those cases, except in so far as the language of the English and the Irish Acts differ.]

In all other cases, the right of the voter must be complete within the qualifying year. There is no reason why a claimant under s. 30 of 2 Wm. 4, c. 45, should be in a better position. The present claimant, therefore, is not a person entitled to be registered under the Representation of the People Act, 1867 (30 & 31 Vict. c. 102), s. 3.

Pickering, Q.C., for the respondent. The claim to be rated and tender of the rate made on the 24th of August, 1868, had relation back to the time of the making of any rate to which such claim

(1) Ante, p. 476.

applied, and put the claimant in the same position as if he had been rated on the 15th of January, 1868, to the rate then made. *Ainsworth* v. *Creeke* (1) does not affect this case, and differs materially from the two Irish cases referred to. It was not necessary in *Ainsworth* v. *Creeke* (1) to determine exactly within what time the claim must be made. All that was decided on that point was that a claim made at the court of revision was too late: and there is good reason for so holding. In the present case the claimant had paid all rates due up to the 5th of January, which is all that 14 & 15 Vict. c. 14, s. 1, requires as an equivalent for actual rating. Finding that his name had been omitted from the rate made on the 15th of January, he makes his claim under s. 30 of 2 Wm. 4, c. 45; and it was the duty of the overseers to put his name upon "the rate for the time being;" and, in the event of their failure to do so, he is to be deemed to have been rated "from the period at which the rate was made in respect of which he had so claimed to be rated." The object of that section was that a voter should not be disqualified through the neglect or default of the overseers; and the 110th section of the Irish Act was passed with the same view. Both statutes are in pari materiâ; and they are so treated in *Agnew* v. *Reilly* (2) and *Muldowney* v. *Malcolmson.* (3) The reasons given in the judgments in those cases are unanswerable. In the former, Monahan, C.J., says: "Under the 110th section, the claim to be rated has relation to the time at which the rate was struck. If the claim had been complied with by the guardians, the barrister would have had no right to inquire when the applicant was put on the rate. He must have been the occupier when the rate was struck, and his name should have been inserted in the list; and, until the list be published, the applicant is not to presume or suppose that the guardians of the union have not done their duty, by omitting his name; so that the 110th section puts the claim to be rated in the same position as if the claimant were actually rated." *Muldowney* v. *Malcolmson* (3) is a very strong case: and the judgment of Fitzgerald, J., fully confirms the former decision. If the argument urged on the part of the appellant be allowed to prevail, of what use is the power of inspection given by 6 Vict. c. 18, s. 16? The decision of the

(1) Ante, p. 476. (2) 2 Ir. C. L. Rep. 560; 569. (3) 15 Ir. C. L. Rep. 375.

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revising barrister in this case was therefore right, and must be affirmed.

Keane, Q.C., was heard in reply.

Cur. adv. vult.

Jan. 18. The judgment of the Court (Bovill, C.J., Byles, Keating, and Brett, JJ.) was delivered by

BOVILL, C.J. In this case the claimant, Henry Russell Streeter, claimed to vote as the rated occupier of a dwelling house in the borough of Horsham. The claimant had not been rated at all in respect of the house in question, but had, at some time before the 20th of July, 1868, paid to the overseer all rates which would have been due previously to the 5th of January, 1868, in respect of the said house. After the 5th of January, viz. on the 15th of January, a rate had been duly made in the borough; but in it the claimant was not rated. On the 24th of August, 1868, the claimant, finding that his name was not in that rate, and never having previously claimed to be put upon that rate, served on the overseer a claim to be rated to all rates made since the 31st of July, 1867, and in such claim stated that he tendered payment of all rates due prior to the 5th of January, 1868.

Upon these facts, the revising barrister, contrary to his own opinion, but in deference to two cases decided in Ireland, held that the claimant was entitled to vote, and inserted his name on the register of voters.

It was contended before us, on behalf of the appellant, that the claimant was not duly qualified as a voter on the 31st of July, 1868, because he had not then been rated to all rates made since the previous 31st of July, nor had then done anything declared to be equivalent to having been so rated; and that nothing done after the 31st of July, 1868, could obviate the objection that he was not qualified on that day.

It was contended, on behalf of the respondent, that the claim and tender of the 24th of August had relation back to the time of the making of any rate to which such claim applied, and put the claimant in the present case in the same position as if he had been rated on the 15th of January, 1868, in the rate then made and published.

The solution of the question thus raised depends upon the construction of the various enactments regarding the qualification and registration of voters. By 30 & 31 Vict. c. 102, s. 3, "every man shall be entitled to be registered as a voter, &c., who (among other things) is *on the last day of July in any year, and has during the whole of the preceding twelve calendar months* been, an inhabitant occupier, &c., and has *during the time of such occupation* been rated, &c., to all rates (if any) made for the relief of the poor," &c. By statute 2 Wm. 4, c. 45, s. 27, "no occupier shall be registered unless he shall have occupied such premises as aforesaid *for twelve calendar months next previous to the last day of July* in such year, nor unless such person, &c., shall have been rated in respect of such premises to *all rates, &c., made during the time of such his occupation*," &c. The collocation of phrases is different; but reading the later by the former statute, it seems that the true meaning of the later enactment is, that no man shall be registered unless he has been rated to all rates made during the twelve months previous to the 31st of July of the qualifying year. The claimant had not been so rated, and therefore primâ facie was not entitled to be registered as a voter. But, by 30 & 31 Vict. c. 102, s. 56, "all laws, customs, and enactments now in force conferring any right to vote, or otherwise relating to the representation of the people in England and Wales, and the registration of persons entitled to vote, shall remain in full force, and shall apply, as nearly as circumstances admit," &c.; and by s. 59, "this Act, so far as is consistent with the tenor thereof, shall be construed as one with the enactments for the time being in force relating to the representation of the people, and with the Registration Acts," &c.; and therefore it is necessary to consider whether the claimant, although he has not been rated, may not have done something which is equivalent, for the purposes of qualification and registration, to his having been rated.

By 2 Wm. 4, c. 45, s. 30, "it shall be lawful for any person occupying, &c., to *claim* to be rated, &c., whether the landlord shall or shall not be liable to be rated to the relief of the poor in respect thereof; and, upon such occupier so claiming, and actually paying or tendering the full amount of the rate or rates (if any) then due, &c., the overseers, &c., are hereby required to put the

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name of such occupier upon *the rate for the time being;* and, in case such overseers shall neglect or refuse so to do" (i.e. to put his name on the rate for the time being), "such occupier shall nevertheless, for the purposes of this Act, be deemed to have been rated, &c., *from the period at which the rate shall have been made* in respect of which he shall have so claimed to be rated as aforesaid;" that is, the rate for the time being. This seems to refer to a claim made at all events during the time the rate is current. This claim cannot effectually be made in respect of a previous rate after a subsequent rate is made and published. This interpretation was acceded to by Maule, J., in *Bushell* v. *Luckett.* (1)

By 14 & 15 Vict. c. 14, s. 1, "no person so claiming to be rated, and paying or tendering on or before the 20th of July in each year the full amount of the rate or rates (if any) due in respect of such premises on the 5th day of January preceding, shall be required to make any further claim in regard to any future rate, &c., but shall be entitled to be put on the list and to be registered as a voter," &c. This enactment, made by way of amendment to that last cited, applies to any claim properly made before the 20th of July to be rated to all rates made before such claim, and accompanied by payment or tender before the 20th of July of all rates due on the previous 5th of January.

The required payment or tender is only in respect of rates due on or before the 5th of January; but the enactment does not dispense with a rating or a valid claim to be rated in respect not only of the rates made before but also of those made after the 5th of January and before the claim or before the 20th of July. It does not dispense with the necessity of the claim, in order to make it valid, being made in respect of a rate current at the time, and does not refer to a claim made *after* the 20th of July. Neither of these provisions, in terms, at all events, enables a claimant, by claiming after the 31st of July to be rated in respect of a rate made previous to the 31st of July, to maintain that he was on the 31st of July qualified to vote by reason of having then been rated to all rates made during the previous year.

These sections do not aid the contention of the respondent, nor do

(1) 2 C. B. 111; 15 L. J. (C.P.) 89.

away with the primâ facie disability arising upon s. 3 of 30 & 31 Vict. c. 102.

If we look to the Registration Acts, the necessity of the qualification being complete on the 31st of July seems to be even more fully made out.

The only jurisdiction or power which the revising barrister can properly exercise is that which is given to him by the statutes under and by which his office is created. By 6 Vict. c. 18, s. 7, the power of objection given, which is to be answered by the claimant, is, that every person upon the register for the time being for any county, may object to any other person upon any list of voters for such county as *not having been entitled on the last day of July then next preceding* to have his name inserted, &c. By s. 15, the persons who may claim in boroughs as having been improperly omitted by the overseers, are those who can and shall claim as *having been entitled on the last day of July then next preceding to have their names inserted*, &c. This seems further to shew that under s. 13 the persons whose names the overseers ought to insert are those who would be entitled on the 31st of July. By s. 17, the power of objection in boroughs is, to any person as *not having been entitled on the last day of July next preceding to have his name inserted*, &c. By s. 37, the revising barrister has power to insert in any county list the name of any person who has claimed, *in case it shall be proved that he was entitled on the last day of July then next preceding to be inserted*, &c. By s. 38, the same limitation to the power of the revising barrister is imposed in boroughs. And by s. 40, the section on which the action of the revising barrister mainly depends, it is expressly enacted that, "when any person shall have been objected to by the overseer or by any other person, &c., such barrister *shall then require it to be proved that the person so objected to was entitled on the last day of July then next preceding to have his name inserted*, &c.; and, in case *the same* shall not be proved to the satisfaction of such barrister, or in case it shall be proved that such person was *then* incapacitated by any law or statute from voting in the election, &c., such barrister *shall* expunge the name of every such person from the said lists," &c.

It would surely require very specific words elsewhere to override the force of these specific enactments, and to authorize the Court

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to say that, although on the 31st of July the claimant would not have been entitled, yet by reason of something done by him after the 31st of July he is entitled, and that the revising barrister should not require it to be proved that the claimant was entitled on the 31st of July, and, even though it should be proved that he was not entitled on the 31st of July, should insert his name in, or refuse to expunge it from, the register of voters.

The case of *Powell* v. *Bradley* (1) seems to shew that for some purposes at least the 31st of July is the day on which the qualification must be complete.

It has, however, been argued that, if the construction contended for by the appellant be adopted, no practical effect can be given to s. 16 of 6 Vict. c. 18, and that the power therein given to inspect the rate-book is futile. It would seem, however, that such power of inspection, even in an extreme case, might be useful for the purpose of seeing what the overseer has done or omitted, even though a claim has previously been made, and thus for guiding a claimant as to the amount of evidence which will be required from him before the revising barrister.

This argument seems hardly sufficient to override the express enactments above referred to. Convenience and safety seem to point to the same conclusion as that to be deduced from the words of the statutes. If that which it is asserted may be done after the 31st of July may be then legally done, there seems nothing to prevent its being done even before the revising barrister in court: and we have already substantially decided, in the case of *Ainsworth* v. *Creeke* (2), that a claim at that time would be too late.

It seems to us that the true construction of the English statutes and convenience and safety alike require that the qualification must be complete on the 31st of July. We are, however, met by authority to which we shall ever feel inclined and bound to pay the highest respect,—the authority of the Irish judges in the cases of *Agnew* v. *Reilly* (3) and *Muldowney* v. *Malcolmson*. (4) We have carefully and anxiously considered those cases, as well as the statutes 1 & 2 Vict. c. 56, on which is founded the adminis-

(1) 18 C. B. (N.S.) 65; 34 L. J. (C.P.) 67.

(2) Ante, p. 476.

(3) 2 Ir. C. L. Rep. 560.

(4) 15 Ir. C. L. Rep. 375.

tration of the poor-laws in Ireland, and 13 & 14 Vict. c. 69, on which the qualification and registration of voters in Ireland depend. We are bound to confess that there is so much similarity between many of the enactments in the English Registration Acts and the last-mentioned Irish statute, that many of the reasons which have led us to the construction which we feel bound to put on the English Acts could hardly have permitted us to coincide with some of the remarks of the Irish judges on the Irish statutes in those cases: but, even in one of those cases, it seems to have been considered by some of the judges that the claim must be made before the court of the revising barrister is opened; but the administration of the system of poor-law rating in Ireland is so different from that in England, and the qualification as to rating of voters, the formation of the lists of voters, and the machinery for preparing them and taking the registration, are so different, and give rise to so many different considerations and arguments, that we do not feel called upon or authorized to discuss further the propriety of the ultimate decision in those cases upon the Irish statutes. We confine ourselves to saying that, having regard to the English statutes, we, for the reasons before stated, are of opinion that the decision of the revising barrister in this case, given in deference to the Irish cases, was wrong, and his own personal opinion was right. The decision of the revising barrister will therefore be reversed, and the register be amended accordingly.

Decision reversed.

Attorney for appellant: *Strangways, for P. Medwin, Horsham.*
Attorneys for respondent: *Baxter, Rose, & Norton.*

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Nov. 18.

ANDREWS' CASE.

IMESON'S CASE.

Parliament—Borough Vote—Rating—30 & 31 *Vict. c.* 102, *s.* 3—6 *Vict. c.* 18, *s.* 75.

A. occupied a dwelling house for the requisite twelve months. There had been two rates for the parish in the course of the twelve months, and in each rate the name of A.'s landlord only appeared. A. paid to his landlord an increased weekly rent in consideration of the landlord paying the rates, and had paid all the rent due. The overseers had written A.'s name in both rates, without any claim on his part, and at a time subsequent to the making of the second rate:—

Held, that A. could not be said to have been rated to all rates made within the year, and that he was not entitled to be on the list of voters.

ANDREWS' CASE.

APPEAL from the Revising Barrister for the borough of Hastings.

The name of Andrew Andrews, on the list of voters for the borough of Hastings, as the inhabitant occupier of a dwelling house, was duly objected to.

Andrews had occupied a dwelling house for more than twelve calendar months preceding the last day of July, 1868. He held as weekly tenant, and by agreement between him and his landlord the latter was to pay the rates for him, he in consideration thereof paying a larger sum weekly as rent than he would otherwise have done.

Two rates were made for the relief of the poor in the parish, between the 31st of July, 1867, and the 31st of July, 1868; in neither was any name inserted under the head "name of occupier," but the name of the landlord appeared under the head "name of owner." It was proved that both rates had been collected from and paid by the landlord. Andrews had duly paid his rent to the landlord in pursuance of the agreement.

The revising barrister decided that Andrews had been rated to and had paid all rates made for the relief of the poor in respect of the premises he occupied, within the meaning of s. 3 of the Representation of the People Act, 1867 (30 & 31 Vict. c. 102),

as construed with 6 Vict. c. 18, s. 75 (1), and as he was duly qualified in all other respects retained his name on the list.

If the Court should be of opinion that the decision was wrong, the register was to be amended by erasing the name of Andrews.

Cohen, for the appellant. It has been held that payment of rates by the landlord is equivalent to a payment by the tenant, if the tenant pays an increased rent on account of the landlord paying them: *Cook* v. *Luckett*. (2) But the voter's name here did not appear at all on the rate book, and he cannot, therefore, in any sense, be said to have been *rated* to the rates made for the relief of the poor.

[BRETT, J. The case against the appellant would be, that Andrews having paid the rates through his landlord, the name of the landlord is really only a misnomer.

KEATING, J. He certainly cannot be said to have been rated even if he can be said to have paid the rates.]

The respondent did not appear.

THE COURT (Bovill, C.J., Byles, Keating, and Brett, JJ.), were of opinion that the voter had not been rated to either of the poor-rates within the meaning of 30 & 31 Vict. c. 102, s. 3.

Decision reversed.

(1) 6 Vict. c. 18, s. 75:—"Whereas doubts have arisen how far any misnomer, or inaccurate or insufficient description in a rate of the person occupying any such premises as in the said recited act (2 Wm. 4, c. 45), are mentioned, or any inaccurate description of the premises so occupied, has the effect of preventing any such person from being registered and entitled to vote in respect of such premises in any year: be it therefore declared and enacted, that where any person shall have occupied such premises as in the said recited Act are mentioned, for twelve calendar months next previous to the last day of July in any year, and such person being the person liable to be rated for such premises, shall have been bonâ fide called upon to pay in respect of such premises all rates made for the relief of the poor in such parish or township during the time of such, his occupation, so required as aforesaid, and such person shall have bonâ fide paid on or before the 20th day of July in such year, all sums of money which he shall have been called upon to pay as rates in respect of such premises for one year previously to the 6th day of April then next preceding; such person shall be considered as having been rated and paid all rates in respect of such premises within the meaning of the said recited Act, and be entitled to be registered in respect of the same in any year; any misnomer, or inaccurate, or insufficient description in any rate of the person so occupying, or of the premises occupied notwithstanding."

(2) 2 C. B. 168; 15 L. J. (C.P.) 78.

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NORRIS v. TOWN CLERK OF HASTINGS.

IMESON'S CASE.

This was also an appeal from the decision of the Revising Barrister for the borough of Hastings. The circumstances were precisely similar to those in *Andrews' Case*, except that the overseers had written the voter's name in the rate book in respect of both rates, but without any claim having been made on the part of the voter, and at a time subsequent to the making of the second rate.

THE COURT (Bovill, C.J., Byles, Keating, and Brett, JJ.) held that this additional fact could in no way affect the question.

Decision reversed.

Attorneys for appellant: *J. G. Langham & Sons.*

Nov. 20.

CLARKE, APPELLANT; BROWN, RESPONDENT.

Parliament—Borough Vote—Boundary Act, 1868 (31 & 32 *Vict.* c. 46), s. 14—*Rating.*

By the Boundary Act, 1868, s. 14, any person who, in consequence of a change of boundary of a borough by the Act, would be entitled to be registered as the occupier of a tenement for which the owner is rated, if he had been rated for the required period, shall be entitled to be registered, notwithstanding he has not been so rated, subject to the condition that he has been duly rated as an ordinary occupier to all poor-rates in respect of the premises made after the passing of the Act. A. occupied such a tenement, and fulfilled all the conditions requisite to entitle him to be registered for the borough, but no rate had been made in the parish after the passing of the Act, and he had not claimed to be rated or paid any rates:—

Held, that A. was entitled to be registered.

APPEAL from the Revising Barrister for the borough of Denbigh.

Richard Clarke duly objected to the name of Robert Brown being retained on the list of voters for the borough.

The following facts were established by the evidence:—Brown at the time of the passing of "The Boundary Act, 1868" (31 & 32 Vict. c. 46), was the occupier of a dwelling house within the township of Bershum, for which, at the time of the passing of the Act the owner was liable to be rated instead of the occupier; by reason of an alteration of the boundary of the borough by the Act, Brown

would have been entitled to be registered as an occupier at the then next registration of parliamentary voters for the borough, if he had been rated to the poor for the whole of the required period. No poor-rate was made for the township of Bershum after the passing of the Act up to the time of the registration of parliamentary voters next after the passing thereof. Brown had not claimed to be rated to the relief of the poor in respect of the premises so occupied by him, nor had the overseers of the township put his name upon the rate for the time being. The whole of the rate made last before the passing of the Act had been collected before the passing thereof.

It was contended on behalf of the objector that in order to entitle Brown to be registered as a voter in respect of the premises under "The Boundary Act, 1868," s. 14 (1), it was necessary that he should have claimed to be rated under 2 Wm. 4, c. 45, s. 30.

The revising barrister decided that Brown was entitled to be registered under "The Boundary Act, 1868," s. 14, and retained his name on the list.

Appeals in the cases of twenty other persons were consolidated. If the Court should be of opinion that the revising barrister's decision was wrong, the register was to be amended by erasing the names of Brown and the twenty other persons from the list.

Day, for the appellant. The voter here has not fulfilled the condition mentioned in the Act, and that is a condition precedent to the right to be placed on the register. It is the voter's misfortune that there have been no rates, and that he could not therefore fulfil the condition.

[BOVILL, C.J. It has been decided that in extraparochial places persons are entitled to vote who have not paid any rates.]

(1) 31 & 32 Vict. c. 46, s. 14:—"Where by reason of an alteration of the boundary of any borough by this Act, the occupier of a dwelling house or other tenement (for which the owner at the time of the passing of this Act is liable to be rated instead of the occupier) would be entitled to be registered as an occupier at the usual registration of parliamentary voters, if he had been rated to the poor-rate for the whole of the required period, such occupier shall, notwithstanding he has not been so rated, be entitled to be registered subject to the following condition:—That he has been duly rated as an ordinary occupier to all poor-rates in respect of the premises made after the passing of this Act."

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In 30 & 31 Vict. c. 102, s. 6, sub-s. 3, the voter must have been rated to all the rates, "if any;" those words are not in the section now in question.

Sir G. Honyman, Q.C., for the respondent, was not called upon.

BOVILL, C.J. There is no doubt in this matter, and the decision of the revising barrister must be affirmed with costs.

BYLES, KEATING, and BRETT, JJ., concurred.

Decision affirmed.

Attorneys for appellant: *Blake & Hughes.*
Attorneys for respondent: *Thomas & Hollams.*

Nov. 17, 18.

MASON, APPELLANT; BENNETT AND OTHERS, RESPONDENTS.
TROTTER, APPELLANT; TREVOR, RESPONDENT.
HANKS, APPELLANT; JONES, RESPONDENT.

*Parliament—Borough Vote—Rating—Composition—*30 *&* 31 *Vict.* c. 102, *ss.* 3, 7, 8—*Small Tenements Act* (13 *&* 14 *Vict.* c. 99).

The Representation of the People Act, 1867, provides, by s. 3, that in order to be entitled to vote for a borough the occupier of a dwelling house must have been rated, as an ordinary occupier, to all rates up to the 31st of July; by s. 7, "that where the owner is rated at the time of the passing of this Act (15th of August, 1867) to the poor rate in respect of a dwelling house or other tenement, situate in a parish wholly or partly in a borough, instead of the occupier, his liability to be rated in any future poor rate shall cease; . . . provided that nothing in this Act contained shall affect any *composition* existing at the time of the passing of this Act, so nevertheless that no such composition shall remain in force beyond the 29th day of September next." The Small Tenements Act provides, by s. 1, that the vestry of any parish may order that the owners of tenements in such parish the yearly rateable value whereof shall not exceed 6*l.* shall be rated instead of the occupiers; and by s. 4, that while such order is in force the owner shall be rated at three-fourths the amount at which such tenement would have been liable to be rated if the Act had not been passed; and further, that if any owner of one or more such tenements shall be desirous of paying a rate for one year in respect of all such tenements in any parish, whether such tenements be occupied or not occupied, and shall give notice in writing of such his desire to the overseers of the poor and the surveyors of the highways within fourteen days from the 5th of March in any year, he shall be rated at a sum not being less than one half of the amount at which such tenement or tenements would have been rated if the Act had not been passed.

In parish A. and parish B. the Small Tenements Act had been applied under s. 3, and in parish A. the owner of small dwelling houses had made an agreement with the parish under s. 4, but in parish B. no such agreement had been come to.

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A rate was made in each parish after the 15th of August, but before the 29th of September, 1867, and in each rate the owners, and not the occupiers, of the dwelling houses were rated at the lower sums:—

Held, that "composition" in s. 7 of the Representation of the People Act included the compulsory as well as the voluntary rating of the owners at a less sum than the full rate, and that the owners, in both cases, had been properly rated to the rates in question; and that the occupiers were entitled to be placed on the list of voters for the borough under s. 8.

MASON *v.* BENNETT.

APPEAL from the Revising Barrister for the borough of Whitehaven.

John Mason, the appellant, duly objected to the names of John Bennett and 132 others, the respondents, being retained in the list of voters for the borough.

The respondents were inserted in the list of voters in respect of their occupation of dwelling houses within the borough. The Small Tenements Acts (59 Geo. 3, c. 12, and 13 & 14 Vict. c. 99) had for many years been applied to the borough; and under s. 4 of the latter Act (1) the owner of the premises in question entered into an agreement in 1867, which was to remain in force from the 25th of March, 1867, until the 25th of March, 1868, to pay a composition instead of the full ordinary rate in respect of the premises, whether they were occupied or not. Two rates for the relief of the poor were made in 1867, viz., on the 13th of March, and the 5th of September, and the names of the respondents appeared upon the rate books as occupiers in respect of both these rates. It further appeared from the rate books, that the owner paid in one gross sum a composition in respect of the premises as soon as it became due under each of the said rates.

In part consideration of their services as workmen, the respondents, who were all employed as colliers by the owner of the premises which they occupied, paid no rent for such premises; but the compounded rates which were paid by the owner under the rates of the 13th of March and the 5th of September, 1867, were on each occasion deducted from the wages of the respondents which became due next after such payment by the owner.

The rate made upon the 5th of September, 1867, was the rate for the time being, and remained in force until superseded by

(1) See this Act, post, p. 505, n.

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another made on the 13th of February, 1868. In respect of the last-mentioned rate, the names of the respondents appeared on the rate books rated as ordinary occupiers in respect of the premises, and many of them had in fact paid the full rates payable by them on that rate.

The Representation of the People Act, 1867 (30 & 31 Vict. c. 102), came into operation on the 15th of August, 1867. (1)

(1) 30 & 31 Vict. c. 102, s. 3:—"Every man shall in and after the year 1868 be entitled to be registered as a voter, and when registered to vote for a member or members to serve in parliament for a borough who is qualified as follows . . .

"2. Is on the last day of July in any year, and has during the whole of the preceding twelve calendar months, been an inhabitant occupier, as owner or tenant, of any dwelling house within the borough; and

"3. Has during the time of such occupation been rated as an ordinary occupier in respect of the premises so occupied by him within the borough to all rates (if any) made for the relief of the poor in respect of such premises; and

"4. Has on or before the twentieth day of July in the same year bonâ fide paid an equal amount in the pound to that payable by other ordinary occupiers in respect of all poor rates that have become payable by him in respect of the said premises up to the preceding fifth day of January."

S. 7:—"Where the owner is rated at the time of the passing of this Act to the poor-rate in respect of a dwelling house or other tenement situate in a parish wholly or partly in a borough instead of the occupier, his liability to be rated in any future poor rate shall cease, and the following enactments shall take effect with respect to rating in all boroughs:—

"1. After the passing of this Act no owner of any dwelling house or other tenement situate in a parish either wholly or partly within a borough shall be rated to the poor rate instead of the occupier, except as hereinafter mentioned.

"2. The full rateable value of every dwelling house or other separate tenement, and the full rate in the pound payable by the occupier, and the name of the occupier, shall be entered in the rate book. . .

"Provided as follows:—

"(1). That nothing in this Act contained shall affect any composition existing at the time of the passing of this Act, so nevertheless that no such composition shall remain in force beyond the twenty-ninth day of September next.

"(2.) That nothing herein contained shall affect any rate made previously to the passing of this Act, and the powers conferred by any subsisting Act for the purpose of collecting and recovering a poor rate shall remain and continue in force for the collection and recovery of any such rate or composition. . ."

S. 8:—"Where any occupier of a dwelling house or other tenement (for which the owner at the time of the passing of this Act is rated or is liable to be rated) would be entitled to be registered as an occupier in pursuance of this Act at the first registration of parliamentary voters to be made after the year 1867 if he had been rated to the poor rate for the whole of the required period, such occupier shall, notwithstanding he may not have been

On behalf of Mason it was contended, first, that the respondents were not entitled to vote, inasmuch as they had not complied

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rated prior to the twenty-ninth day of September, 1867, as an ordinary occupier, be entitled to be registered, subject to the following conditions:—1. That he has been duly rated as an ordinary occupier to all poor rates in respect of the premises after the liability of the owner to be rated to the poor rate has ceased under the provisions of this Act.

2. That he has, on or before the twentieth day of July, 1868, paid all poor rates which have become payable by him as an ordinary occupier in respect of the premises up to the preceding fifth day of January."

13 & 14 Vict. c. 99, s. 1:—"That from and after the passing of this Act, it shall be lawful for the vestry of any parish, from time to time and at all times hereafter, to declare and order that the owners of tenements in such parish the yearly rateable value whereof shall not exceed 6*l*., shall be rated and assessed to the rates for the relief of the poor in respect of such tenements instead of the occupiers thereof, and the order so made shall remain in force until rescinded in the manner hereinafter authorized."

S. 2: "That it shall be lawful for the vestry of the said parish, by a majority of two-thirds at least of the votes of the persons present at a meeting duly called for that purpose pursuant to notice, as hereinafter mentioned, and competent to vote thereat, at any time after the expiration of two years from the time when any such order shall be so made, to order that from and after a day to be fixed by such vestry, not being less than three years from the date of such original order, such order shall cease and be rescinded, in which case, from and after such last-mentioned day, the said order shall be rescinded and no longer in force: Provided nevertheless that the provisions in this Act contained shall remain and continue in force for the purpose of collecting and recovering any rate which may have been previously made in pursuance of such order."

S. 4: "That while such order as firstly hereinbefore mentioned is in force the owner of every tenement in every parish the yearly rateable value whereof shall not exceed 6*l*. shall be assessed to the rates for the relief of the poor, and to the rates for the repairs of the highways, in respect of such tenement at three-fourths of the amount at which such tenement would be liable to be rated in case this Act had not passed; and further, that whilst such order as firstly hereinbefore mentioned is in force, if any owner of one or more such tenements shall be desirous of paying a rate for one year in respect of all such tenements in any parish, whether such tenements be occupied or unoccupied, and shall give notice in writing of such his desire to the overseers of the poor and the surveyors of the highways within one calendar month after the passing of this Act, or in any subsequent year within fourteen days next after the 25th of March in that year, then and in such case such owner shall be assessed to the rate for the relief of the poor, and to the rates for the repair of the highways, in respect of such tenement or tenements respectively, whether the same be occupied or unoccupied, from thenceforth till the 25th of March following, at a sum not being less than one half of the amount at which such tenement or tenements respectively would be liable to be rated if occupied, in case this Act had not passed."

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with the conditions prescribed by s. 3 of that Act; secondly, that under s. 7 the liability of the owner to be rated instead of the occupier ceased on and after the passing of the Act; thirdly, that they had not brought themselves within s. 8, inasmuch as they had not been duly rated as ordinary occupiers to all poor rates in respect of the premises after the liability of the owner to be rated had ceased, nor had they paid all poor rates payable by them as ordinary occupiers in respect of the premises up to the preceding 5th of January.

On the other hand, it was contended in support of the votes: first, that by virtue of proviso 1 in s. 7 the liability of the owner to be rated to the poor rate did not cease until the 29th of September, 1867, and therefore that the compounded rates paid in respect of the rate made on the 5th of September, 1867, were properly paid; secondly, that the respondents were entitled to be registered under s. 8.

The revising barrister decided that under proviso 1 of s. 7 the liability of the owner to be rated did not cease until the 29th of September, and that the respondents were entitled to be registered under s. 8. He, therefore, disallowed the objections, and retained the names of the respondents upon the list.

If the Court were of opinion that his decision was wrong, the register was to be amended by erasing the names of the respondents from the list.

Nov. 17. *Keane, Q.C.*, for the appellant. The liability of the owner to be rated instead of the occupiers in this case ceased on the passing of the Representation of the People Act, 1867 (30 & 31 Vict. c. 102). This depends upon the meaning of the word "composition" in the first proviso to s. 7. If that means an agreement for the payment of a proportion only of the rates, the appellant is wrong; if it means the rate compounded for, he is right. Now s. 7 begins with a clear affirmative statement "that where the owner is rated at the time of the passing of the Act to the poor rate . . . instead of the occupier, his liability to be rated in any future poor rate shall cease." And the first rule for interpreting the rest of the section is, that it should, if possible, be so interpreted as to give effect to this distinct enactment.

[BOVILL, C.J. Is not the expression "liability to be rated" applicable rather to the case where the vestry rate the owner by their own vote, or where the owner is entitled to insist on their entering into an agreement to that effect, than to the case where there is a voluntary agreement? The words, too, of the section "rated instead of the occupier" are less appropriate in a case where the owner is to pay the rates whether the houses are occupied or not.]

In all cases under 30 & 31 Vict. c. 102, the occupiers are claiming, and there must therefore be occupiers, and an owner rated instead of them. The first subsection is equally explicit, but for the concluding words "except as hereinafter mentioned." One exception is to be found in the words which follow the second subsection, and which were explained in the case of *Stamper* v. *Sunderland*. (1) It may be that that is the only exception; it at any rate satisfies the words at the conclusion of sub-s. 1. Coming, then, to the first proviso, if the word "composition" mean agreement to compound, a rate might have been made before the 29th of September which would have continued after that date, and in which the owner should have been rated instead of the occupiers. The expression in these provisoes, at all events, means rather the rate compounded for. The second proviso speaks of "the collection and recovery of any such composition." It is impossible to collect an agreement, and the word "such" shews that the term "composition" has the same meaning as in the preceding section. The meaning of the second proviso appears to be, that where a rate has been made before the passing of the Act, in which the owners have been rated, the composition may be recovered after the passing of the Act up to the 29th of September, but not afterwards.

[BOVILL, C.J. If that were so, the first proviso would be unnecessary; the second would include the whole.]

Then s. 8 does not say that the occupiers must have been rated to all rates after the composition ceased, or after the 29th of September, but after the liability of the owner has ceased. Now that expression only occurs at the beginning of s. 7, and there it is enacted that the *liability* shall cease on the passing of the Act. In

(1) Law Rep. 3 C. P. 388.

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the case of *Stamper* v. *Sunderland* (1), the intention of the Act was held to make the time of its passing the deciding point.

[BOVILL, C.J. That was said with reference to the facts of that case, and the decision was on a part of the Act, in which the 29th of September is expressly mentioned, which involved other considerations.]

Manisty, Q.C. (*Kemplay* with him), for the respondents, was not called upon.

BOVILL, C.J. I think this is a perfectly clear case. Mr. Keane has argued with extreme ingenuity, but has failed to raise even a doubt in my mind. The object of the sections referred to was no doubt to prevent the owner being rated instead of the occupier after the passing of the Act, in order that the occupier might not be deprived of the franchise. The commencement of the 7th section provides distinctly that in some cases the rating of the owner shall cease. The words immediately preceding the provisoes specify equally clearly that in another class of cases, a class which we had to consider in the case of *Stamper* v. *Sunderland* (1), the owner shall continue to be rated. Then, in the first proviso, a third class of cases is referred to where a composition exists, in which the owner shall continue to be rated till the 29th of September, 1867. This class of cases must at any rate include the case in which the landlord has entered into an agreement under the provisions of the Small Tenements Act, s. 4, to pay a composition for the rates of all the houses owned by him, less than three-quarters of the full amount of the rates, which would have been paid by the occupiers. Mr. Keane argues that the first proviso is only intended to prevent the Act affecting any rate made previous to its passing under an agreement of composition, but if that were the intention this proviso would be unnecessary, because that is provided for by the second proviso. That the word composition is here used for an agreement to compound is clear from the last words of the proviso, "that no such composition shall remain in force beyond the given date," which shew that it is something that would otherwise have continued to exist, which a rate would not. The word composition is used in different senses, thus we say either

(1) Law Rep. 3 C. P. 388.

a man made a composition with his creditors, in which case it means an agreement, or that he has paid the composition, in which case it means the sum agreed to be paid. It seems to me therefore that the effect of the first proviso is to continue the liability of the owner to be rated till the 29th of September in all cases in which there is an express agreement for the payment of a composition with the owner existing at the time the Act passed. The language of the 8th section clearly confirms this view; it refers to the case in which the occupier is not and the owner is rated, and provides that the occupier shall be entitled to be registered, notwithstanding he may not have been rated prior to the 29th of September, 1867, under certain conditions. This seems to me to point to a time other than the passing of the Act as intended to be the dividing line with respect to the liability of the owner to be rated; the first condition indicates the same thing, for instead of requiring the occupier to have been duly rated from the passing of the Act, as it would have done if Mr. Keane be right, it requires the rating to have been to all rates "after the liability of the owner to be rated to the poor rate has ceased," an expression that embraces all the cases referred to in the previous section. It seems to me therefore that this case comes within the first proviso of s. 7, and that the decision of the revising barrister was right, and must be affirmed with costs.

BYLES, J. I am of the same opinion, and I rest my decision entirely on the first proviso of the 7th section, which says that where there is a composition existing at the passing of the Act, it is to continue till the 29th of September, 1867. I think that the agreement by the landlord in this case was a composition within the meaning of that proviso.

KEATING, J. I am of the same opinion. I have been really unable to discover how any doubt on the subject could arise.

Decision affirmed.

Attorneys for appellant: *Helder & Kirkbank, for Helder, Whitehaven.*

Attorneys for respondents: *Gregory, Rowcliffes, & Rawle, for Lumb & Howson, Whitehaven.*

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TROTTER v. TREVOR.

APPEAL from the Revising Barrister for the borough of Northallerton.

The name of William Anderson on the list of voters for the said borough was duly objected to.

The facts of the case were as follows:—William Anderson was, on the last day of July, 1868, and during the whole of the preceding twelve months, an occupier as tenant of a dwelling house in the township of Brompton, within the borough of Northallerton, of a net yearly rateable value of less than 10*l*. The Small Tenements Act (13 & 14 Vict. c. 99) (1) had been duly adopted in the township of Brompton, and was in force in that township at the time of the passing of the Representation of the People Act, 1867, and the owner of the premises occupied by Anderson was assessed to the rates for the relief of the poor, and to all other rates and assessments in respect of which the owner of such premises was rateable, pursuant to the provisions of that Act and s. 3 of 14 & 15 Vict. c. 39. It was customary in the township of Brompton to make all poor-rates prospectively to meet the future expenditure. The first rate for the relief of the poor within the township of Brompton made after the passing of the Representation of the People Act, 1867, was duly made and allowed by two justices on the 4th of September, 1867, and in that rate Anderson's name was inserted in the column headed "Name of Occupier," and the owner's name was inserted in the column headed "Name of Owner," and the owner was assessed, as he previously had been in pursuance of the Small Tenements Act, at three-fourths of the amount at which Anderson would have been rateable had the Small Tenements Act not been adopted within the township of Brompton. The amount so assessed was paid by the owner. The owner of the premises occupied by Anderson had not at any time availed himself of the provisions contained in the latter part of s. 4 of the Small Tenements Act. Anderson had not claimed to be rated instead of the owner in respect of the rate of the 4th of September, 1867. No other rate for the relief of the poor was made for the township before the 5th of January, 1868.

(1) See ante, p. 505, n.

The subsequent poor-rates, made in the year ending the 31st of July, 1868, were respectively made on the 14th of February and the 21st of May, and in both those rates Anderson was rated as an ordinary occupier, and paid an equal amount in the pound to that payable by other ordinary occupiers.

It was contended on behalf of the objector, first, that Anderson had not, during the whole of the twelve calendar months preceding the last day of July, 1868, been rated as an ordinary occupier in respect of the premises occupied by him to all rates made for the relief of the poor in respect of such premises, and had not, on or before the 20th day of July, 1868, paid an equal amount in the pound to that payable by other ordinary occupiers in respect of the same premises up to the preceding 5th of January according to the provisions of the 3rd section of the Representation of the People Act, 1867. (1) Secondly: that the liability of the owner to be rated or assessed to any subsequent rate for the relief of the poor ceased on the passing of the Representation of the People Act, 1867, under the provisions of s. 7 of that Act. (1) Thirdly: that this liability was in nowise affected by the first proviso to the last-mentioned section, as the word "composition" in such proviso related only to cases where the owner had, under the provisions of the latter part of the 4th section of the Small Tenements Act (1), compounded for the rate for a year in respect of all his tenements occupied or unoccupied within the township of a rateable value of not more than 6*l.*, and to special local Acts.

It was contended on the part of Anderson, first, that the rate made on the 4th of September, 1867, was not payable by him in respect of the premises then occupied by him, but by the owner thereof, and that therefore the 4th paragraph of s. 3 of the Representation of the People Act, 1867, was not applicable; secondly, that a composition within the meaning of that word in the first proviso to s. 7 existed in the township at the time of the passing of the Act; and that as the rate was made before the 29th of September, 1867, and as Anderson had actually been rated as an ordinary occupier in all subsequent rates, he must be taken to have been sufficiently rated under the 7th and 8th sections for the purposes of being placed on the register.

(1) For the sections of that Act see ante, p. 504, n.

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Upon the above facts the revising barrister decided that Anderson was entitled to have his name retained on the register. If the Court should be of opinion that his decision was wrong, the register was to be amended by expunging the names of Anderson and eighty-five other persons, whose cases were consolidated.

Nov. 18. *Manisty, Q.C.* (*Glyn* with him), for the appellant. The facts in this case are similar to those in *Mason* v. *Bennett* (1) just decided, except that, though the vestry had passed a vote adopting the Small Tenements Act, so that the owner was rated for the houses in question instead of the occupier, there was no special agreement between the parish and the landlord with respect to the rating of all his houses, occupied or unoccupied, but he was simply rated instead of the occupier for occupied houses at three-fourths of the usual rate. The revising barrister has decided that the parish did right in continuing to rate the owner after the passing of the Representation of the People Act, 1867, till the 29th of September, 1868; but the case comes precisely within the substantive enactment of s. 7, and does not come within the first proviso, which refers only to cases where there is a composition, i.e., an express agreement between the landlord and the vestry for his paying a definite sum less than he would otherwise do for the whole of his houses occupied or unoccupied. The word composition appears first to have been used in 14 & 15 Vict. c. 14. The Reform Act (2 Wm. 4, c. 45, s. 30), had provided that any occupier might claim to be rated, and on doing so and paying the full amount of the rates, should be entitled to have his name put upon the rate. Under that Act, however, the occupier was obliged to make a fresh claim every year. The 14 & 15 Vict. c. 14, was passed to remedy this evil, and provided (ss. 1 and 2), that an occupier having once claimed need not renew his claim, but should remain liable to pay the rates as long as he occupied the premises and remained on the register. Then it is provided by s. 3, that "where by a *composition with the landlord* a less sum shall be payable than the full amount of rate which, except for such composition, would be due in respect of the same premises, the occupier claiming to be rated shall not be bound to pay or tender more than the amount then payable under

(1) Ante, p. 502.

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such composition." The words "with the landlord" shews that this refers only to the case where there is an express agreement with the landlord, and not to the case where a less sum is paid merely by the vote of the vestry; and this is fair, because where there is an express agreement the parish receive rates in respect of unoccupied houses, and they cannot therefore be entitled to receive full rates for the occupied houses. Whatever doubt, however, may exist about the meaning of the word composition in former Acts, it seems quite clear from the context what it signifies in the Representation of the People Act, 1867. The owner is never rated by the general law, but only under special Acts, such as the Small Tenements Act, and many local Acts. The 7th section of the Representation of the People Act makes the rating of the owner in all cases to cease, but the first proviso excepts the case of a composition existing at the time of the passing of the Act. If that included the case in which the owner was rated by the force of the Small Tenements Act adopted by a vote of the vestry, and not only the case where there is an express agreement with the landlord under the authority of that or some similar Act, the proviso would be co-extensive with the enactments, and in fact simply a contradiction of it. Moreover, the expression, "a composition existing at the time of the passing of the Act," would not be appropriate, to the mere fact of an Act being then in force which altered the amount of rates payable in a particular case. The legislature might well hesitate to put an end at once to an agreement which would otherwise last for a year; and the end of the half year, which is the 29th of September, would be a natural date at which it should cease; but no such considerations would prevent them from putting an end to the application of an Act, the application of which the vestry itself could make to cease at any moment by merely passing a resolution to that effect. The second proviso of the 7th section enables a rate made previously to the Act to be collected after the passing of the Act up to the 29th of September, 1867. This would be meaningless if a fresh rate could, under the first proviso, even be made during that time.

Gray, Q.C. (*Cave*, with him), for the respondents. The question in this case, no doubt, is what is the meaning of the word composition in the first proviso of s. 7 of the Representation of the People

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Act, 1867? The respondents contend that it includes every case where the occupier is not on the rate but the owner is, and is rated at a lower rate than the other occupiers.

[BOVILL, C.J. Are there any Acts under which the owner is rated instead of the occupier except Sturges Bourne's Act (59 Geo. 3, c. 12), the Small Tenements Act (13 & 14 Vict. c. 99), and local Acts?]

There do not appear to be any other public Acts.

[BOVILL, C.J. Are there any other classes of cases in which the owner is rated instead of the occupier, except those in which the overseers compulsorily rate the owner at three-fourths of the full rate, and cases in which the owners agree to be rated at less than three-fourths the full rate, paying the rate whether the houses are occupied or not?]

Probably not; though it often happens without authority.

[BOVILL, C.J. That is illegal. We cannot suppose, therefore, that it was in the contemplation of the legislature.]

It was hardly illegal, for until the passing of the late Act, the right of the voter was always considered as a privilege, and the earlier Acts gave him a right to claim to be rated if he liked, but he was not obliged to do so. The policy of the late Act, on the contrary, is to compel all occupiers to be rated, and it is consequently made illegal to place the owner on the rate in order that the occupier may necessarily be so. Even, therefore, if the first proviso includes all the cases to which the earlier part of the section could refer, there would be still a sufficient object in the general enactment at the commencement of the section, namely, to make clear the alteration intended in the general law. The Small Tenements Act does not use the word "composition," or "compounding," and those terms are in fact of more recent origin. They are first used in 14 & 15 Vict. c. 14, and there they include both the classes of cases, for 2 Wm. 4, c. 45, s. 30, refers to all persons who are not on the rates, and therefore unable to vote; and 14 & 15 Vict. c. 14, was passed to relieve them from the necessity of making an annual claim, or paying a larger sum than their landlords would have done. But, further, it is notorious that "compounding" and "compound householder," were words in every one's mouth two years ago, at the time when the Representation of

the People Act was in progress, and without referring to what passed in parliament, it is well known that it was used in the newspapers and common conversation to include all cases in which the owner was rated instead of the occupier and at a reduced rate. If the term was only intended to apply to the cases in which the landlord made an express agreement with the parish, what was the term applicable to the other cases, and why was no provision made respecting them? It is only in some cases that the vestry could put an end by vote to the compounding, for 13 & 14 Vict. c. 99, s. 2, shews that when the vestry have by their vote adopted the Small Tenements Act, it must continue in force for at least three years. The reason that the 29th of September, 1867, has been fixed on for the composition in all cases to cease is probably because, that being quarter-day, there would then be an opportunity, in many instances, for the landlords and tenants to readjust their rents upon the new footing.

Manisty, Q.C., in reply.

THE COURT intimated that they would hear the argument in *Hanks* v. *Jones* before giving judgment.

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Appeal from the Revising Barrister for the borough of Malmesbury.

The facts were similar to those in *Trotter* v. *Trevor*.

It was contended on behalf of the appellant that he was entitled, as a compound householder, to be registered under s. 8 of the Representation of the People Act, 1867, for that the effect of the first proviso in s. 7 of that Act, coupled with the enactment in s. 8, was to keep alive the liability of the owner to be rated under the Small Tenements Act, instead of the occupier, until the 25th of September, 1867.

The revising barrister decided that the house occupied by the appellant was a dwelling house for which the owner instead of the occupier at the time of the passing of the Representation of the People Act, 1867, was liable to be rated; that by virtue of s. 7 of that Act this liability of the owner to be rated in any future poor

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rate ceased upon the passing of that Act; that the first proviso in s. 7 had not the operation contended for by the appellant; that the rate in question having been made after the liability of the owner to be rated had ceased, and the appellant not having been duly rated thereto as an ordinary occupier, the first condition of s. 8 had not been satisfied, and the appellant was not entitled to be registered under s. 8, and upon these grounds he expunged the name of the appellant from the list of voters.

The question for the opinion of the Court was whether the liability of the owner to be rated instead of the occupier had ceased, under the provisions of the Representation of the People Act, 1867, prior to the making of the rate on the 31st of August, 1867.

Macnamara (*Sir J. B. Karslake, A. G.*, and *Keane, Q.C.*, with him) for the appellant. The word composition must be taken in its popular sense, which is a rate abated or compounded for; there is no reason why there should be the distinction contended for by the other side between cases in which the landlord agrees specially as to the terms of his rating and those in which he does not. In both cases the resolution of the vestry must be passed, and is the foundation of the liability.

[BOVILL, C.J. There are several distinctions between the two classes of cases. Thus, in the former, the owner is rated without his consent; in the latter, it is with his consent. In the former, the system of rating is applicable to the whole parish, applying to all owners of tenements under the value of 6*l.*; in the latter, the lower rating is applicable only to those who have given the required notice and agreed with the vestry as to the abatement at which they shall be rated. In the former case, too, the system of rating must last for three years, and may then be discontinued at any time; in the latter, the agreement is always for one year certain, and not longer. The real question is whether, in consequence of these distinctions, the legislature have treated them differently in the late Act.]

The word composition is certainly used in 14 & 15 Vict. c. 14, to include both classes of cases.

[BOVILL, C.J. That Act being a Registration Act cannot have referred to the Small Tenements Act (13 & 14 Vict. c. 99), which

applies only to tenements below the value of 6*l.*, the occupiers of which had not then the franchise, nor can it have had reference to Sturges Bourne's Act (59 Geo. 3, c. 12), which did not apply to parliamentary boroughs. It must have had reference, therefore, to local Acts, of which there were many throughout the country.]

Mellish, Q.C. (*Greville Howard* with him), for the respondent. It seems to be agreed that the question turns on the meaning of the word "composition" in the first proviso to s. 7 of 30 & 31 Vict. c. 102, and that there are two classes of cases to which it may apply. The word "composition," in its plain and ordinary sense implies an agreement, while in the one class of cases there is no agreement, only an enactment applied to the parish by the vote of the vestry. There is good reason why the legislature should make the distinction, because in the one class of cases the vestry could themselves put an end to the rating of the owners at any time after the first three years had elapsed, while in the second there was a definite binding agreement which it might well be considered unjust to terminate abruptly.

[BOVILL, C.J. But it is, at all events, terminated only six weeks after the passing of the Act, although the agreement would otherwise last till the 25th of March in the following year.]

The second proviso seems to carry out the distinction between the two classes of cases, the word "rate" in it referring to the cases in which the owner was rated under the general provisions of the Small Tenements Act for three-fourths of the whole rate, while the word "composition" refers to the cases where by agreement he was rated to a less sum. The proviso, however, was probably inserted ex cautelâ; it can hardly be doubted that rates made before the passing of the Act could in any case have been collected. The same use of the word is to be found in 14 & 15 Vict. c. 14; by s. 1 the tenant is to tender the sum due, which would be the three-fourths payable under the general provisions of the Small Tenements Act, and s. 3 then provides that when there is a composition with the landlord, the tenant need only pay the sum due under that composition.

[BRETT, J. The same construction would apply to the Reform Act (2 Wm. 4, c. 45), s. 30, and so the provisions of the later Act as to the amount to be tendered would be unnecessary.]

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It would be necessary in the case of local Acts. In a local Act relating to the town of Walsall (11 & 12 Vict. c. clxi. ss. 53, 56) (1) owners are to be rated at the full rate, but on notice given by the owner he is only to pay two-thirds of the full rate. Other local Acts are probably in the same form.

[KEATING, J. That will also give a reason for the general enactment in s. 7 of 30 & 31 Vict. c. 102, as it would afford an instance in which the owner was rated instead of the occupier, and yet paid the full rate, so that there was no composition so as to bring the case within the first proviso.]

It is worthy of remark, however, that in the local Acts, whenever there is less than the full sum paid, it is by agreement, which points to the meaning of composition as referring to agreements only.

Macnamara, in reply. In neither case is the rate paid by the owner under agreement, but he is rated under the statute in accordance with a statutable notice given by him.

BOVILL, C.J. The question in this case and the case of *Trotter* v. *Trevor* is the same, and entirely depends on what is the construction of the words, "composition existing at the time of the passing of this act," in 30 & 31 Vict. c. 102, s. 7, proviso (1.), which enacts, "that nothing in this Act contained shall affect any composition existing at the time of the passing of this Act, so

(1) 11 & 12 Vict. c. clxi. s. 53:—"The owner of every tenement within the parish of Walsall which may be assessed to the poor-rate . . . . at any annual sum at or under 6*l*. 10*s*. rateable value . . . . or which is let to weekly or monthly tenants, or ready furnished, or in separate apartments, shall hereafter be rated and pay such several poor-rates . . . . in respect of such tenements, instead of the actual occupiers thereof; and upon non-payment of any such rate, or of the sum for which the same may be compounded as hereinafter mentioned, such rate or sum shall and may be levied and recovered by distress . . . ."

s. 56:—"In all cases where any owner shall have been, or shall be, liable to be rated to the said poor rates . . . . for the borough of Walsall, in respect of such tenement as aforesaid, it shall be lawful for such owner to give notice to the officer authorized to make or collect any such rate, of his intention to compound for the same by payment of a reduced rate, whether such tenement be occupied or not; and in every such case every such owner shall thenceforth, until he shall have given the like notice for determining such composition, be liable to pay two-thirds of such rate only, and all such compositions shall be entered in the rate-book of such officer, and such owner shall be thenceforth rated accordingly."

nevertheless, that no such composition shall remain in force beyond the 29th day of September next." If the proviso included every case within the principal enactment in s. 7, the difficulty would present itself of the one stultifying the other, and my great difficulty was to see what case there was which, being within the principal enactment, was not also within the proviso. Towards the close of the argument, however, we were referred to various local Acts, which provide that the owners of tenements below a certain rateable value, or let in a particular way, shall be rated and pay rates instead of the occupiers, and also that such owners may give notice of their intention to compound by paying a reduced rate, whether the premises are occupied or not, in which latter case they are to pay only two-thirds. And thus it seems that the system adopted in some cases was that the owners were assessed for the occupiers, although there was no diminution in the amount of the rates, and that there was also power given for making a composition with a landlord by which a less sum was to be paid by him, and paid irrespective of whether the premises were occupied or not. This system was in existence in various places when the Small Tenements Act (13 & 14 Vict. c. 99), was passed, which authorized the vestry of a parish to order that owners of tenements of a yearly rateable value, not exceeding 6*l*., should be rated instead of the occupiers, and rated at only three-fourths of the ordinary assessment, such order to continue in force for at least three years, but be determinable in a particular way at that or any future date; the Act also authorized the landlords of such tenements to agree to pay for one year, and be assessed at a sum not less than one-half the usual assessment, whether the premises were occupied or not. Consequently, under that Act, there were two cases: the first, where all the owners of such tenements paid a less sum instead of the occupiers; the second, where particular owners undertook to pay a less sum whether the premises were occupied or not; and under various local Acts the owners paid the full amount, or paid by agreement less than the full amount, in place of the occupiers. Then came 14 & 15 Vict. c. 14; but this statute, as has been pointed out, is a Registration Act, and seems to have no operation on 13 & 14 Vict. c. 99, for when 14 & 15 Vict. c. 14, was passed, the occupation franchise was in respect of

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a 10*l.* annual value, and therefore that Act could have no application to tenements not exceeding 6*l.* value. This Act would not apply to Sturges Bourne's Act (59 Geo. 3, c. 12), because the latter (s. 23) is not to apply to parliamentary boroughs, and it could not apply to the Small Tenements Act (13 & 14 Vict. c. 99), because the Small Tenements Act applied only to 6*l.* tenements. Therefore 14 & 15 Vict. c. 14, must apply to the local Acts, under which the owner might, according to circumstances, pay either the full amount of, or a less amount than, the ordinary assessment, a conclusion which is fortified by reference to ss. 1 and 3 of the Act, for s. 1 speaks of a person tendering the "full amount of the rate or rates (if any) due," which seems to refer to the case where by a local Act the owner pays the full amount, and s. 3 refers to "cases where, by any composition with the landlord, a less sum shall be payable than the full amount of the rate:" so that the distinction is made between the payment of the full and a less amount. The 30 & 31 Vict. c. 102, s. 7, enacts that "where the owner is rated at the time of the passing of this Act to the poor-rate in respect of a dwelling house or other tenement situate in a parish wholly or partly in a borough instead of the occupier, his liability to be rated in any future poor-rate shall cease, and the following enactments shall take effect with respect to rating in all boroughs:—1. After the passing of this Act no owner of any dwelling house or other tenement situate in a parish either wholly or partly within a borough shall be rated to the poor-rate instead of the occupier except as hereinafter mentioned," words which would apply to every case but for the exception. Then, by proviso (1.), it was provided "that nothing in this Act contained shall affect any composition existing at the time of the passing of this Act, so nevertheless that no such composition shall remain in force beyond the 29th day of September next." Now, if "composition" is there used for the purpose of designating the cases where less than the full amount is paid, there is no difficulty in the construction of the Act, and though, as I pointed out during the argument, the two cases under the Small Tenements Act (13 & 14 Vict. c. 99) differ in various respects—for instance, the one applying universally, the other to particular cases; the one coming into force without, the other with, the agreement of the owner; and the one remaining in

force for one period, the other for another period—I have yet failed to discover any reason why the legislature should make the then existing state of things come to an end in the one case on the 15th of August, and in the other on the 29th day of September, 1867. It has been said that the reason is that the 29th of September is a quarter-day, and was fixed with a view to the convenience of arrangements between landlords and tenants; but as far as I can see there is equal reason as respects landlords and tenants for fixing on this day in the one case as in the other, and it is difficult to see why there should be a difference of six weeks in the two cases. In the particular case before us it is true that as more than three years had elapsed from the original order, the vestry could put an end to the arrangement when they pleased; but there might be cases in which this would not be so, and no argument can therefore be founded upon it. Looking, then, to the 14 & 15 Vict. c. 14, and seeing the distinction there taken between the payment of the full and a less amount, I conclude that the legislature meant the word "composition" in 30 & 31 Vict. c. 102, s. 7, proviso (1.), to apply to cases where a less sum was paid. We have already held in *Mason* v. *Bennett* (1), that the case where less than the full amount is paid by agreement is clearly within the proviso; there is no reason why the case where a less sum is paid without agreement should not equally be within it; and I think the proviso applies to all cases where less than the whole amount is to be paid by the owner. Section 8 is quite consistent with our decision, the result of which is that the rating of an owner to the full amount is to cease on the passing of the Act; and where the landlord is rated to a less amount, such rating is to cease on the 29th of September. I am of opinion, on the whole, that the rating of the owner (though there be no agreement) at a smaller sum than the ordinary and full assessment, is a "composition" within 30 & 31 Vict. c. 102, s. 7, proviso (1.), and therefore that the decision of the revising barrister must be affirmed in the first case, and reversed in the other.

BYLES, J. I am of the same opinion, and I base my judgment upon the words of the first proviso. I think the word "composi-

(1) Ante, p. 502.

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tion" includes every rate that is abated. Now there are two sorts of abated rates, both of which derive their force from Acts of Parliament, though in one the amount of the composition is settled by agreement, and I see no reason to distinguish between them. In both these cases, therefore, the owner was properly rated, the rate being prior to the 29th of September.

KEATING, J. I am of the same opinion. I agree with my Lord and my Brother Byles as to the meaning of the word "composition." There are two classes of cases in which the owner formerly paid less than the ordinary amount of rates; in the first case by an order of the vestry, and in the second case under a special agreement. But the word "composition" was applied in popular language equally to both. No satisfactory, though some ingenious, reasons have been given why one class should have been excluded from the proviso and not the other, and if it had been intended to make such a distinction, one would have expected to find clear words used for the purpose.

BRETT, J., concurred.

Decision in Trotter v. *Trevor, affirmed; and in Hanks* v. *Jones, reversed.*

Attorneys for appellants, respectively: *Crowdy, for Trotter. Bishop Aucklands; Dean & Chubb.*

Attorneys for respondents, respectively: *Lowe & Co.; Bower & Cotton.*

CUTHBERTSON, APPELLANT; BUTTERWORTH, RESPONDENT. 1868 *Nov.* 24.

Parliament—Borough Vote—Reform Act (2 *Wm.* 4, *c.* 45), *s.* 27—"*House or other Building*"—*Chambers.*

The tenant for business purposes of a separate room forming part of a set of chambers in the Temple, is not entitled to be registered as the occupier of a tenement, within 2 Wm. 4, c. 45, s. 27.

APPEAL from the decision of the Revising Barrister for the city of London.

The respondent, on the list of occupiers for the Inner Temple, was objected to by the appellant.

The landlord of the respondent rented a set of chambers in the Inner Temple, which is extra-parochial. This set of chambers formed part of one of the floors of the building, which part was so structurally severed from the rest of the building as to be of itself a house. This set of chambers consisted of two rooms and a vestibule. Each room was severed from the other; there being no direct communication between the two. Each communicated by its own door with the vestibule, which communicated with the landing on a public staircase, by a door. The subject of the respondent's occupation was one of these rooms. The respondent had occupied for the statutory period, exclusively and as sole tenant, this room, over the door of which communicating into the vestibule he had exclusive control. Under or by virtue of his tenancy, the respondent had a right of way over the vestibule, and in common with his landlord, who occupied the other room, perfect control over the door communicating with the landing, so as at all times to command free ingress and egress to and from the room which he occupied from and to the landing. The respondent was a barrister, and occupied the room for the sole purpose of transacting business in his profession of a barrister, and not for a dwelling house.

It was objected that, having regard to the above facts, the subject of occupation of the respondent was not sufficient in kind to be a qualifying tenement, within any of the qualifications enumerated in 2 Wm. 4, c. 45, s. 27.

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The revising barrister held that the respondent occupied as tenant a sufficient tenement to entitle him, if duly registered, to vote in the election of members for the city of London, within the meaning of s. 27.

The question for the opinion of the Court was, whether or not the revising barrister rightly decided that the respondent was entitled to have his name on the register.

The cases of twenty-one others were consolidated.

Prentice, Q.C., for the appellant. The room in question clearly is not a "separate dwelling house," nor is it a "house" or "building" within the meaning of s. 27 of 2 Wm. 4, c. 45.

Underdown, for the respondent. The claimant is entitled to be registered as tenant of a "building" ejusdem generis with those enumerated in 2 Wm. 4, c. 45, s. 27. There is as complete and substantial a structural severance of the room occupied by him from the rest of the house as there was in *Wright* v. *Town Clerk of Stockport* (1); *Toms* v. *Luckett* (2); *Downing* v. *Luckett* (3); *Bryan Kearney's Case* (4); and *Henrette* v. *Booth* (5): and the case is altogether unaffected by *Cook* v. *Humber* (6), and *Wilson* v. *Roberts*. (7)

BOVILL, C.J. No one of the cases cited goes the length of shewing that a single room in a set of chambers in one of the Inns of Court is a "house or other building" within the Act. The cases have decided that, where the subject of occupation is structurally severed from the rest of the premises, and substantially used as a separate dwelling, or as a shop, counting house, or warehouse, the occupier may be registered. But by the very description of the subject of occupation in this case it is clear that it is a part of a set of chambers, the structural nature of which as well as the use to which it is applied shew that it substantially forms an unsevered portion only of a house. I am of opinion that the decision of the revising barrister must be reversed.

(1) 5 M. & G. 33; 1 Lutw. 32.
(2) 5 C. B. 23; 17 L. J. (C.P.) 27.
(3) 5 C. B. 40; 17 L. J. (C.P.) 31.
(4) Alcock's Reg. Ca. 22.
(5) 15 C. B. (N.S.) 500; 33 L. J. (C.P.) 61.
(6) 11 C. B. (N.S.) 33; 31 L. J. (C.P.) 78.
(7) 11 C. B. (N.S.) 50; 31 L. J. (C.P.) 78.

BYLES and KEATING, JJ., concurred.

BRETT, J. Without defining what is a "dwelling house," it is enough to say that the occupation here described is not of a dwelling house or part of a house separately rated, within the definition given in s. 61 of 30 & 31 Vict. c. 102; nor is it a house or other building within 2 Wm. 4, c. 45, s. 27. The revising barrister finds that the set of chambers is so structurally severed from the rest of the building as to be of itself a house. Then he describes the two rooms, and inferentially he finds that there is no structural severance.

Judgment reversed.

Attorney for appellant: *J. R. Bailey.*

Attorneys for respondent: *Travers Smith, & De Gex.*

CUTHBERTSON, APPELLANT; HAINS, RESPONDENT.

Nov. 24.

Parliament—Borough Vote—Representation of the People Act, 1867 (30 & 31 *Vict. c.* 102), *ss.* 4, 61—*Part of a House—Rating—Lodger*—2 *Wm.* 4, *c.* 45, *s.* 30.

A. occupied exclusively and as sole tenant, for his dwelling, rooms not so structurally severed from the rest of the building as to constitute of themselves a house. A. having claimed to be rated, his name was inserted by the overseers in the rate-book bracketed with those of the other occupiers in the house, no sum being separately assessed against A., but the rental, rateable value, and rate in the pound of the whole house only, appearing in the appropriate columns. No sum had been paid or tendered by A. in respect of poor-rate:—

Held, that, whether or not A. was the occupier of a "dwelling house" within the meaning of s. 61 of 30 & 31 Vict. c. 102, he was not "separately rated to the relief of the poor" within that section, nor had he done enough to entitle him to be "deemed to have been rated" within s. 30 of 2 Wm. 4, c. 45.

Semble, that A. was a "lodger."

APPEAL from the decision of the Revising Barrister for the city of London.

The respondent, on the list of occupiers for the parish of St. James, Garlick Hithe, was duly objected to.

The respondent occupied exclusively and as sole tenant, for his dwelling house, certain rooms in a house No. 2, St. James's Place, in the parish of St. James, Garlick Hithe, London. Such rooms were not so structurally severed from the rest of the building as to constitute of themselves a house. The defendant had the exclusive

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control over the doors which shut the said rooms off from the adjoining passage; and he had, under and by virtue of his tenancy, a right of way over the passage from his rooms to the house door, and in common with the other occupiers resident in the house perfect control over the house door, so as at all times to command free ingress and egress from and to the street.

The respondent had in due time served upon the overseers of the parish of St. James, Garlick Hithe, a claim to be rated in respect of the said premises, in the following form:—

"To the overseers of the parish of St. James, Garlick Hithe.

"I hereby give you notice that I occupy a part of a house at No. 2, St. James's Place, in your parish (in successive occupation from, &c.); and I claim to be duly rated for the same to the rates made for the relief of the poor in your parish, pursuant to the English Reform and Parliamentary Registration Acts."

In pursuance of such claim, the overseers had entered the name of the respondent in the occupiers column of the poor-rate book for the parish, bracketed jointly with the other occupiers of the said house; and, in the appropriate columns, in line with the names, the rental, rateable value, and rate in the pound of the whole house alone appeared. No separate rating or assessment was carried out opposite the name of or with reference to the respondent.

In all other respects the respondent was proved to be qualified to be registered.

It was objected, that, having regard to the above facts, the subject of the respondent's occupation was not a part of a house occupied as a separate dwelling, and separately rated to the relief of the poor, within the meaning of s. 61 of the Representation of the People Act, 1867, 30 & 31 Vict. c. 102.

The revising barrister held, that the respondent had, by his occupation of the said premises in manner aforesaid, occupied part of a house as a separate dwelling; and that the same must be deemed to have been and had been separately rated to the relief of the poor; and that therefore he had been an inhabitant occupier of a "dwelling house," within the meaning of the Act; and he retained the respondent's name on the list of voters for the city of London in respect of the occupation of dwelling houses.

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The question for the opinion of the Court was, whether or not the revising barrister had rightly decided that the respondent and five other persons similarly circumstanced were entitled to have their names retained on the register.

Prentice, Q.C., for the appellant. From the statement of the case it clearly appears that the respondent is not the occupier of a "part of a house," within the meaning of the interpretation clause (s. 61) of the Representation of the People Act, 1867 (30 & 31 Vict. c. 102), but merely a "lodger." The claim to be rated cannot alter the nature of his qualification. The object of s. 61 was, to settle the doubts which had been created by the decided cases, as to when a "part of a house" was to be considered a "house," within s. 27 of the Reform Act, 2 Wm. 4, c. 45. But, if the subject of occupation here is to be deemed "a separate dwelling house," what necessity was there for s. 4 of 30 & 31 Vict. c. 102?

[BOVILL, C.J. There is no separate rating of this claimant; nor has he paid or tendered any rate.]

It will be said that, by virtue of 2 Wm. 4, c. 45, s. 30, one who claims to be rated is in the same position as one who is actually rated.

[BOVILL, C.J. A claim to be rated alone is not enough.]

Underdown, for the respondent. The respondent has duly claimed to be rated to the relief of the poor, and his name has been inserted in the rate-book. He has, therefore, done all that is required of him to entitle him to be "deemed to have been rated," within s. 30 of 2 Wm. 4, c. 45.

[BOVILL, C.J. There are two questions presented to us, first, whether the respondent is the tenant of a "part of a house occupied as a separate dwelling;" secondly, whether he is separately rated to the relief of the poor. There is no statement in the case that there was a separate rating, or that the amount of the rate was either paid or tendered.]

There is nothing in the statement of the case to negative the presumption of payment or tender.

[BOVILL, C.J. The question for us to determine is whether, upon the facts stated, the revising barrister has come to a right conclusion.]

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The Court will assume, in the absence of all evidence to the contrary, that all has been rightly done: *Jones* v. *Innous.* (1)

BOVILL, C.J. I express no opinion as to whether or not the respondent was properly rateable as the occupier of a separate dwelling house, within the statute. It is enough to say that we have no materials laid before us to satisfy us that he was "separately rated to the relief of the poor." His name appears in the rate-book bracketed with those of several other occupiers of rooms in the house; but there is no separate sum inserted therein as payable by him. The decision of the revising barrister must be reversed.

KEATING, J. Suppose the respondent had failed to pay the rate, what sum could the overseers have distrained upon him for?

BRETT, J., concurred.

Decision reversed. (2)

Attorney for appellant: *J. R. Bailey.*
Attorneys for respondent: *Travers Smith, & De Gex.*

(1) 17 C. B. 290; 25 L. J. (C. P.) 73.

(2) HAINS, APPELLANT; CUTHBERTSON, RESPONDENT.

Nov. 24, 1868. The appellant,—the respondent in the above case,—claimed to be registered in respect of his occupation as stated in the case.

The revising barrister held that the appellant must, for the purposes of 30 & 31 Vict. c. 102, be deemed to have been rated to the relief of the poor in respect of the premises from the period at which the rate had been made in respect of which he had claimed to be rated; and that, thenceforward, in consequence of such rating, he had not occupied the premises as a lodger, within the meaning of the Act; and he decided that he could not insert the name on the register as a lodger.

Tindal Atkinson, Serjt., for the appellant.
Prentice, Q.C., for the respondent, admitted he could not support the decision.

PER CURIAM. The decision must clearly be reversed. The claimant will consequently stand upon the register in the character which he seems to fill, viz., that of a lodger.

FRYER, APPELLANT; BODENHAM, RESPONDENT. 1869 Jan. 22.

Parliament — Borough Vote — Representation of the People Act, 1867 (30 & 31 *Vict. c.* 102), *s.* 3 — *Occupation as Owner — Charitable Foundation — Freehold Interest.*

Each of the appellants had during the qualifying period occupied one of several houses known as Lord Conningsby's Hospital (which was originally founded in 1614), and had been separately rated and had paid all poor-rates due in respect thereof. According to the rules of the foundation, the several occupiers of the houses, who were called "servitors," and were subject to the superintendence of a "corporal," were nominated by A., the owner of the Conningsby estates, out of which fixed payments were made to them; and A. could vary the rules. The servitors paid no rent; and clothes and coals were supplied to them out of the funds of the hospital. The houses were situate in a quadrangle entered by an iron gate the key of which was kept by the corporal; the gate was locked at 9 P.M., after which time none of the inmates could go beyond the limits of the hospital without the corporal's leave. None of the houses had ever been let by any of the persons appointed to them; but a garden outside the hospital, and appertaining to the house, held by one of the inmates, had been let by him, because he was too old to cultivate it himself. When a man is appointed to one of the houses, he holds it and a garden near to it for his life, and cannot be disturbed in his occupation by A. or any one else, except for murder or felony, or the like.

Held, on the authority of *Simpson* v. *Wilkinson* (7 M. & G. 50; 1 Lutw. 168), and *Roberts* v. *Percival* (18 C. B. (N.S.) 36; 34 L. J. (C.P.) 84), that, the occupiers of the houses in question, having a freehold for life, occupied as owners within s. 3 of the Representation of the People Act, 1867; and the circumstance of the endowment being more or less eleemosynary in its character did not deprive them of the franchise.

APPEAL from the Revising Barrister for the city of Hereford.

The respondent duly objected to the name of the appellant being retained on the St. John Baptist list of voters.

It was proved that the appellant occupied one of a series of eleven houses known as Lord Conningsby's Hospital, originally founded in 1614, and that he had so occupied during the qualifying period, and had been separately rated, and had paid all poor-rates in respect of such occupation, but that some of the said rates had been afterwards returned to him by Mr. Arkwright hereinafter named, in consequence of a request made by the occupants of the hospital; but such return was optional, and a mere matter of grace on his part.

The appellants' claim was in respect of occupation of one of a

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series of houses known as Lord Conningby's Hospital for and occupied by soldiers of three years service, and domestic servants who have lived in service seven years and are badly off in their circumstances; and that the said eleven occupiers (of whom the appellant was one) are called servitors, and that one of them is appointed superintendent or corporal by Mr. Arkwright, and is called Corporal Conningsby.

The persons who occupied these eleven houses are nominated by Mr. Arkwright, of Hampton Court, who owns the Conningsby estate, out of which fixed payments to the occupants of the houses are made.

Rules had been made in the year 1614 (when the hospital was formed) for the government of the occupants of the hospital; but it appeared that these had become partly obsolete. It was, however, in evidence that Mr. Arkwright could do what he liked with regard to the rules, and that he appointed the inmates of the hospital as servitors to their respective houses, and that the funds of the hospital came from Mr. Arkwright's estate, and are distributed equally among the servitors.

The servitors paid no rent, and clothes and coals were supplied to them out of the funds of the hospital.

The houses are built on two sides of a quadrangle, a portion of the other side of which is occupied by a chapel and a common hall. This quadrangle is entered by an iron gate which opens into the street, and the key of which gate is kept by the corporal of the hospital.

The gate is locked at 9 o'clock in the evening; after which time none of the occupants of the hospital can enter from or go out into the street, or beyond the limits of the hospital, without the special licence of the corporal. The occupants of the houses occasionally dine together in the common hall; and they are expected to attend service on certain fixed days in the chapel, and not to be absent from their houses more than three days at a time, without the leave of the corporal.

When a man is appointed to one of the houses, he holds it and a garden near to it for his life, and cannot be disturbed in his occupation by Mr. Arkwright or any one else, except for a murder or a felony, or something of that kind.

None of the houses had ever been let by any of the persons appointed to them; but a garden outside the hospital, and appertaining thereto, held by the appellant, had been let by him because he was too old to cultivate it himself. There is no service or duty to be performed by the servitors; but they are subject to certain rules of the hospital, which they must obey under penalty of a fine. They are bound by these rules to attend the chapel at regular times, to keep the windows of their houses clean, not to become intoxicated, nor to use profane oaths, and not to be absent from the hospital for more than three days at any one time without the corporal's leave.

The appellant did not produce any deed or other document.

The revising barrister held that the occupation of the appellant was eleemosynary in its character, and that he did not occupy as owner or tenant, within the meaning of the Representation of the People Act, 1867 (30 & 31 Vict. c. 102), s. 3, and accordingly he expunged the names of the appellant and of nine other persons whose cases were consolidated with the principal case from the register.

If the Court should be of opinion that the appellant and the nine others objected to did occupy as owners or tenants within the meaning of the statute, their names were to be restored to the list from which they had been expunged, and the register of voters was to be altered accordingly.

Dowdeswell, Q.C. (*G. Browne* with him), for the appellant. The persons occupying the houses in question occupy as owners having a freehold interest, and pay rates, and consequently are entitled to be upon the register. The case falls within the principle laid down by this Court in *Simpson* v. *Wilkinson* (1), and *Roberts* v. *Percival* (2), where the inmates of Burleigh Hospital were held to have a freehold interest in their respective rooms. There is nothing more eleemosynary in the nature of the occupation of these persons than there was in that of the bedesmen of Burleigh Hospital, and, if there were, it would be no disqualification. On that argument being pressed upon the Court in *Roberts* v. *Percival* (2), Erle, C.J., said: "A great deal of ambiguity has been brought into these

(1) 7 M. & G. 50; 1 Lutw. 168. (2) 18 C. B. (N.S.) 36; 34 L. J. (C.P.) 84.

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cases by saying that a man would be prevented from being qualified though he had a legal or equitable freehold, if the mode of occupation was eleemosynary. I have a great desire to avoid introducing anything that is, to my mind, an entirely mistaken notion as to the question whether the party is owner of the equitable freehold or not. In deciding this question, it may be very material to see whether the trustees held in trust to take the profits and dispose of them in an eleemosynary manner to the objects of the donor's bounty, but, if a person have an estate, whether legal or equitable it matters not whether the motive of the donor of the estate was of a charitable nature, or whether the feelings of the parties who took the estate and enjoyed the profits under it ought to be the feelings of eleemosynary grantees." The case expressly finds that when a man is appointed to one of the houses, he holds it and a garden near to it for his life, and cannot be disturbed in his occupation by Mr. Arkwright or any one else, except for a murder or a felony, or something of that sort. That shews that each inmate has a freehold for life; for, it will not be assumed that he will be guilty of an offence to warrant his amotion. If these persons are not freeholders, they occupy as tenants within the Representation of the People Act, 1867; for, they are at the least tenants at will: *Rex* v. *Collett* (1); *Doe* d. *Groves* v. *Groves* (2); *Randall* v. *Stevens* (3); *Locke* v. *Mathews*. (4) And any kind of tenancy, except an occupation as a mere servant, will suffice to entitle them to a vote.

Macnamara, for the respondent. The appellants did not occupy the houses in question either as owners or as tenants within any of the statutes conferring the franchise. There was no relation of landlord and tenant between Mr. Arkwright and them; and the nature of their occupation and the restrictions imposed upon it divest it altogether of the character of ownership; it was a mere occupation subordinate to the purposes of the charity. Mr. Arkwright can do what he likes with regard to the rules; and the hospital is entirely supported by funds derived out of his estate. The hospital is substantially a mere collection of almshouses. The inmates are called "servitors," and they are appointed by and

(1) Russ. & Ry. 498.
(2) 10 Q. B. 486.
(3) 2 E. & B. 641; 23 L. J. (Q.B.) 68.
(4) 13 C. B. (N.S.) 753; 32 L. J. (C.P.) 98.

are clothed, fed, and lodged at the expense of Mr. Arkwright, and are subject to the control of an officer called a corporal. There is nothing in the case to shew that Mr. Arkwright ever parted with the legal estate.

[BOVILL, C.J. There is nothing to shew that Mr. Arkwright has any estate whatever in the property. It is consistent with all that appears that it was originally conveyed (by a lost grant) with power to Mr. Arkwright to appoint the inmates for life, who once in are irremoveable except for murder, felony, or the like. They do not occupy as tenants of any one.]

Simpson v. *Wilkinson* (1) and *Roberts* v. *Percival* (2) were both cases of county votes, and the only question was whether the inmates of the hospital had a freehold interest, legal or equitable, in the rooms occupied by them. The present case, however, relates to borough votes; and the question is whether the claimants occupied as owners or tenants within s. 3 of 30 & 31 Vict. c. 102. An occupation as servant or as a recipient of charity will not do. *Heartley* v. *Banks* (3) has always been considered a leading case upon this subject. There, the military knights of Windsor were held not to acquire the borough franchise by reason of their occupation of the houses allotted to them, such occupation being subordinate to the purposes of the charity. Cockburn, C.J., in delivering the judgment of the Court, there says: "Whether the interests of these parties in the benefits of the charity be a freehold interest or not, we are of opinion that there is no such estate or interest in these houses as can properly be deemed an ownership;" (4) and he proceeds to distinguish the case from *Simpson* v. *Wilkinson* (1), on the ground, that in the latter case "the recipients of the charity had the direct and uncontrolled management of the property in their own hands; and the only question raised in that case was, whether the revising barrister was right in presuming a commencement of the estate of the bedesman by the royal licence prior to the passing of the 39 Eliz. c. 5."

[BOVILL, C.J. The decision in *Simpson* v. *Wilkinson* (1) is not impeached in *Heartley* v. *Banks*. (3) The grounds upon which that

(1) 7 Man. & G. 50; 1 Lutw. 168.
(2) 18 C. B. (N.S.) 36; 34 L. J. (C.P.) 84.
(3) 5 C.B.(N.S.) 40; 28 L.J.(C.P.) 144.
(4) 5 C. B. (N.S.) at p. 56; 28 L. J. (C.P.) at p. 152.

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case is there distinguished do not distinguish it from the present case. In the one case there were trustees; in the other none. The freehold of the houses occupied by the military knights of Windsor was in the dean and canons. Here, there is no person in whom the freehold is vested, if not in the inmates: and the revising barrister has found substantially that there was a legal origin to the grant.]

In *Heath* v. *Haynes* (1), the inmates of the Earl of Leicester's Hospital,—a charity regulated by a private Act of Parliament,—each had allotted to him by the master rooms of more than the yearly value of 10*l.*, of which he had the exclusive use. The appointment was for life, subject to removal for breach of any of the rules. The inmates were rated in respect of their several occupations. It was held that they did not occupy as "owners" or "tenants" within s. 27 of the Reform Act, and therefore were not entitled to be registered. In *Bridgewater* v. *Durant* (2), Erle, C.J. in delivering the judgment of the Court, says: "Occupation alone of a house is not sufficient to qualify. Thus, occupation as a member of a corporation aggregate,—*Heath* v. *Haynes* (1); or as a receiver of charitable bounty,—*Heartley* v. *Banks* (3); or for purposes connected with services to be performed,—*Dobson* v. *Jones* (4); *Clark* v. *Overseers of St. Mary, Bury St. Edmunds* (5); or under an appointment from governors of a charity, at their discretion,—*Davis* v. *Waddington* (6), has been held not to qualify. The question is one of fact, and it was for the revising barrister to draw his own conclusion from the premises before him." In *Freeman* v. *Gainsford* (7), a hospital was founded for twenty "poor persons who should give themselves to the service of God and to pray for the prosperity of the noble family of the founder and his posterity." The persons eligible as members or inmates were to be "poor indigent people, well esteemed of for godly life and conversation, of good conditions, peaceable and quiet amongst their neighbours, and such as by persons of honest repute should be judged fit objects of the charity." Each poor person on his or her election

(1) 3 C. B. (N.S.) 389; 27 L. J. (C. P.) 50.

(2) 11 C. B. (N.S.) 7, 12; 31 L. J. (C.P.) 46, 48.

(3) 5 C. B. (N.S.) 40; 28 L. J. (C.P.) 144.

(4) 5 Man. & G. 112; 1 Lutw. 105.

(5) 1 C. B. (N.S.) 23; 26 L. J. (C.P.) 12.

(6) 7 Man. & G. 37; 1 Lutw. 159.

(7) 11 C. B. (N.S.) 68; 31 L. J. (C.P.) 33.

was placed in rooms with certain allowances. They were prohibited from letting or assigning, or permitting any person to occupy the rooms jointly with them; and they were to be removeable by the governing body if found guilty of certain irregularities. And it was held, upon the authority of *Heartley* v. *Banks* (1), that the inmates had no such estate or interest in the rooms occupied by them as to entitle them to be registered as voters for the county.

[KEATING, J. Is there any case where one entitled to hold for life has been held not to occupy as owner so as to give him a qualification for a borough vote?

BOVILL, C.J. For the purpose of determining whether the party is owner or not, all the cases apply, whether they relate to county or to borough votes.]

No doubt that is so. The only ground, then, upon which it can be contended that the respondent is entitled to judgment is, that the occupation in this case appears to be entirely subservient to the purposes of the charity, and subject to its rules; and that it is contrary to the policy of the law that persons in that condition should enjoy the franchise: see 2 Wm. 4, c. 45, s. 36.

Dowdeswell was not called upon to reply.

BOVILL, C.J. I am of opinion that the appellant occupied the house in question as owner, within the meaning of s. 3 of the Representation of the People Act, 1867, 30 & 31 Vict. c. 102; and that the case is undistinguishable from the decision of this Court in *Roberts* v. *Percival.* (2) The cases of *Heartley* v. *Banks* (1) and *Freeman* v. *Gainsford* (3) were strongly relied on there in opposition to the claim of the franchise, as they have been here by Mr. Macnamara: but the distinction between them and the case then before the Court, and also that of *Simpson* v. *Wilkinson* (4), was pointed out most clearly by Erle, C.J., in giving judgment. "There is," he says (5), "a broad distinction in my mind between the present case and each of those cases; for, in them there was a governing body, in whom the legal estate was

(1) 5 C. B. (N.S.) 40; 28 L. J. (C.P.) 144.

(2) 18 C. B. (N.S.) 36; 34 L. J. (C.P.) 84.

(3) 11 C. B. (N.S.) 68; 31 L. J. (C.P.) 33.

(4) 7 Man. & G. 50; 1 Lutw. 168.

(5) 34 L. J. (C.P.) at p. 87; 18 C. B. (N.S.) at p. 44.

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necessarily to continue vested, for the purpose of executing the trust to be performed by them; and the profits of the endowment did not belong absolutely and without any intervening person to the persons who claimed to be qualified by reason thereof. The trustees were to receive the profits, and then the poor knights of Windsor were entitled to claim a portion of the money out of those profits; and so the inmates of Lord Shrewsbury's Hospital were entitled to receive a portion of the money from the trustees without themselves having any estate at all, though in each of those cases the trustees were bound to find lodgings for the inmates. But I see that, in Lord Burleigh's Hospital, the members are when named to be placed in certain rooms, and in those rooms they are to continue till they die." Those observations are as applicable here as there. The revising barrister, who has investigated the facts, distinctly finds that, "when a man is appointed to one of the houses, he holds it and a garden near to it for his life, and cannot be disturbed in his occupation by Mr. Arkwright or any one else, except for a murder or a felony, or something of that kind." That is in effect a finding that the inmates have a freehold for life. A similar power of amotion existed in the case of *Roberts* v. *Percival* (1), as appears from the rules which are set out in *Simpson* v. *Wilkinson* (2), a case which arose with reference to the same charitable foundation. The revising barrister having stated the right under which the appellant in the present case occupied, proceeds to state the grounds upon which he holds him not to be entitled to be registered. He says that the occupation of the appellant was eleemosynary in its character, and that he did not occupy as owner or tenant within the meaning of the Representation of the People Act, 1867. Now, it is clear that there are many cases where houses or rooms are allotted to persons as objects of charity who yet occupy as owners. Indeed, the very same point was raised in *Roberts* v. *Percival* (1); but it was clearly laid down by Erle, C.J., that, whether the motive of the donor of the estate was of a charitable nature, or whether the feelings of the parties who took the estate and enjoyed the profits under it ought to be the feelings of eleemosynary grantees, cannot affect the character of the occupation. I am of opinion that the present is

(1) 18 C. B. (N.S.) 36; 34 L. J. (C.P.) 84. (2) 7 Man. & G. 50; 1 Lutw. 168.

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not to be distinguished from that case; and that, upon the grounds there stated by the Court, it is clearly distinguishable from the cases relied on by Mr. Macnamara.

My Brother Byles, who was obliged to leave the court, desired me to say that he entirely concurs with us in thinking that the decision of the revising barrister was wrong and must be reversed.

KEATING, J. I am of the same opinion. No doubt, in *Heartley* v. *Banks* (1), expressions are to be found in the judgment of the Court as to the nature of the occupation of the military knights of Windsor, which have created a difficulty: but it must be remembered that that case was not only distinguishable in its facts from the present, but that it underwent review in *Roberts* v. *Percival.* (2) All the points which have been relied on by Mr. Macnamara were insisted upon there, nevertheless the Court came to the conclusion that they did not prevent the claimants acquiring a right to vote by reason of their having an equitable estate of freehold in the rooms held by them. The decision of the revising barrister in the present case is that the occupation of the appellant was of an eleemosynary character; intending, no doubt, to bring the case within *Heartley* v. *Banks.* (1) But he has not merely found as a fact that the occupation was eleemosynary, but has set out the facts upon which he has founded his opinion: and the Court has held that though the revising barrister may conclude a case by a finding in point of fact, yet, if he sets out the circumstances which led him to that conclusion, the Court will exercise its discretion as to how far they justify his judgment. That the fact of the occupation being in some sense eleemosynary will not prevent the occupier from having a freehold interest is clearly shewn by Erle, C.J., in *Roberts* v. *Percival.* (2) Indeed, it must be so in all the hospital cases in which the inmates have been held entitled to vote, because they all more or less partake of the character of eleemosynary grants. One fact which we cannot struggle against is that the appointees under the charity had a right to occupy the houses allotted to them for their lives, and were only to forfeit that right by being guilty of a felony. Further, it does not clearly appear

(1) 5 C. B. (N.S.) 40; 28 L. J. (C.P.) 144.

(2) 18 C. B. (N.S.) 36; 34 L. J. (C.P.) 84.

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where the freehold is. For anything that does appear, the only persons who could deal in any way with the land are the servitors. The case also finds an exercise of ownership that is somewhat material. Though none of the houses had ever been let, yet a garden outside the hospital and appertaining thereto, held by the appellant, had been let by him because he was too old to cultivate it himself: and this seems to have been done without the interference of any one. Under the circumstances, I think the revising barrister was clearly wrong in supposing that, because the character of the occupation was more or less eleemosynary, the inmates of these houses were not entitled to be registered.

MONTAGUE SMITH, J. I am of the same opinion. It appears to me that the appellant in this case had a freehold interest in the house assigned to him. It is expressly found by the revising barrister that the persons appointed to these houses were appointed for life, and could not be removed by Mr. Arkwright or any other person, except for a murder or felony or the like. There is no such indefinite or arbitrary power of amotion as to deprive the appointee of his freehold interest. If, then, the appellant had a freehold, and was in the occupation of the house, I should have thought there was no difficulty in arriving at a conclusion irrespective of authority. But I think the case falls directly within *Simpson* v. *Wilkinson* (1) and *Roberts* v. *Percival* (2), and is distinguishable from *Heartley* v. *Banks* (3) and the other cases falling within the same category, on the ground to which I have already adverted. The military knights of Windsor were not in the occupation of any rooms which were definitively allotted to them: they were liable to be shifted from time to time; and they had no freehold interest. For these reasons, I think the decision of the revising barrister should be reversed.

Decision reversed.

Attorneys for appellant: *Hancock, Saunders, & Hawksford, for T. W. Garrold, Hereford.*

Attorneys for respondent: *Westall & Roberts, for Bodenham & James, Hereford.*

(1) 7 Man. & G. 50; 1 Lutw. 168. (2) 18 C. B. (N.S.) 36; 34 L. J. (C.P.) 84.
(3) 5 C. B. (N.S.) 40; 28 L. J. (C.P.) 144.

BARNES, APPELLANT; PETERS, RESPONDENT.
PEROWNE, APPELLANT; PETERS, RESPONDENT.
BAKEWELL, APPELLANT; PETERS, RESPONDENT.

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June 5.

Parliament—Borough Vote—Lodger—Oxford and Cambridge Boroughs—Reform Act, 1832 (2 *Wm.* 4, *c.* 45), *s.* 78—*Representation of the People Act*, 1867 (30 *& 31 Vict. c.* 102), *ss.* 4, 56, 59.

A set of rooms in a college at Oxford or Cambridge is a dwelling house within the meaning of the Representation of the People Act, 1867, and the occupier is therefore not entitled to vote for the borough as a lodger in respect of such rooms.

The 78th section of 2 Wm. 4, c. 45, which forbids any person to vote for the borough of Oxford or Cambridge in respect of the occupation of chambers or premises in any college, applies to the new franchises created by the Representation of the People Act, 1867.

APPEALS from the Revising Barrister for the borough of Cambridge.

The appellants claimed to have their names inserted in the lists of persons entitled to vote, in respect of lodgings, for the borough of Cambridge.

At the revision an objection was taken by the respondent, that the appellants had no right to be placed on the register on the ground, first, that they were members of the University of Cambridge, and were occupiers of chambers in college, and were therefore prohibited by s. 78 of the Reform Act (2 Wm. 4, c. 45), and by ss. 56 and 59 of the Representation of the People Act, 1867 (30 & 31 Vict. c. 102), from voting; and secondly, that they were not lodgers within the meaning of the 4th section of the latter Act.

The following facts were proved:—

In the first appeal the appellant was a scholar of his college and a person in statu pupillari. He was of full age, and the particulars stated in his claim were correct.

He occupied the rooms in respect of which his claim was made, separately, and as sole tenant, for the twelve months immediately preceding the 31st day of July, 1868, and resided therein during the same twelve months, subject to the other circumstances mentioned in the case.

The scholars of a college are entitled to reside in rooms therein, paying a rent for them unfurnished. Such rent is a sum of 10*l.* a

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year or upwards, payable in three equal parts at the end of the three university terms, and was paid by the appellant to the corporation or persons mentioned in the 5th column of his claim, and the appellant is a member of that corporation, and receives a fixed annual sum out of its general funds, of which such rent forms part.

Each set of rooms forming such lodgings has a door into a common staircase, and the appellant has a key of the door of his rooms.

The rooms form part of the college buildings, which are approached from the street by an outer gate, and the master and senior fellows have the regulating power as to the hour of closing the outer gate.

The appellant was subject to the general discipline of his college, and spent part of the twelve months immediately preceding the 31st day of July last in college, and part elsewhere at his option; but the permission of the college authorities was required before he resided in college during the long vacation.

Such permission was not ever refused to the appellant when asked for, nor was permission refused to the appellant to leave his college, and he was not asked at any time to leave or give up his rooms.

The academical year commences on the 1st of October, and ends at some time in June, and contains three terms. There is no regulation of the university, or of any college, prohibiting a member of the university from residing in college at any particular period of the year.

Appeals in the case of several other scholars were consolidated.

In the other two appeals similar facts were proved, except that the appellant was in the first case a fellow, and in the second an undergraduate of his college, not being a scholar.

The revising barrister disallowed the claims on both objections.

The question for the opinion of the Court was, whether the claims of the respective appellants were rightly disallowed by reason of either of the above objections.

Mellish, Q.C. (*Lord* with him), for the appellants. First, as to the 78th section of the Reform Act. When it was passed, it can only have referred to the occupation franchise, for that alone existed;

and the fact of the statute being incorporated with the later Act cannot give the section a wider signification than before, although the words may be capable of it. The words must have the same meaning as when originally passed. Sections 56 and 59 of the Representation of the People Act, 1867 (30 & 31 Vict. c. 102), were only intended to apply the general provisions of former Acts respecting registration and voting to the new franchises; any express restrictions were re-enacted, as in s. 5. The first part of s. 78 is expressly re-enacted in s. 2 of the late Act, and the omission of the latter part of the section implies that it was not intended to re-enact it.

As to the second question, it must be admitted that rooms in colleges are structurally distinct within the decisions of this Court in *Cook* v. *Humber* (1), and *Henrette* v. *Booth* (2); but the definition of a dwelling house in the Representation of the People Act, 1867 (30 & 31 Vict. c. 102), s. 61, is, "any part of a house occupied as a separate dwelling, and *separately rated to the relief of the poor*.' These rooms in a college cannot be separately rated, but it is provided by special legislation, in 19 Vict. c. xvii., that, for purposes of rating, the corporate body of the college shall be deemed to occupy the whole building. The rooms, therefore, do not constitute dwelling houses within the definition. As the occupiers are not entitled to vote as householders, they must be entitled as lodgers, for it cannot have been intended to leave a class of persons between householders and lodgers without votes. The appellants are in a very similar position to the persons whose rights with respect to rating were considered in *Stamper* v. *Sunderland* (3), and, though it was not decided, some of the judges seemed to consider that those persons were lodgers. The definitions of a lodger given in *Cook* v. *Humber* (1) and similar cases, are not of much weight, as lodgers were not then entitled to vote, and the exact definition of them, therefore, was not important.

Sir J. D. Coleridge, S.G. (*Cockerell* with him), for the respondent. The 78th section of the Reform Act (2 Wm. 4, c. 45) consists o two parts, which are wholly distinct, and it was logically correct to

(1) 11 C. B. (N.S.) 33; 31 L. J. (C.P.) 78.

(2) 15 C. B. (N.S.) 500; 33 L. J. (C.P.) 61.

(3) Law Rep. 3 C. P. 388.

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separate them in the later Act. The fact that one is expressly re-enacted does not prevent the other being re-enacted by implication: *Mayor of Weymouth* v. *Nugent*. (1) The effect of s. 56 of the later Act is to incorporate this section, unless it is inconsistent with the tenor of the Act, which it does not appear in any way to be; and, by s. 59, the two Acts are to be read as one, and if the enactments of the later Act had been only later sections of the Reform Act, there could have been no doubt that the restriction applied equally to all the franchises. There are many restrictions contained in the Registration Acts which are only incorporated by these general sections, but which it has never been doubted apply equally to the new franchises. If s. 78 be not incorporated, the absurdity might occur of householders voting in respect of houses under the value of 10*l*., because that is a new franchise, but not in respect of houses above the value of 10*l*. Secondly, the appellants are not lodgers; the rooms they occupy constitute dwelling houses, and are therefore not lodgings, and a lodger must, at any rate, be a person who occupies lodgings. Moreover, the lodgings must be in a dwelling house, which is hardly an appropriate term for a college.

Mellish, Q.C., in reply. Lodgings would seem to be any rooms which are part of a dwelling house, and not constituting a dwelling house themselves, and these rooms answer this description, since they cannot be a dwelling house, as has been shewn, because they are not separately rateable. The appellants, therefore, are clearly lodgers.

BOVILL, C.J. The legislature having experienced some difficulty in agreeing on a definition of the term "lodger," have left to this Court to determine its meaning, and we must take for our guide the whole language of the Act of Parliament. The second question in this case, which I will take first, is, whether the appellant is a lodger within the meaning of the Act. I have come to the conclusion that he is not. According to the decisions of this Court, especially in *Cook* v. *Humber* (2), and *Henrette* v. *Booth* (3), each set of rooms

(1) 6 B. & S. 22; 34 L. J. (M.C.) 81.

(2) 11 C. B. (N.S.) 33; 31 L. J. (C.P.) 73.

(3) 15 C. B. (N.S.) 500; 33 L. J. (C.P.) 61.

was a separate dwelling house; a similar view was expressed by my Brother Byles and myself, in *Stamper* v. *Sunderland* (1), with reference to the facts of that case; and indeed Mr. Mellish admitted that he could not deny that these rooms were dwelling houses within those decisions. The occupiers, therefore, would have been entitled to vote as occupiers but for s. 78 of the Reform Act. Can, then, such rooms cease to be a separate dwelling house, and become lodgings, simply because they are not rateable? If we were to decide that the nature of the occupation must be determined by the question of rateability, we might have two adjacent buildings in one of which the tenant and in the other the landlord was rated, and we should have to hold that one was a house and the other lodgings, though they were structurally the same, and similarly occupied. Before the passing of the Representation of the People Act, 1867, these rooms would clearly have been separate dwelling houses; how has the passing of that Act turned them into lodgings? It is true that the fact of the occupiers of separate houses not being liable to be rated, may affect their right to the franchise; but that seems to me no sufficient reason why we should give them the franchise by saying that if they cannot have it as occupiers, they must have it as lodgers, the effect of which would be to let a householder vote without being rated. The Representation of the People Act, 1867, was passed after the decision in *Cook* v. *Humber* (2), and if the legislature had intended to alter the law, it was for them to do so. No difficulty, it seems to me, arises from the definition of a dwelling house in s. 61, because every word of it can be satisfied by the case contemplated in s. 7. On the whole, it seems to me that these rooms were not lodgings, the appellants were not lodgers, and they did not occupy the rooms as lodgers within the meaning of the Act.

On the other question also, I am of opinion that our decision should be in favour of the respondent. It may be difficult to say why s. 78 of the Reform Act was enacted, but one reason may have been, that it was thought right that the representatives of Oxford and Cambridge should be elected by persons residing in those towns, and that the choice of them should not be

(1) Law Rep. 3 C. P. 338.
(2) 11 C. B. (N.S.) 33; 31 L. J. (C.P.) 73.

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interfered with by persons only temporarily resident there. The effect of the section, in fact, is to define the limits of those boroughs. If that be so, what reason is there why it should not be incorporated with the Act of 1867? On the contrary, there are many reasons why we should hold, if possible, that it is incorporated. Otherwise, we might have the anomaly that persons occupying a 10*l.* house would have no vote, while persons living in a house of less than 10*l.* value had one. It is not necessary, however, to find any reason for incorporating the section. All we have to do is to see if there is anything in it inconsistent with the later Act, for by the 56th section of that Act, it is enacted that "subject to the provisions of this Act, all laws and customs now in force, relating to the representation of the people in England and Wales, shall remain in full force, and shall apply as nearly as circumstances shall admit to any person hereby authorized to vote;" and if any doubt were left by that it is entirely removed by the 59th section, which enacts that "this Act so far as is consistent with the tenor thereof, shall be construed as one with the enactments for the time being in force relating to the representation of the people." I construe the two Acts as one, and find no inconsistency nor anything interfering with the reasonableness of applying the 78th section of the earlier Act to the franchises created by the later Act. Mr. Mellish has referred to some restrictions that are re-enacted, but however skilfully an Act be drawn, clauses may always get introduced during its passage through parliament. These re-enacted clauses may raise some inference that s. 78 was not intended to be included in the later Act; but there is an express enactment that the two Acts are to be read as one, and in face of that I am not inclined to give much weight to the slight inference raised by Mr. Mellish. On both grounds, therefore, I think the revising barrister was right, and that the appeal should be dismissed.

BYLES, J. On the last ground taken by my Lord, I entertain no doubt whatever. The 78th section of the Reform Act says: "Nothing in this Act contained shall entitle any person to vote in the election of members to serve in parliament for the city of Oxford or town of Cambridge in respect of the occupation of any chambers or premises in any of the colleges or halls of the Uni-

versities of Oxford or Cambridge." Now, first of all, s. 56 of the Act of 1867 preserves all laws, customs, and enactments relating to the representation of the people in England and Wales. The word "customs" is important, as shewing that the section may refer to rights of voting confined to particular places, as well as to general laws affecting the whole country. But what removes all doubt is s. 59; what can be stronger than saying that the expressions "the provisions hereinafter contained;" and "as aforesaid," shall apply to a later Act? If reading the two Acts together is to have that effect, there can be no reason for not applying the words of the 78th section, "nothing in this Act contained," to the later as well as the earlier Act.

With respect to the other question, I have on a former occasion, and with great labour, tried in private to define the word "lodger," and I certainly shall abstain from such an attempt for the future, at any rate, in public. All I need say is, that the word must be used in its popular sense, and no one would say that the appellants were lodgers in the ordinary sense of the word.

MONTAGUE SMITH, J. I am of the same opinion. I think it is clear that s. 78 of the Reform Act is incorporated in its entirety in the later Act; that section relates both to the election of members in the universities and to the persons entitled to vote for members for the boroughs in which they are situate. The intention seems to me to have been to keep the constitution of the universities as it was, and, that being so, to enact that persons having rooms in their colleges and halls should not have votes for the boroughs in respect of them. Now, I see no evidence of an intention on the part of the legislature to change that policy in relation to the universities; some policy must have dictated the clause, and I cannot conceive any reason why the legislature should disable persons in colleges who are householders from voting, and yet enable persons in colleges who are lodgers to vote. So far, however, from there being such an enactment, s. 2 seems to shew that it was not intended to interfere with the former policy; and I think ss. 56 and 59 are large enough to incorporate s. 78 of the earlier Act. The appellants claim as lodgers; and the lodger franchise is one of the franchises conferred by the Act of 1867; but

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s. 56 says that all laws, customs, and enactments then in force relating to the representation of the people in England and Wales shall apply, as nearly as circumstances admit, to the franchises thereby conferred. The 59th section further says the two Acts shall be read together as far as is consistent with the tenor of the later Act, and I think s. 78 is consistent. I think, therefore, even if the appellants come within any definition of lodgers, they are prevented from being put on the register by the express provisions of that section.

But I am further of opinion, that the appellants are not lodgers within the meaning of the Act. Mr. Mellish admitted that these rooms, as regards their structure, would have been dwelling houses within the definition of the Act and the decisions of this Court. If so, the occupiers of them were householders, and not lodgers in any sense; there may be a difficulty, sometimes, in saying whether certain persons are lodgers; but if they would be entitled to vote as occupiers, the other conditions of the Act having been complied with, they cannot be lodgers. I am quite clear that when a person is the occupier of a house, you cannot change him into a lodger in order to give him the franchise. There may be cases in which a house is wholly let out in lodgings, and it may well be that the persons occupying them are lodgers, but it is not necessary to decide that now. On both grounds I think the appeal should be dismissed.

BRETT, J. In order to sustain this appeal, Mr. Mellish had to support both branches of the case. Now, assuming the appellants to be lodgers, I think they are not entitled to vote because they claim to vote in respect of the occupation of premises in a college. If the 78th section of the Reform Act be incorporated in the later Act, it is, I think, applicable, because the franchise conferred by s. 4 of that Act is on persons who have *occupied* lodgings; and s. 78 says that no person is to vote for the city of Oxford or town of Cambridge in respect of the *occupation* of chambers or premises in any college. That the 78th section is incorporated with the later statute, and made applicable to this franchise, seems to me clear from ss. 56 and 59 of the later Act; but I cannot help relying somewhat on the absurdity which would otherwise occur, that the

Master of Trinity could not vote, since he certainly is not a lodger, and yet all undergraduates would be able to do so.

Secondly, I think that the appellants are not lodgers. I think clearly occupiers and lodgers, within the meaning of the Acts, are distinct, and that no one can be both. The term "lodger" has not been defined, but the term "occupier" has to some extent, and it is admitted that the appellants are occupiers of dwelling houses within the definition already given by this Court; and they therefore cannot be lodgers. It does not seem necessary on this occasion to give any definition of lodgers; but I think that the Solicitor General is right in saying that, at any rate no one can be a lodger who does not occupy lodgings; and the question of whether rooms are lodgings or not is independent of, and prior to, any question of rating. I agree, therefore, in thinking that this appeal must be dismissed.

Decision affirmed.

Attorney for appellants: *S. Gedge.*

Attorneys for respondent: *Matthews, Son, & Bartlett.*

LAWE, APPELLANT; MAILLARD, RESPONDENT. *Jan.* 18.

Parliament—Appeal from Revising Barrister—Practice—Costs.

In an appeal from a revising barrister, the point which was raised by the case depended on a question of fact which the revising barrister did not decide. The Court refused to decide the question, and referred the case back to the revising barrister, to be restated. The appellant then abandoned the appeal:—

Held, that the respondent was not entitled to costs.

APPEAL from the decision of the Revising Barrister for the city of Gloucester.

The question raised by the appeal was as to the right of the canons of the cathedral of Gloucester to vote in respect of their houses in the Cathedral Close, although they had not paid any rates. There had been a contest between the canons and the parochial authorities of the parish of St. Mary de Lambe, with respect to the liability of the canons to be rated, the canons contending that the Cathedral Close was extra-parochial. The revising barrister

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stated this case in order to obtain the decision of that question, and stated the evidence on the subject in the case.

Upon the appeal coming on for argument, the Court held that the question reserved for them was a question of fact which they had no authority to decide, and sent back the case to the revising barrister that he might decide the question of fact, and reserve for the Court the question of law, if any.

The appellant then abandoned the appeal.

Powell, Q.C., for the respondent, applied that the appeal might be dismissed with costs.

Dowdeswell, Q.C. (*Gilmore Evans* with him), for the appellant.

BOVILL, C.J. Both parties seem to have agreed to bring the case before the Court, in the former instance, to obtain a decision on a question of fact. The Court declined to decide it, and sent the case back to the revising barrister to have the question of fact determined. All the costs that have been incurred have been incurred from the revising barrister sending the case here in a form in which the Court could not decide it. The respondent, therefore, is not entitled to costs.

BYLES, KEATING, and MONTAGUE SMITH, JJ., concurred.

Motion refused.

Attorneys for appellant: *Meredith, Lucas, & Meredith, for J. A. Whitcombe & Son, Gloucester.*

Attorney for respondent: *B. Hunt, for M. Corbet, Kidderminster.*

[END OF REGISTRATION CASES.]

BEDDALL *v.* KING AND ANOTHER. 1869

April 16.

Bankruptcy Act, 1861 (24 & 25 *Vict. c.* 134), *s.* 192—*Composition Deed—Assent of Creditors—Affidavit.*

The assents required by s. 192, subs. 1, of the Bankruptcy Act, 1861, to make a composition deed valid against non-assenting creditors, must be given before registration.

Ex parte Petrie (Law Rep. 3 Ch. Ap. 232) followed.

DECLARATION for goods sold and delivered.

Plea, a composition deed under the Bankruptcy Act, 1861, s. 192, bearing date the 1st of April, 1868, made between the defendants as co-partners of the first part, and the persons subscribing, being joint or separate creditors of the defendants, of the other part, and providing for the payment by the defendants of 5*s.* in the pound on the 1st of June, 1868. Issue thereon.

At the trial, before Cockburn, C.J., at the Cambridgeshire summer assizes, 1868, it appeared that, the defendants being in difficulties, a meeting of their creditors was held on the 16th of April, 1868, when it was proposed that the defendants should execute a composition deed providing for the payment of 5*s.* in the pound on the following 1st of May. To this proposal most of the creditors present assented in writing. But, in consequence of the debts of two of the creditors having been disputed at the meeting, an investigation of their accounts afterwards took place, which caused some delay, and it was found impossible to provide for payment of the composition so early as the 1st of May, and consequently the composition deed ultimately drawn up provided for the payment being made a month later, viz. on the 1st of June, 1868. This deed the defendants executed on the 2nd of May, and on the 28th of May it was left for registration at the office of the chief registrar, and together with it an affidavit, sworn by the defendants on the 2nd of May, that a majority in number representing three fourths in value of the creditors had in writing assented to or approved of such deed, pursuant to s. 192, subs. 5, and the deed was accordingly registered.

Without including those creditors who had assented on the 16th of April to the proposal then made, the statutable majo-

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debtor whose debts shall respectively amount to 10*l.* and upwards shall, before or after the execution thereof by the debtor, in writing assent to or approve of such deed or instrument;" and that must be within twenty-eight days. That condition has not been complied with here. The assents which were given on the 16th of April cannot be taken to be assents to the deed which was afterwards filed, because those assents were to a deed making the composition payable on the 1st of May, whereas, the deed which was filed made it payable at a different time. The rule must be absolute.

KEATING, J. I am of the same opinion. No doubt, as Mr. Keane contended, if the question had simply been whether or not an affidavit in conformity with the act had been filed, the affidavit of the 2nd of May was upon the face of it a compliance with the act. But, as it did not prove that its contents were true, it was open to the plaintiff to shew that the requirements of the act had not been complied with. Mr. O'Malley did not deny that the legislature required the assents to be given before the registration of the deed; but he contended that the assents first given were applicable to the deed which was registered. That, however, was not so, seeing that the deed which was registered provided a different time of payment from that provided by the deed to which those assents were given.

MONTAGUE SMITH, J. I am entirely of the same opinion. The legislature makes these deeds binding upon non-assenting creditors upon the performance of certain conditions contained in s. 192. As to the objection that the 5th sub-section, which provides that, together with such deed, there shall be delivered to the chief registrar an affidavit that a majority in number, &c., have in writing assented to or approved of such deed, has not been complied with, —primâ facie that requirement does appear to have been complied with. But it seems to me that the first and fourth conditions have not been complied with. I think the majority described in sub-s. 1 must have assented to or approved of the deed before it is delivered to the chief registrar for the purpose of being registered. If any authority for this were wanting, the two cases referred to by

Mr. Bulwer are amply sufficient for the purpose. If so, the question is whether the requisite number of creditors had assented before registration. The only way in which it has been put by the defendants' counsel is, that the prior assents are to be read with the subsequent deed. As, however, that cannot be done in this case, there was no compliance with the condition of the statute before registration, and the deed cannot avail as against non-assenting creditors.

Rule absolute.

Attorneys for plaintiff: *Digby & Sharp.*

Attorney for defendants: *John Evans, for Cutts, Braintree.*

YOUNG *v.* AUSTEN.

April 29.

Pleading — Contemporaneous Agreement varying written Contract — Bill of Exchange.

To a declaration on a bill of exchange by the drawer and payee against the acceptor, the defendant pleaded that he accepted the bill on a condition then agreed on between him and the plaintiff, viz. that in a certain event, which occurred, the plaintiff would renew the bill. The plea did not aver that this agreement was in writing:—

Held, on demurrer, that, as the agreement would not be a defence unless it was in writing, the plea must be construed as alleging a written agreement, and that the plea was therefore good.

DECLARATION on a bill of exchange for 21*l.* 14*s.* 4*d.*, drawn by the plaintiff upon and accepted by the defendant, payable to the plaintiff two months after date.

Third plea, that the defendant accepted the bill upon a certain condition agreed upon between the plaintiff and defendant as part of the consideration for the bill, viz. that the plaintiff should renew the bill for a further term of two months beyond the date at which the bill was payable, if when the bill became due the defendant should not have received from the corporation of the city of London a certain sum of money then due to him, and the defendant accepted and delivered to the plaintiff, and the plaintiff received and always held the bill, upon and subject to the said condition; that, when the bill became due, and when the action was brought, the defendant had not received the said money,—

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of all which the plaintiff had notice; and that the defendant did all things necessary, &c., yet the plaintiff did not renew the bill, and commenced this action contrary to the terms of the said agreement and condition.

Demurrer and joinder.

Finlay, in support of the demurrer. The plea sets up a collateral agreement which varies the terms of the bill. The agreement is not stated to be in writing. Therefore, in construing the plea, it must be taken that the agreement was not in writing: 1 Wms. Saund. 211, n. (2); Stephen on Pleading, 7th ed. 309; Bullen and Leake, 2nd ed. 569; *Anonymous* (1); *Case* v. *Barber* (2); *Villers* v. *Handley* (3); *Taylor* v. *Hillary* (4); *Foquet* v. *Moor*. (5) This is, therefore, an attempt to vary the terms of the bill by a contemporaneous oral agreement. In *Flight* v. *Gray* (6), the Court refused to allow the defendant to plead by way of equitable defence a plea which was substantially the same as this. In Byles on Bills, 8th ed. 90, it is said: "No mere oral agreement can have any effect at law in contradicting the instrument, if contemporaneous with the making of it." The same rule is laid down at p. 179, and also by Lord Ellenborough in *Hoare* v. *Graham*. (7)

[KEATING, J. In Byles on Bills, 8th ed. 91, it is said: "Though it be necessary that the agreement affecting the operation of the bill or note should be in writing, it is not necessary in pleading to aver that it is in writing." And for this *Kearns* v. *Durell* (8) and *Gillett* v. *Whitmarsh* (9) are cited.]

In those cases it was not sought to vary the contract appearing on the face of the bill, but to shew a want or failure of consideration. In *Kearns* v. *Durell*, Maule, J., says (10): "The allegation in the plea that the note was made and delivered on the condition that the plaintiff should not demand payment thereof unless it should appear that the supposed balance was due, does not in terms contradict the express contract contained in the note. . . .

(1) 2 Salk. 519.
(2) Sir T. Raym. 450.
(3) 2 Wils. 49.
(4) 1 Gale, 22.
(5) 7 Ex. 870; 22 L. J (Ex.) 35, 37.
(6) 3 C. B. (N.S.) 320.
(7) 3 Camp. 57.
(8) 6 C. B. 596; 18 L. J. (C.P.) 28.
(9) 8 Q. B. 966.
(10) 6 C. B. at p. 607; 18 L. J. (C.P.) at p. 32.

It is a good plea of want of consideration." And in *Gillett* v. *Whitmarsh* (1) the plea merely described the consideration of the note, and shewed that it had failed. This may be done without writing: *Abbott* v. *Hendricks* (2); *Foster* v. *Jolly*. (3) In the present case the attempt is, not to shew a want or failure of consideration, but to vary the terms of the promise. *Adams* v. *Wordley* (4) shews that the absolute contract on the face of a bill cannot be varied by a contemporaneous oral contract. Lord Abinger there says (5): "The effect of the cases is, that you are estopped from saying that you made any other contract than the absolute one on the face of the bills." *Moseley* v. *Hanford* (6) is to the same effect.

M'Kellar, contrà. The plea shews a good defence to the action. The parties to the action are the drawer and the acceptor of the bill. It therefore is the same as if it had been a non-negotiable instrument. In Byles on Bills, 8th ed. 90, it is said: "A written and signed simple contract may be delivered with an express parol condition precedent that it is not to take effect except in a certain event. And the instrument may be so delivered, not only to a stranger, but by one party to the other." Here, there was no complete delivery of the bill: it was in the nature of an escrow: *Pim* v. *Campbell* (7); *Wallis* v. *Littel*. (8) It was not to take effect as a bill at all, unless a certain event should happen. In *Bell* v. *Lord Ingestrie* (9), under a plea traversing an indorsement, oral evidence that the alleged indorser wrote his name on the bill, and delivered it to the alleged indorsee on a condition, and that such condition had not been complied with, was held admissible on the authority of *Marston* v. *Allen* (10) and *Adams* v. *Jones*. (11) [He also referred to Story on Bills, s. 239].

[BOVILL, C.J. There is nothing like an allegation of a delivery as an escrow here. Where an instrument is delivered as an escrow, it is not to take effect as a valid deed or agreement. But the

(1) 8 Q. B. 966.
(2) 1 M. & G. 791.
(3) 1 C. M. & R. 703.
(4) 1 M. & W. 374.
(5) 1 M. & W. at p. 380.
(6) 10 B. & C. 729.
(7) 6 E. & B. 370; 25 L. J. (Q.B.) 277.
(8) 11 C. B. (N.S.) 369; 31 L. J. (C.P.) 100.
(9) 12 Q. B. 317.
(10) 8 M. & W. 494.
(11) 12 Ad. & E. 455.

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whole scope of the plea here is that this was a valid bill, but that it was accepted subject to a contract for renewal in a given event.]

In *Lindley* v. *Lacey* (1) evidence of a prior oral agreement was admitted.

[BOVILL, C.J. The action there was brought for a breach of the oral agreement, which was quite beside and collateral to the written agreement between the parties.]

Although it may be necessary that the agreement should be in writing, it is not necessary in pleading to aver that it is in writing: *Thames Haven Dock Company* v. *Brymer* (2); Byles on Bills, 8th ed. 91, citing *Kearns* v. *Durell* (3) and *Gillett* v. *Whitmarsh* (4)

Finlay, in reply.

BOVILL, C.J. In support of the plea in this case it was at first contended that the bill declared on was delivered as an escrow. I have already expressed my opinion that there is nothing in the plea to shew that the bill was accepted or delivered as an escrow, or in the nature of an escrow: it is pleaded as if the bill was drawn, accepted, and delivered upon an absolute engagement to pay the amount two months after date; but it sets up a contemporaneous agreement that the bill should be renewed at maturity unless a given event should happen. The question arises between the immediate parties to the bill. Now, as between the original parties to a bill or note, it may, no doubt, be shewn by oral evidence that there was no consideration, or that the consideration has failed, and that therefore the bill or note is not a binding contract. Here, the plea does not set up the want or failure of consideration; but assuming that there was good consideration or that it has not wholly failed, it alleges that it was part of the agreement that the bill was to be renewed at maturity, if the defendant should not then have received payment of certain money due to him. It is clear that the defendant cannot set up a contemporaneous oral agreement to contradict the contract on the face of the bill: but it is equally clear that he is at liberty to set up a written agreement

(1) 17 C. B. (N.S.) 578; 34 L. J. (C.P.) 7.
(2) 5 Ex. 696, 711; 19 L. J. (Ex.) 321, 328.
(3) 6 C. B. 596; 18 L. J. (C.P.) 28.
(4) 8 Q. B. 966.

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entered into at the time the bill was accepted, which was to regulate the rights of the parties as between themselves. The question, therefore, upon this plea is, whether or not it sufficiently pleads such an agreement: if it sets up an oral agreement, it is bad; if a written agreement, it is good. Then, is it necessary that the plea should in terms allege that the agreement was in writing? The passage cited from Byles on Bills, 8th ed. p. 91, distinctly states that it is not necessary to do so; and I think that is the correct rule. The plea here alleges the agreement to renew as part of the contract. In order to prove that,—the law being that the express contract on the face of the bill or note can only be varied by a contemporaneous agreement in writing,—the defendant must be prepared at the trial to shew an agreement in writing, or he will fail. The objection that the plea did not allege a writing might have prevailed in the time of special demurrers, as in *Adams* v. *Wordley*. (1) Inasmuch, however, as the allegation in this plea can only be proved by shewing an agreement in writing, it must now be taken to import that it was in writing. It is like the case of *Thames Haven Dock and Railway Company* v. *Brymer* (2), where, in an action upon a deed, the declaration averred that the defendants discharged the plaintiff from performing one of the covenants. The discharge was not stated to be by deed, and it was contended on the part of the defendants that this averment was not sufficient, as it was not shewn that the discharge was by deed. But Patteson, J., in delivering the judgment of the Court of Exchequer Chamber (3), said: "This objection is not pointed out as a special cause of demurrer. It is conceded by the learned counsel that the discharge would not be good unless it were by deed: but he says that, if the averment had been traversed, it could not have been proved otherwise than by production and proof of a deed; *Goss* v. *Lord Nugent* (4); and so he contends that, on general demurrer, it must be taken to have been by deed, the only way in which it can be good: and so it was decided in the Court of Exchequer. . . . We think that the Court of Exchequer was right in holding the averment sufficient upon general demurrer." It

(1) 1 M. & W. 374.
(2) 5 Ex. 696; 19 L. J. (Ex.) 321.
(3) 5 Ex. at p. 711; 19 L. J. (Ex.) at p. 328.
(4) 5 B. & Ad. 58.

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seems to me that the same principle applies here, and that the allegation in the plea must be taken to import a writing; and consequently I think the law as laid down by my Brother Byles is correct. The case of *Foquet* v. *Moor* (1) was cited by Mr. Finlay. It appears that that case arose before the Common Law Procedure Act of 1852 came into operation. The question there was whether a plea setting up an agreement for a surrender and for a grant of a new lease, was good without an allegation that it was in writing; and all that Parke, B., says (2) is: "It is said that the agreement alleged in the plea means an agreement by parol; if so, according to the authority of *Case* v. *Barber* (3), the plea was demurrable; but it is questionable whether it might not have been good after verdict, since it will be presumed that the allegations have that meaning which is necessary in point of law to support the plea; as, in the case of a grant of an hereditament which lies in grant, and can only be conveyed by deed, if it be not alleged to have been by deed, but is put in issue and found by the jury, the verdict cures the omission: *Lightfoot* v. *Brightman*. (4) But it is not necessary to decide that now." Under the present system of pleading, the allegation of the agreement here must be held sufficient, inasmuch as it can only be sustained at the trial by proof that the agreement was in writing. For these reasons, I am of opinion that the plea is good, and that the defendant is entitled to judgment on this demurrer.

KEATING, J. I am of the same opinion. The only question now is whether the plea is bad for not averring that the agreement therein stated was in writing. For the reasons given by my Lord, I think that omission does not make the plea bad on general demurrer.

BRETT, J. If the agreement alleged in the plea was in writing, the defence set up by the plea is good. The question is reduced to this, whether it is a good objection to the plea that it does not allege the contemporaneous agreement to have been in writing. We certainly would not so decide unless we found ourselves bound to do so. Mr. Finlay has failed to produce any case where such

(1) 7 Ex. 870; 22 L. J. (Ex.) 35.
(2) 7 Ex. at p. 875; 22 L. J. (Ex.) at p. 37.
(3) Sir T. Raym. 450.
(4) Hut. 54.

an objection has been held available except on special demurrer. Special demurrers no longer existing, we must assume the plea, when it alleges an agreement, to import a valid agreement, and consequently we must hold the plea to be good.

Judgment for the defendant.

Attorneys for plaintiff: *Perrin & Nutt.*
Attorney for defendant: *W. F. Stokes.*

RYDER, PETITIONER; HAMILTON, RESPONDENT.

May 5.

NEW SARUM PETITION.

Representation of the People Act, 1867 (30 & 31 *Vict. c.* 102), *s.* 56—*Registration Act* (6 *Vict. c.* 18), *s.* 98—*Legal Incapacity to Vote—Rating—Voter not rated, but Objection not taken at the Court of Revision.*

Sect. 98 of 6 Vict. c. 18, makes the register in force at the time of an election conclusive as to the right to vote of every person thereon, except, 1. Where the name of the voter has either been specially retained upon the register, or inserted therein, or expunged or omitted therefrom, by the express decision of the revising barrister; 2. Where there is at the time of voting a legal incapacity under any statute; 3. Where there is any other legal incapacity at the time of voting, which may have arisen subsequently to the last day of July.

Occupiers of houses in a borough were placed on the list of voters for the borough. A rate had been made within the borough during the twelve months preceding the last day of July, and such rate was made upon and was paid by the landlords of such occupiers. The names of the occupiers did not appear upon the rate-book. No objection to the registration of these occupiers was made before the revising barrister, and they subsequently voted at an election for the borough:—

Held, on a special case stated in a petition against the return of one of the members for the borough under the Representation of the People Act, 1867, that s. 56 of the Representation of the People Act, 1867, incorporated s. 98 of 6 Vict. c. 18; and that no objection could be taken, on the petition, to the votes of these occupiers, as their case did not fall within any one of the exceptions mentioned in s. 98 of 6 Vict. c. 18; and the register was, therefore, conclusive evidence of their right to vote.

SPECIAL CASE stated by order of Willes, J., in a petition under the Representation of the People Act, 1867, in which the petitioner prayed that it might be determined that the petitioner had been duly elected, and ought to have been returned to serve in parliament as a member for the borough of New Sarum.

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1. At the last election for the borough of New Sarum, the petitioner and the respondent and Mr. Lush were respectively candidates.

2. The nomination took place on the 18th of November, 1868, when the show of hands was declared to be in favour of Mr. Lush and the petitioner, and a poll was demanded on behalf of the respondent, which was taken on the following day; and on the 20th of November, 1868, the respondent and Mr. Lush were returned by the returning officer as being duly elected.

3. The number of votes recorded for the several candidates were as follows,—for Mr. Lush 748, for the respondent 679, and for the petitioner 623.

4, 5, & 6. Previous to the passing of the Representation of the People Act, 1867 (30 & 31 Vict. c. 102), a system of charging the rates of small tenements on the owners, and of compounding by agreement for the same, had existed in the borough of New Sarum, under the provisions of a local Act, 11 Geo. 4, c. lxxvi., and from 1856, until August, 1867, the owners and not the occupiers of small tenements continued to pay the composition for the rates made during that period.

7. During such period rates have been made and levied at uncertain times, but averaging in number six in each year.

8. During such period, the above-mentioned composition has not been varied, discontinued, or renewed; and such rates have been levied and the payment thereof made from time to time, without any further agreement being made in respect of such composition.

12. The Representation of the People Act, 1867 (30 & 31 Vict. c. 102), received the Royal assent on the 15th of August, 1867.

17. On the 26th of August, 1867, the churchwardens and overseers of the parishes of the borough of New Sarum made a rate for the relief of the poor, which rate was confirmed on the 29th.

18. This rate was made and charged, in the case of dwelling houses under the annual value of 10*l.*, in accordance with the practice previously adopted and in force under the provisions of 11 Geo. 4, c. lxxvi., and under the agreement for composition upon the owners instead of the occupiers or tenants; and the names of the latter did not appear upon the rate-book.

19. The rate was paid by the owners in the cases last mentioned, and not by the occupiers or tenants; and it was stated in the rate-book before the pages where the owners were charged instead of the occupiers or tenants, that in the following cases the landlords or owners were rated instead of the occupiers or tenants, in pursuance of 11 Geo. 4, c. lxxvi.

20. The names of such last-mentioned occupiers or tenants were inserted in the register of voters by the overseers, and were not objected to before the revising barrister.

21. It was admitted that they were respectively (within the meaning of the Representation of the People Act, 1867) inhabitant occupiers as tenants of dwelling houses within the borough, and had been so from a time prior to July 31st, 1867, down to the time of voting; and that, except so far as their not being rated by the rate of August 26th, 1867, was a disqualification, they were in every respect entitled to vote.

22. 295 of these occupiers voted for the respondent, but were not rated to and did not pay the rate of the 26th August, 1867, and their names did not appear on the rate-books; and 177 of them voted for the petitioner, but were not rated to and did not pay the rate, and their names did not appear on the rate-books. These occupiers were duly rated to and paid a rate made on the 27th of November, 1867, being the only other rate made prior to the 5th of January, 1868.

23. If the Court should determine that these persons were not entitled to vote at the election for the borough of New Sarum, there would be a majority of 62 good votes for the petitioner.

The question for the opinion of the Court was, whether the occupiers who were not rated to and did not pay the rate of the 26th of August, 1867, were entitled to vote at the election for members of parliament for the borough of New Sarum. If they were so entitled to vote, the Court were to certify, under s. 11 of the Parliamentary Elections Act, 1868, that the respondent was duly elected. But, if the said persons were not so entitled to vote, the Court were to certify that the respondent was not duly elected, and that the petitioner was duly elected and ought to have been returned. And in either case the Court were to determine by whom the costs of the petition and the proceedings thereon, were to be paid.

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Quain, Q.C. (*S. Hill, Q.C.*, and *Archibald*, with him), for the petitioner. Assuming that the occupiers were, by reason of their not having been rated or not having paid the poor-rate, not entitled to be upon the register, the question is whether, their names having been inserted without objection, it is competent to the Court now to inquire into their qualification.

The question depends upon s. 60 of the Reform Act, 2 & 3 Wm. 4, c. 45 (1), which was amended by s. 98 of the 6 Vict. c. 18 (2), and upon the Representation of the People Act, 1867,

(1) S. 60 of 2 & 3 Wm. 4, c. 45, enacts that, "upon petition to the House of Commons complaining of an undue election or return of any member to serve in parliament, any petitioner, or any person defending such election or return, shall be at liberty to impeach the correctness of the register of voters in force at the time of such election, by proving that in consequence of the decision of the barrister who shall have revised the list of voters from which such register shall have been formed, the name of any person who voted at such election was improperly inserted or retained in such register, or the name of any person who tendered his vote at such election improperly omitted from such register; and the select committee appointed for the trial of such petition shall alter the poll taken at such election according to the truth of the case, and shall report their determination thereupon to the House, and the House shall thereupon carry such determination into effect, and the return shall be amended, or the election declared void, as the case may be, and the register corrected accordingly, or such other order shall be made as to the House shall seem proper."

(2) S. 98 of 6 Vict. c. 18 recites that "doubts have arisen as to the true intent and meaning of the said enactment [of 2 & 3 Wm. 4, c. 45, s. 60], with respect to the power and authority of any such committee to inquire into the validity or invalidity of the vote of any person being on the register of voters in force at the time of such election," and enacts that "it shall and may be lawful for any such committee to inquire into and decide upon the right to vote of any person who, being upon the register of voters in force at the time of such election, shall have voted in such election, or, not being upon such register, shall have tendered his vote at such election, in case the name of such person shall have been specially retained upon such register, or inserted therein or expunged or omitted therefrom, by the express decision of the revising barrister who shall have revised the lists of voters from which such register shall have been formed; and also that it shall and may be lawful for such committee to inquire into and decide upon the right to vote of any person, who, being upon such register, shall have voted in such election, so far as the same may be disputed on the ground of legal incapacity at the time of his voting under and by virtue of any statute now or hereafter to be in force, or on the ground of any other legal incapacity at the time of his voting which may have arisen subsequently to the expiration of the time allowed for making out the list of voters from which the register of voters in force at the time of such election shall have been formed; but that, except in such cases or on such grounds as afore-

which created a new series of franchises. Reliance will be placed for the respondent upon s. 56 of the latter Act. (1) The question is whether or not this section incorporates s. 98 of the 6 Vict. c. 18. It is submitted that it does not do so. It relates to the formation of the register only, and not to an inquiry like this. The voters in question were under a legal incapacity at the time of voting, under and by virtue of a statute, within the second exception in s. 98, and the register is, therefore, not conclusive as to their right to vote. It will be said on the other side that rating is part of the qualification. So is continued residence: but it has been held by a committee of the House of Commons that they had power (under 6 Vict. c. 18, s. 79) to strike off the vote from the poll where a man had ceased to reside after the 31st of July. If any one of the qualifications mentioned in s. 3 of the Representation of the People Act, 1867, fails, that creates a legal incapacity within s. 98 of the Registration Act. The voter is not truly registered if he is not possessed of the necessary qualification. Legal incapacity of voting points to an absence of qualification at the time of voting.

[WILLES, J. The *Cambridge Case* (2), shews that a committee of the House of Commons would not have entertained an objection to a vote on the ground of non-residence, unless it were proved to them that a change of residence had taken place since the 31st of July, 1856, or that the vote was specially retained on, or expunged from, or inserted in the list by the express decision of the revising barrister.]

Mellish, Q.C. (*H. James* with him), for the respondent. Legal capacity is part of the qualification of a voter. By s. 3 of the Representation of the People Act, 1867, every man is entitled to

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said, the register of voters in force at the time of such election shall, so far as regards the proceedings before such committee, be final and conclusive to all intents and purposes as to the right to vote in such election of every person who shall be upon such register."

(1) S. 56 of 30 & 31 Vict. c. 102 enacts that, "subject to the provisions of this act, all laws, customs, and enactments now in force conferring any right to vote, or otherwise relating to the representation of the people in England and Wales, and the registration of persons entitled to vote, shall remain in full force, and shall apply, as nearly as circumstances admit, to any person hereby authorized to vote," &c.

(2) W. & D. 49, 51.

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be registered as a voter and to vote, "who is qualified as follows." Then follow the several requisites to form the qualification: "1. Is of full age, and not subject to any legal incapacity: 2. Is on the last day of July in any year, and has during the whole of the preceding twelve calendar months been, an inhabitant occupier," &c. If it could be shewn that the voter had not occupied for the prescribed period, the register would not be conclusive in any matter whatever. Can any distinction be made between sub-s. 2 and sub-s. 3? "Has during the time of such occupation been rated as an ordinary occupier in respect of the premises so occupied by him within the borough, to all rates (if any) made for the relief of the poor in respect of such premises." Rating is clearly part of the general qualification upon which depends the right to be upon the register. "4. Has on or before the 20th day of July in the same year bonâ fide paid an equal amount in the pound to that payable by other ordinary occupiers in respect of all poor-rates that have become payable by him in respect of the said premises up to the preceding 5th day of January." That also is clearly part of the qualification. S. 98 of 6 Vict. c. 18, points to some incapacity existing at the time of voting. If the incapacity existed at the time of registration, so that it could have been but was not objected to then, and ceased to exist at the time of voting, the party would be entitled to vote. Legal incapacity must be something which personally disqualifies and which continues to exist at the time of voting; such as the occupation of an office, or the like. The objection here being to the qualification, it comes within the description of cases upon which the decision of the revising barrister must be taken. The point not having been raised before him, the case does not fall within the exceptions, and consequently the register is conclusive.

[WILLES, J., referred to the cases before the committees of the House of Commons, collected in Wolferstan's Law and Practice of Elections, pp. 111—121; and to the statement, at p. 121, that "committees have acted strictly up to the provisions of s. 98, and, except where the barrister has come to an express decision upon the point, have refused to re-open the register or enter upon any disqualification arising at the time of the revision."]

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BOVILL, C.J. I am clearly of opinion that the 98th section of the Registration Act of 1843 (6 Vict. c. 18), is incorporated with the Representation of the People Act, 1867 (30 & 31 Vict. c. 102), and that this case must be governed by the construction which we think ought to be placed on that section. The occasion of this enactment was, the doubts which are recited to have arisen with respect to the power of election committees to inquire into the validity or invalidity of the votes of persons being upon the register; and, after providing for certain cases, the section concludes by enacting that, "except in such cases or on such grounds as aforesaid, the register of voters in force at the time of such election shall, so far as regards the proceedings before such committee, be final and conclusive to all intents and purposes as to the right to vote in such election of every person who shall be upon such register."

If we were to give effect to Mr. Quain's argument, the result would be that, instead of the register being conclusive, we should hold it to be only primâ facie evidence of the right to vote. But the words are express, that the register shall be conclusive, except in the cases which are previously mentioned. What are those cases which are previously mentioned? One case is, where an objection has been raised before the revising barrister, and the vote has either been allowed, or expunged, or refused to be inserted by the *express decision* of the revising barrister. That must refer to matters which might properly come before the revising barrister, and upon which the right to be upon the register would depend. It is only these matters upon which he could give an *express decision*. All cases relative to the general qualification would seem to come clearly within that part of the section, and possibly others also. The second case in which the register is not to be conclusive is, where there is at the time of voting a legal incapacity under an Act of Parliament. And the third case is that of legal incapacity at the time of voting, which may have arisen subsequently to the expiration of the time allowed for making out the lists of voters, from which the register of voters in force at the time of such election shall have been formed. Those are the three cases in which the register is not to be conclusive.

Now, it is not contended on the part of the petitioner that the present case comes within the first class, viz. where there has been

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an express decision of the revising barrister. Also, it is not contended that this is a legal incapacity arising subsequently to the expiration of the time allowed for making out the lists of voters. But it is contended by Mr. Quain that it does come within the second class of cases, viz. of legal incapacity at the time of voting, under and by virtue of a statute.

The nature of this objection is one which goes to the qualification and to the right to have been upon the register at all. It is an objection which might have been taken before the revising barrister, and upon which the revising barrister might have been required to give an express decision. But the objection was not raised before him, and he was not required to decide it. It was a matter which existed at the time of making out the lists of voters, and at the time when the revision court was held. And the objection was one which, if good (about which I do not mean to suggest any doubt), might have been taken, and upon which the votes might have been disallowed. Had the objection been taken, and the voters' names been struck off, in that case there would have been an express decision, and the question would have been brought within the first class of cases in which the register is not to be conclusive, by express enactment. It seems to me that, if the objection is to the general qualification, as this is, the case then comes within the description of the first class of cases, upon which the decision of the revising barrister must be taken, otherwise that the register will be conclusive.

I cannot give the wider construction which Mr. Quain proposes to the words "legal incapacity at the time of voting," because that would include all cases which the revising barrister might have decided, including all questions of qualification in the sense that Mr. Quain has contended for. The words are, "incapacity at the time of his voting under and by virtue of any statute;" and those words are very well satisfied by placing the construction upon them for which Mr. Mellish contends, without including cases where it is sought to object to the general qualification upon which the right to be upon the register depends. If a man at the time of voting is an officer of the Customs or Excise, or is employed by the government in the Post Office, there is a legal incapacity under a statute, and the clause would clearly apply to those cases. There may be others: but, whatever cases may be included within those

words, I am clearly of opinion that the words "legal incapacity at the time of voting, under a statute," as used in the 98th section, do not include this objection, which is one to the general right or qualification to be placed upon the register. Therefore it seems to me that this case is not brought within any one of the three exceptions mentioned in s. 98. It is only in cases which are brought within one of those three exceptions that the register can be opened; and in all other cases it is declared expressly by the statute that the register shall be final and conclusive to all intents and purposes. This case not being brought within any one of the three exceptions, I think the register was final and conclusive, and that the petition must be dismissed.

WILLES, J. I am of the same opinion. I would only add that no case has been produced in which it ever has been argued or suggested, that I know of, under the 98th section, that the fact of a man not having been rated before the 31st of July (an objection which must have been then complete in order to be effectual, so that in every case in which it could be effectual the objection might have been disposed of before the revising barrister), has been re-heard upon a proceeding analogous to that upon which we are engaged at the present time,—I mean, before an election committee. There have been many cases before election committees in which more doubtful points have been rejected, where the objection was complete before the 31st of July, and no point was raised before the revising barrister. I will take, for instance, the *Aylesbury Case.* (1) The Reform Act retained the qualification of the Aylesbury freeholders in respect of persons who had a right to vote on the 7th of July, 1832, and the objection was taken in that case to the petitioner's right to vote, because he was a minor on the 7th of July, 1832. But he had come of age before the election; and, upon its appearing that no objection had been taken before the revising barrister, the committee held that he was a good petitioner, although objection had been taken before the committee to his right of voting, and consequently to his right to petition.

I cannot recollect to have met, in the election reports, with any case in which an objection to the registration, complete before the

(1) 1 Pow. Rod. & D. 82.

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31st of July, not raised before the revising barrister, has been allowed to be raised before the committee. That being so, I should have thought that the common-sense interpretation of the 98th section would afford very strong grounds for declining to take a new course.

MONTAGUE SMITH, J. I am of the same opinion. The rating is part of the qualification as much as the occupation of the tenement, or, under the old Reform Act, the value of the tenement; and, if this Court could go into the question of rating, which might have been gone into before the revising barrister, it follows that the Court would have equal jurisdiction to entertain all questions which go to make up the qualification of occupation, or the other qualifications which are given, although not decided by the revising barrister. The words on which Mr. Quain relies, are those found in the latter part of the 98th section of the 6 Vict. c. 18, "and also that it shall and may be lawful for such committee to inquire into and decide upon the right to vote of any person who, being upon such register, shall have voted in such election, so far as the same may be disputed on the ground of *legal incapacity* at the time of his voting, under and by virtue of any statute." Looking at that enactment with the previous part of the clause, it seems to me plain that the legislature intended to draw a distinction between the title of a person to be put on the register, in respect of occupation or otherwise, and all the matters that go to make up that title, and the legal incapacity to exercise the right to vote, although the name of such person was upon the register; and that it was intended that in the latter case only should an inquiry, under any circumstances, take place by the committee as an original inquiry. In the clauses which give the right to vote in the Act of 1867, a distinction is again made between legal incapacity to vote and the matters which go to the title to vote by reason of the man being an inhabitant occupier. The 3rd clause is, "Every man shall be entitled to be registered as a voter, and, when registered, to vote for a member or members to serve in parliament for a borough, who is qualified as follows, that is to say,— 1. Is of full age, and not subject to any legal incapacity," which goes to the personal status of the man. Then, the rest of the clause relates to his qualification or title to an occupation franchise:—

"2. Is on the last day of July in any year, and has during the whole of the preceding twelve calender months been, an inhabitant occupier, as owner or tenant, of any dwelling house within the borough;" and "3. Has, during the time of such occupation, been rated as an ordinary occupier in respect of the premises so occupied by him within the borough, to all rates (if any) made for the relief of the poor in respect of such premises;" and 4. "Has, on or before the 20th day of July in the same year, bonâ fide paid an equal amount in the pound to that payable by other ordinary occupiers in respect of all poor-rates."

Mr. Quain argued that, inasmuch as it had been before held, as he stated, by committees of the House of Commons, that they had the power to go into the right to vote, and to strike off the vote from the poll where a man had ceased to reside after the 31st of July, and so was disabled from voting, by non-residence, under the proviso in the 79th clause of the 6 Vict. c. 18; and, as they had done that, as he asserted, by virtue of the power at the end of the 98th section, therefore treating it as a legal incapacity, it gave him a foundation for contending that the words "legal incapacity" in that 98th section would extend to all the elements which went to make up the vote. I have not sufficient knowledge of all the cases before committees to say whether it has been so decided or not; but certainly it seems to me that it was unnecessary so to decide. The only way in which effect could be given to the proviso of the 79th section, viz. that a man ceased to be entitled to vote if he had not resided within the borough during the whole period from the 31st of July to the time of voting,—at all events, where the non-residence was subsequent to the revision,—was by a decision of the House of Commons. Therefore, if this express power to inquire into the right to vote on the ground of legal incapacity had not been given in the 98th clause, I should have thought that the committee, by necessary implication, would have had jurisdiction and power to give effect to the positive and prohibitory words of the enactment of the 79th section, by striking off the vote of a man who had not resided ever since the 31st of July.

It seems to me in this case that it is perfectly clear that this Court has no power to touch the register by striking off these votes, or to strike them off from the poll of the respondent.

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BRETT, J. It seems to me to be perfectly clear that the 79th and 98th sections of the 6 Vict. c. 18 are applicable to the new franchises given under the statute of 1867, 30 & 31 Vict. c. 102. I think that there is a difference between "the title to be registered" and "the capacity to vote." By the 3rd section of the Act of 1867, every person shall be "entitled to be registered" who is qualified in a particular way. That section, therefore, goes to the title to be registered.

The objection which is taken to the votes in question seems to me to be one exclusively pointed to the title to be registered. That being so, the case falls within the 79th section of the 6 Vict. c. 18, and within the latter part of the 98th section, but is not within the first part of the 98th section, because the point raised was not expressly decided by the revising barrister. Where the objection is exclusively addressed to the right to be registered, it cannot, in my opinion, be questioned by this Court any more than it could formerly have been by the committee, unless the revising barrister has expressly decided upon the point. And the present case is not within the other enactments of the 6 Vict. c. 18, s. 98, because the objection has nothing at all to do with the question of legal incapacity, as distinguished from the title to be registered. I think if we were to hold otherwise we should be holding contrary to every decision of every committee of the House of Commons which has been given since the passing of the 6 Vict. c. 18. We should be what has been called "opening the register." I think that, unless we can see clearly that a continued course of decisions of committees upon a given point has been wrong, we ought not to decide contrary to those decisions. So far from those decisions being wrong upon the point now under discussion, I am of opinion that they were clearly right; and therefore I think that this objection cannot be maintained.

Mellish, Q.C., for the respondent, asked for costs.

BOVILL, C.J. There is no reason why the usual course should not be pursued, viz. that the costs follow the event.

Judgment for the respondent, with costs.

Agents for appellant: *Taylor, Hoare, & Taylor.*
Agent for respondent: *S. H. Lewin.*

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April 21.

City of London Court—Power of Judge to appoint Deputy-Registrar on Absence of Registrar from a Sitting of the Court—County Court Rules, 1867, *r.* 8.

By r. 8 of the County Court Rules of 1867 framed by the county-court judges pursuant to 19 & 20 Vict. c. 108, s. 32, it is provided that, "whenever the registrar or his lawful deputy is absent from the sitting of a court, the judge shall appoint a deputy to act on behalf of the registrar."

The registrar of the City of London Court not being present at the sitting of a court, the judge,—assuming to act under the above rule,—appointed a deputy, although there was an "assistant-clerk" duly appointed and competent and ready to perform the duties of the registrar. The registrar half an hour afterwards came to the building where the court was held and remained there performing duties connected with his office, but he did not come into court. The deputy sued the registrar for remuneration for his services in acting on his behalf:—

Held, that the registrar was not "absent from the sitting of a court," so as to warrant the judge in appointing a deputy.

Quære, whether the authority conferred upon the county-court judges under 19 & 20 Vict. c. 108, s. 32, "to make rules and orders for regulating the practice of the courts and forms of proceedings therein," enabled them to make the rule in question?

DECLARATION. First count that the defendant was the registrar of the City of London Court, and that by reason thereof it was his duty as such registrar by himself or by his deputy to perform the duties of the office of registrar; that it was the duty of the defendant as such registrar to attend the sittings of the City of London Court, and that, whenever the defendant and his deputy were absent from the sittings of the court, the judge of the court was authorized to appoint a deputy to act on behalf of the defendant as registrar; that the defendant, on divers occasions, was absent from the sittings of the court, and that no deputy of the defendant was present at the said sittings; that the judge of the court duly appointed the plaintiff a deputy to act on behalf of the defendant as registrar; that the plaintiff accepted such appointment, and on the said occasions duly acted as such deputy on behalf of the defendant as such registrar; and that the plaintiff did all things, &c., &c., to entitle him to be paid by the defendant reasonable remuneration for acting as deputy for the defendant, yet the defendant had not paid to the plaintiff such remuneration.

Second count for work and labour, and on accounts stated.

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The pleas denied all the allegations in the declaration, and alleged in the 6th plea that a lawful deputy of the defendant was present at the sittings of the said court; and in the 11th plea that the action was brought by the plaintiff for the recovery of fees, &c., for business done by him as an attorney, and that the plaintiff had not duly delivered any bill of costs. Issues thereon.

The cause was tried in the Mayor's Court, London, before the Recorder, when the following facts appeared in evidence:—Mr. Nelson, the city solicitor, was by appointment of the mayor, aldermen, &c., of the city of London, registrar of the City of London Small Debts Court (now the City of London court), but he was usually represented in court by one Grant, an assistant-clerk, who efficiently performed all the duties of the office, though not duly qualified to act as registrar, not being an attorney of five years' standing. After repeated complaints of the non-attendance of Mr. Nelson, the judge, on the 14th of September, 1867, finding that Mr. Nelson was not present at the sitting of the court at 10 A.M., and assuming to act under the County Court Rules, 1867, r. 8,—which provides that, "whenever the registrar or his lawful deputy is absent from the sitting of a court, the judge shall appoint a deputy to act on behalf of the registrar, and an entry of such appointment and the cause of such absence (if known) shall be made on the minutes of the court,"—appointed the plaintiff, who was an attorney of more than five years' standing, to act as deputy-registrar, and such appointment was duly entered upon the minutes of the court. The same course was pursued on the three following days, on each of which the plaintiff took notes of the proceedings as deputy-registrar, and heard and disposed of undefended causes. On the 18th of September the registrar's duty was again performed by Grant, the assistant-clerk, it having been alleged that the plaintiff was disqualified from acting as deputy-registrar by reason of a standing order of the common council prohibiting the appointment to such an office of one who has been bankrupt.

On the several days in question Mr. Nelson arrived in the building in which the court is held at about 10.30 A.M., and proceeded to transact in the office the ordinary duties of the registrar, viz. taxing costs, holding references in equity, &c.; and Mr. Nelson protested against the right of the judge to appoint a deputy.

The plaintiff claimed to be paid by the defendant five guineas per day by way of remuneration for his services.

The defendant contended that he was not absent from the court in such a sense as to entitle the judge to appoint a deputy, inasmuch as he was in the building engaged in the performance of the duties of his office, and was represented in court by a competent person: and, at the request of the defendant's counsel, the learned Recorder asked the jury if they thought there was any necessity for the appointment of a deputy-registrar. The jury found that such an appointment was necessary.

A verdict was thereupon entered for the plaintiff for 21*l.*, leave being given to the defendant to move to enter a nonsuit.

Talfourd Salter, in Hilary Term last, obtained a rule nisi to arrest judgment on the first count of the declaration, on the ground that it disclosed no cause of action; or for a nonsuit, on the ground that there was no evidence in support of either count, or for a new trial, on the ground that the verdict was against the weight of evidence.

M'Intyre shewed cause. The appointment of the chief clerk (now called the registrar (1)), and of the assistant-clerk, is regulated and defined by 10 & 11 Vict. c. lxxi, ss. 11, 12, 13, and these provisions are in terms re-enacted in 15 Vict. c. lxxvii, ss. 11, 12, 13. (2) By 30 & 31 Vict. c. 142, s. 35 (3), the court in question has now

(1) See 19 & 20 Vict. c. 108, s. 8.

(2) 15 Vict. c. lxxvii., s. 11, enacts that "every chief clerk of the court to be hereafter appointed shall be an attorney . . . of five years' standing," and shall be appointed and may be removed by the mayor, aldermen, and commons; and assistant clerks may be appointed if necessary.—S. 12. "It shall be lawful for the chief clerk of the court with the approval of the judge, or in case of the inability of the chief clerk to make such appointment, for the judge from time to time to appoint a deputy, qualified to be appointed chief clerk of the court, to act for the chief clerk of the court at any time when he shall be prevented by illness or unavoidable absence from acting in such office, and to remove such deputy at his pleasure, and such deputy while acting under such appointment shall have the like powers and privileges, and be subject to the like provisions, duties, and penalties for misbehaviour, as if he were chief clerk of the court."—S. 13. "That the clerk of the court . . . shall issue all summonses, warrants, precepts, and writs of execution, and register all orders and judgments of the court, and shall take charge of and keep an account of all court fees or fines payable or paid into and out of court, and shall enter an account of all such fees, fines, and monies in a book belonging to the court, to be kept by him for that purpose. . . ."

(3) 30 & 31 Vict. c. 142, s. 35, enacts that the rules and orders in

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become the "City of London Court;" and by r. 8 of the County Court Rules of 1867 (1), the judge had power, in the absence of the registrar, to appoint a deputy. The 30 & 31 Vict. c. 142, ss. 16, 17, shew that it was the duty of the registrar to give his attendance at the sitting of the court, there to perform the duties of his office. If the registrar makes default, and a duty be in consequence cast upon the judge to appoint a deputy in his place, the law will imply a duty in the registrar to pay for the services thus rendered.

[MONTAGUE SMITH, J. The 19 & 20 Vict. c. 108, s. 32, impowers the Lord Chancellor to appoint five county-court judges to frame rules "for regulating the practice of the courts, and forms of proceedings therein, and from time to time to amend such rules," &c. Was it within the power of the county-court judges to make such a rule as the one in question?]

The appointment of a deputy is part of the internal regulation of the court; and the county-court judges had therefore power to make this rule. Reliance may be placed upon s. 4 of the County Courts Equitable Jurisdiction Act, 28 & 29 Vict. c. 99, which provides that the word "registrar" shall be interpreted to include the "assistant-clerks;" and it may be said that therefore the attendance of Mr. Grant, the assistant-clerk, was equivalent to the attendance of the registrar himself. But, if that were so, there would be no necessity for the appointment of a deputy-registrar at all.

Talfourd Salter, in support of the rule. The main question is whether the judge had any authority to appoint a deputy-registrar so as to charge upon the defendant the duty of paying him for his services. The sections of 15 Vict. c. lxxvii, which define the duties of the chief clerk or registrar of the City of London Court, are not repealed by 30 & 31 Vict. c. 142; and they shew that the registrar has numerous duties to perform out of court, as well

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force for the time being for regulating the practice of and costs in the county-courts, and forms of proceedings therein, shall be in force in this court, to the exclusion of any rules and orders now in force therein; but that nothing shall take away, lessen, or diminish any of the powers, rights, or privileges of the judge, or mayor, &c., in common council, in relation to the court or its judge, officers, or fees.

(1) See Pollock & Nicol's C. C. Prac. 6th ed. p. 451.

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as the duty of attending the judge in court. It appears from the learned Recorder's report that Mr. Nelson, if not actually in court in person when the plaintiff's appointment as deputy was made, was there constructively in the person of his "assistant-clerk," who was perfectly qualified and entitled, and prepared to perform all the duties of the registrar: see 28 & 29 Vict. c. 99, s. 4; and that within a very short time afterwards he was in the office attached to the court, engaged in the performance of his ordinary duties as registrar. The rule of 1867, upon which the plaintiff relies as justifying his appointment,—assuming it to be a rule which it was competent to the county-court judges to make under 19 & 20 Vict. c. 108, s. 32, which may well be doubted,—was meant to apply to such an absence of the registrar or his deputy from the sitting of the court as would interfere with or impede the business of the court. The defendant's absence was not of that character. Besides, the appointment of the plaintiff was a violation of the standing order of the common council, which prohibits the appointment to such an office as this of any person who has been bankrupt or insolvent; and s. 35 of 30 & 31 Vict. c. 142 expressly preserves the authority of the mayor, aldermen, &c., of the city of London in common council assembled in relation to the City of London Court, or to the judge or officers thereof, or to the fees taken therein, as such authority existed previously to the passing of the Act. The judge therefore had no power to appoint the plaintiff.

KEATING, J. I am of opinion that the rule should be made absolute to enter a nonsuit. The declaration states, in substance, that the defendant was registrar of the City of London Court, that it was his duty as such registrar, by himself or his deputy, to attend the sittings of the court, and that, whenever the defendant and his deputy were absent from the sittings of the court, the judge was authorized and required to appoint a deputy to act on behalf of the defendant as such registrar: it then goes on to aver that the defendant was on divers occasions absent from the sittings of the court, and that the judge appointed the plaintiff to act as deputy, and that it thereupon became the duty of the defendant to pay him a reasonable remuneration for his services. The pleas put in issue all the material allegations in the declaration: and

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the foundation of the whole claim appears to be the alleged absence of the registrar from the sittings of the court under such circumstances as to give the judge authority to appoint the plaintiff as his deputy. Looking at the statutes which relate to the court in question, it appears that it was originally a court of requests for the city of London, and afterwards became the court of the sheriffs of London. By 10 & 11 Vict. c. lxxi, s. 11, it was provided that the chief clerk of the court should be an attorney of at least five years' standing, and be appointed by the mayor, aldermen and commons of the city of London, and that such assistant-clerk or clerks should be appointed as might be found necessary. The 12th section enacted that the chief clerk of the court, with the approval of the judge, or, in case of the inability of the chief clerk to make such appointment, for the judge from time to time to appoint a deputy qualified to be appointed chief clerk of the court, to act for the chief clerk at any time when he should be prevented by illness or unavoidable absence from acting in such office. And s. 13, which refers to the duties to be performed by the chief clerk, provided amongst other things, that the clerk of the court, with such assistant-clerk or clerks as aforesaid, in case any such should be employed, should issue all summonses, warrants, precepts, and writs of execution, and register all orders and judgments of the court, and keep an account of all proceedings of the court. These provisions are all re-enacted in the London (City) Small Debts Extension Act, 1852, 15 Vict. c. lxxvii, ss. 11, 12, 13. It is said that the latter section requires the attendance of the chief clerk (now styled registrar) in court for the performance of the prescribed duties. It seems to be part of the duty of the registrar to register all orders and judgments of the court, and to keep an account of the proceedings of the court. It appears also that there are other important duties to be performed in court by him, viz. the taking of undefended causes, or such as the judge may think fit to refer to him. That the attendance of the registrar is necessary, I do not for a moment doubt: the only question is what is the nature of that attendance. The facts which give rise to that question are that, on the 14th of September, 1867, Mr. Grant, an assistant-clerk, was in attendance as usual at the sitting of the court, and the judge upon being informed that the registrar was not there, appointed the plaintiff to act as

deputy-registrar. The registrar arrived in the building half an hour afterwards, and in time to have discharged the peculiar duties of taking the undefended causes and others which the judge might think fit to refer to him. The same thing occurred on the following day, notwithstanding the protest of the defendant. The question is, whether that was such a state of things as to justify the judge in appointing the plaintiff to act as deputy on behalf of the defendant, so as to impose upon the latter the obligation to pay the plaintiff a reasonable reward for his services. I am of opinion that it was not. The plaintiff relies mainly upon a rule made by the county-court judges under the authority conferred upon them by s. 32 of 19 & 20 Vict. c. 108, and subsequent acts (not, however, enlarging their powers), which enabled them to frame rules and orders for regulating the practice of the courts and forms of proceedings therein. That rule is No. 8 of the Rules of 1867, which provides that, "whenever the registrar or his lawful deputy is absent from the sitting of a court, the judge shall appoint a deputy to act on behalf of the registrar; and an entry of such appointment, and the cause of such absence (if known), shall be made on the minutes of the court." It was contended on the part of the plaintiff that that rule is as binding as if it were directly enacted by parliament, and enables the judge, whenever the registrar is absent from the sitting of the court, to appoint a deputy to act for him, and raises an implied obligation on the registrar to pay to the person so appointed a reasonable remuneration for his services as such deputy. It is unnecessary to decide whether that rule exceeds the power conferred upon the county-court judges by the statute and the appointment of the Lord Chancellor to make rules. I desire not to be understood as affirming that it does not, because it rather seems to me that it is a rule which does not strictly apply to the practice of the courts and the forms of proceeding therein. But, assuming that they had power to make such a rule, it must receive a reasonable construction, and cannot be taken to mean that, if the registrar be not present exactly at the sitting of the court, though there may be a competent person in attendance ready to efficiently perform all the duties of registrar, that will warrant the judge in at once appointing a deputy and impose upon the registrar the obligation of paying him for his services. It appears to me, upon the facts

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reported to us by the learned Recorder, that there was no such absence of the defendant from the duties of his office of registrar as to justify the course pursued by the judge, or to cast upon the defendant the obligation contended for. I therefore think that the rule must be made absolute to enter a nonsuit. In the view we take of this point, it becomes unnecessary to pronounce any opinion upon the other points relied on by Mr. Salter.

MONTAGUE SMITH, J. I am of the same opinion. I think the judge had no power to appoint a deputy so as to impose this charge upon the defendant. It appears that the defendant was the registrar of the court, and, on each of the four days on which the plaintiff acted as deputy, was present in court, or in the offices adjoining and belonging to the court; and that the neglect of duty, if any, with which he is charged was, that he was not present at the sitting of the court, nor present within the building at all until half-past ten. There was, however, an assistant-clerk in court, who had been appointed by the common council, ready to perform, and quite competent to perform, all the duties required of the registrar, in court at the proper time. Upon these facts, I can find no authority, either in the statutes or in the rule which has been referred to, which enabled the judge to appoint a deputy as he did. It is clear that there is no such power given him by the statute, independently of the rules. The 12th section of 15 Vict. c. lxxvii. only gives him that power in case of the inability of the chief clerk (or registrar) to make such appointment; and no such inability was shewn here; it was not shewn that the chief clerk was prevented by illness or unavoidable absence from acting. But it was said, and upon that Mr. M'Intyre mainly relied, that by r. 8 of the County Court Rules of 1867, the judge had authority to make this appointment. That rule provides that "whenever the registrar or his lawful deputy is absent from the sitting of a court, the judge shall appoint a deputy to act on behalf of the registrar." Upon the facts existing in this case, I think the registrar was not absent from the sitting of the court within the proper interpretation of that rule. It is true that the defendant was not in court, or in the building in which the court is held, until half an hour after the court sat; but he was represented by an efficient person, appointed

by the common council, under s. 11 of 15 Vict. c. lxxvii, who was there at the proper time, and ready to perform his duties. The registrar has, it seems, various duties to perform, some of which are to be performed in court in the presence of the judge, and some in the offices belonging to the court; and the common council having appointed an assistant-clerk to aid the registrar, and that person being in attendance in court, and the registrar himself being shortly after the sitting of the court engaged in the offices of the court, transacting the business in the ordinary way, I think it is impossible to say that he was absent from the sitting of the court in the sense contemplated by the rule. It is not necessary to decide whether or not the county-court judges had authority to make that rule; but I must say I entertain very considerable doubt whether they had such authority, inasmuch as, if it is construed as the judge of the city court has construed it, it would cast upon the registrar the duty of paying the deputy for his services. The 32nd section of 19 & 20 Vict. c. 108, under the authority of which the rule professes to have been made, impowers the county court judges "to frame rules and orders for regulating the practice of the courts, and forms of proceedings therein." They may, therefore, make rules for regulating the practice of the court, including perhaps the attendance of the officers. But it seems to me to be going too far to say that they may make a rule which shall have the effect of enabling the judge to appoint a deputy-registrar if the registrar is not present at the sitting of the court, and of giving such deputy a right of action against the registrar to recover remuneration for the work done by him under such appointment. As the case rests upon that rule, I cannot help expressing my doubt as to the authority of the judges to make it. Our decision resting upon the construction of the statutes and the rule referred to, disposes of the substance of the case, and therefore it is unnecessary for us to express any opinion upon the other points raised in the argument. The rule must be absolute to enter a nonsuit, in pursuance of the leave reserved.

Rule absolute for a nonsuit.

Attorney for plaintiff: *G. M. Wetherfield.*
Attorney for defendant: *T. J. Nelson.*

1869
May 4.

BRIDGES *v.* GARRETT.

Principal and Agent—Authority to receive Payment—Payment to Deputy Steward of a Manor of Fine on Admittance to Copyhold Tenement—Crossed Cheque.

The defendant having purchased copyhold land was admitted by C., who had acted as his attorney in completing the purchase, and had been appointed by the steward of the manor as his deputy for that turn to admit the defendant. Nine days afterwards the defendant gave C. a cheque on his bankers for 87*l.* 10*s.* 8*d.*, viz. 78*l.* 15*s.* for the lord's fine, 4*l.* 11*s.* 8*d.* steward's fees, 4*l.* 4*s.* C.'s own charges as the defendant's attorney. This cheque was crossed by the defendant at the request of C. to C.'s bankers. The amount of the cheque was duly paid by the defendant's bankers to C.'s bankers, who retained the money in discharge of a debt due to them by C., who had overdrawn his account.

In an action by the lord against the defendant to obtain payment of the fine for the admittance:—

Held, by Bovill, C.J., and Montague Smith, J., that, assuming that the steward had power to appoint a deputy with authority to receive the fine for the lord, and that he did appoint C. as his deputy with authority to receive the fine, it could only be an authority to receive it in cash, or in that which was equivalent to cash, and might be handed over as it was received to the steward or the lord; and consequently that, as between the lord and the defendant, the giving to C. of a crossed cheque for a sum which comprised besides the lord's fine charges payable to the steward for his fees and to C. himself for his professional charges, was no payment to the lord.

Held, by Byles, J., that C. had, under the circumstances, authority to receive the fine; and that the payment to him by the cheque was payment of the fine to the lord.

DECLARATION for a fine payable by the defendant on his admission as surrenderee of a customary tenement of the manor of Cressing Temple, in the county of Essex, to the plaintiff, as lord of the manor.

Pleas: Never indebted, and payment. Issues thereon.

The cause was tried before Byles, J., at the Chelmsford spring assizes, 1868. In 1867, the defendant purchased at an auction copyhold tenements held of the manor of Cressing Temple, of which manor the plaintiff was the lord, and one Mills the steward. The defendant employed as his attorney one Craig, of Braintree (who was not his ordinary attorney), to complete the purchase for him. The purchase was completed in February, 1867, and the purchase-money and Craig's bill of costs paid. At this time Craig

was a person in good credit. In March, Mills sent a draft admittance to the auctioneer who had sold the property, which was in the following form:—

"The Manor of Cressing Temple, in the county of Essex.

"The —— day of ——, 1867.

"Balls Garrett admitted on the absolute surrender of Emily Birch and others, devisees of John Gosling, deceased.

"Be it remembered that, on or before the day and year first above written, an absolute surrender was out of court delivered to Richard Mills, gentleman, steward of the said manor, which is as follows:—[The surrender was set out.]

"Now comes the said Balls Garrett before Edward George Craig, deputy-steward of the said manor for this turn only, out of court, and prays that he may be admitted the lord's tenant of the said hereditaments so surrendered to his use as aforesaid; and he was by the hands of the said deputy-steward admitted tenant, and seisin delivered to him by the rod thereof, to have and to hold the said hereditaments, with the appurtenances, unto the said Balls Garrett, his heirs and assigns, for ever, pursuant to the said surrender, of the lord of the said manor, by the rod, at the will of the lord, according to the custom of the said manor, by the rents, customs, and services therefore due and of right accustomed: and he gave to the lord for a fine as appears in the margin: and his fealty was respited."

Fine, 78*l.* 15*s.*

Fees, 4*l.* 11*s.* 8*d.*

On the 3rd of May, Craig (to whom the auctioneer had handed the draft admission as the purchaser's solicitor), returned the draft to the steward, approved; and on the following day Mills wrote to Craig acknowledging the receipt of the surrender and draft admission, and returning the latter, adding,—"You can take the admission as deputy-steward at once, if you please."

On the 25th of May, Craig wrote to the defendant, "I have received the authority of the steward to take your admittance, as his deputy;" and he appointed a day and place in London for that purpose. On the 4th of June, the defendant and Craig accordingly met, and Craig as deputy-steward admitted the defendant as tenant of the manor.

On the 7th of June, Craig wrote to Mills,—"I met Mr. Garrett on Tuesday last, and admitted him, as your deputy. He did not pay the fine, but said he would do so in a few days." On the 8th, Mills replied,—"I am in receipt of your letter of the 7th, informing me that you had admitted Mr. Garrett, as my deputy; but he

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ought to have paid the fine and fees at the time. However, I hope he will remit the same at his earliest convenience." On the 13th of June, the defendant gave Craig a cheque on his London bankers for 87*l.* 10*s.* 8*d.*, which sum was composed of the fine, 78*l.* 15*s.*, steward's fee, 4*l.* 11*s.* 8*d.*, and Craig's charges to Garrett, 4*l.* 4*s.* Craig informed the defendant how the amount of 87*l.* 10*s.* 8*d.* was made up, and requested that the cheque might be crossed with the names of Craig's London bankers; and the defendant accordingly crossed it with the names of Craig's bankers, and Craig paid it in to the credit of his account with his bankers. The cheque was duly paid on presentment by the defendant's bankers to Craig's bankers: but, Craig's balance being against him, his bankers retained the money.

On the 10th of July, Mills wrote to Craig,—"I have been expecting to receive the draft admittance and cheque for fine and fees. The admission cannot be considered complete, nor will it be entered on the court-rolls until the fine and fees are paid."

On the 16th, Craig wrote to the defendant as follows:—

"Braintree, July 16, 1867.

"My dear Sir,—You need not trouble yourself to attend on Thursday. A circular was sent to you, because, owing to the peculiar position I am placed in just now, I have not been able to pay over 83*l.* 6*s.* 8*d.* to the steward of the manor; so that amount stands in the ledger as due to you. Of course, I shall not allow you to be the loser, as the money was with me for a special purpose; but my banking account did not allow for its being paid over. I shall arrange the matter as soon as I can, and you may depend upon me to do so. You wanted to know how this amount was made up. Fine, 78*l.* 15*s.*; steward's fees, 4*l.* 11*s.* 8*d.*; costs, E. G. C., 4*l.* 4*s.*; total, 87*l.* 10*s.* 8*d.*"

On the 18th of July, Craig wrote to Mills as follows:—

"Braintree, July 18, 1867.

"Manor of Cressing. Admission of Garrett.

"Dear Sir,—Mr. Garrett has paid me the fine and your fees; but I must ask your indulgence for a little while, owing to my being in difficulties in money matters. I shall take an early opportunity of communicating with you. The money was paid to me on the 17th of June last."

Mills replied on the 19th, as follows:—

"London, July 19, 1867.

"Manor of Cressing. Admission of Garrett.

"Dear Sir,—I have to acknowledge the receipt of your letter of yesterday, handed to me by Mr. Balls Garrett. In my letter to you of the 8th of June last, when I found that Mr. Garrett had not paid the fine and fees on his admission, I expressed a hope that he would remit the amount as soon as he conveniently

could: but I cannot recognize his subsequent payment to you at all, or acquiesce in any delay. Mr. Garrett must pay his fine and fees to me, and must recover from you the money he appears to have paid to you for the purpose."

It was contended on the part of the plaintiff, that there was no evidence to support the plea of payment, on the ground that Mills had no power to authorize Craig to receive the lord's fine.

For the defendant it was argued that the steward had authority to appoint a deputy, and that the deputy had authority to receive payment of the fine.

The learned judge left it to the jury to say whether or not the fine was paid to a person authorized to receive it, and in a manner consistent with that authority. The jury returned a verdict for the defendant; and leave was reserved to the plaintiff to move to enter a verdict for him for the amount of the fine, if the Court should be of opinion that there was no evidence to support the plea of payment,—the Court to be at liberty to draw inferences of fact.

Garth, Q.C., in Easter Term, 1868, obtained a rule nisi accordingly.

Denman, Q.C., and *Cohen*, shewed cause. There was abundant evidence upon which the jury might justly find the plea of payment proved. It was purely a question for them. Mills, the steward, had authority to appoint a deputy to take the admittance of the defendant; and the deputy so appointed had authority to do any act which his principal might have done,—amongst other things, to receive the fine: 1 Watk. Cop. 29, 67, 239, 251, 252; and such authority need not be in writing: *Trotter* v. *Blake*. (1) The lord's fine is due as a consequence of admittance, and is payable on admittance: *Parker* v. *Kett* (2); *Norton* v. *Simmes* (3); *Combe's Case* (4); 1 Watk. Cop. 263, 287, 317, 318. The taking the admittance and receiving the fine are mere ministerial acts: *Lord Dacre's Case*. (5) In the case of a sale of land, payment of the deposit to the agent of the vendor is payment to the principal: *Duke of Norfolk* v. *Worthy* (6); Story on Agency, p. 76. Whether or not an agent in general has authority to receive money for his

(1) 2 Mod. 229.
(2) 1 Ld. Raym. 658; 1 Salk. 95; 12 Mod. 467.
(3) Hob. 12.
(4) 9 Co. Rep. 76. a.
(5) 1 Leon. 288.
(6) 1 Camp. 337, 341.

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principal, is a question of fact: *Catterall* v. *Hindle.* (1) So, whether he has power to receive it by cheque: *Thorold* v. *Smiths* (2); *Williams* v. *Evans.* (3) The real question is whether there was *any* evidence of authority in Craig: *Fish* v. *Kempton.* (4) The facts proved shew that Craig was authorized by Mills to do everything with reference to the admission of the defendant that Mills himself could have done, and that Mills expressly authorized Craig as his deputy to take the admittance and to receive the fine and fees, and that in the way in which the amount was received, viz., by a cheque.

Garth, Q.C., and *J. Digby*, in support of the rule. Mills, as steward of the manor, though he might have had a right to appoint a deputy to do the mere ministerial act of admitting the defendant, could not delegate the power to receive the lord's fine, which involved a trust: *Parker* v. *Kett* (5); *Earl of Shrewsbury's Case* (6); Vin. Abr. Steward of Courts (K.); Shep. Touch. 239; Gilbert's Tenures, 5th ed. 366; 2 Bac. Abr. 222; Fisher on Copyholds, 97; Watkins on Copyholds, 370, 371. Selden's Fleta, lib. 2, c. 72, ss. 11, 15. Admittance and payment of the fine are not concurrent acts, at all events where, as here, the fine is uncertain: Watkins on Copyholds, 379; Gilbert's Tenures, 219; *Rex* v. *Hendon.* (7) Craig was not a general agent, so as to authorize him to receive the money at all: *Parnther* v. *Gaitskell* (8), where Bayley, J., says: "The rule is, that, if the purchaser pay his money to the agent of the vendor before the time when the latter is authorized to receive it, he makes that agent his own for the purpose of paying over the money to the right owner;" *Brady* v. *Todd* (9); *Wilkinson* v. *Candlish* (10); *Kent* v. *Thomas* (11); *Viney* v. *Chaplin* (12); Story on Agency, s. 98; Smith's Mercantile Law, 7th ed. 128, 129. Even assuming that Craig had authority to receive the fine at the time of the admittance, he clearly had none to receive it afterwards, for

(1) Law Rep. 1 C. P. 186; in error, Law Rep. 2 C. P. 368.
(2) 11 Mod. 72, 87.
(3) Law Rep. 1 Q. B. 352.
(4) 7 C. B. 687.
(5) 1 Ld. Raym. 658; 1 Salk. 95; 12 Mod. 467.
(6) 9 Co. Rep. 49. b.
(7) 2 T. R. 484.
(8) 13 East, 432, 437.
(9) 9 C. B. (N.S.) 592; 30 L. J. (C.P.) 223.
(10) 5 Ex. 91; 19 L. J. (Ex.) 166.
(11) 1 H. & N. 473.
(12) 27 L. J. (Ch.) 434.

he had then ceased to be agent for any purpose: *Kaye* v. *Brett* (1); Smith's Mercantile Law, 7th ed. 146, 147; or in the manner he did, viz., by a crossed cheque which included the steward's fees and his own charges as Garrett's solicttor: *Vandeleur* v. *Blagrave* (2); *Baron* v. *Husband* (3); *Bartlett* v. *Pentland* (4); *Barker* v. *Greenwood.* (5) The payment, even if in other respects good, was clearly made in an unauthorized manner. By 21 & 22 Vict. c. 79, ss. 1, 2, the crossing of a cheque is made part of the instrument, and restricts the payment to the particular banker indicated. That was the act of the defendant himself, and made it necessary that the cheque should pass through the hands of Craig's bankers, and prevented Craig from handing it over to Mills, as he should have done. The handing over the cheque by the defendant to Craig having taken place in London, there was no reason why the payment of the fine should not have been made directly to Mills himself, who resided in London.

Cur. adv. vult.

BOVILL, C.J. This case was argued before my Brothers Byles and Montague Smith and myself in Hilary Term last. We have unfortunately not been able to agree in our judgment. The following is the judgment of my Brother Montague Smith and myself.

This was an action brought by the plaintiff as lord of the manor of Cressing Temple, in Essex, against the defendant, the purchaser of a copyhold tenement of the manor, to which he had been admitted, to recover the fine due on such admittance. The fine was 78*l.* 15*s.*

Mr. Craig, a solicitor at Braintree, in Essex, and then a person of good credit, acted as solicitor for the defendant. The steward of the manor, Mills, sent a draft admittance to the auctioneer employed by the seller of the property, who handed it to Craig as the defendant's solicitor; which draft Craig on the 3rd of May, 1867, returned to the steward, approved. On the 4th of May, the steward, Mills, wrote to Craig, acknowledging the receipt of the surrender and draft admittance, and added these words,—"You

(1) 5 Ex. 269; 19 L. J. (Ex.) 346.
(2) 17 L. J. (Ch.) 45.
(3) 4 B. & Ad. 611.
(4) 10 B. & C. 760, 771, 773.
(5) 2 Y. & C. Ex. 414, 419.

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can take the admission as deputy-steward at once, if you please." On the 25th of May, Craig wrote to the defendant,—"I have received the authority of the steward to take your admittance, as his deputy;" and he appointed a day and place in London for that purpose. Accordingly, on the 4th of June, the defendant, the surrenderee, and Craig met in London, and Craig admitted him, as deputy-steward. The important part of the admittance is as follows:—"Now comes the said Balls Garrett before Edward George Craig, deputy-steward of the said manor for this turn only, out of court, and prays that he may be so admitted; and he was by the hands of the said deputy-steward admitted tenant, and seisin delivered to him by the rod thereof, to hold, &c.; and he gave to the lord for a fine as appears in the margin; and his fealty was respited." In the margin was written, "Fine, 78*l.* 15*s.*," and lower down, "Fees, 4*l.* 11*s.* 8*d.*"

On the 7th of June, Craig wrote to the steward, Mills,—"I met Mr. Garrett on Tuesday last, and admitted him, as your deputy. He did not pay the fine, but said he would do so in a few days." On the 8th of June, the steward, Mills, wrote in answer,—"I am in receipt of your letter of the 7th, informing me that you had admitted Mr. Garrett, as my deputy; but he ought to have paid the fine and fees at the time. However, I hope he will remit the same at his earliest convenience."

On the 13th of June, Garrett, the defendant, gave Craig a cheque on his London bankers for the sum of 87*l.* 10*s.* 8*d.*, which sum was composed of the fine, 78*l.* 15*s.*, steward's fees 4*l.* 11*s.* 8*d.*, and Craig's charges to Garrett 4*l.* 4*s.* Craig informed Garrett how the amount of 87*l.* 10*s.* 8*d.* was made up, and requested that the cheque might be crossed with the names of his London bankers; and the defendant accordingly crossed the cheque with the name of Craig's bankers, and Craig paid it in to the credit of his account. The cheque was duly paid on presentment by the defendant's bankers to Craig's bankers; but, Craig's balance being against him, Craig's bankers refused to pay him the money.

[His Lordship read the letters: July 10, Mills to Craig; July 16, Craig to Garrett; July 18, Craig to Mills; July 19, Mills to Craig.]

The objection at the trial was that this payment to Craig did

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not discharge the defendant, and that Garrett's crossed cheque given to Craig for the sum of 87*l.* 10*s.* 8*d.* was not a good payment of the fine of 78*l.* 15*s.* as against the lord of the manor; and, further, that the cheque was received by Craig as solicitor for the defendant, and not on behalf of the lord.

At the trial the jury found that Craig had authority to receive the fine for the lord, and that the crossed cheque was a good payment to the lord within the authority to pay Craig: and the verdict passed for the defendant. The plaintiff had leave to move to enter the verdict for him for the amount of the fine; and the Court were to be at liberty to draw inferences of fact.

We are of opinion that there was abundant evidence in this case that the steward might appoint a deputy-steward *to take the admittance*, and that he did appoint Craig as such deputy for that purpose.

The admittance purports to be and was in fact taken by Craig in that capacity; and the plaintiff, as lord of the manor, who could have no claim to the fine until after admittance, by now suing for the fine must be taken to have recognized and adopted the admittance so taken by Craig.

It was argued for the defendant, that, from the nature and terms of the form of admittance, it was intended that Craig should receive the fine and fees at or immediately after the time of admittance, and that the letter of Mills shewed that it was understood, as between him and Craig, that the latter might receive those amounts at a subsequent period.

It was contended for the plaintiff that Mills, as the steward, had no power to appoint a deputy to receive the fine for the lord: but, in the view which we take of the case, it is not necessary to determine these points, because, assuming that he had such power, and that he did authorize Craig to receive the money, such authority in our opinion would be only an authority to receive payment in cash, or what was equivalent to cash, and which might be handed over as it was received to Mills or the lord.

The general rule of law is, that, where a creditor's agent is bound to pay the whole amount over to the principal, he must receive it in cash from the debtor; and that a person who pays such agent, and who wishes to be safe, must see that the mode of payment does

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enable the agent to perform this his duty. The law was so laid down by Alderson, B., in *Barker* v. *Greenwood* (1), and is in accordance with *Russell* v. *Bangley* (2), and has been recognized in many other cases. The reasons for the rule are also well stated by my Brother Byles in *Sweeting* v. *Pearce* (3), where he says: "It is not disputed that the general rule of law is that an authority to an agent to receive money implies that he is to receive it in cash. If the agent receives the money in cash, the probability is that he will hand it over to the principal. But, if he is allowed to receive it by means of a settlement of accounts between himself and the debtor, he might not be able to pay it over. At all events, it would very much diminish the chance of the principal ever receiving it; and upon that principle it has been held that the agent, as a general rule, cannot receive payment in anything else but cash. Unless, therefore, there is some usage to control it, payment to the agent must be made in money." The general principle, and also the decision in the last case, were affirmed by the Court of Exchequer Chamber in *Sweeting* v. *Pearce*. (4)

The payment which was relied upon by the defendant in this case was not a payment in cash: it was not even by an ordinary cheque payable to bearer; but it was by a cheque which by being crossed was payable to the bankers of Craig; and the state of his account with his bankers was such that he never did and never could receive the amount so as to be able to hand it over to the lord or to Mills. The cheque also included money payable to Craig himself for fees as the defendant's solicitor; and it never was intended to be, nor could properly have been, handed over by Craig to Mills or the lord. In fact Craig never received the money; nor was he ever in possession of a cheque or cash that he could hand over to the lord, or to Mills, the steward.

At the time the cheque was given to Craig he was in fact solicitor for Garrett; he treated the cheque as received on Garrett's account; and his letter of the 16th of July clearly shews that he considered himself as debtor to the defendant for the amount. It was not until the 18th of July that he informed Mills that he had

(1) 2 Y. & C. Ex. 414, 419.
(2) 4 B. & A. 395, 398.
(3) 7 C. B. (N. S.) at p. 485; 29 L. J. (C.P.) at p. 272.
(4) 9 C. B. (N. S.) 534; 30 L. J. (C.P.) 109.

received the money, and endeavoured to shift the loss from his client, the defendant, to Mills or the lord.

The proper conclusion to be drawn from all the facts, we think, is, that Craig received the cheque as Garrett's solicitor, and not as agent for Mills or the lord, and that he was the agent of Garrett to hand over a portion of the amount when received to Mills; and, until the cheque was paid, or indeed at any time whilst the money remained in the hands of Craig, we think it would have been competent for Garrett to have countermanded the authority to hand over the amount to Mills.

We are also of opinion that there was no evidence which could properly be left to the jury of any authority from the lord to Craig to receive payment by a cheque crossed with the name of Craig's bankers, and which included money due to Craig himself.

We think, therefore, that the rule to enter the verdict for the plaintiff for the amount of the lord's fine, 78*l.* 15*s.*, should be made absolute.

BYLES, J. I state my views with great diffidence and distrust, because I have the misfortune to differ from my Lord and my Brother Montague Smith.

This was an action brought by the plaintiff as lord of the manor of Cressing Temple, in Essex, against the defendant, a copyhold tenant of the manor, for the fine due on the tenant's admittance to a copyhold. The fine was 78*l.* 15*s.*, and the steward's fees 4*l.* 11*s.* 8*d.*

Craig, a solicitor at Braintree, in Essex, had been acting as solicitor for the defendant. The steward of the manor, a gentleman of the name of Mills, sent to Craig a draft admittance, which draft Craig on the 3rd of May, 1867, returned to the steward approved. On the 4th of May, the steward, Mills, writes to Craig acknowledging the receipt of the surrender and draft admittance, and adds these words,—"*You can take the admission as deputy-steward* at once, if you please." On the 25th of May, Craig writes to the defendant and says,—"I have received the authority of the steward to take your admittance, as his deputy;" and he appoints a day and place in London for that purpose. Accordingly, on the 4th of June, Garrett, the surrenderee, and Craig meet in London, and

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Craig, as deputy-steward, admits Garrett. The important part of the admittance is as follows:—"Now comes the said Balls Garrett before Edward George Craig, *deputy-steward* of the said manor for this turn only, out of court, and prays that he may be so admitted; and *he was by the hands of the said deputy-steward admitted tenant*, and seisin delivered to him by the rod thereof, to hold, &c.; and he gave to the lord for a fine as appears in the margin; and his fealty was respited." In the margin was written, "Fine, 78*l.* 15*s.*," and lower down, "Fees, 4*l.* 11*s.* 8*d.*"

On the 7th of June, Craig writes to the steward, Mills, and says,—"I met Mr. Garrett on Tuesday last, and admitted him, as deputy-steward. He did not pay the fine, but said he would do so in a few days." On the 8th of June, the steward, Mills, writes in answer,—"I am in receipt of your letter of the 7th instant, informing me that you had admitted Mr. Garrett, *as my deputy;* but *he ought to have paid the fine and fees at the time. However, I hope he will remit the same at his earliest convenience.*"

On the 13th of June, Garrett gave Craig a cheque on his London bankers for the sum of 87*l.* 10*s.* 8*d.*, which sum was composed of the fine, 78*l.* 15*s.*, steward's fees, 4*l.* 11*s.* 8*d.*, and Craig's charges to Garrett, 4*l.* 4*s.* Craig informed Garrett how the amount of 87*l.* 10*s.* was made up, and Craig himself requested that the cheque might be crossed with the names of his, Craig's, London bankers, which was done accordingly. The cheque was duly paid on presentment by the defendant's bankers to Craig's bankers; but, Craig's balance being against him, Craig's bankers refused to pay Craig the money.

On the 10th of July, Mills, the steward, writes to Craig,—"I have been expecting to receive the draft admittance and *cheque* for fine and fees. The admission cannot be considered complete, nor will it be entered on the court-rolls, till the fine and fees are paid." On the 18th of July, Craig writes to Mills, the steward, in these words,—"Mr. Garrett has paid me the fine and your fees; but I must ask your indulgence for a little while, owing to my being in difficulties." Mills replies on the 19th of July,—"In my letter to you of the 8th of June last, when I found that Mr. Garrett had not paid the fine and fees on his admission, I expressed a hope that he would remit the amount as soon as he conveniently could;

but I cannot recognize his subsequent payment to you at all, or acquiesce in any delay. Mr. Garrett must pay his fine and fees to me, and must recover from you the money he appears to have paid to you for the purpose."

The objection at the trial was, that payment to Craig did not discharge the defendant, and that Garrett's crossed cheque given to Craig for the sum of 87*l.* 10*s.* 8*d.* was not a good payment of the fine, as against the lord of the manor.

It was contended on the part of the plaintiff, that, Craig filling the double capacity of deputy-steward and of defendant's solicitor, the cheque was paid to him and received by him in his character of defendant's solicitor. The defendant, on the other hand, contended that the cheque was paid to Craig and received and held by Craig in his character of deputy-steward.

The question in the case was, whether the payment by the surrenderee to Craig, the deputy-steward, was under these circumstances a good payment of the fine to the lord. The jury found that Craig had authority to receive the fine for the lord, and that the crossed cheque was a good payment to the lord within the authority to pay Craig. But it is contended that the jury ought to have been directed to find for the plaintiff. That point was reserved.

In deciding this question, we are to bear in mind that Craig, at the time when he was appointed deputy-steward, was an attorney of undoubted credit; and it may be that the steward would have preferred him as a debtor even to the surrenderee himself; and that the cheque given by the defendant to the deputy-steward was a *good* cheque, and was duly paid by the defendant's bankers, on presentment.

The steward of a manor may appoint a deputy to act as steward in his place, and the deputy may do all that the steward himself could have done: *Parker* v. *Kett.* (1) Here, it is plain from the terms of the draft admittance, which contains in the body of it a receipt for the lord's fine, and from Mills's letter of the 8th of June, that the deputy had authority to receive the fine and fees. But the fine is not due until after admittance, and is recoverable by action afterwards, as this action shews. And, although the admit-

(1) 1 Ld. Raym. 658; 1 Salk. 95; 12 Mod. 467; 1 Scriven, Cop. 119.

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tance contains a receipt for the fine, the lord does not in practice, and will not, inrol that admittance till the fine is paid.

It appears to me that Craig acted in two capacities,—as deputy-steward in receiving the 78*l.* 15*s.* for the lord's fine, and 4*l.* 11*s.* 8*d.* for the steward's fees, and as solicitor for the defendant in receiving 4*l.* 4*s.*, being his own charges as defendant's attorney. The defendant must have known that the 78*l.* 15*s.* was paid to the lord, and 4*l.* 11*s.* 8*d.* to the steward; for, it will be observed that the draft admittance itself expressly informed the defendant that those two sums were paid to Craig and received by Craig as deputy-steward.

Suppose the steward himself had in this case acted, instead of employing a deputy, and had been (as often happens) himself solicitor to the copyholder as well as steward of the manor, and had himself received from the copyholder a good cheque, duly paid by the copyholder's bankers, for a sum including the lord's fine, the steward's fees, and his own charges; and suppose the money stopped in the hands of the steward's bankers, or the steward otherwise unable to pay the lord; would not that have been a good payment as between the lord and the surrenderee, although the steward sustained the double character of surrenderee's attorney and of steward when he received the money? I think it would have been a good payment; but it would of course have been no payment as between the lord and the steward. The lord would have had his remedy against the steward, as in the case now before us he has his remedy both against the steward and the deputy-steward.

At lowest, from the moment Craig received the money, he *held* it as deputy-steward; his only remaining duty being, to pay it over to the steward.

It was objected that the payment was by cheque. The answer is, that it was not a dishonoured cheque, but a good cheque duly paid on presentment. Moreover, it is plain the steward did not object to a cheque; for, he afterwards writes to Craig (on the 10th of July), desiring to receive a cheque. But whose cheque, or from whom, does not clearly appear.

I do not perceive any obligation on the deputy-steward to remit to the lord or to the steward the identical cheque that he received. Suppose the steward himself had acted in person, and had received

a cheque, would it be his duty to remit it to the lord? Surely not; for, even that cheque would be for two items, the lord's fine and the steward's fees. Here, the cheque was for three items, the lord's fine, the steward's fees, and the defendant's attorney's charges.

Then it is objected that the cheque was crossed: but this was done at the request of the deputy-steward, and for his own convenience and safety. It matters not, as it seems to me, that the crossing was by the hand of the surrenderee. The payee or subsequent holder of a cheque may cross it at any time, either with the words "& Co." or with his own banker's name, and the drawer cannot prevent him. Suppose it had not been crossed, but had been paid by Craig into his own bankers, in the ordinary course of business, after his transaction with the surrenderee had been finished, the result would have been precisely the same. It is as if the deputy-steward, after receiving the cheque, had sent it to be cashed by a clerk or servant of his own, who received the money and appropriated the payment to a debt of his own due to him from his master. Craig's banker, for this purpose, is his servant. Or, suppose Craig had received the money in cash and had paid it into his bankers', the money would still have been stopped.

If it be objected that the amount of the cheque blended the three sums of 78*l.* 15*s.*, 4*l.* 11*s.* 8*d.*, and 4*l.* 4*s.*, so would a bank-note of 100*l.* or nine bank-notes of 10*l.* each. In these cases, and indeed in the case of one payment in coin, a separation of the sums would have been equally necessary afterwards.

With respect to the time when the cheque was given being after admittance, it has been already observed that the fine is not due till *after* admittance, though the lord or steward are not bound to inrol the admittance till the fine and fees are paid: and it is conceived that the time which elapsed between the admittance and the payment was no more than a reasonable time, and within the limits of Craig's authority, the admittance still remaining in Craig's hands.

The facts do not seem here to be in dispute. If, therefore, it be a question of law, I think the payment to Craig a good payment to the steward and the lord. If it be a question of fact, then the jury have found that the payment to Craig and the manner in

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which it was made were within the limits of his authority to receive it as deputy-steward.

On these grounds, I am of opinion that the rule to enter a verdict for the plaintiff should be discharged, and that the verdict for the defendant should stand.

Rule absolute.

Attorneys for plaintiff: *Ward, Mills, & Witham.*
Attorneys for defendant: *Monckton & Monckton.*

END OF EASTER TERM.

CASES

DETERMINED BY THE

COURT OF COMMON PLEAS

AND BY THE

COURT OF EXCHEQUER CHAMBER,

ON ERROR AND APPEAL FROM THE COURT OF COMMON PLEAS,

IN AND AFTER

TRINITY TERM, XXXII VICTORIA.

HEFFIELD *v.* MEADOWS.

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June 24.

Guarantee, Construction of—Evidence—Surrounding Circumstances.

The defendant gave to the plaintiff, a cattle dealer, a guarantee in the following words:—"50*l.* I, J. M., of &c., will be answerable for 50*l.* sterling that W. Y., of &c., butcher, may buy of Mr. J. H., of &c.":—

Held, a continuing guarantee to the extent of 50*l.*, as it appeared from the circumstances under which the guarantee was given that the parties contemplated a continuing supply of stock to W. Y. in his trade of a butcher.

DECLARATION on a guarantee. First count, that in consideration that the plaintiff would sell goods to W. York, on credit, the defendant promised the plaintiff to be responsible to him for the due payment of the price of the goods to the extent of 50*l.*; that the plaintiff sold goods to York, on credit, and that all conditions were fulfilled, &c.; yet that York had not paid for the goods, nor had the defendant paid the same to the extent of 50*l.*

The second count was in similar terms, except that the defendant's promise was alleged to be that he would be responsible to the plaintiff for such sums of money as might from time to time be

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owing from York to the plaintiff as payment for the goods to the extent of 50*l.*

Pleas: 1. Non-assumpsit. 2. Payment by York. Issues thereon.

The cause was tried before Hayes, J., at the last spring assizes at Lincoln. The plaintiff is a farmer and cattle-dealer at Donington, in Lincolnshire, and the defendant is a gentleman of small independent means at Barwick, near Stamford. The action was brought to recover 50*l.* alleged to be due from the defendant upon the following guarantee signed by him on the 5th of July, 1867:—

"50*l.* I, John Meadows, of Barwick, in the county of Northampton, will be answerable for 50*l.* sterling that William York, of Stamford, butcher, may buy of Mr. John Heffield, of Donington."

For several years prior to the spring of 1867, the plaintiff had been in the habit of selling stock to William York, the elder, who carried on the business of a butcher at Stamford; early in that year, the elder York failed in his business, and was succeeded by his son W. York the younger. Shortly afterwards the defendant, accompanied by W. York the younger (who was his nephew), called on the plaintiff, and told him that W. York the younger intended to carry on the business, and expressed a hope that the plaintiff would continue to trade with W. York the younger in the same way he had done with his father. The plaintiff subsequently supplied York the younger with stock from time to time. Payments were made on account by York, and at the end of June there was a balance of 9*l.* 9*s.* 9*d.* due from him to the plaintiff.

On the 5th of July, 1867, the plaintiff called on York at Stamford, and told him he had some nice stock to sell. York wished to buy the lot, which consisted of two beasts and ten sheep, the price being 91*l.* The plaintiff, being unwilling to trust York to such an extent, went to the defendant, and asked the defendant to give him a guarantee, saying that if the defendant would give a guarantee for 50*l.*, he would still keep supplying York as he had supplied his father. The defendant consented, and signed the guarantee above set out, but desired the plaintiff not to let York know that he had done so; and the plaintiff delivered the stock to York on the 11th of July. Payments were subsequently made by York to the plaintiff to an amount exceeding 91*l.*

It was contended on the part of the defendant, on the authority

of *Nicholson* v. *Paget* (1), that the guarantee was not a "continuing" guarantee, and consequently that the defendant's liability was discharged by the payments made by York.

Nothing was left to the jury; and the learned judge directed a verdict for the plaintiff, with leave to the defendant to move.

Boden, Q.C., in Easter Term last obtained a rule nisi to enter a verdict for the defendant or a nonsuit.

Mellor shewed cause. The position of the parties and the surrounding circumstances must be looked at in order to arrive at the true construction of the guarantee. The circumstances, under which the guarantee was given, explain the ambiguous language of the document, and shew that the parties contemplated a continuing security for any stock which York might from time to time buy of the plaintiff in the way of his trade. At all events, there is nothing upon the face of the document which is inconsistent with that construction. The case of *Nicholson* v. *Paget* (1), which was relied on for the defendant at the trial, was observed upon in *Mayer* v. *Isaac* (2) and in *Wood* v. *Priestner*. (3) In *Mayer* v. *Isaac* (2), upon *Nicholson* v. *Paget* (1) being cited, Parke, B., said: "Do you find any other authority to support the rule of construction there laid down? It certainly is at variance with the general rule of the common law, that the words of an instrument are to be taken most strongly against the party using them." And Alderson, B., says (4): "I should rather be disposed to agree with the principle given in *Mason* v. *Pritchard* (5) than with the opinion of Bayley, B., in *Nicholson* v. *Paget*. (1) It was not, however, necessary for the decision of the case of *Nicholson* v. *Paget* (1) that it should depend upon the principle so stated." In *Merle* v. *Wells* (6) Lord Ellenborough says that, "if a party means to be surety only for a single dealing, he should take care to say so."

Boden, Q.C., and *Beasley*, in support of the rule. The document in question refers only to a single transaction and to a single amount of 50*l*. The dealing in respect of which it was given took place on the 5th of July, 1867, and the price of the beasts then

(1) 1 Cr. & M. 48.
(2) 6 M. & W. 605.
(3) Law Rep. 2 Ex. 66; in error, Law Rep. 2 Ex. 282.
(4) 6 M. & W. at p. 612.
(5) 12 East, 227.
(6) 2 Camp. 413.

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bought has since been wholly paid off. Taking the words of the guarantee in their fair and reasonable sense, the words "may buy" must be read "may now buy." In *Broom* v. *Batchelor* (1), Bramwell, B., says: "'May be' is the present tense, and primâ facie means 'now may be.' . . . If you use the words 'may be' without indicating the tense, to my mind the expression applies to the present, or, more correctly, not to a question with reference to the future." In *Mason* v. *Pritchard* (2), *Merle* v. *Wells* (3), and *Mayer* v. *Isaac* (4), the documents clearly referred to a future or a continuing course of dealing. *Nicholson* v. *Paget* (5) is almost identical with the present case. The guarantee there was in the following words: "I hereby agree to be answerable for the payment of 50*l.* for T. Lerigo, in case T. Lerigo does not pay for the gin, &c., which he receives from you, and I will pay the amount;" and it was held not to be continuing. Bayley, B., in delivering the judgment of the Court, says: "We think that it is the duty of the party who takes such a security to see that it is couched in such words as that the party so giving it may distinctly understand to what extent he is binding himself." And, after referring to the particular language of the document, and to the cases of *Melville* v. *Hayden* (6), *Mason* v. *Pritchard* (2), *Merle* v. *Wells* (3), and *Hargreave* v. *Smee* (7), he concludes: "This decision will be attended with beneficial consequences. It is not unreasonable to expect from a party who is furnishing goods on the faith of a guarantee, that he will take the guarantee in terms which shall plainly and intelligibly point out to the party giving the guarantee the extent to which he expects that the liability is to be carried." Reading the guarantee in this case with reference to the circumstances under which it was given, it is clear that it was not intended to be a continuing guarantee. *Dimmock* v. *Sturla* (8) was also referred to.

WILLES, J. The question in this case is whether the guarantee declared on was a continuing guarantee for 50*l.*, so as to be a security to the plaintiff to that extent for any balance which might

(1) 25 L. J. (Ex.) 299.
(2) 12 East, 227.
(3) 2 Camp. 413.
(4) 6 M. & W. 605.
(5) 1 Cr. & M. 48.
(6) 3 B. & A. 593.
(7) 6 Bing. 244; 3 M. & P. 573.
(8) 14 M. & W. 758.

become due to him in the course of his dealings with York, or whether the security was limited to a single transaction between the plaintiff and York. It is obvious that we cannot decide that question upon the mere construction of the document itself, without looking at the surrounding circumstances to see what was the subject-matter which the parties had in their contemplation when the guarantee was given. It is proper to ascertain that for the purpose of seeing what the parties were dealing about, not for the purpose of altering the terms of the guarantee by words of mouth passing at the time, but as part of the conduct of the parties, in order to determine what was the scope and object of the intended guarantee. Having done that, it will be proper to turn to the language of the guarantee, to see if that language is capable of being construed so as to carry into effect that which appears to have been the real intention of both parties. The surrounding circumstances may be stated thus:—York's father, a butcher at Stamford, had failed in business, and was succeeded by the son, who had been supplied from time to time, as his father had been, with stock by the plaintiff, who was a grazier in the neighbourhood of Donington. At the time the guarantee was given, the plaintiff appears to have had some doubt as to whether or not he should continue his dealings with York, and especially whether he should deliver some beasts and sheep whose price amounted to 91*l.*, which the plaintiff had in the market, and which York wanted to purchase. Without consulting York, the plaintiff went to the defendant, who was York's uncle; and the result was that the dealing with respect to the specific quantity of beasts and sheep was referred to, but in a context which shows that the parties talked of continuing the dealing generally with York. That the subject of the interview was not confined to the particular transaction then about to take place, but had reference to the future dealings between the plaintiff and York, is fortified by the fact that York knew nothing of the guarantee being given. It was arranged between the plaintiff and the defendant, not only without any communication with York, but by the defendant's express desire York was to know nothing about it. Under these circumstances, if the facts were stated in a special verdict, it would be to this effect, that a communication was had and held between the plaintiff and the defendant of and concerning the supplying of

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beasts and sheep by the plaintiff to York in the way of his business of a butcher. Now, let us turn to the guarantee, and see if it is applicable to such a dealing. [The learned judge read the guarantee.] The first remark which is to be made upon this document is, that it is not specific as to the consideration; it might either have been the particular transaction then contemplated or a course of dealing in which 50*l.* would or might become due from York for things bought by him of Heffield. It does not even refer to stock. Again, the only thing specific as to the consideration is the amount of money for which Meadows was to be answerable; but whether for particular goods or goods generally does not appear. In that respect the case very much resembles a class of cases upon the Statute of Frauds, where it has been held that oral testimony is admissible for the purpose of determining the subject-matter about which the parties were communicating at the time of the contract; as in the case of *Macdonald* v. *Longbottom* (1), on s. 17, where, on a contract for the purchase of "your wool," evidence was received to shew that all the seller's wool, whether of his own clip or purchased by him from other farmers, was meant. There is another remark to be made upon this document, in respect of the use of the word "may," which, without referring to the learned and refined reasoning of my Brother Bramwell on the one side, and Pollock, C.B., on the other, in *Broom* v. *Batchelor* (2), and without going into any lengthened arguments of grammar, it is manifest may apply either to a present transaction not completed, or to a future transaction, whether definite in the minds of the parties, or definite in description and indefinite as to the details. For these reasons, I am of opinion that the guarantee in question is a continuing guarantee, as well upon the authorities as upon the common-sense view of the matter. The rule, therefore, must be discharged.

MONTAGUE SMITH, J. I am of the same opinion. The consideration is defectively stated in this guarantee. It does not shew in what the supply is to consist. We may, therefore, look at the surrounding circumstances, in order to see for what it was given

(1) 1 E. & E. 977, 987; 28 L. J. (Q.B.) 293; 29 L. J. (Q.B.) 256.
(2) 25 L. J. (Ex.) 299.

and to what transactions or dealings it was intended to apply,—not to alter the language, but to fill up the instrument where it is silent, and to apply it to the subject-matter to which the parties intended it to be applied. That being the principle upon which we ought to proceed in construing this guarantee, the conclusion I draw from the evidence is that it did not contemplate a single transaction, but continuing dealings; the object being to keep up young York in the business of a butcher which he had commenced. If it had contained anything so specific as to shew it was intended to apply to a single transaction, we could not have extended its operation by reference to the surrounding circumstances, even though we might think that by so doing we should best carry out the intention of the parties. If the guarantee had been intended to apply to the beasts brought to the market on the 5th of July, one would have expected something to limit it to that dealing. But the language is general, and is capable of meaning that the defendant was intended to be answerable for goods at any time supplied, to the extent of 50*l.* Applying the surrounding circumstances to the carrying out of the intention of the parties, I can come to no other conclusion.

Rule discharged.

Attorneys for plaintiff: *Scott & Co.*

Attorneys for defendant: *Wright, Bonner, & Wright, for W. F. Law, Stamford.*

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WOOLLEY *v.* THE NORTH LONDON RAILWAY COMPANY.

*Practice—Inspection of Documents—*14 *&* 15 *Vict.* c. 99, *s.* 6*—Privileged Communications.*

In an action against a railway company for a personal injury sustained by a passenger on their railway, the Court allowed inspection of the following documents,—

1. A report of one of the defendants' inspectors to the general manager, as to the accident in respect of which the action was brought: 2. A report of the guard of the train to which the accident happened: 3. A report of the defendants' locomotive superintendent, to the general manager, as to the accident,—upon the ground that they were reports or communications made by agents of the company in the ordinary course of their duty, for the purpose of conveying to the company information upon the subject, and were not opinions obtained confidentially with a view to litigation; and this without reference to whether they were made before or after the commencement of litigation.

The Court also allowed inspection of—4. Copy of a letter written by the defendants' general manager to the secretary of the Board of Trade (pursuant to 3 & 4 Vict. c. 97, s. 3), as to the accident: 8. A guarantee (dated seven years before the plaintiff's injury occurred) of materials for locomotive engines, part of which at the time of the accident formed a portion of the engine of the train in which the plaintiff was injured,—upon the ground that they might be evidence for the plaintiff, and were not privileged: and 10. So much of the entries in the minute-books of the locomotive stores and traffic-committee, relating to the accident, as were not entries of communications between the defendants and their legal advisers, or the result thereof.

The Court refused inspection of—5. Reports to the defendants' locomotive superintendent, from scientific men consulted by or on behalf of the defendants, with reference to the cause of the accident: and 7. Report to the defendants' attorneys from one of the scientific men consulted on behalf of the defendants with reference to the cause of the accident,—upon the ground that they were privileged.

ACTION for injuries sustained by the plaintiff whilst travelling on the defendants' railway on the 16th of November, 1868.

The plaintiff took out a summons to inspect and take copies of the following documents, viz.

1. Report of John Alcock, one of the defendants' inspectors, to the defendants' general manager, dated the 16th of November, 1868, as to the accident in respect of which this action is brought.

2. Report of William Buggey, the guard of the train to which the accident happened, dated the 16th of November, 1868.

3. Report of William Adams, the defendants' locomotive super-

intendent, to the defendants' general manager, dated the 19th of November, 1868, as to the accident.

4. Copy of a letter, dated the 20th of November, 1868, written by the defendants' general manager to the secretary of the Board of Trade as to the accident.

5. Four reports of William Adams dated the 8th, 11th, 23rd, and 28th of December, 1868, from scientific men consulted on behalf of the defendants with reference to the cause of the accident.

7. Report, dated December, 1868, to the defendants' attorneys from one of the scientific men consulted on behalf of the defendants, with reference to the cause of the accident.

8. Guarantee, dated the 20th of September, 1861, of materials for locomotive engines, part of which at the time of the accident formed a portion of the engine which was drawing the train at the time of the accident.

10. The board and locomotive stores and traffic committee minute-books of the directors of the North London Railway Company, containing entries with reference to the accident.

The defendants objected to the production of the documents, on the ground that they were confidential communications, or were not evidence, and that they all related exclusively to the defendants' case.

On the 6th of February, 1869, Hayes, J., ordered that the plaintiff should be at liberty to inspect and take a copy of or extracts from the documents numbered 4, 8, and 10. He referred the question as to the other documents to the Court.

This order was not obeyed by the defendants, and on the 22nd of February Hayes, J., made a further order that the defendants should, within a fortnight, produce to the plaintiff's attorney for inspection the documents and books mentioned in the order of the 6th of February.

April 29. *Hawkins, Q.C.*, moved to rescind these orders. The document numbered 4, which is the return required by 3 & 4 Vict. c. 97, s. 3, to be made by railway companies in the case of accidents occurring on a railway which are attended with personal injury, is framed for public purposes, and the plaintiff is not entitled to

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inspect it. Moreover, the original remains with the secretary of the Board of Trade. The copy in the hands of the defendants would at best be only secondary evidence. No. 8 is a guarantee of materials given in 1861, and can not be material to the case of the plaintiff, which arises out of an accident occurring in 1868. The entries in the minute-books, numbered 10, are clearly privileged, as being a record of private communications between the company and their attorneys with reference to their defence to the action. *Chartered Bank of India* v. *Rich* (1), and *Baker* v. *London and South Western Railway Company* (2), were referred to.

KEATING, J. I think the rule may go, to vary the order of the 22nd of February, so as to limit the inspection of the entries in the minute-books relating to the accident, before the action, to such as are not entries of communications between the defendants and their professional advisers, or the result thereof. As to the rest, I think the order was rightly made, and that the plaintiff should have inspection of the documents Nos. 4 and 8. It is not always easy to say what may or may not be made evidence in a cause, nor is it necessary upon an application of this sort that the document inspected should be shewn to be capable of being given in evidence. If it be quite clear that a document cannot be given in evidence, that may, perhaps, be a ground for refusing inspection. But I cannot say that the documents may not be evidence. As to the entries in the minute-books, they clearly are not privileged, except to the extent I have intimated.

MONTAGUE SMITH, J. I also think the copy of the report made to the Board of Trade should be produced. It is not suggested by Mr. Hawkins that it comes within the description of a privileged communication; and, though the company have a copy only, that might, under some circumstance, be admissible in evidence. I think the plaintiff is also entitled to have inspection of the guarantee. It is a document relating to the matters in the cause. If so, it may be material to the plaintiff's case. The rule will therefore be confined to varying the order as suggested by my Brother Keating.

(1) 4 B. & S. 73; 32 L. J. (Q.B.) 300. (2) Law Rep. 3 Q. B. 91.

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W. G. Harrison also obtained a rule calling upon the defendants to shew cause why the plaintiff should not have inspection of the documents numbered 1, 2, 3, 5, and 7.

May 31. *F. M. White* (*Hawkins, Q.C.*, with him,) shewed cause against the plaintiff's rule. The whole of the documents referred to in the plaintiff's rule are protected, within the rule laid down by the Court of Queen's Bench in *Chartered Bank of India* v. *Rich.* (1) In that case, Cockburn, C.J., expresses his approval of the doctrine of Pollock, C.B., in *Hunt* v. *Hewitt* (2); and Blackburn, J., says (3): "I think the legislature did not mean that we should be bound by the same rules by which a judge of a court of equity is bound, but that we should be regulated by what is just as between the parties." The reports are not statements of a person who was present at the time of the accident, but of an inquiry instituted for the purpose of informing the defendants of the nature of the accident and its cause, so as to enable them to perform the duty cast upon them by 3 & 4 Vict. c. 97, s. 3. They would not be evidence. They are not like the documents of which inspection was ordered in *Daniel* v. *Bond* (4), which were all proximately connected with the matter in issue, or in *London Gas Light Company* v. *Chelsea Vestry.* (5) This is an application to the discretion of the Court; and all these reports were made when litigation was anticipated. In *Woolley* v. *Pole* (6), the plaintiff sought to inspect communications which had passed between the defendants, an insurance company, and the agents by whom the policy declared on was effected, and between the company and other offices who subsequently shared the risk with them, and also the reports and list of salvage made out for the company by their own officers. But Erle, C.J., said: "I do not think the plaintiff is entitled to the communications with the other offices, except so far as relates to the existence or value of the property insured. Nor do I think the plaintiff is entitled to the production of the communications made to the office by their servants as the result

(1) 4 B. & S. 73, 79; 32 L. J. (Q.B.) 300.

(2) 7 Ex. 236, 244; 21 L. J. (Ex.) 210.

(3) 4 B. & S. at p. 82.

(4) 14 C. B. (N.S.) 716.

(5) 6 C. B. (N.S.) 411; 28 L. J. (C. P.) 275.

(6) 14 C. B. (N.S.) 538; 32 L. J. (C. P.) 263.

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of their examination of the ruins, the office having already offered the plaintiff every facility to examine and make the most of them for himself. The plaintiff has no right to see that which will form the brief of the defendant." The reports contain information collected for the purpose of resisting a claim against the company, or for the purpose of enabling the company to make their report to the Board of Trade, under the statute. It is the defendants' case only. If these statements had been put in the brief in the form of a proof, the defendants could not have been called upon to shew it.

[BOVILL, C.J. It is essential that there should be freedom of communication between the client and the legal adviser. But, if those matters which would be privileged if communicated to the attorney are communicated to a friend, they cease to be privileged. He referred to *Flight* v. *Robinson*. (1)]

Flight v. *Robinson* (1) was cited in the Court of Exchequer in *Hunt* v. *Hewitt* (2), and in the Court of Queen's Bench in *Chartered Bank of India* v. *Rich* (3), and not adopted by either of them. It is not just to make a defendant disclose his defence to an anticipated action. It is impossible to reconcile the cases either at law or in equity. As to the former, Dr. Lushington remarks, in *The Macgregor Laird* (4): "I have examined the cases at common law on the subject, but the whole question appears to me to be in a state of darkness and confusion." As to the documents numbered 5 and 7, they are clearly privileged. They are reports and opinions of scientific men obtained confidentially, with a view to impending litigation. They come within the principle of *Baker* v. *London and South Western Railway Company* (5), which the Lord Chief Justice distinguished from *Chartered Bank of India* v. *Rich*. (3)

W. G. Harrison, contrà. The Court of Chancery would certainly order discovery of all these documents. And it is just that the plaintiff should have the information required. The cause of the accident is exclusively in the knowledge of the company's servants; the plaintiff can only prove his case by means of information

(1) 8 Beav. 22.
(2) 7 Ex. 236; 21 L. J. (Ex.) 210.
(3) 4 B. & S. 73; 32 L. J. (Q.B.) 300.
(4) Law Rep. 1 A. & E. 307.
(5) Law Rep. 3 Q. B. 91.

derived from them. No privilege can attach to the documents numbered 1, 2, and 3. They are communications of matters of fact made by servants of the company to their general manager in the ordinary course of their duty. *Goodall* v. *Little* (1) is a much stronger case than this. There, letters from one of the defendants, the manager of a firm abroad, to the co-defendant, the agent in London, for the purpose of being communicated to his solicitors, with a view to the litigation in the suit, were held not to be privileged.

[BOVILL, C.J. There certainly are very strong authorities to shew that this and a great deal more would be granted in Chancery: see *Glyn* v. *Caulfeild* (2); *Kerr* v. *Gillespie* (3); *Flight* v. *Robinson*. (4)]

In *Attorney-General* v. *Rees* (5), the answer of persons engaged in working a coal-mine, which stated that they could not, as to their belief or otherwise, set forth the mode of working, were held insufficient,—the Court assuming that the defendants must have workmen under their control from whom such information might be derived, and which the defendants were bound to afford.

[MONTAGUE SMITH, J., referred to *Reid* v. *Langlois* (6), and *Steele* v. *Stewart*. (7)]

In both those cases the information was substantially obtained by an agent employed by the solicitor for the purpose of collecting evidence. It is not enough, however, to say that the documents were procured for the purpose of the party's defence to a suit, without connecting them with his legal adviser: *Maden* v. *Veevers* (8); *Balguy* v. *Broadhurst*. (9) That they are procured after the dispute has arisen, and with reference to litigation, and even after action brought, is no answer: *London Gas Light Company* v. *Chelsea Vestry*. (10) All that *Chartered Bank of India* v. *Rich* (11) decides is, that the judge at chambers having exercised his discretion, the Court would not interfere. It cannot be denied

(1) 1 Sim. (N.S.) 155; 20 L. J. (Ch.) 132.
(2) 3 M'N & G. 463.
(3) 7 Beav. 572.
(4) 8 Beav. 22.
(5) 12 Beav. 50.
(6) 1 M'N. & G. 627.
(7) 1 Phil. 471.
(8) 7 Beav. 489.
(9) 1 Sim. (N.S.) 111; 20 L. J. (Ch.) 55.
(10) 6 C. B. (N.S.) 411; 28 L. J. (C.P.) 275.
(11) 4 B. & S. 73; 32 L. J. (Q.B.) 300.

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that it is matter of discretion, even in equity; but it is a discretion which is to be guided by some fixed principle: per Lord Cranworth, in *Balguy* v. *Broadhurst*. (1)

The documents numbered 5 and 7 stand upon a somewhat different footing. So far as they relate to matters of fact, the plaintiff is entitled to inspect them: if they contain mere opinions on scientific matters, he is not.

As to the entries in the minute-books numbered 10, the plaintiff does not seek for inspection of any part of them that fall within the privilege of communications between the defendants and their professional advisers; but "the result thereof" is too indefinite, and may include the result of entries not privileged. It may be that the result was an order to dismiss the driver or the guard. That would not be privileged.

White, in support of the defendants' rule, submitted that the plaintiff was not entitled to inspect the entries in the minute-books referred to in that rule.

BOVILL, C.J. It is extremely difficult to lay down in precise terms a rule which will meet every case that may be brought under our consideration; but I will endeavour so to deal with the matter as to make this decision some guide for future applications of the like kind.

In the first place, we are asked to order that the plaintiff may have inspection of documents numbered 1, 2, and 3 in the affidavit. No. 1 is a report of one Alcock, one of the defendants' inspectors, to the defendants' general manager, as to the accident in respect of which the action is brought. No. 2 is a report of one Buggey, the guard of the train to which the accident happened. Both these are dated the 16th of November, 1868, the day of the accident. No. 3, which is dated the 19th of November, is a report of Mr. Adams, the defendants' locomotive superintendent, to the general manager, as to the accident. The first two of these documents would necessarily be reports made by servants of the company, in the ordinary discharge of their duty, to the general manager, describing the nature of the accident, and its cause. As to No. 3, the report of Mr. Adams, made three days after the accident, there

(1) 1 Sim. (N.S.) 111; 20 L. J. (Ch.) 55.

might have been some doubt. But, having inspected it, I think it falls within the same rule, as being a report made by an officer of the company in the course of his duty, and for the information of the company, without reference to any litigation begun or anticipated. I am of opinion that where a report is made by an officer of a company to the manager for the purpose of conveying information to him upon the subject to which it relates, it is not privileged, whether made before or after litigation has been commenced or threatened, and whether it contains matters of fact or of mere opinion: and that applies to all three of these reports. If opinions are obtained confidentially with a view to litigation, they are privileged on the ground laid down by the Court of Queen's Bench in *Chartered Bank of India* v. *Rich.* (1) That principle was adverted to by Willes, J., in *London Gas Light Company* v. *Chelsea Vestry* (2), where, speaking of the experiments which the vestry by their officers had made for ascertaining the quantity and quality of the gas supplied to them by the plaintiffs, he says: "The results of these experiments or observations are not mere proofs collected by the defendants' attorney for the purpose of establishing their defence to the action." And a somewhat similar principle governed the decisions in *Reid* v. *Langlois* (3), and *Steele* v. *Stewart.* (4) I think, therefore, we may safely lay it down that, where information and opinions are obtained with a view to litigation, they are to be considered as privileged. It is not necessary to go through all the cases which have been decided in the equity courts upon this subject. It is clear there are many cases where it has been held that information, which may have been obtained in the ordinary course in apprehension of litigation, must be disclosed; as in *Coleman* v. *Truman* (5), where Pollock, C.B., says (6): "The correspondence amongst the parties themselves, or between them and their agent, has been ordered to be produced; and, if there was no authority for it, I should be so disposed to act. In my opinion there is no reasonable ground for any distinction between such correspondence before the contract and the alleged breach of it. In equity, a

(1) 4 B. & S. 73; 32 L. J. (Q.B.) 300.
(2) 6 C. B. (N.S.) 411, 424; 28 L. J. (C.P.) 275.
(3) 1 M'N. & G. 627.
(4) 1 Phil. 471.
(5) 3 H. & N. 871; 28 L. J. (Ex.) 5.
(6) 3 H. & N. at p. 878.

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defendant may obtain an inspection down to the time when his answer is filed, and there is no reason why the same rule should not apply here." In *Woolley* v. *Pole* (1), the application for inspection of the reports and list of salvage made out for the company by their officers, was not refused on the ground that it was after action commenced, but because the plaintiff himself had equal opportunity of inspecting the salvage. Looking at the rule upon which the courts both of law and of equity have hitherto acted, I see no reason why the documents numbered 1, 2, and 3 should not be produced, on the ground that they are reports made by officers of the company in the ordinary course of their duty, to the general manager. It has been said that litigation generally, and almost inevitably, follows an accident of this sort. But these reports would be made whether any injury occurred to a passenger or not. The directors would in all cases desire to know what was the state of the line and of the engine at the time, and what had been the conduct of their servants in charge of the train.

Next, as to the documents numbered 5, viz. four reports of Mr. Adams, the defendants' locomotive superintendent, dated the 8th, 11th, 23rd, and 28th of December, from scientific men consulted on behalf of the defendants with reference to the cause of the accident. From the statement of counsel it is clear that these documents were obtained with a direct view to litigation. If we were to allow documents of that sort to be produced, it would obviously encourage parties to expect to have the contents of their opponents' briefs disclosed. I do not think any case has gone that length. It seems to me that these documents come within the rule as to opinions obtained confidentially, and ought not to be produced.

The document numbered 7, a report, dated December, 1868, to the defendants' attorneys from one of the scientific men consulted on behalf of the defendants with reference to the cause of the accident, seems to me to fall within the same description, but is even more objectionable, inasmuch as it was a report made to the defendants' attorneys.

With regard to the rule which seeks to vary the two orders of my Brother Hayes, it appears that the plaintiff does not substan-

(1) 14 C. B. (N.S.) 538; 32 L. J. (C.P.) 263.

tially object to their being limited as proposed, except as to "the results" of the communications referred to. It is difficult to draw a distinction between the communications and their results. They seem to me to stand in the same position. Looking at the nature of the entries, I think the orders should be varied so as to limit them as proposed in Mr. White's rule.

The result will be that Mr. Harrison's rule will be made absolute as to the documents numbered 1, 2, and 3, and discharged as to those numbered 5 and 7; and that Mr. White's rule will be absolute as to that part which relates to the minute-books (No. 10): the costs of these rules to be costs in the cause.

BYLES, J. I entirely concur in the general principles stated by my Lord. The result is that, where reports of this kind are made in the course and as part of the duty of the officer, whether an action is pending or not, and whether it contains facts or opinions, they must be produced; but, if they are made confidentially and for the purpose of litigation, and not in the ordinary course of the duty of the person making them, they are privileged. The Court or judge is to make such order as shall be just.

MONTAGUE SMITH, J. I am of the same opinion. Cockburn, C.J., in *Chartered Bank of India* v. *Rich* (1), says: "I am far from saying that our jurisdiction as to discovery and inspection is not co-extensive with that of the Court of Chancery." And I confess I think it is co-extensive with that of the Court of Chancery. The 14 & 15 Vict. c. 99, s. 6, enacted that, whenever any action or other legal proceeding should be pending in any of the superior Courts, the Court or a judge might, on application made for such purpose by either of the litigants, compel the opposite party to allow the party making the application to inspect all documents in the custody or under the control of such opposite party relating to such action or other legal proceeding, and, if necessary, to take examined copies of the same, "in all cases in which, previous to the passing of this Act, a discovery might have been obtained by filing a bill or by any other proceeding in a Court of equity at the instance of the party so making application as aforesaid to the said

(1) 4 B. & S. 73, 81; 32 L. J. (Q.B.) 300.

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Court or judge." That therefore gave the Courts of common law the same power and jurisdiction to order discovery which the Courts of equity exercise in the case of a bill filed. Then came s. 50 of the Common Law Procedure Act, 1854, which provides that, "upon the application of either party to any cause or other civil proceeding in any of the superior Courts, upon an affidavit by such party of his belief that any document, to the production of which he is entitled for the purpose of discovery or otherwise, is in the possession or power of the opposite party, it shall be lawful for the Court or judge to order that the party against whom such application is made shall answer on affidavit, stating what documents he or they has or have in his or their possession or power relating to the matters in dispute, or what he knows as to the custody they or any of them are in, and whether he or they objects or object (and, if so, on what grounds,) to the production of such as are in his or their possession or power; and, upon such affidavit being made, the Court or judge may make such further order thereon as shall be just." The words are, to the production of which he is entitled; that must mean entitled in equity. The effect of that section was to enable the Courts of common law to order the production not only of documents which are in the possession or power of the party, but to enable them to make him disclose what documents he has and what he knows as to the custody of such as are not in his own possession; and such order is to be made thereon as shall be just. It may have been intended that the Courts of common law should exercise a greater discretion even than the Courts of equity had. But, that they have as full and as extensive a jurisdiction as that which is exercised in Chancery, I cannot for a moment doubt.

Here, we are called upon to order inspection of documents which may be classed under two heads. Those numbered 1, 2, and 3, are reports made on the subject of the accident, to the general manager of the company, by certain officers and servants of the company in the ordinary course of their duty. I think we may fairly *infer* that these reports would be made whether there was any cause of action or not; for, it is manifestly most important that the directors should be correctly informed of the cause of the accident,—whether it arose from defective machinery or misconduct or unskil-

fulness of their servants. I cannot conceive any principle upon which such documents could be privileged. The other documents numbered 5 and 7 seem to me to fall within the proper limitation of the right to production, as laid down by the Court of Queen's Bench in *Chartered Bank of India* v. *Rich* (1), and somewhat more narrowly by Lord Cottenham, C., in *Reid* v. *Langlois*. (2) I understand that limitation to be this, that, if the documents are procured for the purpose of assisting the party in an impending litigation and to obtain advice, they are not to be produced. That is quite in harmony with what is said by my Brother Willes in *London Gas Light Company* v. *Chelsea Vestry*. (3) *Reid* v. *Langlois* (2) and *Steele* v. *Stewart* (4) shew that if the information is obtained not by but for the attorney of the party, it is privileged, to the extent that the Courts will not order its production. It may be observed that the Courts of common law are better able than the Court of Chancery to judge of the working of an action, and to say what may with justice be produced and what withheld. There is not much difference in the application of this rule in the cases I have referred to; and, though the judgment of the Court of Queen's Bench extends the exception more widely than is done in the Court of Chancery, I cannot say that it is not wise and just to do so. I therefore think the documents numbered 5 and 7 come within the limitation and exception I have adverted to, and ought not to be produced. As to the other rule, I entirely agree with what has fallen from the Lord Chief Justice.

BRETT, J. The question before us is, what is the general rule which is to regulate our discretion as to granting inspection of a certain class of documents, viz. reports and communications made by agents or servants, in the ordinary course of their duty, to their principals. It seems to me that the rule may be thus stated:— Any report or communication by an agent or servant to his master or principal, which is made for the purpose of assisting him to establish his claim or defence in an existing litigation, is privileged, and will not be ordered to be produced: but, if the report

(1) 4 B. & S. 73; 32 L. J. (Q.B.) 300.
(2) 1 M'N. & G. 627.
(3) 6 C. B. (N.S.) 411; 28 L. J. (C.P.) 275.
(4) 1 Phil. 471.

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or communication is made in the ordinary course of the duty of the agent or servant, whether before or after the commencement of the litigation, it is not privileged, and must be produced. The time at which the communication is made is not the material matter, nor whether it is confidential, nor whether it contains facts or opinions. The question is whether it is made in the ordinary course of the duty of the servant or agent, or for the instruction of the master or principal as to whether he should maintain or resist litigation. The documents numbered 1, 2, and 3 in this case are reports made by officers or servants of the company to the manager in the ordinary course of their duty: therefore, whether litigation had begun or was contemplated or not, they must be produced. But, as to those numbered 5 and 7, assuming that they were reports of facts and opinions, but were made only because the company contemplated litigation, and for the purpose of enabling them to resist it, they ought not to be produced. As to the other rule, I agree with the rest of the Court.

Rules accordingly.

Attorney for plaintiff: *John Webb.*
Attorneys for defendants: *Paine & Layton.*

June 12.

TAYLOR *v.* CASS.

County-Court—Power of Judge to certify for Costs under 30 & 31 *Vict. c.* 142, *s.* 5, *where Cause sent to him for Trial under* 19 & 20 *Vict. c.* 108.

The 30 & 31 Vict. c. 142, s. 5, enables the judge, in actions commenced in a superior Court, where the plaintiff recovers not more than 20*l.* in contract, or 10*l.* in tort, to certify on the record that there was sufficient reason for bringing the action in such superior Court, so as to entitle the plaintiff to costs:—

Held, that a county-court judge, to whom a cause is sent for trial under 19 & 20 Vict. c. 108, s. 26, has power to certify, and that the "issue" sent with the judge's order is a sufficient "record" for that purpose.

ACTION on a builder's bill. Plea, payment into court of 17*l.*, and never indebted. Issue thereon.

On the 15th of March, 1869, issue having been then joined, the cause was sent down for trial in the county-court of Hull, by a judge's order under s. 26 of the County-Court Act, 19 & 20 Vict.

c. 108. (1) The cause was tried on the 20th of May, when judgment was given for the plaintiff for 3*l.* in addition to the money paid into court; and the judge certified that in his opinion there was sufficient reason for bringing the action in the Court of Common Pleas.

The master refused to tax the plaintiff's costs upon this certificate. The plaintiff obtained an order from Martin, B., under 30 & 31 Vict. c. 142, s. 5 (2), for the payment of his costs.

C. Hutton moved to rescind that order. Conceding that the undersheriff has power to certify for costs upon the execution of a writ of inquiry,—*Craven* v. *Smith* (3),—he argued that there was no "record" in this case upon which a certificate could be given.

BOVILL, C.J. I am of opinion that the order of my Brother Martin was right. Under 30 & 31 Vict. c. 142, s. 5, the judge may certify on the record that there was sufficient reason for bringing such action in the superior Court; and Mr. Hutton admits that "the judge" means the judge who tries the cause. That was in this case the judge of the county-court. By 19 & 20 Vict. c. 108, s. 26, a judge of a superior Court is authorized, on the application of either party, to order certain causes to be tried in a

(1) 19 & 20 Vict. c. 108, s. 26, "Where in any action of contract brought in a superior court, the claim indorsed on the writ does not exceed 50*l.*, or where such claim, though it originally exceeded 50*l.*, is reduced by payment into court, payment, an admitted set-off, or otherwise, to a sum not exceeding 50*l.*, a judge of a superior court, ... after issue joined, may .... order that the cause be tried in any county-court which he shall name; and thereupon the plaintiff shall lodge with the registrar of such court such order and the issue; and the judge of such court shall appoint a day for the hearing of the cause, notice of which shall be sent by post or otherwise by the registrar to both parties or their attorneys; and after such hearing the registrar shall certify the result to the master's office of such superior court, and judgment in accordance with such certificate may be signed in such superior court."

(2) 30 & 31 Vict. c. 142, s. 5, "If in any action commenced after the passing of this act in any of her Majesty's superior courts of record, the plaintiff shall recover a sum not exceeding 20*l.* if the action is founded on contract, or 10*l.* if founded on tort, whether by verdict, judgment by default, or on demurrer, or otherwise, he shall not be entitled to any costs of suit unless the judge certify on the record that there was sufficient reason for bringing such action in such superior court, or unless the court or a judge at chambers shall by rule or order allow such costs."

(3) Law Rep. 4 Ex. 146.

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county-court. None but the judge to whom the cause is so sent for trial can certify under 30 & 31 Vict. c. 142, s. 5. But Mr. Hutton contends that the judge is to certify *on the record*, and as there is no record here there can be no certificate. Of course there is no nisi prius record. There is, however, some record provided by 19 & 20 Vict. c. 108, s. 26; there is the issue, which is to be lodged with the registrar together with the order; and that is as much a record as the writ of inquiry, or even more so. And the Court of Exchequer, in *Craven* v. *Smith* (1), has held that the undersheriff has power to certify for costs upon the writ of inquiry. The county-court judge has equal power; and there will therefore be no rule.

MONTAGUE SMITH, J. I also think the judge who tries the cause is the judge, within the meaning of 30 & 31 Vict. c. 142, s. 5, who is to certify, and that his certificate on the back of the issue (which in substance is a record) is sufficient to entitle the plaintiff to his costs, and operates in all respects as a certificate of a judge of a superior Court. Mr. Hutton suggests that there is no record here upon which the judge could certify. I think there can be no doubt that the issue which is sent down with the judge's order under 19 & 20 Vict. c. 108, s. 26, is a record. By the rules of Hilary Term, 1853, and the schedule of forms thereto, it is provided that the nisi prius record shall consist of a copy of the issue as delivered in the action. (2) That is precisely what is sent to the county-court judge under 19 & 20 Vict. c. 108, s. 26. It seems to me, therefore, that we do no violence to the act of 1867 in holding that the county-court judge is one of the judges referred to in s. 5, and that the issue lodged with the registrar is a record, and consequently that the certificate given in this case entitled the plaintiff to his costs.

Rule refused.

Attorneys for defendant: *Hancock, Sharp, Hales, & Morris.*

(1) Law Rep. 4 Ex. 146. (2) See 13 C. B. 43.

[IN THE EXCHEQUER CHAMBER.]

1869
June 17.

THE SOUTH OF IRELAND COLLIERY COMPANY *v.* WADDLE.

Companies Act, 1862 (25 & 26 *Vict.* c. 89)—*Trading Corporation—Contract not under Seal.*

A company incorporated under the Companies Act, 1862, for the working of collieries, contracted, but not under seal, with an engineer for the erection of a pumping-engine and machinery for use in the colliery, and paid him part of the price. In an action by the company against the engineer for a breach of contract in refusing to deliver the engine and machinery:—

Held,—affirming the judgment of the Court of Common Pleas,—that the action was maintainable, though the contract was not under seal.

APPEAL from the decision of the Court of Common Pleas, discharging a rule to enter a verdict for the defendant or a nonsuit, on the ground that the contract declared on did not require a seal. (1)

Maurice Powell (*W. H. Clay* with him), for the defendant, contended that the plaintiffs, being a corporation, could only contract under their common seal, unless in regard to matters of trivial amount and of every day occurrence. He cited *East London Waterworks* v. *Bailey* (2); *Copper Miners Company* v. *Fox* (3); *Lamprell* v. *Billericay Union* (4); *Diggle* v. *London and Blackwall Railway Company* (5); *Homersham* v. *Wolverhampton Waterworks Company* (6); *London Docks Company* v. *Sinnott* (7); *Finlay* v. *Bristol and Exeter Railway Company* (8); *Smart* v. *West Ham Union*. (9) And he sought to distinguish the following cases, on the ground that they fell within the exception as to matters of daily necessity: *Beverley* v. *Lincoln Gas-Light Company* (10); *Clarke* v. *Cuckfield Union* (11); *Church* v. *Imperial Gas-Light Company* (12); *Australian Royal Mail Steam Navigation Company* v. *Marzetti* (13); *Nicholson* v. *Bradfield Union*. (14)

(1) Law Rep. 3 C. P. 463.
(2) 4 Bing. 283.
(3) 16 Q. B. 229; 20 L. J. (Q.B.) 174.
(4) 3 Ex. 283; 18 L. J. (Ex.) 282.
(5) 5 Ex. 442; 19 L. J. (Ex.) 308.
(6) 6 Ex. 137; 20 L. J. (Ex.) 193.
(7) 8 E. & B. 347; 27 L J. (Q.B.) 129.
(8) 7 Ex. 409; 21 L. J. (Ex.) 117.
(9) 10 Ex. 867; 24 L. J. (Ex.) 201.
(10) 6 Ad. & E. 829.
(11) 1 Bail C. C. 85; 21 L. J. (Q.B.) 349.
(12) 6 Ad. & E. 846.
(13) 11 Ex. 228; 24 L. J. (Ex.) 273.
(14) Law Rep. 1 Q. B. 620.

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Huddleston, Q.C. (*Philbrick* with him), for the plaintiffs, was not called upon.

COCKBURN, C.J. We are asked to overrule a long series of decisions in all the Courts, which, in accordance with sound sense, have held that the old rule as to corporations contracting only under seal does not apply to corporations or companies constituted for the purpose of trading, and we are invited to re-introduce a relic of barbarous antiquity. We are all of opinion that the judgment of the Court of Common Pleas ought to be affirmed. It is unnecessary to say more than that we entirely concur in the reasoning and authority of the cases referred to in the judgment of Bovill, C.J., which seems to us to exhaust the subject. In early times, no doubt, corporations could only, subject to the well known exceptions, bind themselves by contracts under seal. And for some time that rule was applied to corporations which were formed for the purpose of carrying on trade. But the contrary has since been laid down by a long series of cases, and may now be considered settled law. The machinery contracted for in this case was clearly necessary for the purpose for which the company was formed, viz. the working of coal-mines.

KELLY, C.B., CHANNELL, B., LUSH, and HAYES, JJ., and CLEASBY, B., concurred.

Judgment affirmed. (1)

Attorney for plaintiffs: *W. B. Jones.*
Attorneys for defendant: *Tucker & New.*

(1) See The Companies Act, 1867 (30 & 31 Vict. c. 131), s. 37.

[IN THE EXCHEQUER CHAMBER.]

1869
June 18.

FORDHAM *v.* THE LONDON, BRIGHTON, AND SOUTH COAST RAILWAY COMPANY.

Railway Company—Negligence of Servants—Injury to Passenger.

The plaintiff, a passenger by the defendants' railway, in getting into a railway carriage at a station, placed his left hand on the back of the open door to aid him in mounting the step. There was conflicting evidence as to whether there was a proper handle affixed to the carriage, to the right hand of the door. The night was dark, and the plaintiff did not see any handle. He had a parcel in his right hand. Before he had completely entered the carriage, the guard, without any previous warning, closed the door, and crushed his hand between the back of the door and the door-post. In an action for the injury thus sustained:—

Held,—affirming the judgment of the majority of the Court of Common Pleas,—that there was evidence of negligence on the part of the company's servant, and no evidence of such contributory negligence on the part of the plaintiff as to entitle the defendants to a nonsuit.

APPEAL from the decision of the Court of Common Pleas, discharging a rule to enter a nonsuit. (1)

The plaintiff was, on the evening of the 1st of September, 1867, a third-class passenger on the defendants' railway, from Sydenham to Norwood Junction, by the 9.15 P.M. train from London to West Croydon. The train was standing at the station when the plaintiff came up, with the doors of the carriages open, and as the plaintiff entered a carriage he placed his left hand on the back of the open door. He had a parcel in his right hand. The guard, without any warning, and before the plaintiff had got completely in, shut the door upon the back of the plaintiff, and in shutting the door pushed the plaintiff forward, and by the same act jammed the plaintiff's fingers between the door and the door-post upon which his left hand was placed. The door opened towards the engine. The night was dark.

There was conflicting evidence as to whether there was a handle at the side of the door to enable passengers to get into the carriage. The plaintiff did not see any such handle.

At the close of the plaintiff's case it was submitted for the defendants that there was no case to go the jury,—first, on the ground

(1) Law Rep. 3 C. P. 368.

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that there was no sufficient evidence of negligence on the part of the defendants,—and, secondly, that the plaintiff himself had been guilty of contributory negligence. The learned judge refused to stop the case, but gave the defendants leave to move.

The following questions were left to the jury,—1. Was there negligence on the part of the defendants?—2. Did the plaintiff contribute to the accident by his own negligence?

The jury found that there was negligence on the part of the defendants' servants, and that the plaintiff had not contributed to the accident by any negligence on his part; and they gave a verdict for the plaintiff, damages 25*l.*

A rule was afterwards obtained to enter a nonsuit, on the ground that there was no evidence of negligence on the part of the defendants, and that there was evidence of contributory negligence on the part of the plaintiff. In Easter Term, 1868, that rule was discharged. (1) Against that decision the defendants appealed.

Huddleston, Q.C. (*S. Laing* with him), for the defendants. There was no evidence to warrant the jury in finding negligence on the part of the company's servants. The guard, the train being about to start, shut the carriage in the ordinary manner, not knowing that the plaintiff's hand was in the way. The true guide as to what should be left to the jury in such cases is that laid down by Williams, J., in *Toomey* v. *London, Brighton, and South Coast Railway Company* (2), and by Erle, C.J., in *Cotton* v. *Wood* (3), viz. that, where there is an even balance of evidence as to negligence or the absence of negligence, the case ought not to be submitted to the jury.

[BLACKBURN, J. The jury might have reasonably thought that the carriage-door was closed too hastily, and without due care.]

Assuming there was evidence of negligence on the part of the guard, there was also evidence of contributory negligence on the part of the plaintiff. He carelessly placed his hand between the back of the door and the side of the carriage. If the hand had not been so improperly placed, it would have sustained no injury. The true principle is that laid down in *Tuff* v. *Warman* (4), viz.

(1) Law Rep. 3 C. P. 368.

(2) 3 C. B. (N.S.) 146; 27 L. J. (C. P.) 39.

(3) 8 C. B. (N. S.) at p. 571; 29 L. J. (C.P.) at p. 334.

(4) 5 C. B. (N. S.) at p. 585; 27 L. J. (C.P.) 322.

that mere negligence on his part will not disentitle the plaintiff to recover, unless it be such that, but for that negligence, the misfortune could not have happened, or if the defendant might by the exercise of care on his part have avoided the consequences of the neglect or carelessness of the plaintiff. Here, if the plaintiff had exercised ordinary care, the accident could not have happened; and no exercise of care on the part of the defendants' servant could have avoided it. In *Richardson* v. *Metropolitan Railway Company* (1), the Court of Common Pleas upheld a verdict for the defendants in a case where the circumstances were almost identical with the present.

[BLACKBURN, J., referred to *Davies* v. *Mann.* (2)]

Joyce, for the plaintiff, was not called upon.

KELLY, C.B. We think the judgment of the Court of Common Pleas in this case should be affirmed.

The first question is whether there was negligence on the part of the defendants. The facts are short and simple. The plaintiff was getting into a railway carriage, when the guard came and without any warning closed the door so as to throw him forward, and jammed his finger between the back of the door and the frame of the carriage. To say that that was no evidence of negligence on the part of the company's servant would be to exclude evidence which would in many cases be conclusive. Suppose the time had arrived for closing the door, the guard should have done as was done in *Richardson* v. *Metropolitan Railway Company* (1), viz. give warning before closing it. Here, no warning was given, but the door was slammed to without looking to see if there was anything in the way. Upon this point the Court below were unanimous; and we think they were right.

Upon the second point, whether the plaintiff contributed to the accident by his own negligence, we do not say that there was not a strong case of contributory negligence. The plaintiff, no doubt, was guilty of much want of caution. Having a parcel in his right hand, he attempts to get into the carriage by placing his left hand on the back part of the door. But we must look at the whole of the evidence together. It was proved to be dark, so that the plain-

(1) Law Rep. 3 C. P. 374, n. (2) 10 M. & W. 546.

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tiff could not see well about him. Whether there was a handle or not, was left in doubt. The plaintiff could not be expected to feel to the right and to the left for a handle. He placed his hand where he best could to assist himself in. We are far from saying there was not a case for the jury; but we are called upon to say, not whether there was evidence for the jury of contributory negligence on the part of the plaintiff, but whether there was such evidence as to call upon the learned judge to stop the case. We think there was not. My Brother Byles, when he left the case to the jury upon the facts, evidently thought there was evidence for them. Under all the circumstances, we see no reason for disturbing the verdict. The judgment of the Court below will therefore be affirmed.

CHANNELL, B., BLACKBURN, LUSH and HAYES, JJ., and CLEASBY, B., concurred.

Judgment affirmed.

Attorney for plaintiff: *H. Parry.*
Attorneys for defendants: *Baxter, Rose, & Norton.*

June 19.

LAURIE, P. O., *v.* SCHOLEFIELD.

Guarantee, Construction of—Surrounding Circumstances—Practice—Payment after Action brought not pleaded—Rule 14 *of H. T.* 1853*—Amendment.*

R. & Co. being about to open an account with the Union Bank, the defendant and one Black signed the following guarantee:—

"In consideration of the Union Bank agreeing to advance and advancing to R. & Co. any sum or sums of money they may require during the next eighteen months, not exceeding in the whole 1000*l.*, we hereby jointly and severally guarantee the payment of any such sum as may be owing to the bank at the expiration of the said period of eighteen months."

1000*l.* was placed by the bank to the credit of R. & Co.'s drawing account, and R. & Co. were debited with 1000*l.* in a loan account.

R. & Co. from time to time drew cheques against, and paid money to the credit of, their drawing account. Over 1000*l.* was thus paid in by R. & Co., and they were not debtors on the drawing account when it was finally closed. The loan account remained unaltered.

The bank sued the defendant for 1000*l.* on the guarantee, and after the com-

mencement of the action Black paid the bank 500*l.* in discharge of his liability. The defendant did not plead this payment:—

Held, that the guarantee was a continuing one, and that the defendant's liability was not discharged by the payments made by R. & Co.

Held, also, that by r. 14 of Hilary Term, 1853, the defendant could not, in the absence of a proper plea of payment, give the payment by Black in evidence in mitigation of damages; and that the bank was therefore entitled to recover the full amount claimed; but that the Court having power to amend the pleadings would reduce the verdict by 500*l.* on payment by the defendant of the costs of the rule.

DECLARATION in the usual form on the guarantee hereinafter set out. Breach: Non-payment by the defendant of the 1000*l.*

Pleas: 1. Non assumpsit. 2. That no money was owing from Russell & Co. to the bank. 3. Payment before action by one Black. 4. Payment before action by Russell & Co. 5. That the guarantee was made and accepted solely as a surety for Russell & Co., and that, in violation of the condition in the guarantee, and without the defendant's consent, the bank made advances to Russell & Co. during the said period of eighteen months greatly exceeding in the whole 1000*l.*, and thereby the defendant was discharged and released from liability on the guarantee.

Issues thereon, and demurrer to the fifth plea. Joinder.

The cause was tried before Mellor, J., at the Kingston spring assizes, 1869. It appeared that on the 8th of February, 1867, the Union Bank of London advanced to Russell & Co., who banked with them, 1000*l.* upon the faith of the following guarantee, which was dated the 4th of February, and signed by Col. Black and the defendant:—

"In consideration of the Union Bank of London agreeing to advance and advancing to the firm of Russell & Co. any sum or sums of money they may require during the next eighteen months, not exceeding in the whole the sum of 1000*l.*, we hereby jointly and severally guarantee the payment of any such sum as may be owing to the said bank at the expiration of the said period of eighteen months, and undertake to pay the same on demand, in the event of Russell & Co. making default in the payment of the same."

Russell & Co. were credited in their drawing account with 1000*l.*,

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and debited 1000*l.* in a loan account, in accordance with the usual course of business in the bank in such cases.

On the 8th of February, 1867, when the 1000*l.* was placed to the credit of Russell & Co.'s drawing account, their account was already overdrawn to the extent of 217*l.* 15*s.* 3*d.* From this time until the account was practically closed, on the 31st of December, 1867, various payments were made by Russell & Co. to the bank, and cheques drawn by them against their account were duly paid. Up to the 31st of December, 1867, the aggregate amount drawn by Russell & Co. was 2633*l.* 6*s.*, whilst the aggregate of the sums appearing to their credit (including the 1000*l.* loan) was 2608*l.* 16*s.* 11*d.*, leaving (with interest) a balance against them of 24*l.* 9*s.* 1*d.*. The balance and the interest down to the 30th of June, 1868, were covered by a payment made by Russell & Co. on the 21st of August, 1868.

The loan account debiting Russell & Co. with 1000*l.* remained unaltered.

On the 4th of August, 1868, Black and the defendant, in ignorance of the state of accounts between Russell & Co. and the bank, signed the following further guarantee:—

"In consideration of the Union Bank of London allowing an extension of three months from the 4th of August, 1868, for the payment by Russell & Co. of the advance of 1000*l.* made to them under our guarantee dated the 4th of February, 1867, we hereby confirm our said guarantee, and hold ourselves liable to pay the said sum of 1000*l.* and interest, in the event of the said Russell & Co. not paying the same on or before the 4th of November next."

After the commencement of this action, and before the trial, Black paid 500*l.* in discharge of the claim of the bank on him.

On the part of the defendant it was argued that the guarantee was not a continuing guarantee, and that, therefore, the defendant's liability had already been discharged by the payments made by Russell & Co.; and also that he was entitled to rely, in mitigation of damages, upon the payment of 500*l.* made by Black after the commencement of the action.

A verdict was taken for the plaintiff for 1037*l.* 14*s.*, with leave for the defendant to move for a nonsuit or a verdict, or to reduce

the damages by 500*l.*; the Court to make any amendment in the pleadings, and the defendant not to appeal from the decision of the Court, without leave.

Sir G. Honyman, Q.C., in Easter Term last, obtained a rule nisi accordingly.

Garth, Q.C., and *R. Clark*, shewed cause. The circumstances under which the guarantee was given shew that the parties intended that this guarantee should be a continuing security for any sums of money which the bank might advance to Russell & Co. during the period specified, and the defendant's liability therefore was not discharged by the payments made by Russell & Co. during that time: *Williams* v. *Rawlinson* (1); *Henniker* v. *Wigg.* (2) If there were any doubt about this, it would be removed by the memorandum of the 4th of August, 1868. As to the allegations in the fifth plea, the rule is thus laid down in Addison on Contracts, 6th ed. 563:—"If a bond or guarantee is given by a surety to secure the re-payment of advances of money to the principal, provided such sums do not exceed in the whole at any one time a certain limited amount, the proviso protects the surety from being answerable beyond the amount named, but does not render the obligation void if the advances go beyond it,"—*Seller* v. *Jones* (3); *Gee* v. *Pack* (4); *Backhouse* v. *Hall* (5);—"unless that clearly appears to be the intention of the parties:" *Parker* v. *Wise* (6); *Gordon* v. *Rae.* (7) *The North British Insurance Company* v. *Lloyd* (8) shews that it is not necessary in banking transactions to make any disclosure to the surety of the state of the principal's account. As to the amount of the damages, the plaintiff is entitled to retain his verdict for the full amount, there being no plea of payment after action brought. Rule 14 of Hilary Term, 1853 (9), expressly provides that "payment shall not in any case be allowed to be given in evidence in reduction of damages or debt, but shall be pleaded in bar." *Beaumont* v. *Greathead* (10) is an authority

(1) 3 Bing. 71.
(2) 4 Q. B. 792.
(3) 16 M. & W. 112.
(4) 33 L. J. (Q.B.) 49.
(5) 6 B. & S. 507; 34 L. J. (Q.B.) 141.
(6) 6 M. & S. 239, 246.
(7) 8 E. & B. 1065, 1087.
(8) 10 Ex. 523.
(9) 13 C. B. (N.S.) 91.
(10) 2 C. B. 494.

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that that applies to payment by a co-contractor. The defendant ought to have pleaded the payment by Black after action brought.

Sir G. Honyman, Q.C., and *Philbrick*, in support of the rule. The bank has lost the benefit of the guarantee by advancing more than the sum stipulated. The consideration for the defendant's promise was that they should advance any sum or sums of money Russell & Co. might require during the next eighteen months, "not exceeding in the whole 1000*l.*;" and they have advanced them sums far exceeding that amount. Unless those restrictive words had been intended as a limitation of what the bank were to do, they would have been found in that part of the document which contains the defendant's promise. The guarantee was exhausted when once the principal debtors had paid in enough to cover the advance made. It may be that they would have declined to enter into the obligation if they had understood that the advances were to be unlimited. And, when they signed the further guarantee of the 4th of August, 1868, they had no notice that the limit had then been exceeded.

Then, as to the rule of Hilary Term, 1853, it was not intended to alter the old rule of pleading in this respect, but merely to prevent a plaintiff being surprised by evidence of payment at the trial of an action of indebitatus assumpsit. The action being brought in respect of a collateral liability, a plea of payment would in effect have been a plea to damages only. Payment had already been provided for by rule 8. And, although rule 14 speaks of damages, it means damages resulting from detention of a *debt*, not damages generally. The damages which the plaintiff has sustained by the defendant's breach of contract is 500*l.* only, the remainder having been paid by the co-surety. *Adams* v. *Palk* (1) was also referred to.

BYLES, J. We are asked to construe a guarantee in these terms:—[The learned Judge here read the guarantee.] In construing the guarantee, we cannot look to what was said at the time of giving it; such evidence is not admissible; but we may look at the position of the parties. Russell & Co. were about to open a banking-account which was to last at least eighteen months. The

(1) 3 Q. B. 2.

bank would, therefore, require security for the varying balance during that period. There is undoubtedly this difficulty in coming to that construction. The words are "not exceeding in the whole the sum of 1000*l*." The more natural construction is to read "not exceeding &c." with the former part of the document. But, so reading it, it nullifies the latter part, and leaves the defendant liable to an indefinite amount. Reading it with the latter part, it carries into effect the obvious purpose and intention of the parties: and I entertain no doubt that that is the true construction of the guarantee.

Then, as to the 500*l*. paid by Colonel Black. I think under the 14th rule of Hilary Term, 1853, that payment should have been pleaded. The rule is express,—"Payment shall not in any case be allowed to be given in evidence in reduction of damages or debt, but shall be pleaded in bar." It is unnecessary to define the precise limitation of that rule. It is enough to say that all the rules which precede it relate to actions ex contractû, and all those subsequent to it to actions ex delicto, or actions in the nature of actions ex delicto. If so, the payment ought to have been pleaded; and, as it was not pleaded, the plaintiff is in strict form entitled to retain his verdict for the whole amount. That, however, would be contrary to justice: and as we have power to make amendments, we can set this right on payment of costs by the defendant. Justice will be done by reducing the verdict by 500*l*.

MONTAGUE SMITH, J. I am of the same opinion. The guarantee was manifestly intended to secure advances to be made from time to time during a period of eighteen months; and the sureties intended to make themselves liable for those advances to the extent of 1000*l*. The words "not exceeding in the whole 1000*l*." do not amount to a condition. They were intended to express the limit of the defendant's liability, and not to prohibit the bank from making any further advances to Russell & Co. If it had been intended that no advances beyond the 1000*l*. should be made during the currency of the suretyship, I should have expected more precise words. That is the view which the Court took of a similar document in *Parker* v. *Wise*. (1)

(1) 6 M. & S. 239.

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The other point resolves itself into a mere question of costs. It seems that a sum of 500*l.* was paid by the other surety after the commencement of the action and before trial: and the question is whether evidence of that payment was admissible to reduce the damages, or whether it should have been pleaded under rule 14 of Hilary Term, 1853. The rule is express, that payment shall not be allowed unless pleaded. I think that applies to all cases where something paid is paid in discharge of part of the claim. The declaration alleges in the usual form that Russell & Co. were indebted to the bank to the extent of 1000*l.* for advances made to them during the eighteen months, and did not pay the same. I think the payment made by Colonel Black was properly a payment in part discharge of that debt within the meaning of payment in the rule. The defendant's liability having been reduced by a payment, it ought to have been pleaded. I agree that the damages ought to be reduced by the amount of that payment. Still, the plaintiff had a right to insist upon a verdict for 1000*l.* at the trial. The rule will therefore be discharged, the plaintiff consenting to reduce the verdict by 500*l.*, and the defendant paying the costs of the rule.

BRETT, J. *Parker* v. *Wise* (1) and the other cases cited fully support the rule of construction laid down in Addison on Contracts, 6th ed. 563. Applying that rule here, the plaintiff is entitled to succeed. I entirely agree with the rest of the Court on both points.

Rule discharged accordingly.

Attorneys for plaintiff: *Davies, Son, & Campbell.*

Attorney for defendant: *Worthington Evans, for J. J. Ritson, Liverpool.*

(1) 6 M. & S. 239.

CRACKNELL *v.* THE MAYOR AND CORPORATION OF THETFORD.

1869
May 28.

Navigable River—Liability for Injury to Riparian Owner—Acts of Omission—50 Geo. 3, c. clxvi.

The defendants were empowered by a private Act of Parliament to render navigable the river B., and to take tolls for the purpose of repaying the necessary expense. In the exercise of their power under the Act they erected staunches in the river, and the result of these, combined with the natural growth of the weeds in the river and the accumulation of silt against the staunches, was that the river overflowed its banks, and damaged the plaintiff's land:—

Held, that there was no obligation on the defendants to cut the weeds or dredge the silt unless it was necessary to do so for the benefit of the navigation, and that the plaintiff's remedy, if any, was not by action against them for not doing so, but by applying for compensation under the Act.

DECLARATION. That before and at the time of committing the grievance thereinafter mentioned, the plaintiff was lawfully possessed of certain land in the county of Norfolk, adjoining a river called the river Brandon, otherwise the Lesser Ouse, and the defendants were the undertakers for making, improving, and completing the navigation of the river between the place called Whitehouse and Thetford, under and according to the statutes in such case made, and had accepted the rights and privileges conferred, and had taken upon themselves the duties imposed, by the statutes, and were in the receipt, possession, and enjoyment of the toll granted by the statutes, and used the river, and permitted the same to be used as authorized by the statutes, and all conditions were fulfilled, &c., necessary to entitle the plaintiff to sue the defendants for the breaches of duty thereinafter mentioned, yet the defendants neglected to cleanse and scour the bed of the said part of the river so under their management or control, and which, by reason of their alterations of the river, it became necessary for them to cleanse and scour, and wrongfully, carelessly, negligently, and improperly suffered and permitted weeds to grow and soil to accumulate in the bed of the said part of the river, and which, by reason of their alterations, became injurious to the plaintiff, and wrongfully, carelessly, negligently, and improperly dredged parts of the river, and removed excessive and improper quantities of earth and soil therefrom, and placed and permitted to be placed, divers obstructions

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therein, and wrongfully and carelessly altered and increased the flow of water in the river by means of which several premises, and of the mere carelessness, negligence, and wrongful and improper conduct of the defendants in that behalf, the river overflowed its banks and inundated the land of the plaintiff, and the land of the plaintiff was for a long time useless and unproductive to him, and became less fertile, and the plaintiff was put to expense in draining the water from the land, and in cultivating the same and remedying the damage caused by the flood, and was otherwise injured.

Pleas: 1. Not guilty by statute 50 Geo. 3, c. clxvi.

2. As to so much of the declaration as related to the alteration of the river, a denial of the alteration.

3. Not possessed.

4. That the supposed grievances were committed after the passing of 50 Geo. 3, c. clxvi., and that the matters complained of were done by the defendants as the corporation in the Act mentioned, and the plaintiff's claim was for damage sustained by the plaintiff by the making and completing by the defendants of the works directed by the Act, and by making and maintaining the navigation in the Act mentioned, and the works belonging thereto and not otherwise, and that the defendants and the plaintiff could not, nor could the commissioners in the Act mentioned, or any five of them and the plaintiff, agree as to the amount of the value or satisfaction to be made for such damage.

5. A similar plea, alleging in addition that no complaint was made by the plaintiff of the injury, or any application in relation to it made by the plaintiff to the defendants or their clerk within the space of six calendar months after the injury had been sustained.

6. As to so much of the declaration as alleged that the defendants dredged parts of the said river, and removed a quantity of earth therefrom, and placed obstructions thereon, and altered and increased the flow of water in the river, that the matter complained of took place after the passing of 50 Geo. 3, c. clxvi, and that the defendants were the corporation in the Act mentioned, and did the acts complained of as undertakers for making, improving, and completing the navigation of the river called the Lesser Ouse from

the Whitehouse and Brandon Ferry to Brandon, and from thence to Thetford, in the counties of Norfolk and Suffolk, in order to improve, support, and maintain the navigation of the river, the acts being acts of cleansing, scouring, cutting, digging, and deepening, enlarging, and straightening those parts of the river, and not otherwise.

7. To so much of the declaration as alleged that the defendants neglected to cleanse and scour the bed of the part of the river under their management or control, and suffered and permitted weeds to grow and soil to accumulate in the bed of that part of the river, that it was not necessary for the improvement and maintenance of the navigation of the river, or for the purposes of the statutes in that behalf for the defendants to do the acts, the omission to do which was complained of.

8. To the same part of the declaration a demurrer.

Issue on the pleas, and a joinder in demurrer.

The cause came on to be tried before Cockburn, C.J., at the Norfolk summer assizes, 1867, and a verdict was found for the plaintiff, subject to the opinion of the Court on the following case.

The plaintiff was possessed as tenant of certain lands in the parish of Broomhill, adjoining a river called Brandon, or Lesser Ouse, and the defendants were by the Acts of Parliament hereinafter referred to, made the undertakers for making, improving, and completing the navigation of such river, and the receivers of the tolls thereon levied for conveying merchandize.

It was agreed between the parties that the following statement, drawn out by the Lord Chief Justice, should be taken as the facts proved by the plaintiff:—

"That owing to the weeds not having been effectually cut, and owing to the staunches erected for the purpose of the navigation, accumulations of silt have taken place in the bed of the river, that the weeds might have been cut so as to prevent this effect, that the accumulations might have been removed by dredging, that owing to the state of the weeds and the accumulations in the bed of the river, the bed does not carry off the water flowing down it in time of flood as it otherwise would do. That, in consequence, the adjacent land is overflowed at times, and to a greater extent than it otherwise would be."

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A copy of the statute 50 Geo. 3, c. clxvi., referring to the earlier statute 22 Car. 2, c. xvi., was annexed to the case. (1)

It was agreed between the parties that the pleadings in the action on both sides should form part of the case.

The question for the opinion of the Court was, how the verdict ought to be entered with reference to the several issues raised in the case.

Keane, Q.C. (*Bulwer, Q.C.*, and *Merewether*, with him), for the plaintiff. The result of the defendants' acts has been that the river does not carry off the water as it did before: this is the result of the joint effect of the weeds, which naturally grow in the river, and the silt which has accumulated through the defendants' works. The defendants were, no doubt, justified under the Acts in putting down the staunches, but they were bound to see that no injury resulted therefrom which was preventible, and they ought, therefore, to have cut the weeds or removed the silt. It is true that

(1) 50 Geo. 3, c. clxvi. s. 5, authorized the defendants to improve, support, and maintain the navigation of the river in question, and for that purpose to cleanse, scour, cut, dig, open, deepen, enlarge, and straighten the bed of the river, and from time to time to alter and repair the same; and to construct, make, and do all other matters and things which they should think convenient and necessary for the making, preserving, improving, and using the navigation and works, doing as little damage as might be in the execution of their powers, and making satisfaction in manner thereinafter mentioned to the owners and proprietors of, and other persons interested in, any lands, &c., which should be taken, used, or prejudiced, for all damages to be by them sustained in or by the execution of all or any of the powers of the Act.

Sect. 7 provided that all persons interested in any lands through, in, or upon which the navigation or other works were made might receive satisfaction for the value of the lands and for the damages to be sustained by the making and completing of the works as should be agreed upon by the parties, and in case of disagreement the amount should be ascertained by a jury.

Sect. 8 provided that if any person so interested as aforesaid could not agree with the defendants respecting the satisfaction to be made for any damages that might from time to time be sustained by him "by the making and maintaining of the navigation or any part or parts thereof, or of any of the works thereunto belonging;" and should give the requisite notice in writing to the defendants, a jury was to be summoned, and to ascertain the value.

Sect. 12 required notice of injury to be given to the defendants within six calendar months next after the time that such supposed injury or damage should have been sustained, or the doing and committing thereof should have ceased.

there was no duty on them to see to the drainage of the river, as may be inferred from the case of *Parrett Navigation Company* v. *Robins* (1), but that does not shew that they were justified in inflicting unnecessary injury on a neighbouring landowner. That case too was of a criminal nature, and the Court was bound to construe the Act strictly. If a railway company were negligently to set fire to a field of corn they would be liable to an action, but would not be indictable, and the acts of the defendants may well be actionable, and yet not such as would render them liable to penalties. The statute may legalize the erecting the staunches, but it does not authorize the defendants to allow the silt to accumulate in consequence, or any injury to accrue which could possibly be avoided. If the defendants had done all that was possible to prevent injury to the plaintiff, his only remedy might have been to claim compensation under the Act, but as his loss arises from their not having done so, he is entitled to recover in this action. There are many cases in which an action has been sustained for injuries arising from the exercise of statutable powers, such as *Whitehouse* v. *Fellowes* (2); *Mersey Docks Trustees* v. *Gibbs* (3); *Bagnall* v. *London and North Western Railway Company.* (4) The defendants have retained the additional water in the river, and they are bound to see that it does no damage: *Fletcher* v. *Rylands.* (5) In *Groucott* v. *Williams* (6), Blackburn, J., says, "The general rule of law is that he who has property should so use it as not to injure the property of his neighbour, and it seems to me that a person who opens a shaft and thus makes an alteration in the normal state of things, should take proper steps to fence it in and protect it so as to prevent injury happening to him who previously has a right to the use of the surface of the soil."

O'Malley, Q.C. (*Abdy*, and *E. L. O'Malley*, with him), for the defendants, were not called on.

BOVILL, C.J. In order to enable the plaintiff to maintain this action, there must be shewn some duty or obligation on the defend-

(1) 10 M. & W. 593.
(2) 10 C. B. (N.S.) 765; 30 L. J. (C.P.) 305.
(3) Law Rep. 1 H. L. 93.
(4) 7 H. & N. 423; 31 L. J. (Ex.) 480.
(5) Law Rep. 1 Ex. 265.
(6) 4 B. & S. 149; 32 L. J. (Q.B.) 237.

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ants which they have omitted or neglected; or in the performance of which they have misconducted themselves or acted negligently; and that by reason of their negligence damage has accrued to the plaintiff. It seems to me that no such conduct on the part of the defendants has been made out. Three points have been relied on: the plaintiff traces the damage he has sustained, 1st, to the growth of weeds and their not having been cut by the defendants. 2nd, to the placing by the defendants of staunches in the bed of the river; and 3rd, to those staunches having caused an accumulation of silt, and the defendants not having dredged it out. The damage is stated to have arisen from the joint effect of the weeds and silt, and not from either alone. The plaintiff fails to make out any duty in the defendants with respect to the drainage of the river, or indeed with respect to anything except the navigation. I can find nothing in the Act of Parliament casting a duty on the defendants to cut the weeds or clear the river; they are not invested with any powers for draining or for maintaining the flow of water, except for the purpose of navigation. The distinction between bodies invested with powers for the improvement of the navigation and for the purpose of drainage is clearly stated in the case of *Parrett Navigation Company* v. *Robins* (1), and this case, so far as the question arising out of the weeds is concerned, cannot, I think, be distinguished from that case. The defendants having powers only for the purpose of improving the navigation, the Act does not vest the soil in them, and the person in whom the soil is vested might complain if they did any act for any other purpose than improving the navigation. It is not stated in the case that anything has been done by the defendants for any other purpose, or that any injury was caused to the navigation by the weeds; the action, in fact, is not founded on any injury to the navigation, or on any neglect of duty respecting it. We come, then, to the question of the staunches. I quite agree that if they had been placed there for purposes other than the navigation, or had been erected improperly or negligently an action might have lain, but the facts here do not disclose any such cause of action. I think, therefore, that their erection came within the power of the defendants under the Act, and was lawful, and that there is no remedy by action for injury

(1) 10 M. & W. 593.

resulting from them, but that the remedy, if any, would be by an application for compensation under the Act of Parliament. It is not enough that the defendants' conduct has caused damage to the plaintiff to entitle him to sustain this action, for in most cases things done under the powers of a special Act do cause damage, and it is in cases of that description that compensation is to be paid, and the means of assessing it is provided under the Act.

Then, as to the third question, whether the defendants are liable for not dredging; it is not found that the accumulations interfered with the navigation. I can conceive many cases in which silt might be advantageous to it, and it is certainly not necessarily an injury. And as to the weeds, it is only necessary to refer to the facts actually found in *Parrett Navigation Company* v. *Robins* (1), that the weeds were advantageous to the navigation. Then, if the powers are conferred and the duties imposed on the defendants with reference to navigation and not to drainage, and if in the course of works which were authorized by the Act and carried out without negligence, injury has occurred to the plaintiff, how can that constitute a cause of action? I think, therefore, that judgment should be entered for the defendants.

BYLES, J. I am of the same opinion. I do not say that the plaintiff is remediless, but that in my opinion he has mistaken his remedy; the defendants are to erect staunches and maintain a certain depth of water for the purposes of navigation. Now, the injury is said to have arisen, first, from the erection of the staunches; that was made legal by the Act; secondly, it is said to have arisen from the defendants' not removing the silt that accumulated and the weeds; but that was inevitable, because they had no power to remove them; they would have been liable for trespass if they had entered on the soil of the river and removed the silt and cut the weeds, except for the purpose of improving the navigation. This, therefore, is a case for compensation, but not for action. I quite agree with all the Lord Chief Justice has said.

MONTAGUE SMITH, J. I am of the same opinion; two things were charged against the defendants. First, that they did not cut

(1) 10 M. & W. 593.

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the weeds; and secondly, that they did not remove the silt. Now with regard to the first, I am at a loss to see the ground on which the obligation of the defendants to cut the weeds can be placed; it is not found that they are the consequence of the defendants' works in improving the navigation; it is consistent with the findings that the weeds are naturally there; there is no obligation by the statute to cut them, and on what other ground can it be placed? The defendants are not the owners of the soil, and for anything that appears they have no right to enter on the lands of other persons and cut the weeds unless it is necessary for the navigation. I should have thought therefore without authority that there could have been no obligation on them to remove them; but *Parrett Navigation Company* v. *Robins* (1) seems also to be a direct authority against the existence of such an obligation. As to the second ground, the case stands differently; the accumulation of silt has been caused by the staunches erected by the defendants, and I am not disposed to say that if it were shewn that the accumulation had arisen from the negligent or unnecessary erection of the staunches, or maintenance of them, that an action would not lie; but, on the facts of this case, I fail to see any evidence of such negligence. It is conceded that the defendants were entitled to erect the staunches, and there is not a word in the case to shew that they have not been erected in a right and proper way and in a right and proper place; it is not found that the silt interferes with the navigation: on the contrary, it may be beneficial to it. The defendants had no power to interfere with the soil of the river except to improve the navigation, and they had no right therefore to remove this accumulation, which might be beneficial to one landholder, though injurious to others. The case of *Bagnall* v. *London and North Western Railway Company* (2) is distinguishable, because there the railway company were by their Act bound to provide proper drains, and that statutable obligation was the foundation of the judgments in that case. On these grounds I think the plaintiff has failed to establish any obligation on the defendants to cut the weeds and remove the silt. If these cause injury and are the result of the staunches, the plaintiff may obtain compensation under the provisions of the Act, but he cannot sustain this action

(1) 10 M. & W. 593. (2) 7 H. & N. 423; 31 L. J. (Ex.) 480.

unless he can shew some duty on the defendants which they have failed to perform.

BRETT, J. I think it must be taken that the damage to the plaintiff is the result of an act done, and of two acts omitted to be done, by the defendants; and if the act had been done negligently or unlawfully, or if the defendants had been bound to do either of the acts omitted by them, I should have thought this action would lie. But if not, the only thing that can be said is, that this is a damage resulting from the erection of the staunches; then it is within the words of the 8th section of the Act, and the plaintiff is entitled only to compensation.

As to the acts omitted, the defendants can only be supposed bound to do them under s. 5 of the Act; but under that they are only bound to cleanse the river for the purposes of navigation, and it is not shewn that either the cutting of the weeds or the removing of the silt was required for that purpose. It seems to me, therefore, that they were not only not bound, but were not authorized, to do them. I think this case is clearly within the authority of *Parrett Navigation Company* v. *Robins* (1), and distinguishable from those in which it has been held that, if a man elects to do an act on his own land, he must take care that he does it so as not to cause damage to his neighbours. Here the defendants are not owners of the land, and they have only done acts which they were authorized to do. I think, therefore, the plaintiff's only remedy, if any, is for compensation under the Act.

Judgment by consent to enter a nonsuit.

Attorney for plaintiff: *T. M. Wilkin.*
Attorney for defendants: *G. L. P. Eyre.*

(1) 10 M. & W. 593.

1869
June 3.

CLARKE, APPELLANT; CROWDER AND OTHERS, RESPONDENTS.

Game—Searching on a Highway—25 & 26 Vict. c. 114, s. 2.

By 25 & 26 Vict. c. 114, s. 2, it is enacted that it shall be lawful for any constable in any highway, street, or public place, to search any person whom he may have good cause to suspect of coming from any land where he shall have been unlawfully in pursuit of game, and having in his possession any game unlawfully obtained, or any guns, nets, or engines used for taking game, and should there be found any game or any such article or thing as aforesaid upon such person, to seize and detain such game, article, or thing, and such constable shall in such case apply for a summons citing such person to appear before two justices; and if such person shall have obtained such game by unlawfully going on land in pursuit of game, or shall have used any such article or thing as aforesaid for taking game, such person shall pay a penalty, and shall forfeit such game, guns, nets, &c.:—

Held, that in order to justify a conviction under this section it is necessary that game or instruments for taking game should be found on the accused in a highway. It is not sufficient that the accused should be seen in a highway and followed, and game found on him elsewhere:—

Semble, it is also necessary that the game or instruments for killing or taking game should be detained and taken from the accused in the highway, in order to give magistrates jurisdiction to convict for the offence.

CASE stated by Justices of Yorkshire under 20 & 21 Vict. c. 43.

At a petty session holden at Rotherham, in the West Riding of Yorkshire, an information was preferred by William Clarke against Robert Crowder and others under 25 & 26 Vict. c. 114, s. 2, charging that they "on the 19th day of July, 1868, at the township of Kimberworth, in the said West Riding, were lawfully searched by the said William Clarke and others, being constables for the said riding, in a certain highway there, they having good cause to suspect them of coming from certain land there where they had been unlawfully in search and pursuit of game, and of having in their possession game unlawfully obtained, and nets and engines used for killing and taking game, there being then found upon them certain game, to wit, one hundred rabbits and eight nets used as aforesaid, they having unlawfully obtained the said game and used the said nets for killing and taking game by unlawfully going on certain land there in search and pursuit of game, contrary to the statute."

Upon the hearing of the information it was proved to the

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satisfaction of the justices that, in consequence of information received by the appellant, a serjeant in the West Riding constabulary, he and four other police constables on the 19th of July, about four o'clock A.M., placed themselves near a place called Wilton Gardens, and that a little after four o'clock they saw the respondents and five or six other men coming along the turnpike road about sixty yards from where they (the police) were stationed. As soon as the respondents saw the police constables they turned back, and ran all together towards Wilton Gardens, at the same time holding up their coat laps, their pockets being large and bulky. The police constables did not speak to the men, but pursued them about 160 yards, and then lost sight of them amongst the houses. The constables then went to one or two houses not occupied by the respondents in search of the men, but none of the men were found there, and afterwards (about ten minutes after they had lost sight of the men) they went to the house of Crowder (one of the respondents) in Wilton Gardens, the door of which was locked, and the window shutters, which were outside of the house, were fast; but the constables pulled them open, and afterwards gained admittance, and found all the respondents in the house, all of them dressed as they were when seen on the road except Crowder, and their pockets empty. No game or game nets were found on their persons; but in the house the constables found eight nets, and a number of pegs, used for the purpose of fastening the nets down when they are being used; some of the respondents were lying upon the nets on the house floor. In the cellar of the house (used as a coal cellar) 102 rabbits, 80 or 90 of them being alive, were found. The rabbits were fresh and clean, and there was no appearance of any food being supplied to them. None of the respondents were seen or found in the cellar. The constables took possession of the nets, pegs, and rabbits, and apprehended the respondents and conveyed them to the police station, where they were locked up.

It was also proved to the satisfaction of the justices, that the respondent Crowder had stated to the superintendent of police, while the latter had him in custody at the police station, that he, Crowder, and others were all coming in together, and that they, the other respondents, left the stuff at his, Crowder's, house, and were going away; that he, Crowder, met them near Fenton

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Wood; that they were on Lord Fitzwilliam's ground, and got the rabbits on his lordship's ground, and that the rabbits were Lord Fitzwilliam's. When Crowder made this statement the other respondents were not present.

On the part of the respondents it was contended that as there was no search of the respondents in a highway, street, or public place, and as the only search which did take place was in the respondent's, Crowder's, house, and as 25 & 26 Vict. c. 114, gives no power to constables to search any person in the private house of any person, and as no game was found upon the respondents in any highway, street, or public place, the justices could not legally convict the respondents.

On the part of the appellant it was contended that as the respondents were pursued from the highway to the house of the respondent Crowder, the search was legal; but whether the constables were wrong or not in searching as they did, it was submitted that the justices would be justified in acting upon the evidence thus obtained, and all that was necessary was, that they should have such evidence as was sufficient to lead them to the conclusion that the offence had been committed.

The justices were satisfied that the respondents were the same men as the constables saw upon, and pursued from, the turnpike road, and afterwards found in the respondent Crowder's house, and that they were coming from land where they had been unlawfully in pursuit of game when they were seen by the constables on the turnpike road; and they were also satisfied that the nets found in Crowder's house had been used by the respondents in unlawfully taking game on the night in question, and that the game found in Crowder's house had been unlawfully taken by the respondents; but they were of opinion that there was no search in a highway, street, or public place, within the meaning of the section of the Act of Parliament under which the information was laid, and therefore they dismissed the information.

The question of law for the opinion of the Court was, whether or not the justices were right in their determination, or whether they would have been justified in convicting the respondents, or any of them, upon the evidence laid before them by the appellant, as previously set out.

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Kemplay, for the appellant. The magistrates might have legally convicted though there was no actual search on the highway. All that was necessary was that there should be sufficient evidence of the offence having been committed, and the offence is the being unlawfully on land in pursuit of game. The object of the Act was not to create a special offence, but to give special powers to constables of searching persons in the highway and taking guns and other poaching instruments from them. There are authorities to shew that an actual search is not necessary. There are three cases on the statute. In *Brown* v. *Turner* (1) the conviction was held good though only one of the prisoners had been searched; and in *Hall* v. *Knox* (2) it was decided that a search was not necessary where the gun or game was seen without searching. There is no reason why the other matters mentioned in the Act should require, more than the searching, to be strictly complied with. The only other case on the statute is *Evans* v. *Botterill* (3), which has no direct bearing on this case.

Sturge, for the respondents. Before the justices have any jurisdiction it must be shewn that the person accused was searched and some game, or gun, or other engine found on him, and the game or gun actually taken from him, and all in a highway. [He was stopped by the Court.]

BOVILL, C.J. In construing this statute, it must be remembered that there is a great body of law relating to game, and when this Act was passed it was as an addition to the existing law and for a distinct purpose. It was passed for the purpose of giving authority to constables and peace officers to do certain acts; and power was given them to search in the highways any suspected person, and also power to stop and search any cart. This power, however, was expressly limited to highways and public places, and it was never intended to give power to search in places other than those in which the officers would be in the ordinary execution of their duty. In those places, if a person is suspected of having been on land illegally in pursuit of game, power is given to search him,

(1) 13 C. B. (N.S.) 485; 32 L. J. M.C.) 106.
(2) 4 B. & S. 515; 33 L. J. (M.C.) 1.
(3) 3 B. & S. 787; 33 L. J. (M.C.) 50.

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and then, if any game, or implements for taking game are found on him, the constable may seize and detain them. If the Act had stopped there, there would have been no judicial tribunal to judge of the propriety of the exercise of these exceptional powers by the police; and the Act, therefore, proceeds to enact that the constable when he has so done, *shall* take out a summons against the person; it is not left to his option, but he is bound to do it, and a check is thus placed on the exercise of the power by the police. That being so, what is the case in which the summons may and must be taken out? The Act says, "in such case." The only case previously mentioned is of a person who has been suspected and searched in a highway, street, or public place, and game or implements found on him, which have been seized and detained; and it is difficult to see how the words "such case" can apply to anything else. The Act then speaks of "*such* person," and "*such* game;" can it be any other than the person so suspected and searched, or upon whom the game is found, and the game so found and detained? At the close of the section it is provided that if a conviction follows the game may be sold or destroyed, and if there is no conviction, that it shall be given back to the person from whom it is taken—directions which seem to be suited to the consecutive series of acts mentioned at the beginning of the section. The first section also requires that the justice who makes out the summons should be a justice of the county in which the game is found. Looking at all these provisions, I am clearly of opinion that the magistrates were right, for even if seizing and detaining the game be not necessary, here it was not even "found" within the terms of the Act. The summons cannot be taken out by any constable, but only by the constable who finds the game or implements, and such finding, therefore, is essential to give the magistrates jurisdiction. In the case of *Hall* v. *Knox* (1), in the Queen's Bench, it seems to have been held that *an actual* search was not necessary to give authority to the magistrates to convict; but the Court did not hold that *finding* was not necessary. My present impression is, that it is necessary that there should also be a seizing and detaining of the game in the highway, street, or public place; but it is unnecessary to decide that point.

(1) 4 B. & S. 515; 33 L. J. (M.C.) 1.

BYLES, J. I am also of opinion that the magistrates were right. It must be remembered that this section not only creates a new summary jurisdiction, but changes the burden of proof in a criminal case. It must, therefore, be construed strictly. It seems to me that there are four requirements before that jurisdiction arises:— First, the accused must be found in a highway, street, or public place. Secondly, a constable or peace officer must have good ground to suspect that he is coming from land where he has been unlawfully in search or pursuit of game. Thirdly, he must have in his possession some game unlawfully obtained, or a gun, or part of a gun, or net, or engine for taking or killing game. Fourthly (which gives rise to the question in this case), the game, or other article, or thing, must have been *found* on him, and by that I understand that it has been either heard, seen, or felt on him. It must then and there have been perceived by the finder's senses, and not inferred by conjecture. If it be found without searching, I agree there need be no search. I do not say whether it is necessary that the game, or other article, or thing, should be then seized and detained; much may be said in favour of that view; but it is not needful to decide the point now, because, as the fourth requisite mentioned above has not been here satisfied, the magistrates could not rightly have convicted. I think, therefore, our judgment should be for the respondents.

MONTAGUE SMITH, J. I am of the same opinion. I think that the various clauses of this section are relative, and depend on one another, and cannot be read as Mr. Kemplay would have us read them. I think it is a condition precedent to the power of the magistrate to convict that a constable should have searched the prisoner in a highway, street, or, public place, or when that occurs which renders the search unnecessary, that he should have found game or a gun or other engine for killing or taking game on the person, and if he does so whether it is found by search or actual sight it seems to me of no importance; but it must be found in such a position that the constable can seize it, and I am inclined to think seizure is as necessary as the rest, and that the jurisdiction of the magistrate only arises when the game or instrument has been seized and detained. The constable has only power to search on the highway,

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and when he has searched or without searching has found game or some instrument for taking game, and has seized it, *such* constable in *such case* may apply to a magistrate for a summons, expressions which plainly shew that it is only the constable who has so acted who can apply to the magistrate; the subsequent part of the statute seem also to indicate that the jurisdiction of the magistrates only arises when the former part of the section has been fulfilled, as I have said. If this is not the construction it is difficult to escape from one which would lay down that if a constable sees a person whom he suspects of having a hare in his pocket cross a highway he may follow him to his own house, and then if he finds the hare may, without seizing it, take out a summons under this Act. It certainly was not intended to turn constables into gamekeepers, which would be the effect of such a construction, and the section, even as we construe it, will undoubtedly give considerable protection to game, because it is not necessary under this statute to prove on what ground the game has been taken as it is under former statutes. I think that the decision of the magistrates was right, and the appeal must therefore be dismissed.

BRETT, J. It seems to me that this statute does not create any new offence: the offence consists as before in a person obtaining game by unlawfully going upon land in search or pursuit of game; but what this Act does is to give a new jurisdiction to a new tribunal to punish in a different way on different evidence the same offence; but only, I think, in certain circumstances. The new tribunal is two magistrates in petty sessions; the different punishment is by inflicting a penalty and forfeiting the game or instrument for taking game; the different evidence consists in its being no longer necessary to prove on what land the person has illegally been. Before the jurisdiction can arise certain conditions are necessary. First, a constable must find on the highway either game, or some article or thing for killing or taking game, upon some suspected person or conveyance; he must seize it, and then the same constable must lay an information before a magistrate respecting it. I think Mr. Kemplay has shewn that a search is not necessary; it is only part of the procedure referred to in the

Act. To shew that the constable has found the game or other articles, I think it is not necessary to prove that he has seen or felt them; but it is sufficient if the circumstances were such as to produce certainty in his mind that the game or other article was there. But I think something more is necessary, viz., that the game or other article should be seized in the highway, and that, if the accused were to escape with the article, the magistrates' jurisdiction would not arise: in the same way as if all these things happened, and if a different constable took out the summons, the magistrates would have no jurisdiction. I agree with Mr. Sturge that it is not all persons who have committed the offence of being unlawfully in pursuit of game who can be prosecuted under this section, but only those persons who are within the terms of the section. I think, therefore, that the magistrates were right in their decision.

Judgment for the respondents with costs.

Attorneys for appellant: *Learoyd & Bleby.*
Attorney for respondents: *H. B. Clarke.*

June 4.

ALBERT SYKES AND W. H. SHAW AND HANNAH HIS WIFE, EXECUTORS AND EXECUTRIX OF ELLEN SYKES, DECEASED, *v.* SIR TATTON SYKES, BART., AND J. A. LOVE.

Practice—Costs, Security for—Plaintiff suing as Executor—Insolvent.

In an action by two executors, one of whom is out of the jurisdiction and the other insolvent, the defendant is not entitled to a stay of proceedings until they give security for costs.

For C.L.O. 71

ACTION by the plaintiffs, as executors and executrix of Ellen Sykes, against the sheriff of Yorkshire and one Love for seizing and selling goods belonging to the testatrix under an execution at the suit of Love upon a judgment recovered by him against W. H. Shaw, the husband of the executrix.

By the will of Ellen Sykes, which was not proved until after the seizure and sale, all her personal estate and effects were bequeathed to Albert Sykes and Hannah Shaw, in trust for the nephews and nieces of the testatrix.

Upon an application by the defendants for security for costs, on

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the ground that one of the plaintiffs (Albert Sykes) was residing out of the jurisdiction of the Court, and that another of the plaintiffs (W. H. Shaw) was a bankrupt, and that neither Shaw nor his wife had any visible means of paying the costs of the defendants should a verdict pass for them, Brett, J., made an order staying the proceedings until the plaintiffs should give such security.

Kemplay obtained a rule nisi to rescind this order.

C. Russell and *Forbes* shewed cause. The order was rightly made. Although the fact that one of two plaintiffs lives out of the jurisdiction and that the other is a bankrupt, will not entitle the defendant to ask for security for costs,—*M'Connell* v. *Johnston* (1), —the additional fact that the plaintiffs sue, not in their own right, but for the benefit of others, will.

[MONTAGUE SMITH, J. Is there any authority for saying that a plaintiff who sues as executor, though he be insolvent, must give security for costs?

BYLES, J. An executor residing out of the jurisdiction has been compelled to give security for costs: *Chevalier* v. *Finnis* (2); *Chamberlain* v. *Chamberlain.* (3)]

In *Larssen* v. *Monmouthshire Railway and Canal Company* (4), where an administrator sued under Lord Campbell's Act, 9 & 10 Vict. c. 93, for the benefit of the deceased's widow and children, Bramwell, B., says: "To entitle a defendant to ask security for costs, the plaintiff must be both suing on behalf of another person and insolvent." In *Smith* v. *Saunders* (5), the plaintiff had executed a deed of inspectorship for the benefit of his creditors, without assignment; and, it appearing that he had no beneficial interest in the suit, the Court stayed the proceedings until security should be given for the costs. So, here, the plaintiffs are suing for the benefit of others. One being insolvent, and the other out of the jurisdiction of the Court, and neither having any interest in the subject-matter of the action, they must give security. A plaintiff suing as prochein amy for an infant has been ordered to give security: *Lees* v. *Smith.* (6)

(1) 1 East, 431.
(2) 1 B. & B. 277.
(3) 1 Dowl. 366.
(4) 16 L. T. 289.
(5) 16 L. T. 386.
(6) 5 H. & N. 632; 29 L. J. (Ex.) 294.

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Kemplay, in support of the rule. There is no authority for holding that an executor, unless he resides out of the jurisdiction, can be called upon to give security for costs. Executors, since the statute 3 & 4 Wm. 4, c. 42, s. 31, are on the same footing as to costs as ordinary plaintiffs. They do not sue for the benefit of others, in the sense contemplated by the rule as to security.

[He was stopped by the Court.]

BOVILL, C.J. By the law of this country a party is not precluded from enforcing his rights in a Court of law by reason of his poverty. In many cases, no doubt, the inability of an unsuccessful litigant to pay costs to his successful adversary works hardship; but it is for the legislature to provide a remedy, not for us. Indeed, the attention of the legislature was called to the subject at the time of the passing of the last County Court Act, 30 & 31 Vict. c. 142. The 10th section of that Act, however, does not preclude the plaintiff from enforcing his remedy if he fails to give security; it merely changes the tribunal. In the present case, one of the plaintiffs, Shaw, is resident in this country. There is no ground, therefore, for asking for security for costs as against him, notwithstanding he appears to be insolvent and without the means of paying costs. That was decided in *M'Connell* v. *Johnston* (1), where the Court refused to order security for costs, though one of the plaintiffs was a foreigner residing abroad, and the other a bankrupt in custody in execution for a debt. To entitle a defendant to security, he must shew not only that the plaintiff is insolvent, but also that he is suing as a nominal plaintiff, in the sense of another person being beneficially interested in the result of the action. In that case, the Court would stay the proceedings until security is given. That doctrine, however, has never been applied to the case of an executor or the assignee of a bankrupt. The distinction is manifest; for, though there may be legatees or creditors, it does not follow that they will receive their legacies or a dividend on their debts; and so there is no person interested to give, or who would be willing to give, security for costs. No authority has been or could be produced in which security for costs has been ordered to be given by a plaintiff suing as executor or as assignee,

(1) 1 East, 431.

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simply on the ground that he is not in a position to pay costs. On the contrary, where an application was made for security in an action brought by an executor, he was treated as being in the position of an ordinary plaintiff, and, being resident abroad, he was ordered to give security: *Chevalier* v. *Finnis* (1); and an ordinary plaintiff is not bound to give security though he may not be able to pay costs. And there is a case cited in Tidd's Practice, 9th ed. 537, where this Court refused to compel security for costs in an action brought by assignees of a bankrupt, which was asked for on the ground that one of the plaintiffs was a bankrupt and the other a prisoner in Newgate. (2) There is no reason why we should not in this case adhere to the old practice; and it is not governed by the recent statute, because one of the plaintiffs at all events is not within it. The rule must, therefore, be made absolute to set aside the order.

BYLES, J. After having entertained some doubt, I have come round to the same opinion. Here are two plaintiffs, as to one of whom it is said that he is out of the jurisdiction of the Court; but that fact is no ground for ordering security for costs, as the other plaintiff is resident within the jurisdiction. As to the latter it is said that he is insolvent, but it has been decided that that fact is no ground for ordering security to be given.

MONTAGUE SMITH, J. I am of the same opinion. If a single plaintiff resides abroad, the proceedings will be stayed until he gives security: but, if there be two plaintiffs, the absence of one of them will not of itself entitle the defendant to security. And the fact that the plaintiff who resides within the jurisdiction is in a state of insolvency, and not able to pay costs if unsuccessful, does not make any difference. The cases in which a plaintiff has been compelled to give security on the ground of insolvency, are cases in which the specific debt sought to be recovered has been transferred to a third party, for whose benefit the action is brought. That is founded on reasons of obvious justice. The real plaintiff ought not to be allowed to enforce his right through the instrumentality of a nominal plaintiff who is not of ability to pay costs if unsuccessful. The case of an executor stands in a totally different position. He

(1) 1 B. & B. 277. (2) Anon. 2 Taunt. 61.

is entitled to all the debts of the testator both at law and in equity. He sues in his own right. He receives the fruits of the judgment, which form part of his testator's general estate. I think we should be acting contrary to justice, and creating a new precedent, if we were to hold the insolvency of an executor to be a ground for compelling him to give security for costs. The legislature has recently interfered to protect persons against whom actions of tort are brought by plaintiffs who have no visible means of paying costs in the event of the verdict being against them. But that is done in an extremely guarded manner. No step can be taken until the judge is satisfied that the plaintiff has no visible means of payment; and the judge may then direct security to be given or remit the cause for trial in a county-court, unless the plaintiff shall satisfy him that he has a cause of action fit to be prosecuted in the superior Court. No obstacle, therefore, is presented to the prosecution of real claims.

BRETT, J. Having heard the matter argued, I am now satisfied that my order was wrong. The case presented to me at chambers was, that one of the plaintiffs was resident abroad, and, as to the others, that they were brought within s. 10 of 30 & 31 Vict. c. 142. (1) The objection then was that, as the application as against Sykes rested upon the ordinary jurisdiction of the Court, and as against Shaw and wife upon the recent statute, no order could be made. I thought the objection untenable; and I think so still. But, looking more carefully at 30 & 31 Vict. c. 142, s. 10, it seems to me that the same order could not be made as to Shaw and

(1) That section enacts that: "It shall be lawful for any person against whom an action for malicious prosecution, illegal arrest, illegal distress, assault, false imprisonment, slander, seduction, or other action of tort may be brought in a superior Court, to make an affidavit that the plaintiff has no visible means of paying the costs of the defendant should a verdict be not found for the plaintiff; and thereupon a judge of the Court in which the action is brought shall have power to make an order that, unless the plaintiff shall, within a time to be therein mentioned, give full security for the defendant's costs to the satisfaction of one of the masters of the said Court, or satisfy the judge that he has a cause of action fit to be prosecuted in the superior Court, all proceedings in the action shall be stayed; or, in the event of the plaintiff being unable or unwilling to give such security, or failing to satisfy the judge as aforesaid, that the cause be remitted for trial before a county-court, to be therein named."

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wife as against Sykes; for, if the defendants satisfied me that the Shaws were without visible means of paying costs to the defendants in the event of their failing in the action, and that the cause of action was not fit to be prosecuted in a superior Court, I must have referred the cause for trial in a county court, and not simply ordered a stay of proceedings until security was given for costs. It has been suggested to-day that, without reference to the recent County Court Act, the order might well have been made against the Shaws, because they were suing without any interest in the subject-matter, and were shewn to be insolvent. If that had been made out, I think it would have supported the order. But I think it is not made out. Insolvency alone is not a ground for compelling security. But an exception has been engrafted on that rule, where the plaintiff is merely lending his name for the benefit of another person, and is therefore not the real plaintiff in the action; as, where he has assigned his interest in the debt to another. There is no authority, however, for extending that exception to the case of an executor or an assignee of a bankrupt. They are not within the same principle; they do not lend their names for the benefit of third persons in this sense. No order could, therefore, properly be made against the Shaws on the mere ground that they were insolvent. And the cases shew that, unless there is ground for making an order for security against all the plaintiffs, it cannot be made against any.

Rule absolute. (1)

Attorney for plaintiffs: *H. T. Naters, for Freeman, Huddersfield.*

Attorneys for defendants: *Bell, Brodrick, and Gray, for Drake, Huddersfield; and T. Calvert, for E. Sykes, Huddersfield.*

(1) See *Denston* v. *Ashton*, Law Rep. 4 Q. B. 590.

THE NEW QUEBRADA COMPANY, LIMITED, *v.* CARR AND OTHERS. 1869

June 8.

Bankruptcy—Set-off—Mutual Credit—Bankruptcy Act, 1849 (12 & 13 *Vict.* c. 106), *s.* 171—*Bankruptcy of one of several Joint Debtors.*

The provisions of the Bankruptcy Act, 1849 (12 & 13 Vict. c. 106), s. 171, with reference to mutual credits, do not apply to cases in which one of several joint debtors becomes bankrupt.

A. sued B. C. and D. on a joint debt. The defendants pleaded a set-off. A. replied that before plea D. had become bankrupt:—

Held, on demurrer, a good replication.

Staniforth v. *Fellowes* (1 Marsh, 184), followed.

Semble, per Brett, J., the replication would have been good, even if the bankrupt had been sole defendant.

DECLARATION against the defendants, as joint owners of shares for calls and interest. There were also indebitatus counts for interest, and on accounts stated.

Plea: A set-off.

Replication: That after action brought, and before plea, one of the defendants, Simmonds, was adjudicated bankrupt, and an assignee in bankruptcy appointed, and that the interest of Simmonds in the debts and causes of set-off vested in him.

Demurrer to the replication.

Holl, in support of the demurrer, contended, first, that the debt proposed to be set off did not pass to the assignees of Simmonds, because on his bankruptcy the effect of the Bankruptcy Act, 1849 (12 & 13 Vict. c. 106), s. 171 (1), was to set off the debt against that due to the plaintiffs, so that Simmonds had no personal interest in it, and therefore it did not pass to the assignees any more than

(1) 12 & 13 Vict. c. 106, s. 171: "Where there has been mutual credit given by the bankrupt and any other person, or where there are mutual debts between the bankrupt and any other person, the Court shall state the account between them, and one debt or demand may be set off against another, notwithstanding any prior act of bankruptcy committed by such bankrupt before the credit given to or the debt contracted by him; and what shall appear due on either side on the balance of such account, and no more, shall be claimed or paid on either side respectively; and every debt or demand hereby made provable against the estate of the bankrupt may also be set off in manner aforesaid against such estate, provided that the person claiming the benefit of such set-off had not, when such credit was given, notice of an act of bankruptcy by such bankrupt committed."

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property of which he was trustee, or debts which he had previously assigned; and, secondly, that if the effect of the Act was to extinguish the debts, so that the defendants' debt could not be pleaded as a set-off, still that the whole pleadings were to be taken together, and if they shewed that the plaintiffs were not entitled to recover, judgment must be for the defendants. He referred to *Bishop* v. *Church* (1); *Ex parte Blagden* (2); *Ex parte Soames* (3); *Watts* v. *Christie* (4), as shewing that a set-off might exist after bankruptcy.

Archibald, in support of the replication, contended, first, that the replication was good, as shewing that the debt did not continue due to the defendants so that they could have brought a cross-action upon it up to the date of the trial; and, secondly, that the law of mutual credits only applied after the debts had become vested in the assignees, and enabled mutual credits to be set-off with them.

[BOVILL, C.J., referred to the case of *Staniforth* v. *Fellowes*. (5)]

Holl, in reply.

BOVILL, C.J. It has been contended very ably on the part of the defendants that the replication is bad, and that, according to the facts disclosed by the plea and replication, this case is brought within s. 171 of the Bankruptcy Act, 1849 (12 & 13 Vict. c. 106), and that the effect of that section is to set off the debt of the plaintiffs and defendants against one another from the time of the bankruptcy, so as to prevent the plaintiffs recovering in this action. The whole of that argument necessarily depends on what is the meaning of that section. In terms it does not seem to apply to the case where one or more of several partners become bankrupt, but only to the cases in which a sole debtor or a whole firm become bankrupt. Justice, indeed, would seem to require that there should be a right of set-off also where some of the partners in a firm become bankrupt, and a claim is sought to be enforced against the firm; but a construction has been placed on the corresponding section in 5 Geo. 2, c. 30, in the case of *Staniforth* v. *Fellowes* (5),

(1) 3 Atk. 691.
(2) 19 Ves. 464.
(3) 3 D. & C. 320.
(4) 11 Beav. 546.
(5) 1 Marsh, 184.

and there being an express decision which is referred to in treatises on the subject without being questioned, I do not feel at liberty to say that it is not law, or ought not to be acted on. In that case the question distinctly arose, and on summons judgment was pronounced deciding that the section did not apply to the case where one or more of several partners become bankrupt. The observations of all the judges in that case seem applicable to the present one, and it may further be remarked that jurisdiction is given by the statute to the commissioners to state the account, and they would have no authority over the solvent partners. It seems to me, therefore, we must be governed by the above case.

BYLES, J. Looking at the form of the pleadings, and at the grounds on which the case has been argued at the bar, I have nothing to add.

MONTAGUE SMITH, J. I am of the same opinion. It is unnecessary to give any opinion as to what would have been the rights of the parties if there had been a sole defendant who became bankrupt. Here there were two other partners, and I think the case is governed by *Staniforth* v. *Fellowes*. (1) I yield to that authority; and if it be too stringent, there is an opportunity to amend the law in the bill now before the legislature.

BRETT, J. The plea is a plea of set-off by three defendants, and it seems to me that it is essential to that plea that at the time of its being pleaded, the three defendants should have had a right of action of equal amount to the plaintiffs' claim, and that anything which sets aside that material allegation avoids the plea.

It has been argued that the replication does not do this, because under the 171st section of the Bankruptcy Act, 1849, the debt of Simmonds still remained vested in the bankrupt. But the first answer is that, according to *Staniforth* v. *Fellowes* (1), that section does not apply, because it is a claim jointly with two solvent partners. If the section did apply, the question would arise, what was its effect? I think its only effect is to transfer the claim to the assignees, subject, when they seek to enforce it, to a right of the plaintiffs to deduct their debt. It does not, I think, extinguish

(1) 1 Marsh, 184.

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the mutual debts, but if it did, I should have thought it would have answered the plea of set-off. In either view I think it does not leave a right of action in the bankrupt against the plaintiffs, and that he cannot, therefore, avail himself of his claim against the plaintiffs under an ordinary plea of set-off, and that, on the present pleadings and argument, it seems to me, is all we have to decide.

Judgment for the plaintiffs.

Attorney for plaintiffs: *G. L. P. Eyre.*
Attorney for defendants: *W. Moore.*

June 8.

SANSOM AND OTHERS *v.* THE VESTRY OF ST. LEONARD, SHOREDITCH.

Apportionment—Action—Metropolis Roads Act, 1863 (26 & 27 *Vict.* c. 78), *s.* 4.

Commissioners under the powers of a private Act of Parliament purchased land lying partly in two parishes for the purpose of forming a metropolitan road, and charged it with the payment of an annual rent.

By the Metropolis Roads Act, 1863 (26 & 27 Vict. c. 78,) s. 4, it was provided that so much of the road as lay within any parish mentioned in a schedule, which included the two parishes in question, should be dealt with as part of the common highways of the parish, and all quit rents and other outgoings payable in respect thereof should be paid as part of the expenses of maintenance:—

Held, that the effect of the Metropolis Roads Act, 1863, was to apportion the rent between the two parishes; and that the representatives of the person from whom the land was bought were entitled to recover by action from each of the parishes a proportional part of the rent: and that the proper form of declaration was one framed on the statute, and not for use and occupation.

THIS was an action to recover 26*l.* 5*s.* for money payable by the defendants to the plaintiffs for the defendants' use by the plaintiffs' permission of certain lands of the plaintiffs.

The defendants pleaded never indebted.

The cause came on to be tried before Keating, J., at the sittings in Middlesex after Trinity Term, 1868, when a verdict was found for the plaintiffs, subject to the opinion of the Court on the following case:—

1. By the City Road Act (1 Geo. 3, c. xxvi.), passed in 1761, it was provided that the trustees of the City Road, in the county of Middlesex, might purchase land for the purpose of making the

City Road, paying the owners such annual rent for the land as might be agreed upon between the trustees and the owners.

2. At the time of the passing of the Act a part of the land on which the City Road is constructed was vested in the plaintiffs' predecessors in title. After the construction of the City Road, the trustees of the City Road, and subsequently the Commissioners of the Metropolis Roads, until the coming into operation of the Metropolis Roads Act, 1863, paid the plaintiffs' predecessors and the plaintiffs a rent of 7*l.* a year in respect of the land.

3. The powers given to the trustees under the Act 1 Geo. 3, c. xxvi. were subsequently enlarged, and the time of its operation extended, by 23 Geo. 3, c. cii., 43 Geo. 3, c. lxviii., and 5 Geo. 4, c. lxi.

4. By 7 Geo. 4, c. cxlii., the property in the City Road (subject to any rents payable in respect of the lands forming the road) was transferred to the Commissioners of the Metropolis Roads, who retained the management thereof until the passing of the Metropolis Roads Act in 1863 (26 & 27 Vict. c. 78), when the management vested in the defendants.

5. By s. 4 of the Metropolis Roads Act, 1863, it is provided, that "on and after the 1st day of July, 1864, so much of the parish highways as lies within any parish specified in the first column of the first schedule to this Act annexed shall be maintained, repaired, watched, lighted, watered, and dealt with in all respects as part of the common highways within that parish, under and subject to all the provisions contained in any Act or Acts from time to time in force within that parish applicable to highways, streets, footpaths, and footways, and under and subject to the Metropolis Local Management Acts; and all quit rents and other outgoings payable in respect thereof shall be paid accordingly as part of the expenses of maintaining the same."

6. A portion of the said piece of land is within the parish of St. Leonard, Shoreditch.

7. It was agreed between the parties, that on the argument of the case reference might be made by either of them to the pleadings in the action, and to the several Acts of Parliament therein mentioned; and that the Court should be at liberty to amend the pleadings (if necessary), and to draw any inference, or find any facts

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which in the opinion of the Court a jury ought to have drawn or found.

The questions for the opinion of the Court were, whether the defendants represented the trustees of the City Road, or the Commissioners of Metropolis Roads, and their liability in respect of the said road; and if they did, whether the plaintiffs' claim could be enforced by action?

If the Court were of opinion in the affirmative, the verdict for the plaintiffs was to stand for 26*l.* 5*s.* and costs; if the Court were of opinion in the negative, then the verdict was to be entered for the defendants with costs.

Macnamara (*Jelf* with him), appeared for the plaintiffs, but the Court called on

Herschell (*Thomas* with him), for the defendants. Only part of the road is in the parish of Shoreditch, and they cannot clearly be liable to pay the whole rent, yet the whole is claimed in the case. Nor can the plaintiffs recover anything without an amendment of the pleadings, for the rent must have been reserved, if at all, by deed. But in truth the plaintiffs' remedy, if any, is in equity. The fact that the Metropolis Roads Act, 1863 (26 & 27 Vict. c. 78), makes this rent payable out of the tolls will not in itself give the plaintiffs a right of action: *Pardoe* v. *Price* (1); *Edwards* v. *Lowndes*. (2) The payment in question cannot be called a quit rent, and would hardly come within any of the terms used in the Act.

Macnamara, in reply. The whole rent issues out of each and every part of the land, and the plaintiffs therefore are entitled to recover the whole from the defendants, who may claim a contribution from the parish in which the other part of the road is situated. The fact that the land has now fallen into two hands ought not to put the plaintiffs to the necessity of bringing two actions.

BOVILL, C.J. I am of opinion that the plaintiffs are not entitled to recover this rent under a count for use and occupation, or the whole of the rent under any form of declaration. It seems to me, however, that they are entitled to recover a part of the rent proportional to the part of the land that is in the defendants' parish

(1) 16 M. & W. 451. (2) 1 E. & B. 81; 22 L. J. (Q.B.) 104.

under a count framed on the statute. At present the amount of this proportional part has not been ascertained, and it must be ascertained in the usual way by the verdict of a jury, unless the parties can agree upon some other mode. I think an obligation to pay their proportion of this rent is imposed directly on the defendants by the 4th section of 26 & 27 Vict. c. 78, and that they are not merely created trustees of a fund out of which it is payable, as in the cases of *Pardoe* v. *Price* (1), and *Edwards* v. *Lowndes*. (2) That section first imposes on them the duty of maintaining so much of the road as is in their parish, and then proceeds, "all quit rents and other outgoings in respect thereof shall be paid accordingly as part of the expenses of maintaining the same." Therefore, as there is under the special circumstances of this road a liability to pay this rent in respect of it, the Act has transferred the liability to pay so much of it as is payable in respect of the part of the road in their parish to the defendants. The effect of the Act, therefore, is, to cause an apportionment of the rent in the same way as is done by the common law in the case of land descending to coparceners. As, however, the plaintiffs are not entitled to recover the amount they have claimed, or in the form of declaration which they have adopted, each party must pay their own costs.

BYLES, J. I am of the same opinion. The whole difficulty of the case arises on the question of apportionment. I think the effect of the statute is to impose on the defendants a due proportion of the quit rent or other outgoing which issues out of the whole land. It may be doubtful whether this is strictly a quit rent, but that difficulty is removed by the other words used in the section, "other outgoings." Three modes may be suggested in which the object of the section might be carried out: first, each parish might be held liable in the first instance for the whole rent, being then entitled to recover back part from the other parish; this would be very inconvenient; secondly, it might be worked out by treating the defendants as trustees of the fund arising from the tolls, and giving to the plaintiffs only a remedy in equity; that would be still more inconvenient; thirdly, this section may be interpreted as

(1) 16 M. & W. 451. (2) 1 E. & B. 81; 22 L. J. (Q.B.) 104.

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itself creating an apportionment of the rent between the two parishes, which is the only way which appears to be free from difficulty, and I think that is the construction we ought to adopt.

MONTAGUE SMITH, J. I am of opinion that the plaintiffs are entitled to recover a proportional part of this rent. Two objections have been raised, first, that there is no quit rent payable; but there was a power under the original Act (1 Geo. 3, c. xxvi.) given to the trustees to charge the land purchased by them with a rent, and the fact, that this rent was paid from the passing of that Act till the liability to pay it was transferred to the defendants, is a sufficient reason for holding that such a rent was created. Then, secondly, it is said there is no remedy by action, but I think the Act 26 & 27 Vict. c. 78, s. 4, imposed this obligation on the defendants. The words of the section are large enough to include such a rent, and it does not merely render them trustees for the plaintiffs, but imposes on them an obligation to pay the rent, as was the case in *Tilson* v. *Warwick Gas-Light Company* (1), where the law is clearly laid down by Bailey, J. There the plaintiff was not specifically named in the Act, nor the amount of his costs, yet it was held he could recover in an action founded on the statute. Here the sum is specific, its amount being simply a matter of calculation.

I agree with the rest of the Court that the effect of the legislation is to apportion the rent between two parishes where part of a road is in one and part in the other.

BRETT, J. The defendants can only be liable to pay this rent if they have been made so by statute, and looking at the cases which have been cited, *Pardoe* v. *Price* (2), and *Edwards* v. *Lowndes* (3), it would seem that can only be if the statute requires them to pay a specific rent for specific land. The question therefore depends on whether the statute has apportioned the rent payable to the plaintiffs between the two parishes. By 1 Geo. 3, c. xxvi., the City Road Commissioners were authorized to purchase land and to pay rent for it, and it must be assumed that this land was taken under the powers of that Act from the plaintiffs' predecessors, and the rent now claimed agreed to be paid. Then by

(1) 4 B. & C. 962. (2) 16 M. & W. 451.
(3) 1 E. & B. 81; 22 L. J. (Q.B.) 104.

7 Geo. 4, c. cxlii., the land was transferred to the Commissioners of the Metropolis Roads, but subject to the rents payable in respect of it, of which this was one, and as this was under the first statute a legal rent recoverable by action, so it was, I think, when transferred to the Commissioners of the Metropolis Roads.

Then we come to the late Act (26 & 27 Vict. c. 78), which transferred the management of the roads to the parish vestries, and the way that Act deals with them is this: it says "so much of the roads as lie within the parish shall be maintained as part of the parish highways." It deals with a part of the road, not the whole, and says of such part that it shall be maintained by the parish. Then the Act continues, "all quit rents and other outgoings in respect *thereof* shall be paid accordingly as part of the expenses of maintaining the same." Now "thereof" does not refer to the whole road, but to the part of it within the parish, so that there is an express enactment that a portion of the quit rents and other outgoings shall be paid by the parish. Then it has been contended that this is not a quit rent; I should have thought that word would have been large enough to include it; but if not, the legislature has guarded against any such objection by adding the words, or "other outgoings," which must mean other similar outgoings. It seems to me therefore that the Act has transferred to the defendants the liability to pay this rent, which is a legal rent recoverable by action, but not the whole of it, but so much of it as is referable to the part of the road within the parish: and though the exact amount to which the defendants are liable is not mentioned in the Act, this becomes merely a matter of figures.

Judgment for the plaintiffs without costs.

Attorneys for plaintiffs: *Lovell, Son, & Pitfield.*
Attorneys for defendants *Mills & Lockyer.*

1869
June 12.

FIELD *v.* MEGAW.

Debtor and Creditor— Equitable Assignment of a Debt.

A promise to pay money when the debtor receives a debt due to him from a third person, does not constitute an equitable assignment, so as to charge the debt in the hands of such third person.

A. having a cargo of wheat brought by a vessel called the *Maraquita* in the hands of a factor for sale, obtained from B. a loan of 500*l.*, for which he gave B. his acceptance at two months, describing the consideration to be "value received in wheat ex *Maraquita*," and they verbally agreed that the bill was to be renewed from time to time until A. should receive from the factor the proceeds of the wheat:—

Held, that this did not charge the fund in the hands of the factor, so as to amount to an equitable assignment of, or an equitable charge upon, the fund.

Fish 46

THE declaration was for money received by the defendants for the use of the plaintiff, interest, and money due upon accounts stated.

Pleas: 1. Never indebted. 2. Payment. Issue thereon.

The cause was tried before Byles, J., at the sittings in London after last Hilary Term. The plaintiff is a corn-merchant in London. The defendant is a member of the firm of Hamilton, Megaw, & Thomson, of Belfast. The plaintiff had purchased a cargo of wheat ex *Maraquita*, which he was desirous of sending either to Belfast or Newcastle for sale; and, in order to induce him to send it to Belfast consigned to Hamilton & Co. for sale, one Wedd (who was in the habit of procuring consignments for Hamilton & Co.) agreed to advance him 500*l.* in addition to the sum which Hamilton & Co. were prepared to advance on the cargo. For this 500*l.* the plaintiff gave Wedd his acceptance at two months, the bill describing the consideration to be "value received in wheat ex *Maraquita*." At the same time it was arranged by parol between the plaintiff and Wedd that the bill should be renewed from time to time until the plaintiff should have received the proceeds of the cargo from Hamilton & Co.; and the plaintiff promised that the bill should be paid when he received such proceeds, but not that the proceeds should be security for the amount of the bill. No notice of this engagement was given to Hamilton & Co., nor did the wheat or the shipping documents pass through Wedd's hands. The plaintiff stopped payment on the 1st of June,

1868, and ultimately compounded with his creditors. Wedd claimed the 500*l.* from Hamilton & Co., and they paid that sum to him. This action was brought by the plaintiff to recover back the 500*l.* on behalf of his creditors, against the defendant as representing Hamilton & Co.

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A verdict having been found for the plaintiff for 500*l.* 12*s.* 6*d.*,

Sir G. Honyman, Q.C., in Easter Term last obtained a rule nisi to enter a nonsuit or a verdict for the defendant.

O'Malley, Q.C., and *Patchett* shewed cause. There was no equitable assignment to Wedd of any portion of the proceeds of the corn in question, but a mere promise on the part of the plaintiff to repay him the advance of 500*l.* out of the proceeds when he should receive them. In Fisher on Mortgages, 45, it is said: "A person entitled to a debt or chose in action, or equitably entitled to a fund, may create a security thereon not countermandable in favour of a third person, either by agreement with him or by an order upon the debtor or holder of the fund to pay it to the assignee, by which agreement or order, after notice thereof, the debtor or holder of the fund will be bound. Such an agreement, if it be clearly proved, may be verbal as well as in writing. . . . And, provided the intention be clear, no particular form of words is necessary." But, p. 46, "there must be a distinct unequivocal engagement that the particular fund shall be made liable to the debt." A mere intimation to the creditor by his debtor that he has made arrangements for payment of the debt out of a fund over which he still retains the control, or a promise to pay it out of a particular debt or fund, is not an assignment,—such an arrangement being countermandable: *Malcolm* v. *Scott.* (1) The debtor's statement to the creditor that the arrival of a certain expected ship will put him in funds to adjust his account, or a direction in a bill of exchange to place it against a particular account, will be equally inoperative: *Jones* v. *Starkey.* (2) The evidence carries the case no further than this. The mere fact that Wedd undertook not to sue upon the bill until the proceeds had been realized, can make no difference. There was no express appropriation of part of the fund to Wedd; nothing to enable him to go to the defendant and

(1) 3 Hare, 39. (2) 16 Jur. 510.

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claim the money. There was not even an agreement to pay the 500*l.* out of the proceeds, but only to pay when the proceeds were received.

Sir G. Honyman, Q.C., and *Day*, in support of the rule. There was an agreement between the plaintiff and Wedd, for a valuable consideration, that the bill should be renewed from time to time until the cargo should be sold, and that it should then be paid by the plaintiff out of the proceeds. The form of the bill shews what the transaction was. By the agreement the plaintiff became trustee for Wedd as to so much of the fund; and if Hamilton & Co. had paid Wedd the 500*l.*, they would have had a good defence to a claim on the part of the plaintiff. If a man directs his debtor to hold the debt for a third person, that is a good equitable assignment: Story's Eq. Jur. §§ 973, 1047; *Collinson* v. *Patrick* (1); *M'Fadden* v. *Jenkyns* (2); *Wheatley* v. *Purr* (3); *Burn* v. *Carvalho.* (4) In *Watson* v. *Duke of Wellington* (5), Sir John Leach thus defines an equitable assignment: "In order to constitute an equitable assignment, there must be an engagement to pay out of a particular fund." The ground of the decision of the Vice-Chancellor in *Malcolm* v. *Scott* (6) was, that there was no contract, but a mere direction given by a principal to his own agent as to the application of the proceeds of the ship, countermanded before any communication had been made by the agent to the creditor,—a mere expression of hope on the part of the debtor that he would be of ability to pay when the ship should be sold; nothing to create a lien on the ship or its proceeds. (7) Wedd might have obtained an injunction against the plaintiff and Hamilton & Co., to prevent them from parting with the fund until his demand was satisfied. And if an equitable plea be necessary to give effect to the real contract and do justice between the parties, the Court may amend.

BOVILL, C.J. I am of opinion that the verdict was right, and that the rule should be discharged. The case turns entirely upon the effect of the parol evidence. The question is whether the agreement entered into between the plaintiff and Wedd was, to repay

(1) 2 Keen, 123, 134
(2) 1 Phil. 152.
(3) 1 Keen, 551.
(4) 4 B. & Ad. 382; 4 My. & Cr. 690, 702, in equity.
(5) 1 Russ. & My. 602, 605.
(6) 3 Hare, 39, 51.
(7) 14 L. J. (Ch.) 57, 61.

the 500*l.* advance out of the proceeds of the wheat ex *Maraquita*, or to pay when the proceeds should be received. Throughout the plaintiff's evidence,—and there was none to contradict him,—the arrangement is stated to be that the bill was to be renewed until the wheat should be sold and the proceeds realized. The plaintiff throughout expressly repudiates having made that fund a security for the payment of the 500*l.* If so, the question is what is the inference we are to draw. The only inference which I can draw is that there was no such engagement on the plaintiff's part as to create an equitable assignment, a claim that could be enforced in equity. The substance of the arrangement was that the money realized by Hamilton & Co. after satisfying their advances, was to be paid to the plaintiff. The ordinary course, where it is intended to give a security on a fund in the hands of a third party, is to give an order upon such third party to pay, or an authority to the creditor to receive, the money. Nothing of the sort was done here. No writing passed. And there is an express repudiation by the plaintiff of his having told Wedd that the proceeds of the cargo should be a security for the 500*l.* All that the evidence amounts to is, that Wedd would not enforce payment of the bill until the plaintiff should have received the money.

BYLES, J. I am of the same opinion. Wedd promised to renew the bill from time to time until the plaintiff should have received the proceeds of the wheat; and the plaintiff promised that he would pay the bill when he received the proceeds. There was no agreement to assign to Wedd any portion of the debt due from Hamilton & Co. to the plaintiff. The absence of notice of the transaction to Hamilton & Co., though notice was not necessary, is nevertheless an ingredient in considering the effect of the evidence. Upon these facts, there clearly was no assignment of the debt, nothing to constitute the plaintiff a trustee of any part of the fund for Wedd.

MONTAGUE SMITH, J. I am of the same opinion. There was no such agreement for a specific appropriation of any part of the fund in the hands of Hamilton & Co. as to bind that fund in equity. The evidence falls short of establishing an equitable assignment, or that the plaintiff was constituted in equity a trustee

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for Wedd. If the plaintiff had agreed that the fund should be held specifically for Wedd, that agreement might have been enforced by a bill in equity. There was nothing more than an expectation that the plaintiff would be able to meet the bill when he received the proceeds of the wheat. In this the case very much resembles *Malcolm* v. *Scott.* (1)

BRETT, J. I must confess I have entertained some doubts. The law upon this subject is brought to such an exquisite degree of refinement that it is by no means easy to understand it. The agreement was that Wedd was to be paid when the proceeds of the cargo should be realized. But I think there was no specific agreement that Wedd was to be paid the 500*l.* out of the proceeds of the cargo in the hands of Hamilton & Co. The plaintiff sues the defendant for money received to his use. As soon as Hamilton & Co. had sold the cargo, they were bound to hand over the proceeds to the plaintiff. They could only justify the payment of the 500*l.* to Wedd by shewing that Wedd could have filed a bill in equity against them to compel them to do so. To do this the defendant was bound to prove a specific agreement that Wedd's debt should be paid out of the particular fund. This he has failed to do.

Rule discharged.

Attorney for plaintiff: *Mark Shephard.*
Attorneys for defendant: *Cattarns & Jehu.*

(1) 3 Hare, 39.

[IN THE EXCHEQUER CHAMBER.]

1869
June 17.

XENOS *v.* FOX.

Ship and Shipping—Insurance—Suing and Labouring Clause—Running-down Clause.

A policy was made subject to a stipulation that, in case the vessel should by accident or negligence run down or damage any other vessel, and the assured should thereby become liable to pay and pay *as damages* any sum not exceeding the value of ship and freight, by or in pursuance of any judgment of any Court given in any action defended with the consent of the underwriters, they (the underwriters) would bear and pay a given proportion of the sum so paid.

The owners were sued for running down another vessel, and obtained a judgment in their favour, but were put to costs:—

Held,—affirming the judgment of the Court of Common Pleas,—that these costs were not recoverable from the underwriters either under the running-down clause or under the usual suing and labouring clause.

APPEAL by the plaintiff against a decision of the Court of Common Pleas discharging a rule for setting aside a nonsuit, or for a new trial. (1)

1. The action was upon a Lloyd's policy for 6000*l.* upon the steamship *Smyrna*, to recover a proportion of the expenses incurred by the plaintiff in successfully defending a collision suit, as hereinafter mentioned. The defendant underwrote for 100*l.*

2. The policy was subject to the running-down clause, as per slip attached. The slip was as follows:—

"And we, the assurers, do further covenant and agree that, in case the said vessel shall, by accident or negligence of the master or crew, run down or damage any other ship or vessel, and the assured shall thereby become liable to pay, and shall pay, as damages, any sum or sums not exceeding the value of the said vessel *Smyrna* and her freight, by or in pursuance of any judgment of any court of law or equity given in any suit or action defended with our previous consent in writing, or by or in pursuance of any award made upon reference entered into by the assured with our previous consent in writing, we, the assurers, shall and will bear and pay such proportion of three fourth parts of the sum so

(1) Law Rep. 3 C. P. 630.

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paid as aforesaid as the sum of 6000*l.* hereby assured bears to the value of the said vessel *Smyrna* and her freight."

The policy also contained the usual suing and labouring clause: "And, in case of any loss or misfortune, it shall be lawful to the assured, their factors, servants, and agents, to sue, labour, and travel for, in, and about the defence, safeguard, and recovery of the said goods and merchandize, and ship, &c., or any part thereof, without prejudice to this insurance."

3. The *Smyrna*, whilst navigating the Sulina branch of the Danube, came into collision with a steam-tug called the *Mars*, and the *Mars* sustained such injuries that she shortly afterwards sank and was lost.

4. The owners of the *Mars* sued the *Smyrna* and her owners in the Consular Court, at Galatz, for the recovery of damages for the loss of the *Mars*. The plaintiff resisted the claim, and the Court gave judgment, dismissing the suit, leaving each party to bear their own costs.

5. The owners of the *Mars* appealed to the Supreme Consular Court at Constantinople. That Court confirmed the judgment of the Court below, with costs.

6. The owners of the *Mars* again appealed to the Privy Council, and the appeal was dismissed, with costs.

7. The plaintiff incurred considerable costs in these proceedings beyond the taxed costs, and he brought this action to recover a proportion thereof.

8. At the trial, the plaintiff proposed to prove that the defendant gave his consent in writing to the defence of the suit and appeals. The Chief Justice ruled that the fact was immaterial, and that the plaintiff, upon the construction of the policy, was not entitled to recover the costs in question.

Sir G. Honyman, Q.C. (*Watkin Williams* and *Cohen* with him), for the plaintiff. The running-down clause was introduced in consequence of the decision of the Court of Queen's Bench in *De Vaux* v. *Salvador* (1); and, although the costs in question are not, strictly speaking, "damages," yet, in construing this clause, regard must be had to the obvious intention of the parties, and the liberal

(1) 4 Ad. & E. 420.

interpretation which is always applied to the language of policies of insurance: *Paterson* v. *Harris*. (1) At all events, the money was paid for the purpose of averting a loss which otherwise would have fallen upon the underwriters, and so is recoverable under the suing and labouring clause: *Kidston* v. *Empire Marine Insurance Company*. (2) The main object of the suing and labouring clause is to give the assured an interest in saving as much as possible for the underwriters.

[LUSH, J. The suing and labouring clause does not come into operation until a loss or misfortune has actually happened. The assured cannot, under that clause, claim the cost of employing a tug to prevent the vessel going on shore.

BLACKBURN, J. The only "misfortune" here is, that the owners of the *Mars* were unreasonable enough to sue the *Smyrna* without sufficient cause. In *Kidston* v. *Empire Marine Insurance Company* (2), there was a total loss of the ship; and the claim was for expenses incurred in rescuing the cargo from a situation in which there would have been a total loss of that also.]

Then, the plaintiff had the consent of the underwriters to defend the proceedings; consequently, he is entitled to recover, as for money paid, the expenses which he incurred in making his defence.

J. C. Mathew (*Brown, Q.C.*, with him), for the defendant, was not called upon.

COCKBURN, C.J. I am of opinion that the judgment of the Court below was right. The suing and labouring clause has no application whatever to the facts of this case. That clause applies to a loss or misfortune happening to the thing insured. Nor has it any relation to the running-down clause. The running-down clause is a distinct contract, under which the underwriters engage to pay a proportion of any damages which may be awarded against the assured in a suit for a collision which may be defended with their previous consent in writing. That is express. The view suggested by Sir G. Honyman would, no doubt, be an equitable view of the matter. But the parties have not so contracted, and we cannot do

(1) 1 B. & S. 336.
(2) Law Rep. 1 C. P. 535; in error, Law Rep. 2 C. P. 357.

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it for them. It can hardly be said that the expenses in question were incurred by reason of the consent of the underwriters to the suit being defended. That assent was given only with reference to the special terms of the running-down clause. If damages had been recovered by the owners of the *Mars* against the plaintiff, that would have brought the case within the clause.

KELLY, C.B., CHANNELL, B., LUSH and HAYES, JJ., and CLEASBY, B., concurred.

Judgment affirmed.

Attorneys for plaintiff: *Thomas & Hollams.*
Attorneys for defendant: *Waltons & Bubb.*

June 18.

[IN THE EXCHEQUER CHAMBER.]

JOHN FOWLER AND THE REV. JOHN ALLEN, CLERK, *v.* THE BISHOP OF GLOUCESTER AND BRISTOL, THE RIGHT REV. DAVID ANDERSON, AND THE REV. CHARLES HILL WALLACE.

Church Building Act, 5 *Geo.* 4, *c.* 103—*Election of Life-Trustees.*

The Church Building Act (5 Geo. 4, c. 103), s. 6, enacts that the several persons subscribing sums not less than 50*l.* each to the building of a church shall elect three trustees from amongst themselves, for (amongst other things) the nomination of a spiritual person to serve the church.

S. 7 enacts that, in case any of the persons first appointed trustees shall die or resign, the majority of the 50*l.* subscribers present at a meeting to be called for that purpose by one or more such trustees, upon a certain notice, shall appoint any other 50*l.* subscriber a life-trustee in his place.

S. 8 enacts that, if the number of persons subscribing shall not exceed three, such persons shall be deemed to be the life-trustees under the Act; and, in case of the death or resignation of any one of them, he may by deed or will nominate his successor.

And s. 12 enacts that the life-trustees shall nominate for the first two turns, or for any number of turns which may occur within forty years; and that, if all the subscribers entitled to elect trustees shall die before such nominations shall have been made or such forty years shall have elapsed, the incumbent of the parish shall nominate; with a proviso, that, if all the 50*l.* shareholders shall die, so that no election of a trustee can be made, and a trustee shall die or resign, the incumbent of the parish shall become a trustee:—

Held,—affirming the judgment of the Court of Common Pleas,—that s. 8 applies only to the first election of trustees, and that there could be no subsequent appointment of trustees except in the manner pointed out in s. 7, viz. by the majority at

a meeting called by the surviving trustees, even though there was only one 50*l.* subscriber remaining; and that, on the death of one or all of the trustees without any such election having taken place, the sole surviving 50*l.* subscriber did not by force of the statute become a life-trustee.

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QUARE IMPEDIT. The following case was stated for the opinion of the Court of Common Pleas:—

1. The church or chapel of the Holy Trinity, Hotwells, in the city of Bristol, and in the diocese of Gloucester and Bristol, was built in the year 1830 by certain persons acting under the provisions of 5 Geo. 4, c. 103, intituled, "An Act to make further provision, and to amend and render more effectual three Acts passed in the fifty-eighth and fifty-ninth years of his late Majesty and in the third year of his present Majesty (1), for building and promoting the building of additional churches in populous parishes." The said church or chapel is situate within the parish of Clifton and city of Bristol, and diocese of Gloucester and Bristol; and the requirements of s. 5 of the aforesaid Act were all duly complied with prior to the erection of the said church or chapel. The building was completed and was duly consecrated for divine service within the period of forty years before the commencement of this suit.

2. Many persons, exceeding three in number, subscribed to build the church; and the plaintiff Fowler was one of the persons originally proposing to build the church, and subscribed 60*l.* for that purpose.

3. On the 6th of October, 1830, the first election of trustees under the provisions of the Act took place, and Sir E. C. Hartopp, Bart., T. Whippie, and A. G. Harford Battersby, were duly elected life-trustees.

4. On the 8th of the same month, the three trustees duly appointed the Rev. John Hensman, clerk, as the spiritual person to serve the church; and on their nomination to the bishop he was duly licensed to serve.

5. On the 23rd of the same month, at a meeting of the life-trustees, it was resolved that the renters of pews should pay in advance from the day of the consecration for pews they engaged to take for one year from the 21st of December, 1830, to the Christmas

(1) 58 Geo. 3, c. 45; 59 Geo. 3, c. 134; 3 Geo. 4, c. 72.

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following; the pew-rents in future to be dated from the 21st of December in each year, and to be paid for at the time of being taken.

6. On the 26th of August, 1863, Isaac Cooke was duly elected a life-trustee in the place of Sir E. C. Hartopp, deceased.

7. On the 21st of December, 1836, J. S. Harford was duly appointed a life-trustee, in the place of T. Whippie, deceased.

8. On the 9th of January, 1845, John Hensman having been presented to another church, the then trustees nominated the Rev. Humphrey Allen, clerk, to the said church or chapel; and he was licensed by the bishop accordingly.

9. On the 17th of July, 1854, John Hensman, and also Abraham Hilhouse, were duly appointed life-trustees in the places of Battersby and Cooke, deceased.

10. In April, 1864, Hensman died, and no new trustee was appointed in his place; and there then were only three subscribers of 50*l.* living, viz. the plaintiff Fowler, and Hilhouse and Harford, the trustees.

11. On the 17th of April, 1866, Harford died.

12. No election of trustees was held after that of 1864, except as hereinafter appears.

13. The plaintiff Fowler, not being aware of the fact that Hilhouse, the surviving trustee, was then living, in July, 1866, caused to be affixed to the door of the church a fourteen days' notice calling a meeting of the persons who had subscribed towards the building thereof sums not less than 50*l.* each, and being owners or renters of pews in the same, for the purpose of nominating and appointing by writing under their hands some other person duly qualified to be a life-trustee. Such notice was signed by Fowler, and was affixed to the door of the church upon the two Sundays next preceding the day when the meeting was intended to be held. At the day and time appointed for the meeting, Fowler alone attended; and he nominated and appointed himself in writing under his hand to be a life-trustee in due form, according to the requirements of the statute.

14. On the 9th of April, 1867, Hilhouse died, and thereupon the plaintiff Fowler became the only surviving person who had subscribed 50*l.* and upwards to build the church.

15. On the 11th of August, 1867, the incumbency of the church became vacant by the resignation of the Rev. H. Allen, the then incumbent.

16. On the happening of the avoidance, the plaintiff Fowler, on the 22nd of August, 1867, nominated and presented the co-plaintiff, the Rev. John Allen, to the defendant the Bishop of Gloucester and Bristol for his approbation and license, and to be duly admitted to the church; but the bishop did not act upon the said presentation and nomination.

17. After making his nomination, Fowler for the first time learnt the fact that Hilhouse, deceased, had claimed to be and act as a life-trustee; and thereupon Fowler, on the 5th of September, 1867, caused a notice to be affixed to the door of the church, appointing a meeting to elect life-trustees on the 20th of September, 1867; and such notice was affixed to the door upon the two Sundays next preceding the day appointed to hold the meeting.

18. Before the holding of the meeting, viz. on the 19th of August, 1867, the defendant Anderson, who since the year 1864 had been and then was the vicar of Clifton, and as such the incumbent of the parish in which the church was built (and also as such claiming to be the sole life-trustee), nominated and presented to the bishop the defendant Wallace as his clerk, to serve the church, and to fill the vacancy caused by the resignation of the Rev. H. Allen; and the bishop accepted and acted upon the said nomination and presentation of Anderson, and on the 19th of September, 1867, approved and licensed the defendant Wallace to the church, and duly inducted him to the same.

19. The meeting convened by the plaintiff's notice for the 20th of September, 1867, was held at the time and place appointed; and Fowler attended thereat, and elected himself to be a life-trustee, by writing under his hand.

20. A question was raised by the defendant as to the right of Fowler to be treated as a pew-owner or pew-renter according to the Act of Parliament. The following are the facts bearing on that question:—

21. Upon the original allotment of pews, one was allotted to him, and he held it for some years and paid the rent; but, for some time before the year 1855, he had ceased to occupy or pay

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for it, or in any manner to interfere with the use of it. The acting authorities of the church before 1855, and ever since, have acted as the proprietors of that pew; and it has been rented, occupied, and paid for by others.

22. In August, 1866, the plaintiff applied to the person employed to let pews, and paid six months' rent in advance for another year.

23. On the 7th of September, 1867, the plaintiff became assignee of another pew held by one Riley up to the 21st of December, following. The plaintiff was and is a member of the Church of England.

24. Immediately after such nomination and appointment of himself on the 20th of September, Fowler nominated and appointed the co-plaintiff the Rev. John Allen to the church, and presented him to the bishop, for his approbation and license thereto; but the bishop refused to accept the said nomination and appointment, or to license the Rev. John Allen to the church, on the ground that he had previously acted on the nomination and appointment made by the defendant Anderson, and had approved, licensed, and inducted the defendant Wallace thereto.

25. The defendant Anderson claims by virtue of his being incumbent of the parish of Clifton, and under the circumstances appearing by this case, to be the sole life-trustee of the church, and as such alone entitled to nominate and present a clerk thereto.

26. The church was in November, 1863, duly constituted and made a district church.

The question for the opinion of the Court (who were to be at liberty to draw inferences) was, whether the plaintiff Fowler was, at the time of either of the aforesaid nominations of the plaintiff the Rev. John Allen to the said church, entitled to nominate or present thereto.

Sir R. Collier, Q.C. (*F. J. Wood* and *Philbrick* with him), for the plaintiffs.

Lopes (*Coleridge, Q.C.*, and *C. W. H. Fryer*, with him), for the defendants.

Cur. adv. vult.

May 8. BRETT, J. In this special case, the question for the Court, as stated in the case, was, whether the plaintiff Fowler, at the time

of either of two nominations made by him of the co-plaintiff, the Rev. John Allen, to the incumbency of the church or chapel of the Holy Trinity, Hotwells, in the city of Bristol, was entitled to make such nomination.

The material facts on which the question depended were, that the plaintiff Fowler, and several others, more than three in number, had in 1830, being within forty years from the nominations in question, subscribed 50*l.* and upwards respectively towards the building of the said church or chapel. In October, 1830, three life-trustees duly elected had nominated the Rev. John Hensman to the incumbency. He resigned in January, 1845, and was replaced, upon the nomination of the three life-trustees, by the Rev. Humphrey Allen. In April, 1864, whilst Hensman, Harford, and Hilhouse, were life-trustees, Hensman died, and at that time the only surviving subscribers of 50*l.* and upwards were the two elected trustees, Harford and Hilhouse, and the plaintiff Fowler. On the 17th of April, 1866, Harford died. In July, 1866, Fowler, without communicating with Hilhouse, gave fourteen days' notice, according to the statute (5 Geo. 4, c. 103), of a meeting to elect trustees, and on the day named attended and elected or nominated himself to be a life-trustee. Hilhouse died on the 9th of April, 1867, leaving the plaintiff Fowler the only surviving subscriber of 50*l.* and upwards. On the 11th of August, 1867, the Rev. Humphrey Allen resigned. On the 19th of August, 1867, the defendant the Right Rev. David Anderson, the incumbent of the parish in which the church or chapel is situated, nominated the co-defendant, the Rev. Charles Hill Wallace, to the incumbency. On the 22nd of August, 1867, the plaintiff Fowler nominated the co-plaintiff, the Rev. John Allen.

On the 5th of September, 1867, Fowler gave fourteen days' notice, by publication, of a meeting to elect life-trustees; and on the 20th of September, 1867, he again elected or nominated himself as life-trustee.

Upon the original allotment of pews in the said church or chapel, one was allotted to Fowler; but from some time previous to 1855 he had ceased to occupy or pay for such pew, and the acting authorities of the church had from that time acted as the proprietors of that pew, and had let it and received the rent. In

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August, 1866, Fowler applied to and obtained from the person employed to let pews another pew, for which he then paid six months' rent in advance. On the 7th of September, 1867, Fowler became assignee of another pew held by one Riley, up to the 21st of December following.

Upon these facts, it was contended on behalf of the plaintiffs that Fowler had, by virtue of the statute 5 Geo. 4, c. 103, and the circumstances, become a life-trustee in April, 1864, when Hensman died, and sole life-trustee when Hilhouse died; that Fowler had made a valid election or nomination of himself as life-trustee in July, 1866, or, if not, a valid election or nomination of himself in September, 1867; that no lapse had occurred, or, if it had, the power given to the bishop thereby had not been exercised; that the defendant the Right Rev. D. Anderson had never obtained any right, either as incumbent or trustee, to nominate; and consequently that one or other of the nominations of the co-plaintiff Allen by the plaintiff Fowler was valid.

On the part of the defendants it was contended that the defendant the Right Rev. D. Anderson became by virtue of the statute a life-trustee in April, 1864, on the death of Mr. Hensman, as at that time Fowler was not a trustee and could not elect a trustee; that Fowler never became a trustee; that, consequently, in August, 1867, and indeed from the death of Hilhouse, the Right Rev. D. Anderson was sole trustee; and that his nomination of Wallace on the 19th of August, 1867, was a valid nomination by him as sole trustee. It was further suggested that, if the nomination by him was not good as by a trustee, it was good by virtue of his office as incumbent of the parish.

The decision depends upon the proper construction of the statute 5 Geo. 4, c. 103, and its application to the circumstances of the case. In the first place, I am of opinion that, upon the facts stated, Fowler was not a pew-owner or renter in April, 1864, or in July, 1866; but that he became a pew-renter in August, 1867.

Secondly, I am of opinion that Fowler never became a life-trustee by election, under s. 7.

In July, 1866, he was not a pew-owner or renter, and consequently was not entitled to vote for a trustee or to be elected as a trustee: and in September, 1867, though he was a pew-renter, it

seems to me that the machinery of s. 7 is wholly inapplicable to the then existing circumstances.

The next question is whether the Right Rev. D. Anderson ever became a life-trustee, or was in August, 1867, entitled to nominate, as incumbent of the parish. Both points depend upon the construction of s. 12. I think that the words "all the subscribers entitled to elect trustees," used in that section, mean, all who originally subscribed 50*l.* and upwards, though they may not at the moment of a vacancy be entitled to vote, because they are not at that moment pew-owners or renters; otherwise, though there were three properly elected trustees alive on the happening of a vacancy, and all the other original subscribers were still alive, but not at the moment pew-owners or renters, yet able to become so on any day, the nomination would fall to the incumbent.

It seems to me, therefore, that "all the subscribers entitled to elect trustees," giving to those words the sense which I attribute to them, were not dead, and that the conditions never existed which would have made the Right Rev. D. Anderson a trustee, or would have entitled him to nominate as incumbent of the parish.

The remaining question is, whether the plaintiff Fowler, before either nomination made by him, became a trustee by virtue of s. 8 of the statute. If not, the nomination by him, as well as that by the Right Rev. D. Anderson, may be invalid, and the nomination may be in lapse to the bishop.

Now, as to s. 8, it is contended on behalf of the defendants, that it applies only to the time at which trustees must first have been called into existence, that is, only in case there were not originally more than three subscribers of 50*l.* and upwards. But the words do not grammatically bear, of necessity, that construction; and the spirit of the legislation would seem rather to be that there should be three trustees, being subscribers, so long as any three such persons should be alive, to be chosen by election, so long as more than three subscribers should be alive, to be instituted by the statute if not more than three alive. There is, no doubt, a difficulty in this construction, which is, that, if Fowler be held to have become a trustee in April, 1864, under this section, he became so without being a pew-owner or renter, although under s. 7 he could

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not have voted for a trustee or have been elected a trustee. Section 8, however, imposes no such limitation as this, whether it applies only to the first institution of trustees or also to subsequent periods.

It seems, therefore, to me more consistent with the spirit of the legislation, with the interpretation of s. 12 to which I have arrived, and to true construction, to say that s. 8 applies to any period within forty years at which there are not more than three original subscribers of 50*l.* and upwards alive. It follows that Fowler became a trustee in April, 1864, that, upon the death of Hilhouse, he became sole trustee, and that at the time of either nomination by him he was entitled to nominate.

Under these circumstances, judgment in my opinion should be entered for the plaintiffs.

WILLES, J. I have now to deliver the judgment of my Brother Keating and myself.

We agree with the judgment of my Brother Brett up to this point, that, unless the 8th section of the Act is in favour of three or a less number of subscribers who in the first instance exceeded that number, the plaintiffs are not entitled to recover, but that the right to appoint became in the year 1866 vested in the incumbent as trustee with the one surviving trustee, or that he had a right to appoint, as he did appoint, as incumbent, either of which rights will come under s. 12; or, if not, that the right had lapsed to the bishop,—in either of which cases the plaintiffs have no right: and that reduces the question to the only point on which a difference of opinion exists, viz. whether the 8th section applies to a number of subscribers of 50*l.* each, originally exceeding three, but who in the course of time have been reduced to the number of three or less.

In the opinion of my Brother Keating and myself, the 8th section is not applicable under such circumstances.

The scheme of the Act appears to be that, on the certificate of a certain number of the householders of the parish, upon certain notices which are provided by the Act, the bishop is to be authorized to sanction the building or purchasing of a church for the cure of souls in the parish; and then by the 6th section it is

enacted in general terms that the several and respective persons who propose to build, and who are persons subscribing for that purpose a sum of not less than 50*l.* each, shall elect three trustees amongst themselves for two purposes, viz. for the management and general regulation of the temporal affairs of such church or chapel in the first place; secondly, for the nomination to the bishop of a spiritual person to serve the same; which trustees are to be called life-trustees of the church or chapel, and are to continue to be such trustees so long as any spiritual person nominated by them under the Act shall serve such church or chapel. It would seem from that section that the intention of the Act was, that there should be a body not springing or coming into existence from time to time for the purpose of nomination only if the living should become vacant, but a continuous body who should attend to the management and general regulation of the temporal affairs of the church or chapel; a body, therefore, in the existence of which there should be no break, and whose existence should not depend on the will of an individual.

The 7th section provides for the supply of a vacancy in the number of the life-trustees to be appointed under s. 6; and it is unnecessary to make any remark on that section, beyond saying that we entirely concur with my Brother Brett in his view, that the machinery of that section was inapplicable under the circumstances in which the plaintiff Fowler sought to elect himself in 1866, when he had no pew, or in 1867, when he had gained a pew. It seems almost a solecism to speak of a man electing himself, without referring to the machinery of the election, which seems inapplicable to such a case.

Passing over for a moment s. 9, s. 12 is the section which confers the right of nomination upon the life-trustee or trustees of any such church or chapel. I may here observe, in passing, that the word "trustee" is used in the singular number, as if the survivor of the trustees appointed might nominate. That would certainly be so under the 8th section, to which reference will presently be made. It would seem, however, that the use of the singular as well as of the plural number in the 12th section was intentional. It looks as if it were intended that the trustees for the time being should have the right in them, though the full number was not filled up. They may nominate for the first two turns after the

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consecration of the church or chapel, or for any number of turns during the space of forty years after the same; and all subsequent nominations shall be in the incumbent of the parish or extra-parochial place.

The first clause of the 12th section provides for a nomination by the trustees for two turns or space of forty years, and afterwards for a nomination by the incumbent, with an exception which I need not read: and then comes this provision,—"In case of any neglect of any trustee or trustees, patron, or incumbent, respectively, to make such nomination, the same shall lapse as in the case of actual benefices." We think "neglect" must be read there in the sense of omission to make the nomination. It would seem that at the end of six months from the time of the vacancy, the bishop might appoint. Then it proceeds,—"And, if all the subscribers entitled to elect trustees shall die before such nominations shall have been made, or such forty years shall have elapsed as aforesaid, then and in every such case the nomination shall be made by the incumbent during such period." That, therefore, gives the incumbent the right of nominating at the end of the forty years, in the event of the death of the subscribers entitled to elect such trustees. Who are the subscribers entitled to elect trustees? The choice is between subscribers of 50*l.*, whether they have pews or not, supposing they have the capacity to obtain pews, and subscribers of 50*l.* having pews. Looking to the continuous character of the trustees, it does seem an inconvenient construction to be put on the section, and one not intended, that it should mean where the subscribers who had no pews were able, should they choose, to furnish themselves with pews, then the incumbent should not have the right. It seems more reasonable that, when the case should arise in which there should be a nomination to be made, and there were then no persons who could appoint new trustees without first re-possessing themselves of pews, to say that the incumbent should have the right. This would suggest a reading of the words "subscribers entitled to elect trustees" as meaning subscribers of 50*l.* having pews at the time the nomination is to be made. The section concludes with this proviso,—"that, if all such subscribers shall die, so that no such election of any trustee can be made, and any one of the trustees for the time shall die or vacate,

then and in every such case the incumbent for the time being shall be and become a trustee." That provides for the case of the incumbent having a share in the nomination with the surviving trustees, there being no power of filling up the vacancy.

To come back to the 8th section. Does the 8th section fill up the gap in any other way than by enacting that, if the number originally did not exceed three, that then the persons who survived should be the life-trustees themselves? That must depend on the terms of that section. "If the number of persons subscribing to build or purchase such church or chapel shall not exceed three, such person or persons shall be and be deemed to be the life-trustee or life-trustees of such church or chapel under the provisions of this Act," and shall have, use, and exercise all such and the like powers and authorities as life-trustees chosen under the provisions of this Act; and in case of the death or resignation of such life-trustee, the person nominated by him in his last will and testament shall be a life-trustee in his place." Does that mean the number of persons subscribing in the first instance not exceeding three? or does it mean the number of persons subscribing who may, in the course of events, have been reduced to a number not exceeding three? In the opinion of my Brother Keating and myself, it applies to subscribers who at the beginning are of the number of three or less, and it gives to these, who are so few that they may be almost considered as the patrons of the church, the same powers as are vested by the Act in the nominees of those who constitute a more numerous body of probably smaller subscribers to building the church.

We seem to be confirmed in this by the provision that, in the case of the death or resignation of any such life-trustee (that is, a life-trustee being one of a body of three or less originally building the church out of their funds), the person nominated by him shall be a life-trustee in his place,—a power which is not given to the life-trustees appointed under s. 7 by the general body.

Upon these grounds, we are unable to agree in the conclusion that the 8th section helps the plaintiffs; and, in our judgment, the decision of the Court ought to be in favour of the defendants. There will, therefore, be judgment for the defendants.

The Bishop of Gloucester was only a formal party. He entered

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a disclaimer; and no question arises as to his position. The question arises entirely as to the position of the incumbent.

Judgment for the defendants.

The plaintiffs brought error in the Exchequer Chamber, and the case was argued on the 18th of June, 1869.

F. J. Wood (*Sir R. Collier*, *A. G.*, and *Philbrick*, with him), for the plaintiffs. In the year 1830, several persons, exceeding three in number, acting under 5 Geo. 4, c. 103, subscribed the sum of 50*l.* each towards the building of a church, and life-trustees were duly appointed. In 1864 there were three trustees living, viz. Hensman, Harford, and Hilhouse. In that year Hensman died. In April, 1866, Harford died; and in July in that year, Fowler, in ignorance that Hilhouse was still living, called a meeting of subscribers to elect trustees, giving the fourteen days' notice required by s. 7 of the statute; and, on the day appointed, Fowler attended, and nominated himself to be a life-trustee. Hilhouse having died in April, 1867, Fowler (who was then the sole surviving subscriber of 50*l.*) gave notice of another meeting to elect trustees, and on the 20th of September again nominated himself a life-trustee. Looking at the whole scope and intention of the statute, the sole surviving subscriber became, under the circumstances stated in the case, a trustee by force of the words of the Act, without going through the form of calling a meeting and electing himself. It was an idle proceeding altogether. The incumbency became vacant on the 11th of August, 1867. On the 19th the incumbent of the mother church nominated the defendant Wallace to the bishop, who inducted him accordingly. On the 22nd of August, and again on the 20th of September (after the second so-called meeting and election), Fowler nominated the co-plaintiff Allen to the bishop, who declined to act upon that nomination, having already accepted the nomination of the defendant Wallace. The preamble and ss. 13, 14, 63, 73, 79, and 81 of 58 Geo. 3, c. 45, and s. 32 of 59 Geo. 3, c. 134, have some bearing upon this question.

[BLACKBURN, J. The question in reality turns upon the construction of a few sections of 5 Geo. 4, c. 103.]

That Act, which first introduced the system of contribution, holds out to persons subscribing sums of 50*l.* and upwards each a prospect of beneficial enjoyment for forty years of an estate capable of being assigned inter vivos, and of being disposed of by will. The material sections are the 6th, 7th, 8th, and 12th. (1) The effect

(1) Sect. 6 enacts "that the several and respective persons proposing to build or purchase any such church or chapel, or any such building as aforesaid, and their assigns, respectively subscribing for that purpose sums of not less than 50*l.* each, shall elect three trustees from amongst themselves for the management and general regulation of the temporal affairs of such church and chapel, and for the nomination to the bishop, for a limited period, of a spiritual person to serve the same; and such trustees shall be called life-trustees of such church or chapel, and shall continue such trustees so long as any spiritual person nominated by them under the provisions of this Act shall serve such church or chapel."

Sect. 7 enacts "that, in case any of the persons first appointed life-trustees of any such church or chapel shall during the period above mentioned happen to die, or shall signify to the other life-trustees his resignation of such trust, it shall be lawful for the majority of the persons who have subscribed towards the building or purchasing such church or chapel sums not less than 50*l.* each, and being owners or renters of pews in the same, who shall be present at any meeting to be called for that purpose, and which meeting any one or more of such trustees are hereby authorized and required to call and appoint, upon fourteen days' notice at the least being affixed to the door of such church or chapel upon the two Sundays next preceding the day on which such meeting is intended to be held, from time to time to nominate and appoint, by writing under their hands, any other person having subscribed a sum not less than 50*l.*, and being an owner or renter of a pew in such church or chapel, and a member of the Church of England, a life-trustee in the place of the life-trustee so dying or resigning; and every such new life-trustee shall in every respect be vested with such and the like powers and authorities, to all intents and purposes, as the person to whose place he may be nominated and appointed as aforesaid."

Sect. 8 enacts "that, if the number of persons subscribing to build or purchase such church or chapel shall not exceed three, such person or persons shall be and be deemed to be the life trustee or life-trustees of such church or chapel under the provisions of this Act, and shall have, use, and exercise all such and the like powers and authorities to all intents and purposes as any such life-trustees as aforesaid chosen under the provisions of this Act may use and exercise; and, in case of the death or resignation of any such life-trustee, the person nominated by him, being a member of the Church of England, by his last will and testament, or by any instrument signed by him, shall be a life-trustee in his place."

Sect. 12 enacts "that the life-trustee or trustees of any such church or chapel which shall be built or purchased by private subscription, may nominate for the first two turns which shall occur after the consecration of the church or chapel, or for any number of turns which may occur during the space of forty years after the same, to the bishop of the diocese for his approbation and licence, a spiritual person to serve the

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of ss. 6 and 8 is, that subscribers of not less than 50*l.* each shall elect three trustees from amongst themselves; but that, if there be only three such subscribers, those three shall be trustees, and in case of the death or resignation of any one of them, the person nominated by him by deed or will shall be the trustee in his stead. Sect. 7 regulates the mode of election when a vacancy occurs in the trust. And the proviso at the end of s. 12 makes the incumbent of the parish church a trustee in the event of all the 50*l.* subscribers dying, so that no election of a trustee can take place. There is no gift over of the power of nomination until all the 50*l.* subscribers are dead or the forty years have elapsed. At the time of the death of Hilhouse, therefore, under the whole purview of the Act the plaintiff Fowler became a statutory trustee. The form of election gone through amounts only to an assent on his part to accept the office of trustee.

[BLACKBURN, J. The latter part of s. 12 is not consistent with your construction of s. 8 or with the judgment of my Brother Brett in the Court below.]

There is no doubt an inconsistency; but, looking at the general scope of the Act, and at the language of ss. 8 and 12, the only sensible construction that can be given to them is, that Fowler became on the death of Hensman in 1864, or at all events in 1867 when Hilhouse died, a trustee.

Lopes (*Sir J. D. Coleridge, S. G.*, and *Fryer*, with him) was not called upon.

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same; and all subsequent nomination shall be in the incumbent of the parish or extraparochial place in which such church or chapel shall be built or purchased; unless in case of such chapel being made a district church as hereinafter (s. 16) mentioned, in which case such subsequent nomination shall be in the patron of the church of the original parish; and, in case of any neglect of any trustee or trustees, patron, or incumbent respectively, to make such nomination, the same shall lapse, as in the case of actual benefices; and, if all the subscribers entitled to elect trustees shall die before such nomination shall have been made, or such forty years shall have elapsed as aforesaid, then and in every such case the nomination shall be made by the incumbent during such period: Provided also, that, if all such subscribers shall die, so that no such election of any trustee can be made, and any one of the trustees for the time shall die or vacate, then and in every such case the incumbent for the time being shall be and become a trustee, to use and exercise all powers and authorities given to trustees under the provisions of this Act."

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KELLY, C.B. I am of opinion that the judgment of the Court of Common Pleas should be affirmed. It appears that in the year 1830, under the powers of the Acts of Parliament on the subject, a number of persons subscribed for the building of a church, and proceeded to elect three trustees. These trustees were changed from time to time by death or otherwise; until in the year 1864 the three life-trustees were Hensman, Harford, and Hilhouse. In the course of that year Hensman died; and in 1866 Harford died; and thus Hilhouse became the only surviving trustee. Hilhouse died in 1867, and upon his death the body of trustees became extinct. The first question is whether upon the death of any one of the trustees, the plaintiff Fowler, being the only qualified person in existence, became ipso facto, by the equity of the statute, a life-trustee in his place. I am of opinion that he did not, but that it was necessary for the two surviving trustees, under s. 7 of the Act, to go through the ceremony of calling a meeting of persons who had subscribed 50*l.* or upwards each towards the building of the church, for the purpose of filling up the vacancy; and, that formality not having been complied with, I find nothing in the Act to warrant us in holding that Fowler became at that time a life-trustee. The 6th section of the Act applies to the first election of trustees. The 7th section provides for the filling up vacancies arising from the death or resignation of a trustee, and expressly requires a meeting of 50*l.* subscribers to be called for the purpose of electing one of their number a life-trustee in his place. It is true that it is now known that, assuming him to have then been a pew-owner or renter, Fowler was, at the time of Hensman's death, the only person who could have been elected. But, for anything that was known at the time, there might have been other candidates for the office of trustee. The next question is, whether, upon the death of the last of the three life-trustees in 1867, Fowler became, without any meeting being called, and without any election, the sole trustee under s. 7. Now, for this purpose, as well as on the first point, it was argued for the plaintiffs that Fowler, as the sole surviving 50*l.* subscriber, became by virtue of s. 8 sole trustee. I think it is only necessary to look at the clear and distinct language of that section to see that it can have no such operation. [His Lordship read s. 8.] It is only necessary to read

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these words to see that s. 8 applies only to the state of things existing at the outset,—to the original appointment of trustees. If there were then only three subscribers of 50*l.* or upwards each, they would be the trustees, without the necessity of any meeting or any election. But, to say that, when three life-trustees have once been elected, and have acted for years, that section is to apply if the number of trustees and of 50*l.* subscribers should be reduced to three or a less number, would be to introduce a new provision into the Act, which might tend to defeat its operation in many ways. The concluding provision of s. 8, enabling a trustee dying or resigning to appoint his successor by will or by deed, tends to shew how impossible it is to apply that section to the case which has arisen here.

Without, therefore, referring to s. 12, it seems to me that the election of trustees and the mode of filling up vacancies in the trust, are expressly provided for by ss. 6 and 7, and that it is not competent to us to speculate upon the beneficent intentions of the legislature, and to superadd a provision which is not to be found in the Act, and which might have the effect in many cases of defeating and nullifying its provisions. It is enough to say that the two surviving trustees in 1864, or, when in 1866 the number of life-trustees was reduced to one, the sole surviving trustee or trustees did not proceed to fill up the vacancies in the manner pointed out by the statute, and consequently that Fowler never did become a trustee.

For these reasons I think the judgment of the Court of Common Pleas should be affirmed.

BLACKBURN, J. Agreeing as I do with what has fallen from the Lord Chief Baron, I desire only to add a few words. The 5 Geo. 4. c. 103, by s. 6, enacts, that persons respectively subscribing sums of not less than 50*l.* each towards the building of the church, shall elect from amongst themselves three trustees, who, amongst other things, are to nominate for a limited period a spiritual person to serve the church; and a subsequent section (s. 12) gives them the patronage for the first two turns or forty years. Having by s. 6 provided for the first election of trustees, the 7th section points out the way in which vacancies are to be filled, viz. by election by the majority of

the 50*l.* subscribers present at a meeting to be called for that purpose by any one or more of such trustees. In the case which has happened, of there being at the time a vacancy happened only one subscriber eligible, it might have been well worthy the consideration of the legislature whether the form of an election might not be dispensed with. But they have not dispensed with it. There is another contingency which the legislature do not seem to have contemplated, viz. that it might happen that all three of the trustees might die without having supplied the vacancies. It seems to be casus omissus. There is no provision in the Act for continuing the trust. Is there, then, any power to supply the omission? Section 7 clearly does not give it: and upon this the Court of Common Pleas were unanimous; and this Court entirely agrees with them, except that one of my brethren, I believe, entertains some doubt. The difference of opinion in the Court below arose upon s. 8, the meaning of which my Brother Brett conceived to be, that, whenever the number of 50*l.* subscribers should be reduced to three, those three should ipso facto become life-trustees. But, when the words of that section are looked at, they seem to me to apply not to the case of the number being reduced by death, but where the number of 50*l.* subscribers originally did not exceed three; and it is only in that event that the last provision in s. 8 is to come into operation, viz. the appointment of a successor by deed or will. No such power is given to the elected trustees. This circumstance is pointed out and relied on by my Brother Willes in the judgment in the Court below. I cannot, therefore, agree with the interpretation put by my Brother Brett upon s. 8, and I come to the conclusion that that section has no reference to the case of the number of trustees being reduced by death or resignation to less than three. The result is that there are no longer any trustees, and that the plaintiff Fowler had no power to nominate an incumbent.

It is unnecessary to enter upon the question of fact as to whether Fowler was or was not a pew-owner or renter, or to say whether or not the defendant Anderson had a right to appoint.

LUSH, J. I also am of opinion that the case which has arisen here is one not provided for by the Act, and that the plaintiff Fowler was not entitled to act as trustee. Looking at the general

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scheme of the Act, and especially to ss. 6 and 12, the intention of the legislature seems to have been to give the patronage of the church to subscribers of 50*l.* and upwards for a period of forty years, to be exercised by trustees elected in a certain way. I have no doubt whatever as to the meaning of s. 8. That section is clearly confined to the case of the number of 50*l.* subscribers originally not exceeding three. It has no application to the case of the number of elected life-trustees becoming by death or resignation reduced below three. I at first felt some doubt whether upon the equity of s. 7 we ought not to hold that Fowler became ipso facto a trustee when he became the sole surviving person who was eligible as a trustee, because it seemed useless to go through the ceremony of calling a meeting for the purpose of electing him. But, upon further consideration, I think we cannot so hold. The statute contemplates that there may be several persons out of whom the trustee or trustees may be elected. Calling a meeting is not a mere idle ceremony: there must be a notice in writing, under the hands of the trustees, affixed to the church door; and thus one object of calling a meeting, viz., insuring publicity, is attained. Again, if a meeting were held, the surviving trustee or trustees might have declined to vote for Fowler, and so he would not be elected by a majority, as the Act requires. At all events, the statute has not said, as it might have done if it had been intended, that, where all the trustees have died, and only one subscriber of 50*l.* remains, he shall be deemed to be the trustee for carrying out the purposes of the Act. I therefore think that Fowler had no right, either within s. 7 or s. 8, to appoint an incumbent. I entirely put out of sight the meeting called by Fowler after the death of Hilhouse. He was not a trustee, and had no power to call a meeting.

CHANNELL, B., HAYES, J., and CLEASBY, B., concurred.

Judgment affirmed.

Attorneys for plaintiffs: *Poole & Hughes.*
Attorneys for defendants: *Young, Jones, Roberts, & Hales.*

MORRIS *v.* OGDEN.

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July 5.

Incumbent—Suspension—Sequestration—1 & 2 *Vict. c.* 106—*Church Discipline Act* (3 & 4 *Vict. c.* 86)—*Sentence, Ambiguity of.*

When a clergyman has been suspended ab officio et a beneficio, he is not entitled to any of the profits of the benefice, and cannot recover them by action during the continuance of the suspension, although no sequestration may have issued.

When a sentence of suspension is pronounced under the Church Discipline Act, the sentence need not shew on its face that seven days notice of the execution of the commission was given, as required by s. 4 of the Act, or that the inquiry was in public, or that the other provisions of the statute as to the preliminary proceedings, with which the bishop pronouncing the sentence has not been personally concerned, have been strictly observed.

A charge of having committed adultery *or* fornication with A. B. is sufficiently definite to sustain a sentence of suspension.

THIS action was brought to try whether the plaintiff was incumbent of the benefice of St. Peter's, Ashton-under-Lyne, and as such entitled to certain payments, rents, fees, and emoluments to the benefice appertaining.

The first count was for breaking and entering the church and a pulpit and reading-desk of the plaintiff therein, and keeping the plaintiff ejected from the same, and preventing him from enjoying his perpetual curacy of St. Peter's, Ashton; the second for money received by the defendant to the use of the plaintiff; and the third for detaining the keys of the church.

The defendant pleaded to the first count not guilty, and a traverse of the messuage, pulpit, and reading-desk being the plaintiff's; to the second, never indebted; and to the third, non detinet. Issue thereon.

The cause came on for trial before Montague Smith, J., at the summer assizes at Manchester, 1867, when a verdict was found for the plaintiff, damages 500*l.*, subject to the opinion of the Court upon the following case:—

1. St. Peter's, Ashton-under-Lyne, is a district chapelry formed in pursuance of the statute 59 Geo. 3, c. 134, s. 16, and constituted under an order in council of the 29th of January, 1840.

2. The position of the chapelry and the minister thereof is defined by s. 17 of the 8 & 9 Vict. c. 70; and the minister thereof duly nominated and licensed, and his successors, are and are

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esteemed in law to be a perpetual curate and body politic with perpetual succession, and as such entitled to the payment of certain payments, rents, fees, and emoluments as belonging and appertaining to the benefice.

3. The patron of St. Peter's is the rector of the parish of Ashton-under-Lyne.

4. The plaintiff was duly nominated and appointed incumbent and perpetual curate of St. Peter's in 1848. The licence under the episcopal seal is dated the 3rd of October, 1848, and the plaintiff read himself in on the 15th of October, 1848.

5. The plaintiff continued to officiate as the incumbent of St. Peter's, and continued in receipt of the payments, rents, fees, and emoluments till January, 1861. It was to be taken that he was properly appointed and was entitled to receive such payments, &c., till that date.

6. On the 15th of January, 1861, the plaintiff left Ashton for Worcester, and certain events there took place which led eventually to proceedings being taken in the Divorce Court by Mrs. Morris, the plaintiff's wife, which resulted in a decree of judicial separation being pronounced by that Court in November, 1861.

7. On the 17th of January, 1861, the plaintiff returned to Ashton, and left the next morning, and went to reside temporarily at Leeds, intending to return to his benefice of St. Peter's, and appointed a curate (the Rev. T. Radley) to take charge thereof.

8. Mr. Radley continued to officiate and to do all the duties for about three calendar months. The plaintiff did not reside in Ashton from the 15th of January, 1861, except as hereinafter appears.

9. On the 16th of April,—just before the termination of the three months,—the plaintiff received a letter from his solicitor, Mr. Darnton, a resident in Ashton, apprising him of the state of feeling in Ashton, and advising him to apply to the Bishop of Manchester for a licence of non-residence. The plaintiff accordingly wrote to the bishop, inclosing Mr. Darnton's letter, and asking for such licence.

10. On the 16th of April, 1861, the bishop issued a monition under 1 & 2 Vict. c. 106, s. 54, requiring the plaintiff forthwith to proceed to and reside in his benefice, and also sent a letter to the plaintiff apprising him that a monition had been issued.

11. The letter was received by the plaintiff on the 17th of April; and a copy of the monition, after an endeavour to effect personal service, was left by the clerk to the bishop's secretary on the 18th of April at 23, St. Paul's Street, Leeds, where the plaintiff was residing at the time; but the plaintiff could not be found; and on the same day a copy of the monition was posted on the doors of the parish church of Leeds and on the door of St. Paul's church, Leeds, and a copy was delivered to the officiating minister of St. Paul's, Leeds, within which district the plaintiff then temporarily resided, and another copy of the monition was served on the churchwardens of the parish church of Leeds; and a copy was on the same day affixed to the doors of St. Peter's, Ashton, and of Ashton parish church, in which parish and district the plaintiff's benefice was situate. The plaintiff afterwards wrote to the bishop a letter dated the 2nd of May, 1861, acknowledging the receipt of the letter and monition.

12. In compliance with the monition the plaintiff returned to his benefice on the 15th of May, 1861, being within the time limited by the monition; and on the following day he went to St. Peter's church to perform a burial service, where Mr. Radley had gone for a like purpose. Mr. Radley performed the service; and, owing to the plaintiff's presence at the church, some hundreds of persons assembled in and near the churchyard. The plaintiff on leaving the church was followed by a large portion of the crowd to his house, and was struck and wounded on the head by a stone on the way. The crowd remained outside the house to which he had gone, making a great noise and disturbance; and the plaintiff being advised by the police to leave the house, a coach was procured, and with the assistance of the police he left Ashton the same evening.

13. On the 22nd of May, 1861, the plaintiff wrote to the bishop a letter, reporting the above facts, and again begged for a licence of non-residence, for any period he might think fit. On the 23rd of May, 1861, the bishop wrote in reply that he did not feel justified in granting such a licence, and that at the expiration of the period named in the monition he must issue an order to the plaintiff to proceed and reside. Except as hereinbefore stated the plaintiff made no return to the monition.

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14. On the 28th of May, 1861, the bishop issued an order requiring the plaintiff to reside within thirty days, pursuant to 1 & 2 Vict. c. 106, s. 54. Endeavours were made to effect personal service of this order, but the plaintiff could not be found; and on the 30th of May, 1861, a copy was left at 23, St. Paul's Street, Leeds, the usual and last known place of residence of the plaintiff; and copies were also posted and served as stated in par. 11. The plaintiff did not come to reside (on the alleged grounds set forth by him in his letter to the bishop); but no communication other than is hereinbefore set forth was made by him to the bishop.

15. On the 2nd of July, 1861, the bishop, without any other notice to the plaintiff than as hereinbefore appears, issued an order to his chancellor, Dr. Bayford, requiring him to sequestrate the profits of the benefice until the plaintiff should comply with the order to return and reside; and on the 3rd of July, 1861, Dr. Bayford decreed sequestration, and appointed sequestrators. A copy of the order and of the decree were served personally on the plaintiff on the 4th of July, 1861, at Leeds, and the original and a copy were posted upon the door of St. Peter's church on the 7th.

16. No appeal was entered or prosecuted by the plaintiff against the sequestration. Except as hereinbefore is mentioned, the plaintiff had no notice of the sequestration or of any intention to sequestrate the living.

17. Application was shortly afterwards made to the Bishop of Worcester, pursuant to the Church Discipline Act, to issue a commission to inquire into the conduct of the plaintiff in January, 1861, at Worcester, within the diocese of Worcester. Notice of the intention to issue such commission was within the time mentioned by the Act served upon the plaintiff under the hand of the said bishop, containing all the particulars required by the Act, and due notice of the time and place of the meeting under the hand of one of the commissioners was duly given to the plaintiff; but the plaintiff did not attend before the commissioners, who thereupon duly heard the charges made against the plaintiff.

18. The commissioners reported that there were primâ facie grounds for instituting further proceedings against the plaintiff.

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19. In November, 1861, articles founded on this report were duly filed against the plaintiff in the registry of the diocese of Manchester, pursuant to the last-mentioned Act.

20. On the 14th of November, 1861, the Bishop of Manchester signed a written notice, addressed to the plaintiff, inhibiting him from performing any services within the diocese of Manchester after the expiration of fourteen days from the service of the said notice, and until sentence should have been given on the said charge. After an ineffectual attempt to serve this notice personally on the plaintiff, a copy was left on the 16th of November, 1861, at No. 23, St. Paul's Street, Leeds, his usual and last known place of abode.

21. On the 16th of November, 1861, a copy of the said articles, after an ineffectual attempt to effect personal service, was left at the same place: and on the 3rd of December, 1861, the Bishop of Manchester issued a notice, which was served on the plaintiff, requiring him to appear before the said bishop, to make answer to the said articles, at 11 A.M. on the 17th of December, 1861.

22. The plaintiff did not appear to answer the charge, and the bishop, in default of appearance, and pursuant to the Act, proceeded to hear the cause and to investigate the charge; and on the 13th of December, 1861, the bishop pronounced sentence in the said cause, suspending the plaintiff ab officio et a beneficio for the space of three years, to commence from Sunday, the 13th of December, 1861; and the bishop also decreed that the sentence should remain in force until the plaintiff should produce a certificate to the bishop's satisfaction, signed by three neighbouring beneficed clergymen of the diocese of Manchester, of his good conduct during the said period of suspension; and that such suspension should not be taken off until he should produce such certificate.

The sentence and decree of suspension were in the following terms:—

"In the name of God, amen. Whereas there is now depending in judgment before us, James Prince, by divine permission Lord Bishop of Manchester, acting under the provision of a certain Act of Parliament made and passed in the 3rd and 4th years of the reign of her present Majesty, entitled, 'An Act for better enforcing Church Discipline,' a certain cause or proceeding promoted by

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Peter Flitcroft and William Higginbottom, inhabitants of Ashton-under-Lyne, in the county of Lancaster, against the Rev. Thomas Whittaker Morris, a clerk in Holy Orders of the United Church of England and Ireland, perpetual curate of St. Peter's Church, Ashton-under-Lyne, in the county of Lancaster, and the diocese of Lancaster, and which cause or proceeding has in the first instance, in accordance with the said Act, been brought before the Right Reverend Father in God, Henry, Lord Bishop of Worcester, who rightly and duly proceeding in the said cause or proceeding issued his commission under his hand and seal authorizing and requiring the commissioners therein named to inquire into the grounds of the charges made against the said Thomas Whittaker Morris; and whereas the said commissioners having met and examined witnesses (as by the said Act is required) transmitted to the said Lord Bishop of Worcester under their hands and seals the depositions of the witnesses taken before them, and also a report of the unanimous opinion of the commissioners present at the inquiry that there was sufficient primâ facie ground for instituting further proceedings, and whereas the said Lord Bishop of Worcester, in further pursuance of the said Act, did transmit or cause to be transmitted a copy of such report and of the depositions to us the said Lord Bishop of Manchester (being the bishop of the diocese in which the said Thomas Whittaker Morris holds preferment), and whereas articles were thereupon drawn up, and filed as required by the said Act of Parliament, wherein the said Thomas Whittaker Morris was charged and articled touching his soul's health and the lawful conviction and reformation of his manners and excesses, and more especially for his having offended against the laws ecclesiastical in the month of January last past by being guilty of having committed adultery or fornication with a person named Bertha Lee, at the city of Worcester, and having caused great scandal to the Church, contrary to the statutes and to the canons and constitution ecclesiastical of the realm, and more particularly set forth in the articles duly drawn, signed, brought in to this cause and filed, and now remaining in the registry of the diocese of Manchester, and whereas the said Thomas Whittaker Morris was duly served with a copy of the said articles, and was duly required by writing under our hand to appear and make answer to the said articles,

and whereas the said Thomas Whittaker Morris having been thrice called neglected to appear and make answer to the said articles, we rightly and duly proceeding in the said cause or proceeding, with the assistance of three assessors nominated by us, to wit, the Worshipful Augustus Frederick Bayford, Doctor of Civil Law (a barrister of not less than seven years standing) and Chancellor of the diocese of Manchester, the Venerable Robert Mosley Master, clerk, Master of Arts, Archdeacon of Manchester, and Richard Copley Christie, of the city of Manchester, Esquire, Barrister-at-Law, having heard, seen, and understood and fully and maturely discussed the merits and circumstances, and diligently searched into and considered the whole proceedings had and done therein, and observed all and singular the matters and things that by law ought to be observed, and having heard witnesses examined in proof of the said articles do, on this Friday, the 13th day of December, 1861, pronounce, decree, and declare that the herein before-mentioned articles filed against the said Thomas Whittaker Morris have been proved so far as is by law necessary, and that the said Thomas Morris hath been shewn to be guilty of having within two years last past, to wit, in the month of January last, committed adultery or fornication with a person named Bertha Lee, at the city of Worcester, and having caused great scandal to the Church, contrary to the statutes and to the canons and constitution ecclesiastical of the realm, as particularly set forth in the articles; therefore we, the said James Prince, Lord Bishop of Manchester, have thought fit to pronounce, and do accordingly pronounce, declare, and decree that by reason of the premises the said Thomas Whittaker Morris ought by law to be suspended, and we hereby suspend him accordingly, ab officio et a beneficio for the space of three years, to commence from Sunday, the 13th day of December, 1861, and on which day we direct our said sentence to be published by affixing the same on the principal door of the said church of St. Peter, Ashton-under-Lyne, and we further decree that the said sentence shall remain in force until he, the said Thomas Whittaker Morris, shall produce a certificate to our satisfaction signed by three beneficed clergymen of the diocese of Manchester of his good conduct during the said period of suspension, and such suspension be not taken off until he shall produce such certificate, and we

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further condemn the said Thomas Whittaker Morris to the costs incurred and to be incurred in this suit."

23. The sentence of suspension was affixed to the door of St. Peter's church on Sunday, the 15th of December, 1861, before and during morning service; and a copy thereof was left so affixed. (1) No attempts were made to serve the plaintiff personally with a copy, or to bring its terms to his knowledge. Afterwards another sequestration, dated the 30th of September, 1864, of the profits of the benefice, was served for the costs of the proceedings, under 3 & 4 Vict. c. 86.

24. The plaintiff after this sentence continued to reside at 23, St. Paul's Street, Leeds, in the diocese of Ripon, for twenty-one months, when he went to reside in Manchester.

24*a*. On one day in the year 1864, the plaintiff was in Ashton, and there was a repetition of the disturbances; in consequence of which he left the town. The three years expired on the 12th of December, 1864; and a few days afterwards he sent to the Bishop of Manchester certificates of good conduct, and a testimonial signed by three beneficed clergymen of the diocese who had known him particularly during the last fifteen months.

25. On the 24th of December, 1864, Mr. Burder, the bishop's secretary, by order of the bishop wrote to the plaintiff informing him that the certificates and testimonial had been submitted to the chancellor of the diocese, who considered them unsatisfactory in respect of the period of knowledge.

26. The plaintiff within a few days called on the bishop to ask for explanations; but the bishop declined an interview. The plaintiff thereupon wrote to the bishop on the 5th of January, 1865, informing him that he would have complied with the letter of the sentence, but that he had not been served with a copy, and was not aware of its purport, and that, as soon as he learned that a certificate from clergymen in the bishop's diocese would be required, he came to reside in Manchester. On the 6th, the bishop's secretary sent a reply, intimating that "the sentence was served in the usual legal manner (on the non-appearance of the party), by being affixed to the church door."

(1) This part of the case was amended during the argument by alleging publication as in par. 11.

27. On the 17th of January, 1865, the bishop's secretary wrote to the plaintiff informing him that the bishop was advised that the church of St. Peter's, Ashton, became vacant by s. 58 of the Act on the 3rd of July, 1862, by his not having returned into residence, as ordered by the proceedings taken in 1861 under the provisions of 1 & 2 Vict. c. 106.

28. In February, 1865, the plaintiff was again at Ashton, and within the benefice of St. Peter's there. On a Sunday in that month he was in St. Peter's church, but not officiating. A crowd collected, and hooted him. To avoid them, he left the town, being protected from the mob and escorted to the railway station by the police.

29. The bishop, on the 14th of February, 1865, gave notice to the rector of the parish of Ashton, who is patron of St. Peter's, that the church and benefice of St. Peter's, Ashton, "had become void of a clerk, by reason of the same having continued for the space of one whole year under sequestration issued under the provisions of 1 & 2 Vict. c. 106, for disobedience to our monition and order requiring the Rev. T. W. Morris, clerk, the late incumbent thereof, to reside on his said benefice." The rector accordingly, by an instrument under his hand and seal, dated the 10th of March, 1865, nominated and appointed the defendant to the benefice of St. Peter's; and, without further communication with the plaintiff, the bishop, by instrument under his hand and seal, dated the 21st of March, 1865, licensed the defendant to the benefice, and he was admitted thereto; and the aforesaid sequestrations were by an instrument, dated the 21st of March, 1865, relaxed, and the relaxation published by affixing a copy to the doors of St. Peter's church on Sunday, the 26th of March, 1865, before and during morning service, and leaving it so affixed.

30. Since that time the defendant has always officiated in the benefice, and received all the payments, rents, fees, and emoluments appertaining thereto.

31. The plaintiff would have obeyed the order of the bishop issued on the 28th of May, 1861, to reside within his benefice, but for the aversion he entertained to encounter the mobbings and stoning hereinbefore described, and which there appears good reason to believe would have been repeated had he resided there according to the bishop's order.

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32. On or soon after the 15th of September, 1866, the plaintiff sent the bishop a testimonial or certificate dated that day, and signed by three beneficed clergymen of the diocese of Manchester, that the plaintiff had been personally known to them for more than three years last past, that they had had opportunities of observing his conduct, and that during the whole of that time they verily believed he had lived piously, &c., and as becoming a minister in holy orders. The bishop objected to the plaintiff being termed in the testimonial "perpetual curate of St. Peter's, Ashton," and also objected that two clergymen of Manchester and one of Preston could not all three be the plaintiff's "neighbours" at the same time.

33. On the 3rd of November, 1866, a third certificate of good conduct was sent to the bishop by the plaintiff through his solicitors. It covered more than three years, and was signed by three beneficed clergymen of Manchester living in the neighbourhood of the plaintiff. The plaintiff had during these three years continually resided in Manchester.

34. On the 6th of November, 1866, the bishop in reply stated that "he should be ready to communicate with any of the bishops who might wish it, on the subject of Mr. Morris's suspension, as was set forth in the circular letter issued by His Grace the Archbishop of York."

35. The plaintiff's attorneys then asked the bishop to furnish them with a copy of the circular letter issued by the Archbishop of York referred to in the bishop's letter of the 6th of November. On the 13th the bishop replied, "As I have already done all usually required in similar cases, I regret I must decline to comply with your request as regards the Rev. T. W. Morris. I am still ready to attend to any application from a proper quarter." The bishop's secretary also wrote to the plaintiff's attorney, informing them that "he did not feel at liberty to give a copy of the circular letter sent him in this case by his metropolitan, the Archbishop of York."

36. Since March, 1865, the defendant has in every month performed the duties of the church of St. Peter's, has preached in the pulpit and has read prayers in the reading-desk of the said church, and has been in possession and is still in possession of the keys of the church.

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37. The pleadings were annexed to and were to form part of the case. The Court were to have all powers of amendment, and power to draw all inferences of fact, and to send the case back to the arbitrator who had settled it.

The question for the opinion of the Court was, whether or not the plaintiff was the incumbent of the district church of St. Peter's, Ashton-under-Lyne, and whether or not, and from what time, he was entitled to the payments, rents, fees, and emoluments received by the defendant.

If the Court should decide in favour of the plaintiff, the amount of damages was to be ascertained by the arbitrator who settled the special case, and judgment for the plaintiff, with costs, was to be entered for the plaintiff for the amount so found. If the Court should decide in favour of the defendant, then judgment with costs was to be entered for the defendant.

April 26. *J. Brown, Q.C.* (*C. Crompton*, with him), for the plaintiff. This case raises two questions: First, whether the plaintiff has ceased to be the incumbent of the church of St. Peter's, Ashton-under-Lyne, under the provisions of 1 & 2 Vict. c. 106; and secondly, whether, if not, he is prevented from recovering from the defendant the profits of the benefice by the sentence of suspension that had been pronounced against him. The first depends on the effect of certain proceedings taken under 1 & 2 Vict. c. 106, in the course of which a sequestration was issued by the bishop, and the benefice eventually declared void; the second, upon other proceedings taken by the bishop under the Church Discipline Act, 3 & 4 Vict. c. 86.

[On the first point he contended: 1. That the sequestration was void, because it was issued without hearing the plaintiff or giving him any notice to shew cause against it: citing *Bonaker* v. *Evans* (1); *Capel* v. *Child* (2); *Reg.* v. *Archbishop of Canterbury* (3); *Bartlett* v. *Kirwood* (4); *In re Pollard.* (5) 2. That the order to reside and the sequestration were revoked by the decree of suspension. 3. That the benefice had not become void under the Act because the plaintiff had not been guilty of any wilful disobedience to the order, since he could not reside on account of the

(1) 16 Q. B. 162; 20 L. J. (Q.B.) 137.
(2) 2 C. & J. 558.
(3) 1 E. & E. 545; 28 L. J. (Q.B.) 154.
(4) 2 E. & B. 771; 23 L. J. (Q.B.) 9.
(5) Law Rep. 2 P. C. 106.

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popular feeling, which endangered his life, and because of the order of suspension. Upon these points, however, the Court eventually gave no decision, and a fuller report of the argument on them is therefore omitted.]

The second question is, whether the proceedings taken by the bishop under the Church Discipline Act (3 & 4 Vict. c. 86), prevent the plaintiff being entitled to maintain this action. The plaintiff contends: 1st. That the three years named in the decree have elapsed, and that he has given in a certificate which satisfies the decree. 2. That the sequestration was afterwards revoked on the appointment of the defendant to the benefice, and that the sentence of suspension, unaccompanied by sequestration, does not prevent the plaintiff's right to recover the profits of his benefice. 3. That the sentence is illegal and void on its face.

On the first point it is material to notice that the sentence was given in the plaintiff's absence, and this in itself would appear to be a fatal objection to it: see Gibson's Codex, 1046.

[BOVILL, C.J. The whole of the Church Discipline Act proceeds upon the assumption that the sentence may be pronounced in the absence of the accused.]

The last certificate fulfilled all the conditions except that it was only for three years and not the whole period of suspension; but the whole period must mean the period of three years and not the whole period from the commencement of the suspension: otherwise if, as in the present case, the person suspended is out of the diocese at the time the sentence is pronounced, and continues out of it a day even from not knowing the contents of the decree, it is impossible he should ever fulfil the conditions of the decree, since he can never have known any neighbouring clergymen of the diocese during the whole time of the suspension.

[BOVILL, C.J. It may be hard, but if the sentence is valid, we cannot alter the express words of it.]

The question whether it is invalid on that ground can hardly now be raised except in a court of error, though it is very doubtful whether it is not so.

Secondly. The sequestration was relaxed on the 21st of March, 1865, and it would appear from the case of *Bunter* v. *Cresswell* (1),

(1) 14 Q. B. 825; 19 L. J. (Q.B.) 357.

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that until sequestration the profits of the benefice belong to the suspended clergyman not to the ordinary, for there a rule was made absolute to pay over to a prior sequestrator, representing the creditors of a suspended clergyman, the amount of the profits arising before sequestration though after the suspension.

[BOVILL, C.J. There the question was only between the two sequestrators, and the bishop paid into Court the amount of the profits up to the date of the sequestration, so no judgment really was given on that point.]

That is the only authority in the books. If the clergyman is not entitled to the profits they are in abeyance, which is contrary to the principles of our law. When a clergyman becomes insolvent or bankrupt, the profits do not pass to the assignees till the sequestration issues: *Waite* v. *Bishop* (1); *Hopkins* v. *Clarke*. (2)

Thirdly. The sentence is void on its face. This is a proceeding under a statutable authority, created by 3 & 4 Vict. c. 86, and it is necessary, therefore, that there should appear on the face of the sentence an averment of all that is necessary to give rise to the statutable authority: *Christie* v. *Unwin* (3); *Gosset* v. *Howard* (4); *Rex* v. *Fowler* (5); *Rex* v. *Dugger* (6); *Bodenham* v. *Ricketts* (7); *Rex* v. *Maby*. (8) The sentence does not shew on the face of it that the plaintiff received notice of the proceedings, or that the proceedings were public as required by s. 4 of the Act.

[BOVILL, C.J. We are dealing with the jurisdiction of the Bishop of Manchester, and he is put in motion by a report, and must not the rule of law omnia rite fieri præsumuntur apply to the proceedings which result in that report?]

The Bishop of Manchester would have the means of knowing if the requirements of the Act had been complied with in those preliminary proceedings.

Lastly. The sentence is bad on its face, because it states the offence for which the sentence is awarded in the alternative as adultery *or* fornication. These are distinct offences, and are men-

(1) 1 C. M. & R. 507.
(2) 4 B. & S. 836; 33 L. J. (Q.B.) 93; in error, 5 B. & S. 753; 33 L. J. (Q.B.) 334.
(3) 11 A. & E. 373.
(4) 10 Q. B. 411, 452; 16 L. J. (Q.B.) 345.
(5) 1 Salk. 293.
(6) 5 B. & A. 791.
(7) 2 H. & W. 132.
(8) 3 D. & R. 570.

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tioned separately in 1 Hen. 7, c. 4, by which the punishment of imprisonment was authorized; adultery was much the most serious: 6 Bing. Ecc. Ant. 230, 231; Van Espen, Jus. Ecclesiasticum, pars. 3, tit. 4, c. 6. There are many cases which shew that the crime must not be stated in the alternative: *Reg.* v. *Sadler* (1); *Rex* v. *North* (2); *Rex* v. *Morley.* (3) If adultery was charged in the articles, and fornication was proved, the clerk ought to be acquitted.

Holker, Q.C. (*John Edwards* with him), for the defendant. The proceedings under the Church Discipline Act were valid, and deprive the plaintiff of his right to recover in this action. The case of *Bunter* v. *Creswell* (4) is really an authority in favour of the defendant, for it clearly lays down that a sentence of suspension while it lasts has the same effect as a sentence of deprivation and degradation; and Cripps' Church and Clergy, 5th ed. 679, states, as an inference from that case, that the effect of a sentence of suspension is the same as if the clergyman were dead for the time. The very meaning of the term "ab officio et a beneficio" implies that the clergyman is deprived of the profits as well as the office. It has been held that for a suspended clergyman to preach is to be guilty of contempt: *Bishop of London* v. *Day.* (5) The bishop has to provide for the performance of the duties of the benefice, and the profits belong to him for that purpose.

[BRETT, J. How do you interpret the words of the 12th section of the Act, that such sentences may be enforced by the like means as a sentence pronounced by an ecclesiastical court of competent jurisdiction?]

That is a general section applying to all cases in which a sentence needs to be enforced; here, at any rate, the sentence has been enforced by the issuing of the sequestration, and it does not cease to be of force because the sequestration is relaxed. Then as to the form of the sentence, the Bishop of Manchester need only set out generally the particulars of the preliminary proceedings with which he had nothing to do. If there was any irregularity, the plaintiff should have appeared and availed himself of it.

(1) 2 Chit. 519.
(2) 6 D. & R. 143.
(3) 1 Y. & J. 221.
(4) 14 Q. B. 825; 19 L. J. (Q.B.) 357.
(5) 1 Rob. Ecc. Cases, 724

With respect to the alleged uncertainty in the offence, the two offences are really the same. They are merely two forms of the same offence. In the cases cited for the plaintiff, the offences, though similar, are really distinct, and that is the ground of the decisions.

Brown, Q.C., in reply.

Cur. adv. vult.

July 5. The judgment of the Court (Bovill, C.J., Keating and Brett, JJ.), was delivered by

BOVILL, C.J. The plaintiff claimed to maintain this action as incumbent of St. Peter's, Ashton, and as being legally entitled to the temporalities of that benefice. The defendant had been appointed to, and was actually in possession of, the living. The plaintiff was bound to establish his title to maintain the action; and, in the view which we take of the case, it will not be necessary to consider the validity of the defendant's appointment.

The plaintiff had been duly appointed incumbent of the chapelry in question: but his right to sue in this action was contested on several grounds, one of which was that, by certain proceedings instituted against him under the Church Discipline Act, and by the decree or sentence of the 13th of December, 1861, the plaintiff had been suspended ab officio et a beneficio: and, as we are of opinion that this objection must prevail, it is unnecessary to enter into many of the points and arguments that were brought to our attention by the learned counsel who argued the case.

By this sentence the plaintiff was suspended ab officio et a beneficio for three years from the 13th of December, 1861, and until the plaintiff should produce a certificate to the bishop's satisfaction, signed by three neighbouring beneficed clergymen of the diocese of Manchester, of his good conduct during the said period of suspension; and it was declared that such suspension should not be taken off until he should produce such certificate.

The sentence was duly published, and has never been revoked. An attempt was made by the plaintiff's counsel to shew that it had been complied with, and that a proper certificate of good conduct had been obtained; but, as we intimated in the course of the argu-

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ment, it was impossible, upon the facts stated in the special case, for him to maintain that position: and we are still of that opinion.

After the sentence was pronounced, a sequestration of the profits of the living was issued by the bishop on the 30th of September, 1864, for the purpose of satisfying the costs of the proceedings and providing for the performance of the duties of the incumbent; and it was to continue during the pleasure of the bishop.

This sequestration, together with another which had been issued by reason of the plaintiff's non-residence, were both revoked and taken off on the 24th of March, 1865, on the occasion of the defendant being appointed to the living.

If that appointment of the defendant was valid, the plaintiff of course could have no title to maintain this action. But his learned counsel contended that such appointment of the defendant was void by reason of an irregularity in the proceedings; and, assuming such objection to be valid, and that the plaintiff is therefore still legally the incumbent of the chapelry, the effect, as it seems to us, is, that the sentence of suspension of the 13th of December, 1861, is still in force as against him.

It was contended, however, on the part of the plaintiff, that the sequestration which issued under this sentence having been relaxed in 1865, and no fresh sequestration having been issued, he was not prevented from claiming and asserting his right to the profits of the living; and this raises an important question as to the effect of a sentence of suspension ab officio et a beneficio, when either no sequestration has followed upon it, or when, after a sequestration issued, it has been relaxed.

A sequestration may be necessary, in order to entitle the bishop's nominee to receive the profits: but the absence of the sequestration, or its being relaxed, cannot in our judgment alter the effect of the sentence or entitle the plaintiff to recover any profits of which he was by the sentence, and during its continuance, deprived.

In the case of *Bunter* v. *Cresswell* (1) it was held, in accordance with what is said in Gibson's Codex (2), that a sentence of suspension ab officio et a beneficio is a sentence of degradation and deprivation, but both in a qualified sense, because only temporary; but that it did operate as a temporary degradation and deprivation.

(1) 14 Q. B. 825; 19 L. J. (Q.B.) 357. (2) Codex, vol. ii. p. 1047, ed. 2.

It is quite true that in that case the Court said that the plaintiff's right there was suspended from the 13th of September, 1846, the date of the publication of the sequestration: but, in that case, no claim was made except as from that date; and, in the paragraph immediately preceding the passage last cited from the judgment, the Court say: "It seems to us that on principle it is clear that the suspension for the time of its endurance operates in respect of the perception of profits as amotion or death." We entirely concur in that view, and are of opinion that, as long as the sentence of suspension remains in force, the incumbent can no more maintain a legal claim to the temporalities than he could claim to exercise his spiritual functions; and that his right to both is suspended by the mere force of the sentence itself.

We are of opinion that the sentence of suspension operates per se to incapacitate the suspended clerk from bringing any action or instituting any suit to recover the profits of the benefice; and that, whether a sequestration be issued or not, or, having issued, is afterwards revoked, the clerk is not restored until the sentence be altered or satisfied.

Several objections were then taken to the form of the sentence; and it was contended that it was bad on the face of it. One of these objections was that it did not appear what the offence was with which the plaintiff was charged, and that the statement of it was in the alternative and uncertain, inasmuch as it was stated to be "adultery *or* fornication." But we think that the charge is substantially one of an act of incontinence with the female named in the charge, and that it is immaterial for the purpose of these proceedings whether she was married or a single woman.

Another objection raised to the validity of the sentence was, that it did not shew that the provisions of the Act of Parliament had been complied with, or that the Bishop of Manchester had jurisdiction in the case. But, in our opinion, these objections also fail. We think that the offence does appear to have been committed within the diocese of Worcester, and that the jurisdiction of the Bishop of Manchester, which arises under the 5th section of the Act of Parliament, is sufficiently shewn. We think it was not necessary to shew on the face of the sentence that the seven days' notice of the execution of the commission was given, as directed by s. 4, or that

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the inquiry was in public, or to shew that the provisions of the statute as to the preliminary proceedings, with which the Bishop of Manchester was not concerned, had been strictly observed.

A further point was mentioned by Mr. Brown, viz. that the sentence was not pronounced in the presence of the plaintiff, nor served upon him. But we did not understand that this point was seriously pressed, nor is there in our opinion any valid objection to the sentence on these grounds.

We think that the whole of the objections to the sentence of suspension fail; that, by that sentence, the plaintiff was deprived of all right to the profits of the living or to sue for them so long as that sentence remained unrevoked; that it is still in force; and that the judgment should therefore be in favour of the defendant.

Judgment for the defendant.

Attorneys for plaintiff: *Dale & Stretton.*
Attorney for defendant: *G. Wray.*

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Bill of Exchange—Indorsement obtained by means of a Fraudulent Representation—Misdirection—Negligence.

The defendant was induced to put his name upon the back of a bill of exchange by the fraudulent representation of the acceptor that he was signing a guarantee. In an action against him as indorser at the suit of a bonâ fide holder for value, the jury were directed that, "if the defendant's signature to the document was obtained upon a fraudulent representation that it was a guarantee, and the defendant signed it without knowing that it was a bill, and under the belief that it was a guarantee, and if he was not guilty of any negligence in so signing the paper, he was entitled to the verdict:"—

Held, a proper direction.

Addison Con. 907. Bell. 452

ACTION by indorsee against indorser on a bill of exchange for 3000*l.* drawn on the 6th of November, 1867, by one Cooper upon and accepted by one Callow, payable six months after date, and indorsed successively by Cooper, the defendant, J. P. Parker, T. A. Pooley & Co., and A. G. Pooley, to the plaintiff, who became the holder for value (having taken it in part-payment of a debt due to him from A. G. Pooley) before it became due, and without notice of any fraud.

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The pleas traversed the several indorsements, and alleged that the defendant's indorsement was obtained from him by fraud.

The cause was tried before Bovill, C.J., at the last spring assizes at Guildford. The defendant, who was a gentleman far advanced in years, swore that the indorsement was not in his handwriting, and that he had never accepted nor indorsed a bill of exchange; but there was evidence that the signature was his; and Callow, who was called as a witness for the plaintiff, stated that he saw the defendant write the indorsement under the following circumstances:—Callow had been secretary to a company engaged in the formation of a railway at Sandgate, in Kent, in which the defendant (who had property in the neighbourhood) was interested; and the defendant had some time previously, at Callow's request, signed a guarantee for 3000*l.*, in order to enable the company to obtain an advance of money from their bankers. Callow took the bill in question (which was drawn and indorsed by Cooper) to the defendant, and asked him to put his name on it, telling him it was a guarantee; whereupon the defendant, in the belief that he was signing a guarantee similar to that which he had before given (and out of which no liability had resulted to him), put his signature on the back of the bill immediately after that of Cooper. Callow only shewed the defendant the back of the paper: it was, however, in the ordinary shape of a bill of exchange, and bore a stamp, the impress of which was visible through the paper.

The Lord Chief Justice told the jury that, if the indorsement was not the signature of the defendant, or if, being his signature, it was obtained upon a fraudulent representation that it was a guarantee, and the defendant signed it without knowing that it was a bill, and under the belief that it was a guarantee, and if the defendant was not guilty of any negligence in so signing the paper, he was entitled to the verdict.

The jury returned a verdict for the defendant.

Sir J. D. Coleridge, S. G., in Easter Term last, obtained a rule nisi for a new trial, on the grounds of misdirection and that the verdict was against evidence.

Ballantine, Serjt., Brown, Q.C., and *Archibald*, shewed cause. Two questions arise here—1. Whether there was any negligence

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on the part of the defendant in signing the document as he did. 2. Whether, assuming Callow's evidence to be true, the defendant can be responsible upon an indorsement so fraudulently obtained. In considering the first of these questions, regard must be had to the age and condition of the party. What would be negligence in a merchant or a banker would not necessarily be negligence on the part of a gentleman of great age and impaired physical powers. Negligence must in all cases be a relative term: *Lynch* v. *Nurdin*. (1) Then, as to the second question. It is essential to every contract that there be volition. A man cannot be said to contract when he signs a paper upon a representation and under a belief that he is signing something different from that which it turns out to be; to make a valid and binding contract, the mind must go with the act. This arises upon the traverse of the indorsement. Upon the facts proved, the defendant cannot be said to have indorsed the bill at all. The rule which is applicable to deeds is equally applicable to bonds and to bills of exchange: Com. Dig. *Fait* (B. 2); *Thoroughgood's Case* (2), and note R. referring to Keilwey, 70, b., pl. 6; *Swan* v. *North British Australasian Company* (3); *Polhill* v. *Walter*. (4) Where a man puts his name as acceptor or indorser on a blank stamp, he becomes responsible, if the bill is afterwards filled up and gets into the hands of a bonâ fide holder for value, to the full amount which the stamp will cover: *Russel* v. *Langstaffe* (5); *Montague* v. *Perkins* (6); Byles on Bills, 9th ed. 181; but in such case he intends to become a party to the bill. All the cases in which one who has been defrauded has been held liable upon the bill or note are explainable on the ground of agency: Byles on Bills, 9th ed. 131. *Young* v. *Grote* (7) may be sustained on that ground. (8) But the fact of agency must be first established: *Awde* v. *Dixon* (9); *Kingsford* v. *Merry*. (10) In *Ingham* v. *Primrose* (11), the defend-

(1) 1 Q. B. 29.
(2) 2 Co. Rep. 9. b.
(3) 2 H. & C. 175.
(4) 3 B. & Ad. 114.
(5) 2 Doug. 514.
(6) 22 L. J. (C.P.) 187.
(7) 4 Bing. 253; 12 Mo. 484.
(8) See the observations upon that case of Parke, B., in *Robarts* v. *Tucker* (16 Q. B. 560); of Williams, J., in *Ex parte Swan* (7 C. B. (N.S.) 445); and of Blackburn, J., in *Gum* v. *Tyrie* (4 B. & S. 680, 713).
(9) 6 Ex. 869.
(10) 11 Ex. 577; in error, 1 H. & N. 503.
(11) 7 C. B. (N.S.) 82; 28 L. J. (C.P.) 294.

ant had once made a complete bill, and the ground of the decision was that he had negligently omitted to cancel or destroy it effectually.

Sir J. D. Coleridge, S. G., Sir G. Honyman, Q.C., and *Talfourd Salter*, in support of the rule. The fact that the defendant's indorsement on the bill was obtained by a fraudulent representation that he was signing something else, is no answer to the claim of a bonâ fide holder for value, without notice of the fraud. No doubt, as a general rule, fraud vitiates all contracts. But a bill of exchange is not in the ordinary sense of the word a contract at all. The law-merchant imposes certain obligations on parties who put their names on bills of exchange,—obligations altogether apart from the ordinary obligations arising out of other contracts. Bills of exchange now form an important part of the currency of the country. No matter how a bill or note may be tainted with fraud, or even if it has been obtained by duress or by felony, that is no answer to an action at the suit of a bonâ fide holder for value: Bayley on Bills, 472, 473, 534; Chitty on Bills, 10th ed. 50, 53, 178; Byles on Bills, 8th ed. 57; *Duncan* v. *Scott* (1); *Marston* v. *Allen* (2); *Harvey* v. *Towers* (3); Parsons on Bills, ed. 1865, pp. 109—115, citing, amongst other cases, *Putnam* v. *Sullivan* (4), where Parsons, C.J. (5) says: "The counsel for the defendants agree that generally an indorsement obtained by fraud shall hold the indorsers according to the terms of it; but they make a distinction between the cases where the indorser through fraudulent pretences has been induced to indorse the note he is called on to pay, and where he never intended to indorse a note of that description, but a different note and for a different purpose. Perhaps there may be cases in which the distinction ought to prevail; as, where a blind man had a note falsely and fraudulently read to him, and he indorsed it, supposing it to be the note read to him. But we are satisfied that an indorser cannot avail himself of this distinction but in cases where he is not chargeable with any laches or neglect or misplaced confidence in others." In *Rex* v. *Hales* (6), the prisoner had got from a member of parliament named Gibson a blank frank, which

(1) 1 Camp. 100.
(2) 8 M. & W. 494.
(3) 6 Ex. 656.
(4) 4 Massachusetts, Rep. 45.
(5) At p. 54.
(6) 17 How. St. Tr. 161.

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he subsequently, by writing over the signature and altering the word "free" into "for" and adding "myself and partners," turned into a promissory note for 2600*l.*; and, though the most eminent counsel of the day were retained to defend him, it did not occur to any of them that the then necessary allegation in the indictment of the intent to defraud Gibson failed in proof, which it would have done if the argument urged here is well founded, viz. that Gibson was not liable on the note, and therefore could not be defrauded. So, in *Rex* v. *Revett* (1), A. by false representations induced B. to sign his name to a blank stamped paper, which A. afterwards secretly filled up as a promissory note for 100*l.*, and induced C. to advance him 100*l.* upon it. A. was indicted for defrauding C.; and it was held that C. had his remedy against B. on the note, and that the fraud therefore not being upon C. but upon B., the indictment was not sustained by the evidence. Wherever there is consideration, fraud may be disregarded. If a stolen bill gets into circulation, the acceptor is liable at the suit of a bonâ fide holder for value. That is asserted in *Ingham* v. *Primrose*. (2) *Awde* v. *Dixon* (3) is like *Stagg* v. *Elliott*. (4) This was not a case of forgery: it was a mere fraudulent procurement of the defendant's signature to a genuine and a complete bill. *Thoroughgood's Case* (5) is peculiar, and not very intelligible; and in the case cited from Keilwey, 76. b., the deed was fraudulently read by the grantee himself.

[BRETT, J. *Nance* v. *Lary* (6), cited in Parsons on Bills, 114, seems to be very much to the purpose. In that case, the defendant and one Langford being about to execute a bond in blank, the latter produced a sheet of paper, upon which the defendant signed his name; whereupon Langford suggested that the signature was so far from the bottom of the paper that there might not be room for the bond to be written above it, and produced another sheet for the defendant to sign so as to leave sufficient room for the intended bond. Langford, with apparent carelessness, slipped the first sheet aside, and signed the other with the defendant, who carried it to

(1) Byles on Bills, 8th ed. 124.
(2) 7 C. B. (N.S.) 82, 85; 28 L. J. (C.P.) 294.
(3) 6 Ex. 869.
(4) 12 C. B. (N.S.) 373.
(5) 2 Co. Rep. 9. b.
(6) 5 Alabama Rep. 370.

the clerk of the court to be filled up, leaving the former with Langford, under the impression that it had been or would be destroyed. Subsequently, Langford caused the note upon which the present suit was brought to be written over the blank signature of the defendant retained by him, and negotiated it to the plaintiff. Collier, C.J., said: "The making of the note by Langford was not a mere fraud upon the defendant; it was something more. It was quite as much a forgery as if he had found the blank, or purloined it from the defendant's possession. If a recovery were allowed upon such a state of facts, then every one who indulges in the idle habit of writing his name for mere pastime, or leaves sufficient space between a letter and his subscription, might be made a bankrupt by having promises to pay money written over his signature. Such a decision would be alarming to the community, has no warrant in law, and cannot receive our sanction."]

In that case the defendant never intended to sign the instrument at all. Byles, J., in his judgment in *Swan* v. *North British Australasian Company* (1), in the Exchequer Chamber, says: "The object of the law-merchant as to bills and notes made or become payable to bearer is, to secure their circulation as money; therefore honest acquisition confers title. To this despotic but necessary principle, the ordinary rules of the common law are made to bend. The misapplication of a genuine signature written across a slip of stamped paper (which transaction, being a forgery, would in ordinary cases convey no title), may give a good title to any sum fraudulently inscribed, within the limits of the stamp, and in America, where there are no stamp-laws, to any sum whatever. Negligence in the maker of an instrument payable to bearer makes no difference in his liability to an honest holder for value: the instrument may be lost by the maker without his negligence, or stolen from him, still he must pay."

[BYLES, J. If that be right, it can only be with reference to the case of a complete instrument; it can hardly be applicable to a case where a man's signature has been obtained by a fraudulent representation to a document which he never intended to sign.]

Then, the verdict was clearly against the weight of evidence upon the question of negligence. Can it be said that it was any

(1) 2 H. & C. at p. 184.

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other than gross negligence on the part of the defendant to put his name upon the back of a document such as that described, without even looking at the face of it. If any one is to suffer from his misplaced confidence in Callow, it surely must be the defendant himself.

Cur. adv. vult.

July 5. The judgment of the Court (Bovill, C.J., Byles, Keating, and Montague Smith, JJ.) was delivered by

BYLES, J. This was an action by the plaintiff as indorsee of a bill of exchange for 3000*l.*, against the defendant, as indorser. The defendant by one of his pleas traversed the indorsement, and by another alleged that the defendant's indorsement was obtained from him by fraud. The plaintiff was a holder for value before maturity, and without notice of any fraud.

There was contradictory evidence as to whether the indorsement was the defendant's signature at all; but, according to the evidence of one Callow, the acceptor of the bill, who was called as a witness for the plaintiff, he, Callow, produced the bill to the defendant, a gentleman advanced in life, for him to put his signature on the back, after that of one Cooper, who was payee of the bill and first indorser, Callow not saying that it was a bill, and telling the defendant that the instrument was a guarantee. The defendant did not see the face of the bill at all. But the bill was of the usual shape, and bore a stamp, the impress of which stamp was visible at the back of the bill. The defendant signed his name after Cooper's, he the defendant (as the witness stated) believing the document to be a guarantee only.

The Lord Chief Justice told the jury that, if the indorsement was not the defendant's signature, or if, being his signature, it was obtained upon a fraudulent representation that it was a guarantee, and the defendant signed it without knowing that it was a bill, and under the belief that it was a guarantee, and if the defendant was not guilty of any negligence in so signing the paper, the defendant was entitled to the verdict. The jury found for the defendant.

A rule nisi was obtained for a new trial, first, on the ground of misdirection in the latter part of the summing-up, and secondly, on the ground that the verdict was against the evidence.

As to the first branch of the rule, it seems to us that the question arises on the traverse of the indorsement. The case presented by the defendant is, that he never made the contract declared on; that he never saw the face of the bill; that the purport of the contract was fraudulently misdescribed to him; that, when he signed one thing, he was told and believed that he was signing another and an entirely different thing; and that his mind never went with his act.

It seems plain, on principle and on authority, that, if a blind man, or a man who cannot read, or who for some reason (not implying negligence) forbears to read, has a written contract falsely read over to him, the reader misreading to such a degree that the written contract is of a nature altogether different from the contract pretended to be read from the paper which the blind or illiterate man afterwards signs; then, at least if there be no negligence, the signature so obtained is of no force. And it is invalid not merely on the ground of fraud, where fraud exists, but on the ground that the mind of the signer did not accompany the signature; in other words, that he never intended to sign, and therefore in contemplation of law never did sign, the contract to which his name is appended.

The authorities appear to us to support this view of the law. In *Thoroughgood's Case* (1) it was held that, if an illiterate man have a deed falsely read over to him, and he then seals and delivers the parchment, that parchment is nevertheless not his deed. In a note to *Thoroughgood's Case* (1), in Fraser's edition of Coke's Reports, it is suggested that the doctrine is not confined to the condition of an illiterate grantor; and a case in Keilwey's Reports (2) is cited in support of this observation. On reference to that case, it appears that one of the judges did there observe that it made no difference whether the grantor were lettered or unlettered. That, however, was a case where the grantee himself was the defrauding party. But the position that, if a grantor or covenantor be deceived or misled as to the *actual contents* of the deed, the deed does not bind him, is supported by many authorities: see Com. Dig. *Fait* (B. 2); and is recognized by Bayley,B., and the Court of Exchequer, in the case of *Edwards* v. *Brown*. (3)

(1) 2 Co. Rep. 9. b. (2) Keilw. 70, pl. 6. (3) 1 C. & J. 312.

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Accordingly, it has recently been decided in the Exchequer Chamber, that, if a deed be delivered, and a blank left therein be afterwards improperly filled up (at least if that be done without the grantor's negligence), it is not the deed of the grantor: *Swan* v. *North British Australasian Land Company.* (1)

These cases apply to deeds; but the principle is equally applicable to other written contracts. Nevertheless, this principle, when applied to negotiable instruments, must be and is limited in its application. These instruments are not only assignable, but they form part of the currency of the country. A qualification of the general rule is necessary to protect innocent transferrees for value. If, therefore, a man write his name across the back of a blank bill-stamp, and part with it, and the paper is afterwards improperly filled up, he is liable as indorser. If he write it across the face of the bill, he is liable as acceptor, when the instrument has once passed into the hands of an innocent indorsee for value before maturity, and liable to the extent of any sum which the stamp will cover.

In these cases, however, the party signing knows what he is doing: the indorser intended to indorse, and the acceptor intended to accept, a bill of exchange to be thereafter filled up, leaving the amount, the date, the maturity, and the other parties to the bill undetermined.

But, in the case now under consideration, the defendant, according to the evidence, if believed, and the finding of the jury, never intended to indorse a bill of exchange at all, but intended to sign a contract of an entirely different nature. It was not his design, and, if he were guilty of no negligence, it was not even his fault that the instrument he signed turned out to be a bill of exchange. It was as if he had written his name on a sheet of paper for the purpose of franking a letter, or in a lady's album, or on an order for admission to the Temple Church, or on the fly-leaf of a book, and there had already been, without his knowledge, a bill of exchange or a promissory note payable to order inscribed on the other side of the paper. To make the case clearer, suppose the bill or note on the other side of the paper in each of these cases to be written at a time subsequent to the signature, then the frau-

(1) 2 H. & C. 175.

dulent misapplication of that genuine signature to a different purpose would have been a counterfeit alteration of a writing with intent to defraud, and would therefore have amounted to a forgery. In that case, the signer would not have been bound by his signature, for two reasons,—first, that he never in fact signed the writing declared on,—and, secondly, that he never intended to sign any such contract.

In the present case, the first reason does not apply, but the second reason does apply. The defendant never intended to sign that contract, or any such contract. He never intended to put his name to any instrument that then was or thereafter might become negotiable. He was deceived, not merely as to the legal effect, but as to the *actual contents* of the instrument.

We are not aware of any case in which the precise question now before us has arisen on bills of exchange or promissory notes, or been judicially discussed. In the case of *Ingham* v. *Primrose* (1), and the case of *Nance* v. *Lary* (2), both cited by the plaintiff, the facts were very different from those of the case before us, and have but a remote bearing on the question. But, in *Putnam* v. *Sullivan*, an American case, reported in 4 Mass. 45, and cited in Parsons on Bills of Exchange, vol. i. p. 111, n., a distinction is taken by Chief Justice Parsons between a case where an indorser intended to indorse such a note as he actually indorsed, being induced by fraud to indorse it, and a case where he intended to indorse a different note and for a different purpose. And the Court intimated an opinion that, even in such a case as that, a distinction might prevail and protect the indorsee.

The distinction in the case now under consideration is a much plainer one; for, on this branch of the rule, we are to assume that the indorser never intended to indorse at all, but to sign a contract of an entirely different nature.

For these reasons, we think the direction of the Lord Chief Justice was right.

With respect, however, to the second branch of the rule, we are of opinion that the case should undergo further investigation. We abstain from giving our reasons for this part of our deci-

(1) 7 C. B. (N.S.) 83; 28 L. J. (C.P.) 294.

(2) 5 Alabama, 370, cited 1 Parsons on Bills, 114, n.

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sion only lest they should prejudice either party on a second inquiry.

The rule, therefore, will be made absolute for a new trial.

Rule absolute.

Attorney for plaintiff: *F. W. Mount.*

Attorneys for defendant: *Barlow, Bowling, & Williams.*

June 18.

[IN THE EXCHEQUER CHAMBER.]

ASTLEY AND ANOTHER, ASSIGNEES OF JOYCE & Co., BANKRUPTS, *v.* GURNEY AND OTHERS.

Bankrupt—Mutual Credit, within 12 *&* 13 *Vict. c.* 106, *s.* 171.

On the 30th of March, 1865, J. & Co. indorsed and deposited with the defendants bills of lading for cotton and coffee valued at 7048*l.*, as collateral security for the defendants' acceptance at three months for 5000*l.*, which became due on the 23rd of June, J. & Co. undertaking "to provide funds one day before maturity of the bill."

On the 5th of April, J. & Co. indorsed and deposited with the defendants bills of lading for other cotton valued at 4280*l.*, and four bills of exchange amounting to 2400*l.*, as collateral security for a further acceptance of the defendants for 5000*l.* due June 30th, J. & Co. undertaking "to provide funds before maturity to keep the defendants out of cash advance."

J. & Co. were at this time already largely indebted to the defendants upon bills which the defendants had discounted for them, and which were subsequently dishonoured; and on the 19th of May J. & Co. became bankrupt. Before their bankruptcy, J. & Co. gave their assent that the defendants should sell the cotton and coffee and receive the proceeds.

The cotton was sold and the proceeds received by the defendants before the bankruptcy of J. & Co. The coffee did not arrive until after the bankruptcy. It was then sold by the defendants. The four bills deposited with the defendants were duly paid.

The securities deposited on the 30th of March and 5th of April respectively, realized 11,816*l.* 12*s.* 3*d.*, thus leaving, after payment of the defendants' acceptances for 5000*l.* and 5000*l.*, a balance of 1816*l.* 12*s.* 3*d.*, which the defendants claimed to set off against the debt due to them from J. & Co., under 12 & 13 Vict. c. 106, s. 171:—

Held, by the Court of Common Pleas, upon the authority of *Naoroji* v. *Chartered Bank of India* (Law Rep. 3 C. P. 444), a case of mutual credit as to the cotton and coffee: *aliter* as to the bills, upon the authority of *Young* v. *Bank of Bengal* (1 Moo. P. C. 150); and judgment was given for the plaintiffs for 1816*l.* 12*s.* 3*d.*

The Exchequer Chamber (Kelly, C.B., dissenting), reversed the judgment.

THIS was an action brought to recover a sum of 1816*l.* 12*s.* 3*d.*

as money received by the defendants to the use of the plaintiffs as assignees of Joyce & Co., bankrupts. The following case was stated for the opinion of the Court:—

1. The plaintiffs are assignees of Joyce & Co., merchants, of London, who were adjudicated bankrupts on the 19th of May, 1865. The defendants, up to August, 1865, carried on business in partnership as money-dealers and bill-brokers, under the firm of Overend, Gurney, & Co.

2. The business of that firm embraced money dealings of all sorts, discounting bills, advancing on securities, advancing credits, receiving money on deposit, holding securities for customers, receiving dividends, and holding money at call, against which the customers drew. Where the securities were bills of lading or bills of exchange, they were indorsed by the customer and handed to Overend, Gurney, & Co. In the ordinary course, the customer would repay the sum advanced, and then realize the securities. If the customers wished to realize, they gave Overend, Gurney, & Co. a borrowing ticket, who then allowed the customer to have the securities for the purpose of realizing and paying the proceeds to Overend, Gurney, & Co.

3. Joyce & Co. had for upwards of five years before their bankruptcy been customers of Overend, Gurney, & Co.

4. On the 30th of March, 1865, Overend, Gurney, & Co. received from Joyce and Co. the following letter:—

"Messrs. Overend, Gurney, & Co.

"Referring to letters of Messrs. Joyce & Co., of Alexandria, dated the 20th inst., advising having drawn on you 5000*l.* at three months' date from that day, we will thank you to accept same; and, as collateral security for your so doing, we beg to hand you herewith documents as per memorandum annexed. We undertake to provide funds one day before maturity of said bill.

"Both the coffee and cotton are duly and fully covered by insurances on our floating policies; and we hereby transfer our interest in same to yourselves until your acceptance is paid, as agreed. Charles Joyce & Co."

[The memorandum inclosed in this letter described bills of lading for cotton valued at 5350*l.*, and for coffee valued at 1698*l.*]

5. The goods mentioned in the above letter were parcels of

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cotton and coffee then shortly expected to arrive, which had been shipped from Alexandria consigned to Joyce & Co., and for which they held the bills of lading. In accordance with the terms of the letter, Overend, Gurney, & Co. accepted the draft for 5000*l.*, and received the bills of lading, all of which were indorsed to them by Joyce & Co.

6. On the 5th of April, 1865, Overend, Gurney, & Co. received from Joyce & Co. the following letter:—

"We beg to inclose letters from Messrs. Joyce & Co. of Alexandria advising having drawn on you to the extent of 5000*l.* on sundry appoints, at three months' date from 27th ultimo, and due 30th June. We will thank you to accept same, and as collateral security we beg to inclose you herewith the following documents, say,—

"Bill of lading 13 bales cotton per Erin,
8 do. per do.,
99 do. per do.,
16 do. per do., valued at £4280
Bill on T. Bingham, due 30th June . 400
Do. do. . . 600
Do. on G. Tulche do. . . 1000
Do. on J. C. Im Thurn, due 10th April 400
£6680

"We undertake to provide funds before maturity to keep you out of cash advance. The above cotton is covered by insurance on our floating policy, and we hereby transfer our interest in same to yourselves. Charles Joyce & Co."

7. The goods mentioned in this letter were also parcels of cotton shortly expected to arrive, of which Joyce & Co. were the consignees, and for which they held the bills of lading. In accordance with the terms of this letter, Overend, Gurney, & Co. accepted drafts for the further sum of 5000*l.*, and received the bills of lading and bills of exchange mentioned in the letter, which were respectively indorsed to them by Joyce and Co.

8. At the dates of these letters, Joyce & Co. were already liable to Overend, Gurney, & Co. upon their acceptances of bills discounted by Overend, Gurney, & Co., to a very large amount, and

exceeding the sum claimed in this action. These acceptances were dishonoured at maturity, and are now debts proveable by Overend, Gurney, & Co. against the estate of Joyce & Co.

9. Joyce & Co. before their bankruptcy gave their assent to the sale by Overend, Gurney, & Co. of the cotton and coffee mentioned in the above letters, *and to their receiving the proceeds.* (1) All the cotton was sold before the bankruptcy of Joyce & Co.; and the net proceeds thereof, except 59*l.*, were handed to Overend, Gurney, & Co. before the bankruptcy. The coffee arrived after the bankruptcy of Joyce & Co., and was after its arrival sold by the brokers in the ordinary course. The coffee realized 1721*l.* 9*s.* 7*d.* This sum and the above 59*l.*, part of the proceeds of the cotton, were afterwards paid over by the brokers to Overend, Gurney, & Co. The bills of exchange mentioned in the letter of April 5th, 1865, were shortly after the 28th of April re-discounted by Overend, Gurney, & Co., and were paid by the acceptors at maturity.

10. The goods described in the letter of the 30th of March, 1865, realized 5176*l.* 12*s.* 3*d.*, and the securities described in the letter of the 5th of April, 1865, realized 6640*l.*, leaving, after providing for the acceptances mentioned in the letter, which Overend, Gurney, & Co. were compelled to pay at maturity, the sum of 1816*l.* 12*s.* 3*d.* sought to be recovered in this action. And there is now due from the estate of Joyce & Co. to Overend, Gurney, & Co. 20,116*l.* or thereabouts.

11. The plaintiffs, as assignees, seek to recover the 1816*l.* 12*s.* 3*d.* as the amount of surplus proceeds of the securities lodged with Overend, Gurney, & Co., for, as the plaintiffs contend, the special purpose of protecting the above-mentioned acceptances. Overend, Gurney, & Co. claim to retain this sum against the general balance due to them from Joyce & Co. at the time of their bankruptcy; and allege that there was a mutual credit and mutual debts between them and Joyce & Co., in respect of which they are entitled to retain the above sum against the much larger amount due to them from the estate of Joyce & Co.

12. It was agreed that the Court should draw such inferences or conclusions as the jury ought to draw.

(1) The words in italics were added by way of amendment, during the argument in the Court below.

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The question for the opinion of the Court was, whether the defendants were entitled to retain the above amount against the balance of account due to them from Joyce & Co. at the date of their bankruptcy, and proveable against their estate.

Field, Q.C. (*Lord* with him), for the plaintiffs. Upon the principles laid down in *Young* v. *Bank of Bengal* (1), and approved and confirmed by this Court in *Naoroji* v. *Chartered Bank of India* (2), the deposit of the bills of lading for the cotton and the coffee by Joyce & Co. with Overend, Gurney, & Co., as security for their two acceptances for 5000*l.* and 5000*l.*, even coupled with the subsequent authority to sell the cotton and coffee and to apply the proceeds in payment of those bills, did not constitute a "mutual credit" within 12 & 13 Vict. c. 106, s. 171 (3), and consequently the plaintiffs, as assignees of Joyce & Co., are entitled to recover back the moneys paid over by the brokers after the bankruptcy of Joyce & Co. To bring a case within that section, the credit must be such as must necessarily end in a debt: *Rose* v. *Hart* (4); *Alsager* v. *Currie.* (5) Here there was nothing to prevent Joyce & Co. from at any time revoking the authority to sell, and themselves providing funds to take up the bills at maturity. As to the deposit of the bills, the case is not distinguishable from *Young* v. *Bank of Bengal.* (1)

[BOVILL, C.J. As to the cotton and coffee, the decision of this Court in *Naoroji* v. *Chartered Bank of India* (2) is against the plaintiffs. As to the bills, *Young* v. *Bank of Bengal* (1) is in their favour.]

(1) 1 Moo. P. C. 150.

(2) Law Rep. 3 C. P. 444.

(3) 12 & 13 Vict. c. 106, s. 171: "Where there has been mutual credit given by the bankrupt and any other person, or where there are mutual debts between the bankrupt and any other person, the Court shall state the account between them, and one debt or demand may be set against another, notwithstanding any prior act of bankruptcy committed by such bankrupt before the credit given to or the debt contracted by him; and what shall appear due on either side on the balance of such account, and no more, shall be claimed or paid on either side respectively; and every debt or demand hereby made proveable against the estate of the bankrupt may be set off in manner aforesaid against such estate, provided that the person claiming the benefit of such set-off had not, when such credit was given, notice of an act of bankruptcy by such bankrupt committed."

(4) 8 Taunt. 499.

(5) 12 M. & W. 751.

Buchanan v. *Findlay* (1), *Hill* v. *Smith* (2), and *Alder* v. *Keighley* (3), were also referred to.

J. C. Mathew (*Garth, Q.C.*, with him), for the defendants. The first question is how far *Young* v. *Bank of Bengal* (4) is an authority, and how far applicable to the present case. The bills of exchange were indorsed to Overend, Gurney, & Co., and deposited with them upon the terms that they were to hold them as collateral security for their acceptance of the second 5000*l.* That was a sufficient credit within the statute, in one alternative, viz. the failure of Joyce & Co. to provide for the acceptance before maturity. That distinguishes the present case from *Young* v. *Bank of Bengal.* (4) It was urged in *Naoroji* v. *Chartered Bank of India* (5) that the authority to receive the money was revocable, and therefore the transaction did not necessarily indicate that a debt must result. But the Court declined to accept that view.

[BOVILL, C.J. The indorsement of the bills by Joyce & Co. did no more than enable Overend, Gurney, & Co. to receive the proceeds if Joyce & Co. should make default in providing funds to meet the 5000*l.* bill. If Joyce & Co. had provided the funds, the bills would have been handed back to them.]

If *Young* v. *Bank of Bengal* (4) is to stand, it is hardly consistent with the decision of this Court in *Naoroji* v. *Chartered Bank of India.* (5)

[BOVILL, C.J. We certainly did not intend to overrule the case in the Privy Council. We expressly distinguished it from the case before us.]

As to the cotton and coffee, the authority given to Overend, Gurney, & Co. by Joyce & Co. before their bankruptcy to sell, and to receive the proceeds, clearly brings the case within *Naoroji* v. *Chartered Bank of India.* (5)

Field, Q.C., in reply.

BOVILL, C.J. With regard to the proceeds of the sale of the cotton and coffee, it is clear from the statement in the case, as

(1) 9 B. & C. 738.
(2) 12 M. & W. 618.
(3) 15 M. & W. 117.
(4) 1 Moo. P. C. 150.
(5) Law Rep. 3 C. P. 444.

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The question for the opinion of the Cou[rt] cy defendants were entitled to retain the abo[ve] he balance of account due to them from Jo[yce] ed their bankruptcy, and proveable against [them] lly

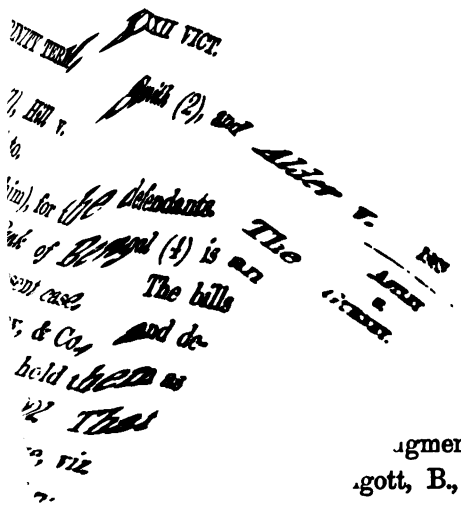
Field, Q.C. (*Lord* with him), for t[he] . the loan ciples laid down in *Young* v. *Ba[nk]* iberty to sell and confirmed by this Court i[n] ith them. So, *India* (2), the deposit of the b[ills] to provide for the coffee by Joyce & Co. with O[rr] as were to be received their two acceptances for 50[00] distinction between the subsequent authority to se[ll] *Chartered Bank of India* (1) proceeds in payment of [the] decision of the Privy Council credit" within 12 & 1[3] , but, on the contrary, they care- the plaintiffs, as assi[gn] ground on which this case is equally back the moneys pa[id] rmer decision, viz. that the money was Joyce & Co. To [Gu]rney, & Co., only in the event of Joyce be such as mus[t] , and that carries out what is the justice of *Alsager* v. *Cur[rie]* was intended that the proceeds of the bills & Co. from a[ny] to anything but the second 5000*l.* acceptance. selves provi[ded] of Parke, B., in *Alsager* v. *Currie* (3), as to the deposit of [Bank] v. *Bank of Bengal* (2), that, "although there had *Bank of* [Bengal] from the bank to Palmer, inasmuch as they had dis-

[Bo[ught] promissory notes, still there was no *mutual* credit, as Cour[t] company's paper had been deposited by him for a particular pla[ce] purpose and no credit was given for the surplus," is equally fa[vour]able here. If there had been no bankruptcy here, it would have been the duty of Joyce & Co. to redeem the bills; and, Joyce & Co. having become bankrupt, it was the duty of their assignees to redeem them. There was no credit given for the surplus. I therefore think the plaintiffs are entitled to judgment for the balance of 1816*l.* 12*s.* 3*d.*

KEATING, J. I am of the same opinion, and for the same reasons.

BRETT, J. I am of the same opinion. I am unable to dis-

(1) Law Rep. 3 C. P. 444. (2) 1 Moo. P. C. 150.
(3) 12 M. & W. 751, 757.



v. *Bank of Bengal* (1); and this
of India (2) certainly did not
f that case.

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t for the plaintiffs.

judgment, and the case
mas Term, 1868.

. the plaintiffs.
h him), for the defendants.

Cur. adv. vult.

gment of the majority of the Court (Channell,
gott, B., Hannen, J., and Cleasby, B.), was de-

BY, B. The only question for consideration in this case is, ...er, at the time of the bankruptcy of Joyce & Co., there was ...ch a mutual credit between them and Overend, Gurney, & Co. as to entitle the latter to retain the proceeds of certain coffee against the large balance due to them, or whether they were bound to pay it over to the assignees notwithstanding that balance.

We are of opinion that, after the arrangement mentioned in par. 9 of the case (3), by which Overend, Gurney, & Co. were authorized to sell and convert into money the cotton and coffee which formed the subject of the transaction of the 30th of March and the 5th of April, 1865, there was such a mutual credit.

The effect of the original transactions, by themselves, was to place in the hands of the defendants the goods and documents of title mentioned, upon their accepting the two bills for 5000*l.* and 5000*l.* drawn on them by Joyce & Co., and they (Joyce & Co.) were to find the money to meet the bills, and to receive back the goods and documents.

It is clear that these transactions did not constitute a mutual credit, because, though the property was deposited, it was not deposited for the purpose of being converted into money, but with

(1) 1 Moo. P. C. 150. (2) Law Rep. 3 C. P. 444.
(3) Ante, p. 717.

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the intention of its being returned, and therefore there was no credit given by Joyce & Co. to the defendants within the mutual credit clause of the Bankrupt Law Consolidation Act, 1849, 12 & 13 Vict. c. 106, as the credit was not of such a nature as would end in a debt. The case would then have been clearly within the authority of the well-known case of *Young* v. *Bank of Bengal.* (1)

The real question, therefore, is, what is the effect of the statement in par. 9 of the case? (2) It appears that, before the bankruptcy, and before either of the bills became due, Joyce & Co., upon their being applied to by Overend, Gurney, & Co. (who were their creditors to a very large amount independent of those bills), gave them authority to sell the cotton and coffee comprised in the two letters.

It appears to us that this authority altered the relation of the parties; and that, so soon as it was given, credit was given to Overend, Gurney, & Co. for the proceeds of the sale; and the case is brought within the authority of the case in the Common Pleas of *Naoroji* v. *Chartered Bank of India.* (3) The facts of that case and of the present bring them within the second rule laid down by Gibbs, C.J., in *Rose* v. *Hart* (4), as quoted by the present Lord Chief Justice of the Common Pleas in *Naoroji* v. *Chartered Bank of India* (5), "or where there is a debt on one side, and a delivery of property, with directions to turn it into money, on the other, in such case the credit given by the delivery of the property must in its nature terminate in a debt, the balance will be taken on the two debts, and the statute is in every respect complied with."

We think the case of *Naoroji* v. *Chartered Bank of India* (3) was rightly decided by the Court of Common Pleas, and could not have been otherwise decided without subverting the rule given in *Rose* v. *Hart* (4), which had always been considered a binding authority; and, further, it does not, when properly considered, conflict with *Young* v. *Bank of Bengal* (1), because in that case there was no power to sell, except upon a default of repayment of a loan by a certain day, and the day had not arrived at the time of the bankruptcy, and therefore at that time there was no authority to sell,

(1) 1 Moo. P. C. 150.
(2) Ante, p. 717.
(3) Law Rep. 3 C. P. 444.
(4) 8 Taunt. 499.
(5) Law Rep. 3 C. P. at p. 450.

and no credit given. In truth, the power to sell was not the matter really contemplated, and was only to be exercised in case of default.

In the present case, under the original arrangements, Joyce & Co. were to find money to meet the bills, and to receive back the goods in return. But, as soon as they gave authority to sell the goods, and so gave up the right to receive them back, they were no longer under an obligation to provide the money to meet the bills, because they were not entitled to the agreed equivalent for doing so. That being so, is it not plain that Overend, Gurney, & Co. were to find the money to meet the bills, and were entitled to sell to put themselves in funds? This, upon all the authorities, would be a mutual credit, as the result must be debts on both sides.

It is deserving of notice, that, according to the statement in par. 9 (1), Joyce & Co. before the bankruptcy gave *their assent* to the sale by the defendants of the cotton and coffee, and to their receiving the proceeds. This shews that it was not the case of a mere direction to sell (which might or might not, according to the circumstances, be revocable); and it raises the proper inference that it was an assent to an application proceeding from the defendants (who were at the time very large creditors) for authority to sell for their security and reimbursement property then in their possession. Such a power of sale is a power coupled with an interest, and is irrevocable. In that view, the present case is that of a creditor having property of his debtor in his possession as a security, with power of sale; and it could hardly be disputed that such a case is one of mutual credit.

If the effect of the altered arrangement was to constitute a mutual credit, it does not, of course, signify whether the actual sale of the property took place before or after bankruptcy. So far, indeed, as the goods were sold and realized before the bankruptcy, it would be an ordinary case of set-off, and not properly speaking of mutual credit.

There is no report of the judgment of the Court of Common Pleas in the present case. It is possible that the original arrangements were chiefly considered, which were clearly not mutual

(1) Ante, p. 717.

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credits, and that the attention of the Court was not properly called to the effect of the statement in par. 9.

The result of the conclusion at which we have arrived is, that the judgment of the Common Pleas must be reversed.

KELLY, C.B. I have the misfortune to differ from the majority of the Court, and am of opinion that the judgment of the Court of Common Pleas should be affirmed. In this case Joyce & Co., of whom the plaintiffs below, Astley & Co., were assignees, agreed with the defendants below, Gurney & Co., that, upon the defendants accepting two bills for 5000*l.* each, drawn upon them by their correspondents abroad, Joyce & Co. would provide for the two acceptances at maturity; and certain bills of lading for a quantity of cotton and a quantity of coffee yet to arrive in England, together with three bills amounting together to 2000*l.*, and another bill for 400*l.*, were deposited with the defendants as a security for the providing for these acceptances on the part of Joyce & Co.

There were two transactions out of which the contract arose, one of the 30th of March, the other of the 5th of April, 1865. On the 19th of May, and while the acceptances were running, Joyce & Co. became bankrupts. They had, however, before that time, but after the making of the contracts, given their assent to the sale by the defendants of the cotton and the coffee.

Under this assent the cotton was sold, and realized, together with the produce of the bills deposited and discounted by the defendants, Gurney & Co., and the bill for 400*l.*, which became due and was paid also before the bankruptcy, the sum of 10,095*l.* 2*s.* 8*d.*, with which sum the defendants, Gurney & Co., were enabled to provide, and did provide, for the two acceptances of 5000*l.* each, the first of which was due and paid on the 23rd of June, and the second on the 30th of June, 1865; and a small surplus of 95*l.* 2*s.* 8*d.* was thus left in cash in the hands of the defendants. As to this, I may observe that there can be no doubt it came within the principle of the mutual credit clause in the Bankruptcy Act; and that sum, I think, the defendants are entitled to set off against their general balance claimed from the estate of Joyce & Co.

The coffee did not arrive until after the payment of these

acceptances; and it was sold at a later period, viz., in the month of September, and realized 1721*l.* 9*s.* 7*d.*, and the action was brought to recover these two sums, the defendants, Gurney & Co., claiming to set off against them the balance of a general account with Joyce & Co.

The question in the cause is, whether this was a case of mutual credit under the bankrupt law between the plaintiffs and the defendants, that is, between Joyce & Co. and the defendants. The Court of Common Pleas have decided that it was not; and I am of opinion that their judgment should be affirmed.

No question arises concerning the proceeds of the cotton, or the amount of the bill for 400*l.*, both having been realized before the bankruptcy; but it is further contended, on the part of the defendants below, that they were likewise entitled to treat the proceeds of the coffee as a mutual credit, to be set off against their general balance, on the ground that, where the demands on both sides result, or must result, or are likely to result, in mutual pecuniary debts, the case comes within the doctrine of mutual credit. I am, however, of opinion that it is only where, from the nature of the transaction, and according to the terms of the contract or contracts between the parties, the demands arising on the one side and on the other must necessarily result in mutual pecuniary debts, that doctrine applies and that the case of mutual credit arises.

The term "mutual credit" has been extended to demands not yet due, but such as were afterwards to become due and to be satisfied by a money payment, as in *Smith* v. *Hodson* (1), where the amount of an acceptance given by the defendant to the bankrupt for his (the bankrupt's) accommodation, although not due until after the bankruptcy, was treated as a mutual credit to be set off against a pecuniary demand by the assignees of the bankrupt for which the action was brought against the defendant. *Ex parte Prescot* (2), and *Hankey* v. *Smith* (3), are to the same effect. So *Atkinson* v. *Elliott* (4) was determined upon the same principle; while in *Rose* v. *Sims* (5) a contract or promise to indorse a bill,

(1) 4 T. R. 211.
(2) 1 Atk. 230.
(3) 3 T. R. 507.
(4) 7 T. R. 378.
(5) 1 B. & Ad. 521.

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the performance of which would not necessarily have been the payment of a debt, and the breach of which gave only an action for unliquidated damages, was held not to be a mutual credit within the Act.

Two cases cited for the defendants below require especial consideration. In *French* v. *Fenn*, Cooke's Bankrupt Laws, 8th ed. p. 565, the assignees of one Coæ brought an action against Fenn to recover one-third of the proceeds of the sale of a quantity of pearls which had been purchased on account of Coæ and himself and a third person with money advanced by him. And, although at the time of the bankruptcy the pearls remained unsold, the defendant Fenn was held entitled to set off a pecuniary demand of his own upon Coæ against the demand of the assignees of the third of the proceeds of the pearls. The distinction between that case and this is, that there, according to the terms of the contract, the transaction could not but result in a pecuniary debt which would arise upon the sale of the pearls; whereas here no debt could arise in respect of the coffee unless it should be sold before the acceptances were due, or unless the plaintiffs should make default in providing for the acceptances; and, although it was possible that the coffee might have been sold before the acceptances became due, it was at no time certain that it must result in a debt, for it did not in fact so result, the goods remaining in specie represented by the bills of lading when the transactions were closed by the payment of the two bills of 5000*l*. In the other case of *Naoroji* v. *Chartered Bank of India* (1) the plaintiffs had placed bills in the hands of the defendants to be transmitted to their correspondents in India, there to be collected, and the amount when collected to be remitted by them to the defendants in London. These transactions obviously could not but result in a pecuniary debt when they should be completed and closed by the receipt of the moneys by the defendants in London; and accordingly the moneys so received were held to constitute a mutual credit. It was said in that case that the authority to collect the bills might have been countermanded; but it was not in fact countermanded, and so the moneys received by the defendants in the result became a mere pecuniary debt. That case is, therefore, quite reconcileable with *Young* v. *Bank*

(1) Law Rep. 3 C. P. 444.

of Bengal (1), and with the view which I take of the present case.

Rose v. *Hart* (2) is next to be noticed. There it was held that a deposit of cloth by a bankrupt before his bankruptcy with the defendant to be dressed, did not constitute a mutual credit within the statute. Gibbs, C.J., there observes: "Something more is certainly here meant by 'mutual credits' than the words 'mutual debts' import; and yet, upon the final settlement, it is enacted merely that one debt shall be set against another. We think this shews that the legislature meant such credits only as must from their nature terminate in debts; as, where a debt is due from one party, and credit given by him on the other for a sum of money payable at a future day, and which will then become a debt; or where there is a debt on one side, and a delivery of property, with directions to turn it into money, on the other; in such case the credit given by the delivery of the property must in its nature terminate in a debt, and the balance will be taken on the two debts, and the words of the statute will in all respects be complied with; but where there is a mere deposit of property, without any authority to turn it into money, no debt can ever arise out of it, and therefore it is not a credit within the meaning of the statute."

Here, undoubtedly, there was an authority, but there was no direction to sell, and the authority in this case as in *Young* v. *Bank of Bengal* (1), was in effect superseded by the performance of the contract at the time stipulated, in that case by the repayment of the loan, in this by the providing for the acceptances. The authority to sell did not extinguish or put an end to the original contract, but merely superadded the provision that the defendants might, if they thought fit, provide funds to enable them to meet the two acceptances by selling the cotton and the coffee, but still leaving the power in the hands of Joyce & Co. to provide the funds and take them up themselves if they should think fit and the cotton or the coffee should remain unsold when they should become due.

Thus the whole transaction, though varied by the authority to sell, was not such as necessarily to result, and did not in fact result, in a pecuniary debt at the time when it was closed and the con-

(1) 1 Moo. P. C. 150. (2) 8 Taunt. 499.

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tract performed. Lastly, *Alsager* v. *Currie* (1) merely determines that a bill indorsed by the plaintiff, who became bankrupt, constitutes a mutual credit between him and his assignees, although it had not been dishonoured at the time of the bankruptcy, and therefore might possibly have been paid by the acceptor. In that case, however, as in all those where bills or other securities were held to be mutual credits, the instruments represented a mere sum of money, though payable conditionally or in futuro, and so became a pecuniary credit within the act. It had been determined in *Starey* v. *Barns* (2) that a bill indorsed to a creditor, and not due till after the bankruptcy, so that it might possibly have been paid by the acceptor, was nevertheless a debt proveable under the commission. It was, therefore, necessarily a mutual credit within the statutes of bankruptcy.

It was insisted at the bar that where a security might probably, though not necessarily, result in a pecuniary demand, it must be deemed a mutual credit. But I find no authority for that proposition. The three leading cases on this subject are *Young* v. *Bank of Bengal* (3); *Naoroji* v. *Chartered Bank of India* (4); and *Rose* v. *Hart* (5), in the first, Lord Brougham (6), quoting *Rose* v. *Hart*, where the Court decided that the credit must end in a debt, and observing that in *Easum* v. *Cato* (7), it appeared to have been thought enough "if the transaction would most likely end in a debt," distinctly lays it down as the judgment of the Privy Council, that there can be no mutual credit, "unless the dealing be at the time of bankruptcy such as must necessarily and at all events" so terminate. And in the case of *Naoroji* v. *Chartered Bank of India* (8), Bovill, C.J., after observing himself that the transaction *must* be such as to terminate in a debt, also quotes from *Rose* v. *Hart* the following words:—"We think this shews that the legislature meant such credits only as *must* in their nature terminate in debts."

Now the real question here is, whether the authority to sell took away the power from Joyce & Co., undoubtedly existing under the

(1) 12 M. & W. 751.
(2) 7 East, 435.
(3) 1 Moo. P. C. 150.
(4) Law Rep. 3 C. P. 444.
(5) 8 Taunt. 499.
(6) 1 Moo. P. C. 168, 169.
(7) 5 B. & A. 861.
(8) Law Rep. 3 C. P. 449, 450.

contract, to provide for the acceptances themselves, and take back the bills of lading for the coffee. I think it did not.

Upon a review of all the authorities it will be seen that, in the case of *Young* v. *Bank of Bengal* (1), the paper could only be sold and result in a debt if the plaintiff should fail in his payment to the bank on the day when the debt should become due. So here, the coffee could only have resulted in a debt if Joyce & Co. had failed to provide for the two bills of 5000*l.* each; and, these bills having in fact been provided for and paid out of the proceeds of the cotton of Joyce & Co. and other securities, the coffee, or rather the bills of lading representing it, remained in specie in the hands of the defendants, returnable or re-deliverable according to the terms of the contract to Joyce & Co. upon the providing for and payment of the acceptances; and the re-delivery of the coffee thus closing the transactions under the contract, no pecuniary debt or demand in respect of the coffee did or could arise when the transactions under the contract were thus closed and at an end.

It is contended by the defendants below that the authority to sell without any specific time for the sale being appointed, at once converted the transaction into a case of mutual credit, and that the coffee must be treated as money, because whenever it should be sold it must necessarily be converted into money, and thus might be set off against another pecuniary demand; and it is urged that it must have been the intention of the parties that the coffee should be sold at all events by the defendants, whether it should be sold or not, or arrive or not, before the acceptances should have become due, and whether they should be provided for or not by Joyce & Co.; and, that in either event, the proceeds of the coffee might be brought into the general account between Joyce & Co. and the defendants.

The plaintiffs, on the other hand, suggest that the authority to sell the cotton and the coffee may have been given merely on account of the state and prospects of the market; and that, at all events, unless both should be sold before the acceptances should be provided for, it was not intended that Joyce & Co. should forfeit the right which they possessed under the contract to provide for the acceptances themselves, and to demand the re-delivery of the secu-

(1) 1 Moo. P. C. 150.

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rities deposited. I think it altogether uncertain, and I find nothing in the case to shew, what the real intention of the parties was in the assent given to the sale of these articles. Joyce & Co. may have intended no more than that the goods should be sold for the reasons above assigned, or that if they should arrive in time the proceeds might assist them in meeting the acceptances. On the other hand, they might no doubt have intended that they should be sold at all events, whether before or after the acceptances would become due, and that the proceeds should be carried to the general account. Or Joyce & Co. may have had one meaning, and the defendants another. We can only look to the words used and the acts done, and their immediate effect upon the original contract, which was simply to add to it the agreement that the cotton, or the coffee, or both, might be sold, and if sold before the maturity of the bills that the proceeds should be applied to the payment of the bills in case Joyce & Co. should fail to provide for them; and not that they should at all events be sold, whether they should arrive before or after the maturity of the bills, and whether the bills should be provided for and paid by the sale of a portion only before they should become due,—the effect of which would be to deprive Joyce & Co. of the right, if (as actually occurred) the whole of the goods should not arrive or be sold before the maturity of the bills, to provide for the bills themselves and claim the return in specie of the remainder of the goods, and thus finally close the transaction. I think that, if either of the parties had intended more than the authority to sell necessarily imported, and so substantially to vary the original contract, and especially if the defendants intended that the bills of lading should in all events and at once become a security for their general balance, they should have said so and declared their intention in express terms. In this view of the case, inasmuch as the acceptances might have been, and in fact were, provided for while the coffee was unsold and the bills of lading in the hands of the defendants when the last of the acceptances was paid out of the produce of the other securities, I am of opinion that the case comes within the principle established by *Young* v. *Bank of Bengal* (1), and some earlier cases of less authority, that there was no mutual credit as respects the coffee, and that the

(1) 1 Moo. P. C. 150.

original contract remained in full force, and the rights of Joyce & Co. under it unimpaired, except to the extent to which it was affected by the execution of the power of sale and the realizing the proceeds of the cotton. If the law were otherwise, and a case of mutual credit were to arise whenever it is likely or probable that the transaction may result in a debt, such a doctrine would introduce great uncertainty into a class of transactions in which it is essential that a clear, precise, and intelligible rule should prevail, to govern and regulate the rights of the parties. Upon these grounds I think the judgment of the Common Pleas should be affirmed. But the great majority of the Court being of opinion that the judgment should be reversed, that will be the order of the Court.

Judgment reversed.

Attorneys for plaintiffs: *Lawrence, Plews, Boyer, & Baker.*
Attorneys for defendants: *Young, Jones, Roberts, & Hale.*

THE FINANCIAL CORPORATION, LIMITED, *v.* LAWRENCE.

June 3.

Companies Act, 1862 (25 & 26 *Vict.* c. 89), *ss.* 74, 75—*Inspectorship Deed—Liability of Debtor for subsequent Calls.*

A., being the holder of shares in a company, executed an inspectorship deed. After the execution of the deed, a call was made on A.'s shares. Subsequently, but before the property included in the deed had been distributed among the creditors, the winding up of the company commenced:—

Held, that the call was not barred by the deed.

DECLARATION, in the statutory form, for calls, and interest thereon.

Plea, that the plaintiffs were being wound up under the Companies Act, 1862, and setting out an inspectorship deed made between the defendant and one Fry, of the first part, trustees of the second part, and the several persons, companies, and co-partnership firms who, at the date of the said deed, were respectively creditors of the defendant and Fry, or would have been entitled to prove under an adjudication of bankruptcy against the defendant and Fry, founded on a petition filed on the day of the date of the

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deed. The deed provided for the distribution of the assets of the debtors among their creditors according to the rules of bankruptcy. It contained no immediate cessio bonorum, but provided that the debtors should, at the request of the inspectors, transfer to them or their nominee, all their estate and effects remaining undivided to be distributed to the creditors according to the rules of bankruptcy. The deed contained an immediate release by the said creditors of their debts in consideration of the covenants in the deed, and a provision that when the estate was fully administered, or the debtors had assigned the remainder of their estate and effects to the inspectors as before provided, the inspectors should give to the debtors a formal certificate thereof.

Averments of the fulfilment of the conditions necessary to render the deed binding on non-assenting creditors under the provisions of the Bankruptcy Act, 1861, that the defendant was, at the time of the making of the said deed, holder of the shares mentioned in the declaration; that the plaintiffs were at that time creditors of the defendant, within the meaning of the Bankruptcy Act, 1861, in respect of the claim therein pleaded to by virtue of the liability of the defendant to contribute to the assets of the company; and that all conditions were performed necessary to render the plaintiffs bound by the deed as if they had been parties thereto, and had duly executed the same.

Replication, that the call in the declaration mentioned was made after the execution and registration of the deed in the plea mentioned, and before the beginning of the proceedings for the winding up of the said company.

Rejoinder, that at the times respectively that the call was made and became payable, and the proceedings for the winding up of the company were commenced, the said deed was in force, and the estate referred to in it was being administered according to its provisions, and no part thereof had been conveyed, assured, or assigned under the provisions contained in the deed, nor had the certificates mentioned in the said deed, or either of them, been given.

Demurrers to the replication and rejoinder.

C. Russell (*Milward, Q.C.*, with him), for the plaintiffs. The

question raised on these pleadings is, whether the call made by the plaintiffs is barred by the inspectorship deed set up in the plea, the making of the call, and the winding up of the company, having both taken place after the execution of the deed, but before its trusts had been carried out.

The deed professes to be made between the defendant and persons who were his creditors, or would have been entitled to prove if he had become bankrupt, and unless therefore the plaintiffs were, at the time the deed was made, either creditors or persons who would have been entitled to prove, they were not parties to it.

It is clear that at the date of the deed the plaintiffs were not creditors of the defendant in the ordinary sense of the word. Neither could they have proved for this call under a bankruptcy taking place at the time the deed was executed, since future calls in a company which is not winding up cannot be proved. That this was so under the Bankruptcy Act, 1849, is clear, and the 154th section of the Bankruptcy Act, 1861, which was passed to meet the case of future insurance premiums which, it had been held in *Warburg* v. *Tucker* (1), could not be proved, does not apply to calls on shares. The point seems to have been decided by the case of *Martin's Patent Anchor Company* v. *Morton.* (2) There the order of events was, first, the bankruptcy; secondly, a call; thirdly, the discharge of the bankrupt; fourthly, a second call; fifthly, the winding-up of the company: and it was held that neither call was barred by the bankruptcy. The defendant will rely on the provisions of the Companies Act, 1862 (25 & 26 Vict. c. 89), ss. 74, 75 (3), which render the liability of a shareholder

(1) 5 E. & B. 384; 24 L. J. (Q.B.) 317; in error, E. B. & E. 914; 28 L. J. (Q.B.) 56.

(2) Law Rep. 3 Q. B. 306.

(3) 25 & 26 Vict. c. 89, s. 74:—"The term 'contributory' shall mean every person liable to contribute to the assets of a company under this Act in the event of the same being wound up; it shall also, in all proceedings for determining the persons who are to be deemed contributories, and in all proceedings prior to the final determination of such persons, include any person alleged to be a contributory."

s. 75:—"The liability of any person to contribute to the assets of a company under this Act in the event of the same being wound up shall be deemed to create a debt (in England and Ireland, of the nature of a speciality) accruing due from such person at the time when his liability commenced, but payable at the time or respective times when calls are made as hereinafter mentioned for enforcing

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to contribute to a company that is winding up a debt, and provable in bankruptcy; but, first, these sections only come into force when the winding up of the company has commenced, and are only applicable when the winding up precedes the bankruptcy. If the winding up had commenced before the execution of the deed, the call, though not made till afterwards, would have been proveable; for it would seem from a decision of Lord Westbury that when a company is being wound up the liability referred to in these sections must be treated as having commenced when the contributory first took the shares: *Ex parte Harding, In re Williams.* (1) Until the winding up of a company is commenced, the possible future liability to contribute is too uncertain to be estimable in any way. In *Mudge* v. *Rowan* (2) it was held that an annuity payable by a husband to a wife, which was to cease on their cohabiting again, was incapable of being estimated, and therefore could not be proved. When the winding up of a company is commenced, some estimation may be made of the liability of the contributories; but when the company is still a going concern, the shares may be even a source of profit instead of loss. Secondly, the sections in the Companies Act, 1862, refer only to the case of bankruptcy, and s. 192 of the Bankruptcy Act, 1861, though putting composition deeds on a par with bankruptcy as it then existed, cannot be held to be extended by the sections of the Companies Act which were passed subsequently.

The plaintiffs must not only be parties to the deed, but creditors within the meaning of s. 192 of the Bankruptcy Act, 1861, as they have not signed the deed, and cannot therefore be bound by it, unless that section applies to them. It has been held in *Ex parte Wilmot, In re Thompson* (3) that s. 153 of the Bankruptcy Act, 1861, which provides that claims for unliquidated damages may be assessed by a jury and then proved, could not apply to composition deeds under s. 192, because the persons claiming such damages were not creditors, the nature of their claim being too uncertain.

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such liability; and it shall be lawful, in the case of the bankruptcy of any contributory, to prove against his estate the estimated value of his liability to future calls, as well as calls already made."

(1) 33 L. J. (Bky.) 26.

(2) Law Rep. 3 Ex. 85.

(3) Law Rep. 2 Ch. App. 795.

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Thesiger (*J. Brown, Q.C.*, with him), for the defendant. This case really depends upon the effect of the Companies Act, 1862 (25 & 26 Vict. c. 89), ss. 74, 75, and first, those sections must apply to composition deeds as well as bankruptcy.

[MONTAGUE SMITH, J. It can hardly be contended that they would not apply to any deeds.]

Secondly, they apply although the making of the deed precedes the winding up if the carrying out of its trusts are not complete. In this case the inspectors might still have required to have the whole property given up to them and distributed it among the creditors. *Martin's Patent Anchor Company* v. *Morton* (1) is really in the defendant's favour, for in that case the bankrupt had obtained his discharge before the winding up commenced, and though the argument now urged for the plaintiff was evidently urged in that case too, yet Blackburn, J., decided upon another ground, and Lush, J., said distinctly that such a construction would be too narrow. In the case of *In re Richmond Hill Hotel Company, Ex parte King* (2), Lord Cairns seems distinctly to have thought that if the deed had been wide enough future calls might have been barred though the winding up was subsequent to the deed. This brings us to the question whether the plaintiffs were creditors within the meaning of the deed. That depends on the true effect of the Companies Act, 1862, s. 75. It has been distinctly laid down by Westbury, C., in *Ex parte Harding, In re Williams* (3), that the liability of a contributory spoken of in that section arises when the contributory first acquires the shares and not when the company is wound up. The case was overruled upon another ground in *Williams* v. *Harding* (4), but has been recognized as still an authority for the above rule in *In re General Estates Company Hastie's Case.* (5) In this latter case the winding up was subsequent to the bankrupt's discharge, which distinguishes it from the present case in the same way as *Martin's Patent Anchor Company* v. *Morton* (1) already referred to.

[BYLES, J. A bankrupt obtains his discharge as soon as he has made a full disclosure of his estate, and before it has been distri-

(1) Law Rep. 3 Q. B. 306.
(2) Law Rep. 3 Ch. App. 10.
(3) 33 L. J. (Bky.) 26.
(4) Law Rep. 1 H. L. 9.
(5) Law Rep. 4 Ch. App. 274.

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buted. I cannot see, therefore, how the fact of the bankrupt having obtained his discharge in those cases should affect the question.]

The fact that these calls could not have been proved till after the winding up does not shew that they were not barred. This appears clearly from s. 178 of the Bankruptcy Act, 1849 (12 & 13 Vict. c. 106). The case of *Ex parte Wilmot, In re Thompson* (1) was a very special case, and turned on the wording of the deed in question, and the provision of that section which renders an order of the court of bankruptcy necessary in order that the debt may be ascertained. The present case is more like the case of a co-surety whose liability was held proveable in *Adkins* v. *Farrington* (2), though just as difficult of ascertainment as that of the plaintiffs in this case. Claims under s. 178 of the Bankruptcy Act, 1861, afford another instance of claims which are not ascertainable at the date of the bankruptcy, but when ascertained may be proved.

C. Russell, in reply. There is a difference between bankruptcy, and deeds under s. 192 of the Act of 1861. Contingent liabilities may be proved at any time under the former, but s. 192 contemplates debts which can be ascertained, though it may not, in fact, be done at the time of the making of the deed, so that the persons may be "creditors" of a definite though unascertained amount. The recent case of *Ex parte Pickering, In re Pickering* (3) is another authority that future calls are not proveable if there is no winding up.

BYLES, J. At first sight this case seemed to present considerable difficulty; but it is now plain both on principle and authority. It appears to me that the Companies Act, 1862 (25 & 26 Vict. c. 89), ss. 74 and 75 only applies to cases where the winding up of the company has preceded the bankruptcy of the shareholder, or a deed which takes the place of a bankruptcy. Until the winding up of the company the liability of the shareholder is not calculable. It not only depends on a great variety of circumstances, such as the prospects of the company and the position of the other shareholders, but the ownership of shares may even be a

(1) Law Rep. 2 Ch. App. 795. (2) 5 H. & N. 586; 29 L. J. (Ex.) 345.
(3) Law Rep. 4 Ch. App. 58.

source of gain. This case seems on principle, therefore, to be similar to the case which has been cited of *Mudge* v. *Rowan*. (1) There nobody could estimate the value of the contingency upon which the liability of the defendant depended at the date of the bankruptcy, and the Court of Exchequer, therefore, held that the debt was not proveable. Applying the principle of that decision to the case now before us, it seems to me that the defendant's liability was not calculable till the winding up of the company had taken place, and that this debt, therefore, would not have been proveable under a bankruptcy at the date of the deed.

Turning now to authority, the cases seem to be in favour of the plaintiffs. In the case of *In re General Estates Company, Hastie's Case* (2), I think for the reasons I mentioned during the argument, the absence of an order of discharge could make no difference. The Court of Appeal in Equity, therefore, has decided that bankruptcy is no answer to future calls when it precedes the winding up of the company. There is, besides, the case of *Ex parte Pickering, In re Pickering* (3), also before the Lords Justices, which is an authority to the same effect; and so also is the case of *Martin's Patent Anchor Company* v. *Morton* (4), though there may be some expressions thrown out by the judges not so easily reconcilable with these views. Our judgment, therefore, must be for the plaintiffs.

MONTAGUE SMITH, J. I am of the same opinion. I think this debt or liability is not bound by the deed. It is not contended that this is a liability which would from its nature be proveable in bankruptcy, and would therefore come within the scope of s. 192 of the Act of 1861; but the contention has been that, by the express enactment of the Company's Act, 1862, s. 75, this liability is rendered proveable, and therefore such as to be included within the deed. It seems to me that in this case, which has been likened to that of a bankruptcy preceding the winding up of the company, that clause had not come into operation at the date of the deed, and that the date of the deed is the governing time in the decision of this case. The clauses in part 4 of the Companies Act,

(1) Law Rep. 3 Ex. 85.
(2) Law Rep. 4 Ch. App. 274.
(3) Law Rep. 4 Ch. App. 58.
(4) Law Rep. 3 Q. B. 306.

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1862, speak only from the commencement of the winding up of a company. When they begin to speak, no doubt for some purposes they have a retro-active effect; but at the date of this deed they had not begun to speak, and I think this case must be decided by the relation of the parties at that time. Several cases have been cited, and two of them seem to me strongly in favour of the plaintiffs, viz., *Martin's Patent Anchor Company* v. *Morton* (1), and *In re General Estates Company, Hastie's Case.* (2) The sequence of events in those cases is precisely the same as in this case, and the only distinction is that in those cases the debtor had received an order of discharge. Now it certainly appears to me that the order of discharge does not make a distinction on which we could decide in favour of the defendant. Those cases must have been decided on the ground that the liability was not proveable under the bankruptcy, and that must have been because the clauses I have referred to in the Companies Act, 1862, did not speak at the time of the bankruptcy. It seems to me, too, that our decision is perfectly consistent with what is said by Lord Justice Wood in *Ex parte Pickering, In re Pickering.* (3) He says, "While the concern is a going concern, the amount of liability to future calls is incapable of being estimated; but when the company is being wound up this state of things is altered, and the contributory is a debtor for an amount which the legislature assumes to be capable of being estimated." I understand him to mean that until a company has begun to be wound up, the liability to future calls cannot be proved, because it cannot be estimated, and that the company is not to be considered as a creditor in respect of it, but that this is altered as soon as the winding-up is commenced; and it is so, because as soon as the company begins to be wound up the liability of the shareholders, which was not then an existing obligation, is altered by the statute into a different species of liability; it is to be then a debt, and in England and Ireland a specialty debt, and it is to be deemed to have accrued at the time when the liability commenced, and to be payable when calls are made for enforcing such liability. That might in itself have rendered it proveable in bankruptcy; but, in order to prevent all doubt, the legislature have said that,

(1) Law Rep. 3 Q. B. 306. (2) Law Rep. 4 Ch. App. 274.
(3) Law Rep. 4 Ch. App. 58, 61.

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in case of the bankruptcy of any contributory, it shall be lawful to prove against his estate the estimated value of his liability to further calls, as well as calls already made. As soon as the winding up of the company takes place the existing liability of the shareholder is altered into a liability to contribute, and he himself is altered from a shareholder into a contributory. I quite agree, therefore, with all that my Brother Byles has said, and that the plaintiffs' was not a liability which could have been proved in a bankruptcy on a petition filed, at the date of the deed, nor were they then creditors of the defendant, and the claim of the plaintiffs does not therefore come within the terms of the deed, and there is nothing to prevent their proceeding in this action, and our judgment must be for the plaintiffs.

Judgment for the plaintiffs.

Attorneys for plaintiffs: *Flux, Argles, & Rawlins.*
Attorneys for defendant: *Linklaters, Hackwood, & Addison.*

June 15.

ADAMS *v.* THE LANCASHIRE AND YORKSHIRE RAILWAY COMPANY.

Negligence—Carrier of Passengers—Proximate Cause of Injury.

The door of a carriage, in which the plaintiff was being carried as a passenger, on the defendants' railway, flew open several times through the negligence of the defendants. There was room in the carriage for the plaintiff to sit away from the door, and the train would have stopped at a station in three minutes. The plaintiff shut the door three times. The door opened a fourth time, and in endeavouring to shut it again the plaintiff fell out and was hurt. The train stopped at three stations between the time when the door first opened and the occurrence of the accident:—

Held, that, as the inconvenience that the plaintiff would have suffered if he had not shut the door was slight, and the peril incurred in his attempt to shut it considerable, the injury he suffered was not the necessary or natural result of the company's negligence, and that they were therefore not liable for such injury.

ACTION to recover damages for personal injuries sustained by the plaintiff through the negligence of the defendants.

The case was tried before Brett, J., at the Liverpool spring assizes, when the following facts appeared. The plaintiff was a

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passenger, in the preceding July, by one of the defendants' trains from Waterloo, in Lancashire, to Liverpool. He sat next to the door of the carriage, but there were only two or three other persons in the carriage, and he could have sat away from the door if he had chosen to do so. Shortly after leaving Waterloo the door flew open, and there was evidence to shew that this arose from the lock of the door being defective owing to the negligence of the defendants. The plaintiff shut and fastened it, but shortly afterwards it again flew open and he shut and fastened it again. This occurred three times, and the fourth time that the door flew open the plaintiff, while holding it shut with his left hand and trying to fasten it with his right, fell out and was injured; the train would have arrived at the next station at which it stopped in three minutes, and it would have reached Liverpool in about five minutes. The train stopped at three stations between the time when the door first opened and the occurrence of the accident.

A verdict was found for the plaintiff, with leave to the defendants to move to enter the verdict or a nonsuit on the ground that there was no evidence that the accident was caused by their negligence.

Holker, *Q.C.*, having obtained a rule accordingly,

R. G. Williams shewed cause. (1) There is no doubt that there was evidence of negligence on the part of the defendants; the only question is whether there was contributory negligence on the part of the plaintiff, or at least whether the injury can be treated as the consequence of the defendants' negligence. This depends upon whether it was reasonable for the plaintiff, under the circumstances, to endeavour to shut the door; that was a question for the jury, and was left to them, and they have decided it in his favour. The Court will not say, as a matter of law, that a passenger cannot, under such circumstances, be justified in shutting the door.

[MONTAGUE SMITH, J. Is not the case of *Siner* v. *Great Western Railway Company* (2) against you?]

The Judges who gave judgment for the defendants in that case, both in the Exchequer and in the Exchequer Chamber, based

(1) There was also a demurrer to the declaration, but it was withdrawn by agreement.

(2) Law Rep. 4 Ex. 117.

their decision on the ground that there was no evidence of negligence on the part of the defendants. In *Jones* v. *Boyce* (1), where the horses of the defendant's coach ran away, and the plaintiff, a passenger, jumped off and was injured, Lord Ellenborough laid down that if the plaintiff had acted from a reasonable apprehension of danger produced by the defendant's negligence, the defendant was liable for the damage the plaintiff had sustained while so acting; and the principle of that case applies to the present.

Bayliss (*Holker, Q.C.*, with him), in support of the rule. Admitting the negligence of the defendants, yet the negligence was not sufficiently connected with the accident to render them liable for it. The plaintiff was a mere volunteer in shutting the door; it was not even necessary to do so to avoid inconvenience, for he might have got out of the compartment at one of the stations at which the train stopped, or at any rate have sat elsewhere in the carriage if he had liked. There is nothing to shew that the door remaining open would have caused any danger. If to avoid inconvenience a man runs into peril, he must take the consequences.

BYLES, J. I am of opinion that the rule must be made absolute. I quite agree that there is a distinction between this case and that of *Siner* v. *Great Western Railway Company* (2), because it cannot be doubted in this case that the defendants were negligent, and that but for their negligence the accident would not have happened. Their negligence, however, was neither the immediate nor the efficient cause of the accident; that cause was the act of the plaintiff, in trying to shut the door and resting a part of his body against it. Did, then, the defendants' prior negligence necessitate this act of the plaintiff? It has been suggested that he might have got out of the compartment, but it is at any rate plain that he might have changed his seat to another part of the compartment, or held the door without attempting to fasten it, and the more so as he knew by experience that the door would not remain shut. Neither of these acts would have been attended with any serious inconvenience, as he had only to wait for three minutes, by

(1) 1 Stark. 493. (2) Law Rep. 4 Ex. 117.

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which time the train would have stopped again, and I think he had no right, therefore, to run the risk of attempting to shut the door, and the defendants are not liable for the consequences of this act. On this ground, I think that a nonsuit should be entered; but my Brother Brett did right in leaving the question to the jury, so that the amount of damages might be ascertained, in case the Court should decide otherwise.

MONTAGUE SMITH, J. I am of the same opinion. I think that the injury sustained by the plaintiff did not naturally or legitimately flow from the negligence of the defendants. I will assume that there was negligence on the part of the defendants, and, from the evidence, I should rather infer that there was such, in their having the lock of the carriage in an imperfect state. The door came open several times, and on the last time of its doing so this accident happened. At the time the plaintiff got up to shut the door he was in a position of entire safety, and it is not even stated in the evidence that he was suffering inconvenience from draughts or otherwise. Such being the case, he voluntarily undertook to shut the door, and, in doing so, used both hands, and did not hold on with either of them. He was obviously doing that which was dangerous, and the ground upon which the plaintiff puts his case is, that it was necessary to do so to obviate the results of the defendants' negligence. I quite agree that, if the negligence of a railway company puts a passenger in a situation of alternative danger, that is to say, if he will be in danger by remaining still, and in danger if he attempts to escape, then, if he attempts to escape, any injury that he may sustain in so doing is a consequence of the company's negligence; but if he is only suffering some inconvenience, and, to avoid that, he voluntarily runs into danger, and injury ensues, that cannot be said to be the result of the company's negligence. It is hardly necessary to say, that though I use the words "danger" and "inconvenience," yet, if the inconvenience is very great and the danger run in avoiding it very slight, it may not be unreasonable to incur that danger. Here, however, I see no proof that the plaintiff was suffering any inconvenience, certainly none comparable to the danger he ran in endeavouring to close the door in the way he did.

I think the rule is well stated and illustrated by Lord Ellenborough in *Jones* v. *Boyce*. (1) Lord Ellenborough says: "To enable the plaintiff to sustain the action, it is not necessary that he should have been thrown off the coach; it is sufficient if he was placed, by the misconduct of the defendant, in such a situation as obliged him to adopt the alternative of a dangerous leap or to remain at certain peril; if that position was occasioned by the default of the defendant, the action may be supported;" and again, "if I place a man in such a situation that he must adopt a perilous alternative, I am responsible for the consequences."

In the present case I think there is no evidence that the plaintiff was placed in such a situation, or that he was justified in undertaking the peril he voluntarily undertook. Many cases might be put in which the defendants' negligence causes inconvenience which would not justify the plaintiff in incurring danger to avoid it. Take the case of a passenger intending to alight at a station, but the train starting before the door of the carriage has been opened for him to get out, if he then opens the door and jumps out, he must take the consequences of his act, otherwise he would throw on the company a greater risk than they have undertaken. If he keeps his seat, he may bring an action against the company for carrying him on, and so recover from them the true damages. So here the plaintiff could not, by his own act, impose on the company a liability for the injury caused by his falling out of the carriage. The injuries he has sustained were not the result of the negligence mentioned in the declaration. On these grounds, I think the rule should be made absolute.

BRETT, J. I am not prepared to differ from the rest of the Court. I think, on the whole, this was not a proper case to go to the jury, though at the trial I thought there was sufficient evidence for them to act upon. I think the jury were justified in finding that the defendants were negligent; but the immediate result of their negligence was not any peril to the plaintiff, but only considerable inconvenience. It has been argued that no amount of inconvenience, if there be no actual peril, will justify a person incurring danger in an attempt to get rid of it. I confess

(1) 1 Stark. 493, 495.

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I am not prepared to go to that length. I think, if the inconvenience is so great that it is reasonable to get rid of it by an act not obviously dangerous, and executed without carelessness, the person causing the inconvenience by his negligence would be liable for any injury that might result from an attempt to avoid such inconvenience. I think here the jury might well find that there was no obvious danger, and that the act was not carelessly done; but I think the inconvenience was not so great as to make it reasonable for the plaintiff to get rid of it in this way. It was a July afternoon. There was no evidence of the weather being bad, and in three minutes the train would have arrived at the next station. I think, therefore, there was no great inconvenience; and, though the danger was not obvious, I think it could not be said that the act was not dangerous in itself; and under these circumstances, I think the putting himself into peril was contributory negligence, and that the case therefore ought not to have been left to the jury.

Rule absolute for a nonsuit.

Attorneys for plaintiff: *Johnson & Weatherall.*
Attorneys for defendants: *Clarke, Woodcock, & Ryland.*

July 5.

FARROW *v.* WILSON AND WIFE, ADMINISTRATRIX, &c.

Master and Servant—Dissolution of Contract by Death.

In contracts for personal services, it is an implied condition that the death of either party shall dissolve the contract.

A. was hired by P. to serve as farm bailiff, at weekly wages, with other advantages, and a residence in a farm-house; the service to be determinable by a six months' notice or payment of six months' wages. P. died:—

Held, that P.'s personal representative was not bound to continue A. in her service, or pay him six months' wages.

DECLARATION that, in consideration that the plaintiff would enter into the service of one Price Pugh and serve him in the capacity of farm bailiff, at the wages of 15*s.* per week, together with the benefit of certain bonuses and of a certain residence in a farm house until the service should be determined as thereinafter mentioned, Price Pugh promised the plaintiff to retain him in his

service until the expiration of six months after notice given by Price Pugh or the plaintiff to the other of them to put an end to such service, or that, in case Price Pugh should put an end to such service without such notice, he should pay to the plaintiff such wages at the rate aforesaid for the six months from the time of the end of such service; that the plaintiff accordingly entered into the service of Price Pugh, and continued therein until the death of Price Pugh, and had always been ready and willing to continue in the service of his administratrix in the capacity and on the terms aforesaid,—of which the defendants always had notice; yet that the defendants wrongfully dismissed the plaintiff from the said service without such notice as aforesaid—and without paying the plaintiff such six months' wages as aforesaid, whereby, &c.

Demurrer and joinder.

June 26. *Bridge*, in support of the demurrer, contended that in all cases of personal service the contract of service was terminated by the death of the master, and that at any rate in this case as part of the remuneration was the right to reside in a farm house which, in the absence of evidence, it must be presumed would go to the heir, there was a sufficient indication of an intention that the service should terminate on the master's death. He referred to Williams on Executors, 5th ed. p. 757; Wentworth on Executors, 14th ed. p. 141; *Tasker* v. *Shepherd* (1); and *Boast* v. *Firth*. (2)

[WILLES, J., referred to *Jackson* v. *Bridge* (3), and pointed out that in that case the Court grounded their decision on the fact that the contract contained the word assigns.]

Cooper, in support of the declaration. The general rule is that contracts can be enforced against the executors of the person contracting. It is only where the contract cannot be performed with the executor that it determines by the death of one of the parties, unless it appears from the terms of the contract that it is intended to be so terminated. There is nothing to shew the farm was not leasehold, and as the contract is one which on its face would survive to the administratrix, it must be presumed that the farm would in fact pass to her so as to enable her to fulfil it. Though the

(1) 6 H. & N. 575; 30 L. J. (Ex.) 207.

(2) Law Rep. 4 C. P. 1.

(3) 12 Mod. 650.

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servant might perhaps object to the transfer of his services, yet if the servant waived that right, the administratrix, who represented the master, could not. Whatever may be the case with a personal attendant, like a valet, at any rate when the objects on which the service is to be performed, survives, as the children in the case of a governess, the service continues, and if the farm passed to the administratrix the service in the present instance is of that kind. He cited *Rex* v. *Inhabitants of Ladock* (1); *Rex* v. *Peck*. (2)

Bridge, in reply.

Cur. adv. vult.

July 5. The judgment of the Court (Willes and Montague Smith, JJ.) was delivered by

WILLES, J. In this case our judgment is for the defendants. Generally speaking, contracts bind the executor or administrator, though not named. Where, however, personal considerations are of the foundation of the contract, as in cases of principal and agent and master and servant, the death of either party puts an end to the relation; and, in respect of service after the death, the contract is dissolved, unless there be a stipulation express or implied to the contrary. It is obvious that, in this case, if the servant had died, his master could not have compelled his representatives to perform the service in his stead, or pay damages, and equally by the death of the master the servant is discharged of his service, not in breach of the contract, but by implied condition.

Judgment for the defendants.

Attorney for plaintiff: *G. Brady.*
Attorney for defendants: *W. Hammond.*

(1) Burr. S. C. 179. (2) 1 Salk. 66.

MACDONALD *v.* THOMPSON.

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June 11.

Bankruptcy Act, 1861 (24 & 25 *Vict. c.* 134), *s.* 110—*Resolution of Creditors as to the mode of Winding up the Estate.*

Section 110 of the Bankruptcy Act, 1861, gives a specified majority of creditors power to resolve that "proceedings in bankruptcy shall be suspended and the estate of the bankrupt shall be wound up and administered in such manner as such majority shall direct." A bankrupt proposed at a meeting of his creditors that the bankruptcy should be suspended under s. 110, and that he should receive back his estate and pay a composition of 2*s.* 6*d.* in the pound. The creditors, by a resolution duly confirmed, accepted the proposal. The resolution did not purport to re-vest the estate in the bankrupt until after the payment of the composition. The messenger of the court of bankruptcy then went out of possession, but the creditors' assignee who had guaranteed the messenger his fees, retained the keys of the premises. Subsequently and before payment of the composition, a judgment creditor, who was not present at the meeting and had not assented to the resolution, issued execution and seized goods belonging to the bankrupt's estate. On an interpleader summons between the assignee and the execution creditor:—

Held, that the fact of the bankruptcy being suspended under s. 110 did not re-vest the estate in the bankrupt, and that the assignee was therefore entitled to the goods.

Semble, per Montague Smith, J., that the resolution, if valid under s. 110, was binding on non-assenting creditors.

Semble, per Brett, J., that the bankruptcy still continued in force till the bankrupt obtained his discharge.

Query, whether a resolution to accept a composition is within s. 110.

INTERPLEADER issue tried in the Passage Court at Liverpool. The question was whether the plaintiff was entitled to certain goods as against the defendant.

At the trial it appeared that the plaintiff was the creditors' assignee of one W. Pope, who became bankrupt in December, 1868, and to whom the property in question had belonged. On the 11th of January, 1869, at the first meeting of creditors, the following resolution was passed:—"This being the day appointed for the first meeting of creditors, and it appearing to us, the undersigned, being a majority in value of the creditors present of the above-named bankrupt, that no further proceedings in bankruptcy should be taken in this case on the ground that it is advisable that an offer made by the bankrupt to take all his estate and effects of every description and pay all his creditors a composition of 2*s.* 6*d.*

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in the pound on the amount of their respective debts payable in one month from the date hereof, namely, on the 11th of February next, should be accepted, we resolve that no further proceedings shall be taken in bankruptcy." This resolution was duly confirmed at a subsequent meeting of creditors on the 25th of January. On the afternoon of that day the plaintiff gave a guarantee to the messenger of the court of bankruptcy to pay his fees, and the messenger then gave up possession of the goods and gave the keys of the place to the plaintiff, who kept them up to the commencement of the action. On the 26th of January the defendant issued a fi. fa. on a judgment he had obtained against the bankrupt previous to the bankruptcy, and seized the goods. On the 27th of January the bankrupt applied for, and on the 29th obtained, his discharge. On these facts a verdict was found for the plaintiff, with leave to the defendant to move to enter the verdict.

L. Temple having obtained a rule accordingly,

C. Russell, and *Foard*, shewed cause. These goods vested in the plaintiff on his appointment as creditors' assignee under s. 117 of the Bankruptcy Act, 1861, and the question is what was the effect of the resolution which the creditors adopted under s. 110 of that Act. (1) That section speaks of the bankruptcy being sus-

(1) 24 & 25 Vict. c. 134, s. 108:—"Immediately on adjudication, it shall be the duty of the official assignee to take possession of the bankrupt's estate, and to retain possession thereof until the appointment of a creditors' assignee; but if such official assignee, or if the court, upon the representation of any creditor, shall be of opinion that the keeping possession of the bankrupt's property is not requisite for the due protection of the creditors, such possession shall not be continued."

s. 110:—"In case at such meeting, or at any other meeting of creditors, any proposal shall be made by or on behalf of the bankrupt which it shall appear to the major part in value of the creditors then present ought to be accepted, or if it shall appear to the majority in value of the creditors present at any meeting to be desirable on any ground to resolve, and such majority shall resolve, that no further proceedings be taken in bankruptcy, the meeting shall be adjourned for fourteen days, in order that notice of such resolution may be given to every creditor by the official or creditors' assignee, which shall be done accordingly; and if at such adjourned meeting a majority in number representing three-fourths in value of the creditors present shall so resolve, the proceedings in bankruptcy shall be suspended, and the estate and effects of the bankrupt shall be wound up and administered in such manner as such majority shall direct, and the

pended not annulled, and the bankruptcy therefore still continues as a bar to any execution being issued by a creditor, and this is confirmed by s. 136, which gives the Court power to settle all disputes which may arise with respect to such a resolution, and to set it aside if inequitable. It is true that it is not expressly said that the resolution shall be binding on non-assenting creditors, and that their debts are not bound till after the order of discharge, but this must be because the goods are to remain in the possession and under the control of the court.

[MONTAGUE SMITH, J. Is a resolution to accept a composition within the meaning of the 110th section; that seems only to refer to resolutions fixing upon the mode in which the estate shall be wound up, and not dispensing with the winding-up altogether.

BOVILL, C.J. This may perhaps be treated as a mode of winding up the estate by selling it to the bankrupt for the amount agreed upon as a composition. If the goods have been re-vested in the bankrupt the defendant will be entitled to succeed, as it is for the plaintiff to make out his title.]

The plaintiff has at any rate a possessory title which will be sufficient against a mere stranger, for he had guaranteed the fees of the messenger of the bankruptcy court, and had kept the possession of the goods as security for that and also for the payment of the composition. Moreover, until the composition was paid, the property would not re-vest in the bankrupt; for the resolution is not an unconditional acceptance of the offer, but only that no further proceedings in bankruptcy should be taken in order that the proposal of the bankrupt might be carried out.

L. Temple, in support of the rule. The messenger of the court is the person who was entitled to hold possession of the goods, if any one was, under the Bankruptcy Act, but the plaintiff authorized him to give up possession of them. It is clear from s. 108 that the assignee may give up possession of the goods if the cre-

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bankrupt having made a full discovery of his estate shall be entitled to apply for an order of discharge."

s. 117:—"Upon the appointment of the creditors' assignee, all the estate, both real and personal, of the bankrupt, shall be divested out of the official assignee, and vested in the creditors' assignee."

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ditors think it best, and that has been the case here. The bankruptcy is only "suspended" under s. 110 till the estate is wound up, and here the creditors have wound it up by handing it over to the bankrupt in consideration of the composition; when it has been wound up the power of the bankruptcy court over it ceases. Even if the defendant is bound by the resolutions, the court of bankruptcy is the only court that will interfere to restrain him.

BOVILL, C.J. I am of opinion that the Judge of the Passage Court was quite right in the view he took of this case. It is perfectly clear that the goods in question passed on the bankruptcy of Pope to the plaintiff as his assignee; that being so, they would remain vested in him unless something has occurred to take them out of him. There is nothing in the fact of the bankruptcy being suspended by force of s. 110 of the Bankruptcy Act, 1861, to revest the property in the bankrupt. Mr. Temple says that the resolution that has been referred to was effectual under that section, and I think that is so; but that brings us to the consideration what was the meaning of the resolution. I find nothing in it to take the property in the goods out of the plaintiff till after the composition was paid, and he accordingly, in fact, remained in possession of them. The composition not having been yet paid, the plaintiff is entitled to recover the goods.

BYLES, J. I am of the same opinion. It seems to me no doubt can be suggested that the effect of the bankruptcy was, at any rate, to vest from the time of adjudication the property in the plaintiff, and nothing has since occurred to take it out of him. It is not necessary to decide whether the resolution was effectual under s. 110 of the Bankruptcy Act, 1861, or not; for if it was so, it leaves the property where it was, with the difference only that it is subject to the composition instead of being subject to the original debts.

MONTAGUE SMITH, J. I am of the same opinion. It is clear that at one time this property was vested in the assignee. I very much doubt if a mere composition is within s. 110 of the Bankruptcy Act, 1861, at all, because that section refers to the winding-up and the administering of the bankrupt's estate, and

speaks of the bankrupt having made a full discovery of it. Reading, however, this resolution as my Lord has read it, it may be it is within the section, because it provides for the administration of the bankrupt's estate in a particular way, but there is a month for carrying it out, and this execution came in before it had been completed. On another ground, I think that the defendant had no right to issue execution, viz. that he was bound by the resolution as one of the minority. It is admitted that, as soon as the bankrupt got his order of discharge the defendant was bound by it, and it seems to me that it would be against the whole policy of the section to hold that when a resolution had been come to for administering the estate in a particular way it could be defeated by one of the minority issuing execution.

BRETT, J. On the petition in bankruptcy, and the appointment of the plaintiff as assignee, the property in question passed to him, and the question is whether he has since been divested of it. Mr. Temple's argument is based on the supposition that the resolution is within s. 110 of the Bankruptcy Act, 1861, because if not there is no colour for saying that the property had ceased to be in the plaintiff; if then it is so, what is the true construction of that section? It says that the effect of a resolution shall be that the bankruptcy shall be suspended; but it is not said that s. 117 shall be set aside and the court have no more control in the matter. It seems to me that the bankruptcy is to remain in force and will protect the bankrupt and his property till he obtains his discharge, and then, at any rate, the right of execution by his creditors will cease. I think, therefore, this rule should be discharged with costs.

Rule discharged.

Attorneys for plaintiff: *Westall & Roberts, for Forshaw, Goodman, & Hawkins.*

Attorneys for defendant: *Johnson & Wetherell.*

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June 17.

PILLAR *v.* THE LLYNVI COAL AND IRON COMPANY, LIMITED.

Truck Act (1 & 2 *Wm.* 4, c. 37, *ss.* 23, 24)—*Master and Servant—Prohibition of a Master to make Stoppages without a Written Agreement.*

The Truck Act (1 & 2 Wm. 4, c. 37), s. 23, provides that an employer may make a stoppage or deduction from the wages of any artificer in respect of medicine or medical attendance, or of fuel, materials, tools, implements, hay, corn, or provender. "Provided always, that such stoppage or deduction shall not exceed the real and true value of such fuel, materials, tools, implements, hay, corn, or provender, and shall not be in any case made from the wages of such artificer, unless the agreement or contract for such stoppage or deduction shall be in writing and signed by such artificer." And s. 24 provides, "that nothing in the Act shall extend to prevent" any employer "from deducting, or contracting to deduct, any sum or sums of money from the wages of such artificers for the education of any child or children of such artificer, and unless the agreement or contract for such deduction shall be in writing and signed by such artificer."

An employer stopped part of the wages of an artificer as a contribution to funds established by him to provide medicine and medical attendance for the artificers employed by him, and schools for their children, without any written agreement with the artificer:—

Held, that the artificer was entitled to recover the whole of the deductions.

DECLARATION on the common counts for work done, materials provided, money had and received, and on accounts stated.

Pleas: Never indebted; payment; and set-off. Issues theron.

The action was tried before Montague Smith, J., at the spring assizes at Bristol, and it was proved that the defendants were a company engaged in coal and iron works, and the plaintiff an artificer employed by them. The defendants established doctor's and sick funds, for the purpose of providing medical attendance and relief in sickness for their workmen, and also a school fund for providing free schools for their workmens' children. They deducted monthly from the plaintiff's wages a sum for each of these funds, and paid the remainder partly in cash, and partly by cheques on a bank within fifteen miles of the works, and also, from time to time, any sum due to the company for coals, and for materials for his work, which he voluntarily purchased from the company; the plaintiff, however, was in fact, though not nominally, compelled to change the cheques at a shop established by the defendants, where he received for them only 4*s.* in the pound in cash and the remainder

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in goods. The action was brought to recover the amount so paid by cheques instead of cash, and the amount of the deductions.

A verdict was found for the plaintiff with leave to the defendants to move to enter a nonsuit or verdict for the defendants, the Court to draw inferences of fact, all points to be open to the defendants, and the amount of the verdict, if the verdict for the plaintiff should stand, to be settled by arbitration according to the decision of the Court respecting the different heads of claim.

Prideaux, Q.C., having obtained a rule accordingly,

Cole, Q.C., and *Bailey*, shewed cause, and argued first, on the questions of fact, that the plaintiff was an artificer within the meaning of the Act, that the plaintiff was compelled to change the cheques at the defendants' shop and accept goods for four-fifths of the amount, and that the drawing the cheques on a bank within fifteen miles, was a mere subterfuge for the evasion of the Act. Secondly, respecting the deductions in respect of the doctor's, sick, and school funds, that they were illegal, because there was no written agreement with the plaintiff that they should be made. The claim in respect of the deductions for coal and materials was not pressed.

Mellish, Q.C., *Prideaux, Q.C.*, and *Pindar*, for the defendants, contended, first, on the facts that the plaintiff was not an artificer, that he was at any rate not employed in the same business as the defendants, and that the changing of the cheques at the defendants' shop was not compulsory, but the payment a bonâ fide payment by cheques within the Act. Secondly, with respect to the deductions, that upon the true interpretation of 1 & 2 Wm. 4, c. 37, ss. 23, 24 (1), a written agreement was not necessary, the proviso in

(1) 1 & 2 Wm. 4, c. 37, s. 23:—"And be it further enacted and declared that nothing herein contained shall extend, or be construed to extend, to prevent any employer of any artificer or agent of any such employer from supplying or contracting to supply to any such artificer any medicine or medical attendance, or any fuel, or any materials, tools, or implements to be by such artificer employed in his trade or occupation, if such artificers be employed in mining; or any hay, corn, or other provender to be consumed by any horse or other beast of burden employed by any such artificer in his trade and occupation; nor from demising to any artificer, workman, or labourer employed in any of the trades or occupations enumerated in this Act, the whole or any part of any tenement at any rent to be thereon reserved; nor from supplying or con-

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s. 23 referring only to deductions in respect of fuel, materials, tools, implements, hay, corn, and provender, and not to deductions in respect of medicine and medical attendance, and the final clause of the 24th section being hardly intelligible, but certainly not taking away, in the absence of writing, the right given to the employer by the former part of the section to make the deduction for the school fund. They referred to *Cutts* v. *Ward*. (1)

Cur. adv. vult.

July 5. The judgment of the Court (Montague Smith and Brett, JJ.) was delivered by

MONTAGUE SMITH, J. [who, after deciding upon the evidence as a question of fact, first, that the defendants had a right to the personal services of the plaintiff and that he was in their employment as an artificer; secondly, that he was employed in the same trade and occupation which the defendants carried on; thirdly, that the giving the cheques was a mere subterfuge to enable the defendants to pay the plaintiff part of his wages in goods instead of money; and fourthly, that the deductions in respect of coal and materials formed no part of the system of payment and could not

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tracting to supply to any such artificer any victuals, dressed or prepared under the roof of any such employer, and there consumed by such artificer; nor from making or contracting to make any stoppage or deduction from the wages of any such artificer for or in respect of any such rent, or for or in respect of any such medicine or medical attendance; or for or in respect of such fuel, materials, tools, implements, hay, corn, or provender, or of any such victuals dressed and prepared under the roof of any such employer; or for or in respect of any money advanced to such artificer for any such purpose as aforesaid. Provided always, that such stoppage or deduction shall not exceed the real and true value of such fuel, materials, tools, implements, hay, corn, and provender, and shall not be in any case made from the wages of such artificer, unless the agreement or contract for such stoppage or deduction shall be in writing and signed by such artificer."

s. 24:—"Nothing herein contained shall extend, or be construed to extend, to prevent any such employer from advancing to any such artificer any money to be by him contributed to any friendly society, or bank for savings, duly established according to law, nor from advancing to any such artificer any money for his relief in sickness, or for the education of any child or children of such artificer, nor from deducting or contracting to deduct any sum or sums of money from the wages of such artificers, for the education of any such child or children of such artificer, and unless the agreement or contract for such deduction shall be in writing and signed by such artificer."

(1) Law Rep. 2 Q. B. 357.

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be recovered by the plaintiff; proceeded]:—The only remaining point is with respect to the stoppages debited to the plaintiff in the periodical settlements for the doctor's, sick, and school funds. It was not denied that these stoppages were made, and that there was no consent in writing signed by the plaintiff that they should be so made. We think that upon the right construction of the 23rd and 24th sections, such a written consent was necessary to enable the defendants to make these stoppages, and consequently we are obliged to hold that the plaintiff is entitled to recover the amount of them. The result is that the rule to enter a nonsuit will be discharged, and there must be a reference to an arbitrator as arranged at the trial, to ascertain the amount at which the verdict is to stand.

Rule discharged.

Attorneys for plaintiff: *Miller & Miller.*

Attorneys for defendants: *Willoughby & Cox.*

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June 26.

Building Contract—Interpretation of Contract—Penalty for Delay.

A building contract, entered into by a burial board, contained a clause that it should be lawful for the said burial board, in case the said contractor should fail in the due performance of any part of his undertaking, or should become bankrupt . . . . or should not, in the opinion and according to the determination of the architect, exercise due diligence and make such progress as would enable the works to be effectually and efficiently completed at the time and in the manner therein mentioned, to determine the contract by a notice in writing under the hand of the clerk of the burial board, and to enter upon and take possession of the works, and of the plant, tools, and materials of the contractors, and use or sell or use and sell the same as the absolute property of the burial board.

The architect having given a certificate that the plaintiff was not exercising due diligence, the burial board gave the notice required to determine the contract, and took possession of the works; the certificate was given bonâ fide, but the delay was in fact occasioned by the act of the board in ordering extra works and otherwise:—

Held, that the board were, notwithstanding, entitled to act as they did, their right to enter on the works being, by the terms of the contract, dependent on the opinion and judgment of the architect, and not upon the contractors' failure to exercise due diligence, in fact.

DECLARATION, setting out a building agreement entered into by the defendants with the plaintiff, of which the material clauses, for the purposes of this case, were the following:—

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S. 4:—"That the said architect shall have full power and authority from time to time and at all times, by himself and his clerks of the works, assistant, or inspector for the time being (if any such be at any time or times appointed), to make and issue such further drawings and to give such further instructions and directions as may appear to him or them, or either of them, necessary or proper for the guidance of the said contractor, and the good and sufficient execution of the works, according to the terms of this specification; and the said contractor shall receive, execute, and obey and be bound by the same, according to the true intent and meaning thereof, and as fully and effectually as though they had accompanied, or had been mentioned or referred to, in this specification; and he or they may also alter or vary the levels or positions of any of the buildings contemplated by this specification, or order any further and other works and buildings not contemplated by this specification or the contract; or may order any of the buildings contemplated thereby to be omitted; or may order any work or any portion of the works, executed or partially executed, to be removed, changed, or altered, and, if needful, that other works shall be substituted instead thereof; but the said burial board shall not become liable to the payment of any charges in respect of any such additions, alterations, or deviations unless the instruction for the performance of the same shall have been given in writing by the said architect, or his said clerk, assistant, or inspector, and shall be claimed for in writing by the said contractor (the claim to contain the description and quantity of the work done, labour employed, and materials used, and the prime cost of such materials and labour respectively) within the week in which such work is executed and such materials used, and before the same are placed out of view or beyond check or admeasurement, nor unless the value of any altered or varied works, or any other further works, shall, whenever practicable, have been determined and settled before such altered or varied or further works shall have been commenced, such value, in case of dispute, to be ascertained and fixed by the architect, who shall determine in all cases whether such previous agreement were practicable or not; and in all cases where he shall consider the same to have been practicable, the contractor shall not be entitled

to make any claim in respect of such altered or varied or further works, unless such previous agreement were made. The contractor (on signing the contract) must furnish a list or schedule of the prices at which the contract has been made out, to serve as a guide in estimating the value of any alterations, additions, or deductions. The certificate of the architect must in all cases be obtained previous to the payment of any money under this contract."

S. 24:—"Provided always, that if by reason of any additions to or enlargements of the works (which additions or enlargements the said architect is hereby authorized to make), or for any other just cause arising with the said burial board, or with the architect, or his clerk, assistant, or inspector, or in consequence of any unusual inclemency of weather, or for want or for alleged want or deficiency of any orders, drawings or directions, or by reason of any difficulties, impediments, obstructions, oppositions, doubts, disputes, or differences whatsoever and howsoever occasioned, the contractor shall, in the opinion of the architect, have been unduly delayed or impeded in the completion of his contract, it shall be lawful for the said architect to grant from time to time, in writing under his hand, such extension of time, and to assign such other day or days for completion as to him may seem reasonable, without thereby prejudicing, or in any manner affecting, the validity of the contract or the sufficiency of the tender; and any and every such extension of time shall be deemed to be in full compensation and satisfaction for or in respect of any and every actual and probable loss or injury sustained or sustainable by the said contractor in the premises, and shall in like manner exonerate him from any claim or demand on the part of the said burial board for or in respect of the delay occasioned by the cause or causes in respect of which any and every such extension of time shall have been made, but not further or otherwise, or for or in respect of any delay continued beyond the time mentioned in such writing or writings respectively."

S. 27:—"That it shall be lawful for the said burial board, in case the said contractor shall fail in the due performance of any part of his undertaking, or shall become bankrupt or insolvent, or shall compound with his creditors, or propose any composition to his

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creditors for the settlement of their debts, or shall carry on or propose to carry on his business under inspectors on behalf of his creditors, or shall commit any act of bankruptcy, or shall not, in the opinion and according to the determination of the said architect, exercise due diligence and make such progress as would enable the works to be effectually and efficiently completed at the time and in the manner aforesaid, to determine the contract by a notice in writing under the hand of the clerk of the burial board, and to enter upon and take possession of the said works, and of the plant, tools, and materials of the said contractor, and use or sell or use and sell the same as the absolute property of the burial board."

S. 36:—"If the works are let in one contract, the whole to be completed on or before the second day of October, one thousand eight hundred and sixty-eight."

Averments, that the defendants refused to permit the plaintiff to complete the contract, and finally renounced the contract, whereby the plaintiff was deprived of the price and profits he would have obtained on its completion.

Plea, that the plaintiff failed in the due performance of certain parts of his undertaking, and did not, in the opinion and according to the determination of the said architect and within the meaning of the said agreement, exercise due diligence and make such due progress as provided in and by the said 27th clause above-mentioned, and as would have enabled the said works to be effectually and efficiently completed at the time and in the manner by the said alleged agreement provided.

Averments, that all conditions were fulfilled, &c., to entitle the defendants to give the notice, and proceed as thereinafter mentioned, that a notice was given to the plaintiff under the hand of the clerk of the board as provided by the 27th clause, and that the defendants thereupon determined the contract, and took possession of the works which was the matter complained of.

Replications: 1. That the architect did not at any time grant an extension of time for the performance and completion of the said contract, and that the alleged failure of the plaintiff in the plea mentioned, and the non-exercise by the plaintiff of such due progress as therein mentioned was caused and occasioned by the

acts and orders and by the neglects, defaults, and hindrances of the defendants and their said architect, and by breaches of the said contract by the defendants, and not otherwise. (1)

2. That the alleged failure by the plaintiff in the plea mentioned, and the non-exercise by the plaintiff of due diligence as therein alleged, and the not making by the plaintiff of such due progress as therein alleged, were wholly caused and occasioned by reason of causes, matters, and things provided for in and by the 24th clause, by reason whereof the plaintiff was in fact and in the opinion of the architect unduly delayed and impeded in the completion of the contract, and all conditions were fulfilled, &c., to entitle the plaintiff to have granted him by the architect an extension of time, and to have another day assigned for completion of the contract, nevertheless the architect wholly failed and neglected to grant any extension of time whatever to the plaintiff, or to assign any other day or days whatever for the completion of the contract by the plaintiff.

3. A repetition of the several statements in the second replication, with the exception of the words "and in the opinion of the said architect."

Demurrer to the replications.

The remaining pleadings were immaterial to the question.

Manisty, Q.C. (*R. G. Williams* with him), in support of the replications. The right of the defendants to determine the contract depended on the exercise by the plaintiff of due diligence for the completion of the works by the specified time; anything, therefore, which put an end to the obligation on the plaintiff to complete the works at a specified time would put an end to the right given to the defendants by the 27th clause to determine the contract. It is clear that if the contractor was delayed by the acts or defaults of his employers, the obligation to complete by the given time ceased: *Holme* v. *Guppy* (2); *Russell* v. *Bandeira* (3);

(1) It was agreed that this should be amended by inserting the special acts of the defendants, and their architect complained of, viz., first, delay in delivering the requisite plans; secondly, delay in setting out the lands; thirdly, delay in defining the roads; fourthly, delay in giving particulars which would enable the contractors to commence the specified works.

(2) 3 M. & W. 387.

(3) 18 C. B. (N.S.) 149; 32 L. J. (C.P.) 68.

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Westwood v. *Secretary of State for India.* (1) The 24th clause, no doubt, gives the architect power to extend the time; but the effect of that is only that, if he does so, the various penalties and rights which may have been forfeited by the acts of delay on the part of the defendants revive in relation to the new date so affected. The clause does not alter the fact that the penalties and rights are gone through the defaults of the defendants till the new term is appointed.

Holker, Q.C. (*C. Russell* with him), in support of the demurrers. The question depends entirely on the construction of the contract. The parties by this contract have given the architect authority to decide whether the plaintiff exercised due diligence, and the replication, which in effect states that the architect though acting honestly was mistaken, is, in fact, an appeal from him. In the cases cited the Court thought that the architect or engineer had not been made by the parties the sole judge in the matter. *Stadhard* v. *Lee* (2), in which all the previous cases were cited, is precisely in point and conclusive for the defendants; and *Scott* v. *Liverpool Corporation* (3) is another case to the same effect. The cases of *Milner* v. *Field* (4), and *Clarke* v. *Watson* (5), shew that in such a case, even if the architect acts wrongfully, if there is no collusion, his certificate is binding.

Manisty, Q.C., in reply.

WILLES, J. The question arising in this case is simply whether the Bury Improvement Commissioners having employed the plaintiff to do certain works according to a specification, and the architect having decided that he was not proceeding with due diligence, the commissioners were justified, under the 27th clause of the agreement, in interfering and taking the works out of his hand. That question depends on the construction of the agreement, and mainly on the 27th clause, which must of course be construed with due regard to there mainder of the agreement; but the cardinal rule, that the Court should be guided more by the words of the clause dealing specifically with the matter than by any general inference

(1) 7 L. T. (N.S.) 736.
(2) 3 B. & S. 364; 32 L. J. (Q.B.) 75.
(3) 1 Giff. 216; 27 L. J. (Ch.) 641.
(4) 5 Ex. 829; 20 L. J. (Ex.) 68.
(5) 18 C. B. (N.S.) 278; 34 L. J. (C.P.) 148.

from the whole contract, ought to be applied. Taking first, then, the 27th clause, it provides "that it shall be lawful for the said burial board in case the said contractor shall fail in the due performance of any part of his undertaking;" these words are very stringent, because they deal generally with any breach of contract and shew that the contractor was willing to trust himself to the good conduct of the board, because one can hardly conceive a case in which no small breach of contract should occur, of which a captious person might take advantage. The clause goes on, "or shall become bankrupt or insolvent, or shall compound with his creditors, or propose any composition to his creditors for the settlement of their debts, or shall carry on, or propose to carry on, his business under inspectors on behalf of his creditors, or shall commit any act of bankruptcy." Here are a number of specific acts mentioned in respect of which no case of hardship could be pleaded as a reason why the penalty imposed by the clause should not be exacted; then follows the proviso on which the present case turns, and it is put on a footing of equality with the specific acts previously referred to. Now, what is it which is to produce the same effect as any of those previously described? It is "or shall not, in the opinion and according to the determination of the said architect, exercise due diligence and make such due progress as would enable the works to be effectually and efficiently completed at the time and in the manner aforesaid;" that is, the time provided for by the parties. It does not seem necessary to refer to any distinction between the time originally provided by the contract and that which might be settled by the architect; it must be taken that before the time originally specified had arrived, and before any extension of time had been given, the board put in force the stringent powers given them by the contract, and on a certificate by the architect that due diligence had not been exercised, took possession of the works, and of the plant and tools of the contractors. What, then, is the effect of the words "shall not in the opinion and according to the determination of the architect, exercise due diligence and make such due progress as would enable the works to be effectually and efficiently completed at the time and in the manner aforesaid." It is not only a proviso for an additional or alternative event in which the powers of the board might be put in

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force, but a judge is appointed by the parties to decide whether that event has happened. The right, therefore, is made dependent not on the event, but on the determination of the judge that it has occurred. Now, the plea founded on the 27th clause, states that such a default did take place, which is superfluous and need not have been averred, and that the plaintiff did not, according to the opinion and determination of the architect, exercise due diligence. Up to this point the case seems to raise much the same question as was raised in the cases where there was a proviso in a lease that it should terminate if the tenant should become bankrupt, and the tenant having been adjudicated bankrupt, the question arose whether it was necessary that he should have been so adjudicated on sufficient grounds in order to terminate the lease; and it was held, by the majority of the Court, that he need not. That opinion is clearly the one to be acted on here, for it has been often decided on such contracts as the present one that "the decision of the architect" means merely his decision in fact and not his decision on reasonable grounds; the plea, therefore, is good and sufficient.

Is it answered by any of the replications? By the first, the contractor sets up against the decision of the architect that the delay arose from acts and defaults of the defendants in not delivering the plans and laying out the ground in due time. We must look, then, to see what powers are given to the architect, and two clauses are material, the 4th and 24th. The 4th, in terms, gives to the architect the power and discretion to give what further drawings and plans he thinks right: but assuming that that were not so, and that the delay in giving the plans was unjustifiable, what would be the consequence of such delay? That appears to be provided for by the 24th clause, which gives power to the architect under those circumstances to extend the time for the completion of the works. It would seem, therefore, that all the matters relied on in the first replication are, in truth, matters which the architect ought to have taken into his consideration in determining whether there should be an extension of time; and, therefore, also in determining whether the plaintiff used due diligence. And the replication only, in fact, sets up reasons why the architect should not have given the certificate he did. It is, therefore, in fact, an appeal from the architect, and not something paramount to his judgment, and not intended to be

decided by him. Upon these grounds it would seem that the replication is not sustainable.

As to the second replication, that states that the failure of the plaintiff to make progress with the works was wholly caused by the things mentioned in the 24th clause, by reason of which, in fact, and in the opinion of the architect, he was entitled to more time. If that sets up matter which ought to have been taken into account by the architect, it is open to the objection I have stated above, but it is also bad because it does not really shew any reason why the architect should not have come to the conclusion that the plaintiff was not proceeding with due diligence; it is consistent with there having been a general delay on the part of the contractor, which disentitled him to any extra time. There is an apparent equity introduced into the replication by the averment that it was the opinion of the architect that the plaintiff was entitled to extra time; but, unless this is to be taken as implying bad faith on the part of the architect, it really means nothing, because people may act bonâ fide on other persons' opinions instead of their own, or may feel bound by authority to act in a particular way contrary to their own views. Even if the architect's certificate were fraudulent, it is doubtful whether that would afford a good answer, if there was no collusion on the part of the defendants.

If the second replication is bad, the third one is bad also, for similar reasons. Referring now to the authorities relied upon by the plaintiff, the broad distinction is that in them the penalty was to accrue on a given event, viz., the failure of the contractor to fulfil his contract; and it was held in them that the failure must not have been caused by the other party; but in this case the penalty was not to accrue on the failure of the plaintiff to perform his contract, nor on any want of diligence on his part, but upon the judgment of the architect that there was such failure and want of diligence; the parties have made the architect the judge of the facts, and when he has given his judgment, the penalty accrues whatever the real facts may be.

MONTAGUE SMITH, J. I am of the same opinion, and as I concur in the reasons of my Brother Willes, I have little to add. The question, in the first place, depends on the construction of the 27th

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clause, which gives power to the defendants to determine the contract in certain events: one of these is, if the plaintiff "shall not, in the opinion and according to the determination of the said architect, exercise due diligence and make such progress as would enable the works to be effectually and efficiently completed at the time and in the manner aforesaid." Now, the architect has determined that the plaintiff did not exercise such due diligence.

It is not denied in the first replication that he has come to that opinion and determination, but the answer given in it is that the want of due diligence was a consequence of the acts of the defendants. That is an issue which cannot, I think, be left to a jury, because, looking at the whole contract, I think the parties intended to make the architect the judge, and that his judgment should not be reviewed. I think they meant to leave to him the question whether there was a want of *due* diligence, and that he was bound to take into his consideration all the matters now relied on by the plaintiff. It seems to me that this case is distinguishable from *Wood* v. *Secretary of State for India* (1), because there was nothing in the contract relied on in that case equivalent to the 27th clause in this. Every case of this kind must turn on the construction of the particular contract, and if on the true construction an arbitrator is appointed to decide the question without appeal, his decision cannot be reviewed.

Judgment for the defendants.

Attorneys for plaintiff: *Shaw & Tremellen, for P. & J. Watson.*

Attorneys for defendants: *Gregory, Rowcliffes, & Rawle, for Harper & Dodd.*

(1) 7 L. T. (N.S.) 736.

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April 21.

Practice—Interrogatories under s. 51 *of the Common Law Procedure Act*, 1854, 17 *&* 18 *Vict. c.* 125.

In an action under the Bills of Exchange Act, 1855 (18 & 19 Vict. c. 67), by indorsee against acceptor of a bill for 400*l.*, purporting to be drawn by R. B. upon and accepted by the defendant, payable at Coutts & Co.'s, the defendant having obtained leave to appear, upon an affidavit that the acceptance to the bill sued upon was not in his handwriting or written by his authority, a judge at chambers refused to allow, as being irrelevant and unnecessary, the following interrogatories to be administered to the plaintiff with reference to a former bill similarly drawn and accepted, which the plaintiff had discounted for the drawer, and which had been paid at maturity by the defendant's bankers,—"1. Did you accept or authorize your brother (R. B.) to accept a bill of exchange for 300*l.*, dated the 2nd of May, 1867, drawn by him upon you, and payable at the bank of Messrs. Coutts & Co.? 2. Were Messrs. Coutts & Co. your bankers, and did they pay the said bill at maturity for you or by your authority? 3. When did you first know that Messrs. Coutts & Co. had paid the said bill? 4. Was the said bill delivered to you by Messrs. Coutts & Co., and is it now in your possession?":—

The Court declined to vary his order.

ACTION by indorsee against drawer of a bill of exchange for 400*l.* purporting to be drawn by one Richard Bethell upon and accepted by the defendant, payable three months after date to the order of the drawer, and indorsed by him to the plaintiff.

The writ was issued under the Bills of Exchange Act, 1855 (18 & 19 Vict. c. 67), and the defendant obtained leave to defend, upon an affidavit in which he swore that the acceptance was not in his handwriting nor written by his authority.

The plaintiff took out a summons for leave to administer interrogatories to the defendant, upon an affidavit stating that, in the year 1867, he was the holder of a bill of exchange for 300*l.* dated the 2nd of May in that year, drawn by Richard Bethell upon and purporting to be accepted by the defendant, and payable at the bank of Messrs. Coutts & Co. three months after date; that the said bill (which he had discounted for Richard Bethell) fell due on the 5th of August, 1867, and was paid by Messrs. Coutts & Co.; and that the acceptance to the bill sued on was similar to the acceptance to the before-mentioned bill for 300*l.* which had been paid as aforesaid. The proposed interrogatories were in substance as follows:—

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1. Did you accept, or authorize your brother, Richard Bethell, to accept, a bill of exchange for 300*l*., dated the 2nd of May, 1867, drawn by him upon you, and payable at the bank of Messrs. Coutts & Co.?

2. Were Messrs. Coutts & Co. your bankers, and did they pay the said bill at maturity for you or by your authority?

3. When did you first know that Messrs. Coutts & Co. had paid the said bill?

4. Was the said bill delivered to you by Messrs. Coutts & Co., and is it now in your possession?

5. Are the words "accepted payable at Messrs. Coutts & Co.'s, Strand, Slingsby Bethell," written across the bill copied on the back of the writ in this action, or is any or either of them, in your handwriting?

6. Were they written by your authority?

7. Did you ever, at the instance of Richard Bethell, or of any other person, write the form of an acceptance of any bill of exchange, or your signature, across any blank bill-stamp or blank bill-stamps?

8. Did you ever authorize Richard Bethell to draw any bill or bills of exchange upon you and to accept such bill or bills in your name?

Upon the hearing of the summons, Martin, B., disallowed the first four interrogatories, on the ground either that they were irrelevant, or that the information thereby sought might be obtained by subpœnaing a clerk from Messrs. Coutts & Co.'s; but he allowed the rest.

Holl moved for a rule to vary the order by allowing the interrogatories which the learned judge had rejected; and contended that the fact of the plaintiff having authorized the payment by his bankers of a former bill similarly drawn and accepted to the bill declared on would be evidence, and justify the plaintiff in assuming, that such an acceptance was authorized by and binding upon him; as in the case of a master who by paying for goods ordered by his servant recognizes the servant's authority to bind him by orders subsequently given.

[BRETT, J. That might be so if a general authority to accept

bills in the name of the defendant could be shewn, as in *Cash* v. *Taylor* (1) and *Llewellyn* v. *Winckworth.* (2) Here, however, it is not proposed to prove a general course of dealing, but merely to shew a single isolated transaction.]

The plaintiff is not to be precluded from interrogating the defendant because his answers would not be conclusive. It is enough to shew that the evidence would be admissible, and that the interrogatories are material, bonâ fide, and not irrelevant or scandalous: *M'Fadzen* v. *Mayor &c. of Liverpool.* (3)

KEATING, J. I think there should be no rule. The application is to vary an order of my Brother Martin, disallowing certain proposed interrogatories. The action is brought by an indorsee against the acceptor of a bill of exchange; and the defendant obtained leave under the Bills of Exchange Act, 1855, to appear, upon an affidavit that the acceptance was not in his handwriting or written with his authority,—in other words, that the acceptance is a forgery. The plaintiff sought by the application to my Brother Martin to obtain the defendant's answers to interrogatories which would be substantially a repetition of the statements contained in the defendant's former affidavit. These were allowed. In addition to them, the plaintiff sought to interrogate the defendant as to whether or not he had on a former occasion authorized his bankers to pay a bill drawn and accepted in precisely the same manner as the bill which was the subject of the action,—the suggestion being that, if it should turn out that he had done so, that would be evidence to go to the jury that the defendant had authorized his brother as his agent to accept the bill in question in his name. It seems to me, however, that no foundation is laid for saying that there has been any such holding out, because, although the plaintiff swears that he discounted the bill in question, he does not allege that he did so upon the faith of its being the genuine acceptance of the defendant. There is no suggestion of any general authority in the defendant's brother to accept bills in the name of the defendant, or of any course of dealing: but the mere fact of the defendant having paid a former bill drawn and accepted

(1) 8 L. J. (K.B.) 262; Lloyd & Wils. C. C. 178.

(2) 13 M. & W. 598.

(3) Law Rep. 3 Ex. 279.

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MORRIS v. BETHELL.

in a similar manner is relied on as evidence that the acceptance of the bill declared on in his name was authorized by him. The learned Baron having refused to allow these interrogatories, we are called upon to review his decision. Now, it has been repeatedly laid down by this Court that they will not interfere with the discretion exercised at chambers in these matters, unless it be clearly shewn that the judge has done wrong. I cannot see that any wrong has been done here, and therefore I am not disposed to accede to this application.

BRETT, J. I also am of opinion that these interrogatories ought not to be allowed. The plaintiff does not suggest that he took the bill which is the subject of the action upon the faith of the signature of the acceptance being the defendant's. To entitle him to succeed, the plaintiff must either shew a general authority in Richard Bethell to accept bills in the defendant's name, or an authority to accept this particular bill. It is not pretended that there was any such general authority; and, whichever way these interrogatories might be answered, the answers would be no evidence which ought to be left to a jury. The case of *Cash* v. *Taylor* (1) is a sufficient authority for that proposition: and *Llewellyn* v. *Winckworth* (2) is no authority in favour of the plaintiff. There, the defendant's admission of liability as acceptor of a former bill accepted in his name by A. B. was held to be admissible, because not given for the purpose of shewing that A. B. had authority to accept the particular bill, but only to confirm a witness who had proved a general authority. Here, it is not proposed to ask any question as to a general authority in Richard Bethell to accept bills in his brother's name: and we ought not to allow interrogatories unless we can see clearly that the answers are or may be material. I think Baron Martin was quite right.

Rule refused. (3)

Attorney for plaintiff: *E. G. Lawrence.*

Attorneys for defendant: *Harrison, Beal, & Harrison.*

(1) 8 L. J. (K.B.) 262; Lloyd & Wils. C. C. 178.

(2) 13 M. & W. 598.

(3) At the trial before Povill, C.J., at the sittings at Westminster after Trinity Term, 1869, the plaintiff proved that he had discounted the bill sued on for the defendant's brother,

Richard Bethell, and that he had in 1867 discounted another bill for 300*l.* similarly drawn and purporting to be accepted by the defendant, and which had been paid by the defendant's bankers, Coutts & Co., at maturity. It was further proved that the defendant had paid two other bills (held by strangers) which his brother had drawn upon him and accepted in his name in the same manner. It was thereupon contended for the plaintiff that the defendant, having thus held his brother out as a person having authority to accept bills in his name, was estopped from saying that the bill sued upon was not his acceptance. The defendant swore that the acceptance to the bill in question was not in his handwriting or written by his authority, that he had never given his brother authority to accept any bill in his name, and that he had paid the former bills in order to relieve his brother from the consequences of his unauthorized act, and upon a solemn promise that it should not occur again.

The jury found that the acceptance to the bill sued on was not in the defendant's handwriting or written by his authority, that the signature had not been adopted by him, that he did not know that the bill of 1867 had been held by the plaintiff, and did not lead the plaintiff to believe that the acceptance sued on was his. A verdict was thereupon entered for the defendant; leave being reserved to the plaintiff to move to enter it for him, if the Court should be of opinion that the Lord Chief Justice ought to have directed the jury as a matter of law that the plaintiff was entitled to a verdict upon the above evidence.

In the ensuing Michaelmas Term a rule nisi was moved for, but refused.

END OF TRINITY TERM, 1869.

REGULÆ GENERALES.

MICHAELMAS TERM, 1868.

GENERAL RULES

MADE BY

SIR SAMUEL MARTIN, Knight, one of the Barons of the Exchequer; Sir JAMES SHAW WILLES, Knight, one of the Justices of the Common Pleas; and Sir COLIN BLACKBURN, Knight, one of the Justices of the Queen's Bench; the Judges for the time being for the trial of Election Petitions in England, pursuant to the Parliamentary Elections Act, 1868:—

I.

The presentation of an Election Petition shall be made by leaving it at the office of the Master nominated by the Chief Justice of the Common Pleas, and such Master or his Clerk shall (if required) give a receipt, which may be in the following form:—

Received on the day of at the Master's office a petition touching the Election of A. B., a Member for purporting to be signed by (*insert the names of Petitioners*).

C. D., *Master's Clerk.*

With the petition shall also be left a copy thereof for the Master to send to the Returning Officer, pursuant to section 7 of the Act.

II.

An Election Petition shall contain the following statements:—

1. It shall state the right of the Petitioner to petition within Section 5 of the Act.

2. It shall state the holding and result of the election, and shall briefly state the facts and grounds relied on to sustain the prayer.

III.

The petition shall be divided into paragraphs, each of which, as nearly as may be, shall be confined to a distinct portion of the subject, and every paragraph shall be numbered consecutively, and no costs shall be allowed of drawing or copying any petition not substantially in compliance with this rule, unless otherwise ordered by the Court or a Judge.

IV.

The petition shall conclude with a prayer, as for instance, that some specified person should be declared duly returned or elected, or that the election should be declared void, or that a return may be enforced (as the case may be), and shall be signed by all the Petitioners.

V.

The following form, or one to the like effect, shall be sufficient:—

In the Common Pleas.

The "Parliamentary Elections Act, 1868."

Election for [*state the place*] holden on the day of A.D.

The petition of A. of [*or* of A. of , and B. of , *as the case may be*] whose names are subscribed.

1. Your Petitioner A. is a person who voted [*or* had a right to vote, *as the case may be*], at the above election [*or* claims to have had a right to be returned at the above election, *or* was a candidate at the above election]; and your Petitioner B. [*here state in like manner the right of each Petitioner.*]

2. And your Petitioners state that the election was holden on the day of A.D., when A. B., C. D., and E. F., were candidates, and the returning officer has returned A. B., and C. D., as being duly elected.

3. And your Petitioners say that [*here state the facts and grounds on which the petitioners rely.*]

Wherefore your Petitioners pray that it may be determined that the

said A. B. was not duly elected or returned, and that the election was void [*or* that the said E. F. was duly elected and ought to have been returned, *or as the case may be.*]

(Signed) A.
B.

VI.

Evidence need not be stated in the petition, but the Court or a Judge may order such particulars as may be necessary to prevent surprise and unnecessary expense, and to ensure a fair and effectual trial in the same way as in ordinary proceedings in the Court of Common Pleas, and upon such terms as to costs and otherwise as may be ordered.

VII.

When a Petitioner claims the seat for an unsuccessful candidate, alleging that he had a majority of lawful votes, the party complaining of or defending the election or return, shall, six days before the day appointed for trial, deliver to the Master and also at the address, if any, given by the Petitioners and Respondent, as the case may be, a list of the votes intended to be objected to, and of the heads of objection to each such vote, and the Master shall allow inspection and office copies of such lists to all parties concerned; and no evidence shall be given against the validity of any vote, nor upon any head of objection not specified in the list, except by leave of the Court or Judge upon such terms as to amendment of the list, postponement of the inquiry, and payment of costs, as may be ordered.

VIII.

When the Respondent in a petition under the Act, complaining of an undue return and claiming the seat for some person, intends to give evidence to prove that the election of such person was undue, pursuant to the 53rd Section of the Act, such respondent shall, six days before the day appointed for trial, deliver to the Master, and also at the address, if any, given by the Petitioner, a list of the objections to the election upon which he intends to rely, and the Master shall allow inspection and office copies of such lists to all parties concerned; and no evidence shall be given by a Respondent of any objection to the election not specified in the

list, except by leave of the Court or Judge, upon such terms as to amendments of the list, postponement of the inquiry, and payment of costs, as may be ordered.

IX.

With the petition, Petitioners shall leave at the office of the Master a writing, signed by them or on their behalf, giving the name of some person entitled to practise as an Attorney or Agent in cases of Election Petitions whom they authorise to act as their Agent, or stating that they act for themselves, as the case may be, and in either case giving an address, within three miles from the General Post Office, at which notices addressed to them may be left; and if no such writing be left or address given, then notice of objection to the recognizances and all other notices and proceedings may be given by sticking up the same at the Master's office.

X.

Any person returned as a member may at any time after he is returned send or leave at the office of the Master a writing signed by him or on his behalf, appointing a person entitled to practise as an attorney or agent in cases of Election Petitions, to act as his agent in case there should be a petition against him, or stating that he intends to act for himself, and in either case giving an address within three miles from the General Post Office, at which notices may be left, and in default of such writing being left in a week after service of the petition, notices and proceedings may be given and served respectively by sticking up the same at the Master's office.

XI.

The Master shall keep a book or books at his office in which he shall enter all addresses and the names of agents given under either of the preceding rules, which book shall be open to inspection by any person during office hours.

XII.

The Master shall upon the presentation of the petition forthwith send a Copy of the Petition to the Returning Officer,

pursuant to Section 7 of the Act, and shall therewith send the name of the Petitioners' Agent, if any, and of the address, if any, given as prescribed, and also of the name of the Respondent's Agent, and the address, if any, given as prescribed, and the Returning Officer shall forthwith publish those particulars along with the petition.

The cost of publication of this and any other matter required to be published by the Returning Officer, shall be paid by the Petitioner or person moving in the matter, and shall form part of the general costs of the petition.

XIII.

The time for giving notice of the presentation of a petition and of the nature of the proposed security, shall be five days, exclusive of the day of presentation.

XIV.

Where the respondent has named an agent or given an address, the service of an Election Petition may be by delivery of it to the agent, or by posting it in a registered letter to the address given at such time that, in the ordinary course of post, it would be delivered within the prescribed time.

In other cases the service must be personal on the respondent, unless a Judge on an application made to him not later than five days after the petition is presented on affidavit showing what has been done, shall be satisfied that all reasonable effort has been made to effect personal service and cause the matter to come to the knowledge of the Respondent, including, when practicable, service upon an agent for election expenses, in which case the Judge may order that what has been done shall be considered sufficient service, subject to such conditions as he may think reasonable.

XV.

In case of evasion of service, the sticking up a notice in the office of the Master of the petition having been presented stating the Petitioner, the prayer, and the nature of the proposed secu-

rity, shall be deemed equivalent to personal service, if so ordered by a Judge.

XVI.

The deposit of money by way of security for payment of costs, charges, and expenses payable by the Petitioner, shall be made by payment into the Bank of England to an account to be opened there by the description of "The Parliamentary Elections Act, 1868, Security Fund," which shall be vested in and drawn upon from time to time by the Chief Justice of the Common Pleas for the time being, for the purposes for which security is required by the said Act, and a bank-receipt or certificate for the same shall be forthwith left at the Master's office.

XVII.

The Master shall file such receipt or certificate, and keep a book open to inspection of all parties concerned, in which shall be entered from time to time the amount and the petition to which it is applicable.

XVIII.

The recognizance as security for costs may be acknowledged before a Judge at chambers or the Master in town, or a Justice of the Peace in the country.

There may be one recognizance acknowledged by all the sureties, or separate recognizances by one or more, as may be convenient.

XIX.

The recognizance shall contain the name and usual place of abode of each surety, with such sufficient description as shall enable him to be found or ascertained, and may be as follows:—

Be it remembered that on the day of , in the year of our Lord 18 , before me [*name and description*] came A. B., of [*name and description as above prescribed*] and acknowledged himself [*or severally acknowledged themselves*] to owe to our Sovereign Lady the Queen the sum of one thousand pounds [*or the following sums*] (that is to say) the said C. D., the sum of £ , the said E. F., the sum of £ , the said G. H., the sum of , and the said J. K., the sum of £ , to be levied on his [*or* their respective] goods and chattels, land and

tenements, to the use of our said Sovereign Lady the Queen, her heirs and successors.

The condition of this recognizance is that if [*here insert the names of all the petitioners, and if more than one, add*, or any of them] shall well and truly pay all costs, charges and expenses, in respect of the Election Petition signed by him [*or* them], relating to the [*here insert the name of the borough, or county*] which shall become payable by the said Petitioner [*or* Petitioners, or any of them] under the "Parliamentary Elections Act, 1868," to any person or persons, then this recognizance to be void, otherwise to stand in full force.

(Signed)

[*Signatures of Sureties.*]

Taken and acknowledged by the above-named [*names of sureties*] on the day of at , before me,

C. D.

A Justice of the Peace [*or as the case may be*].

XX.

The recognizance or recognizances shall be left at the Master's office, by or on behalf of the Petitioner in like manner as before prescribed for the leaving of a petition forthwith after being acknowledged.

XXI.

The time for giving notice of any objection to a recognizance under the 8th section of the Act shall be within five days from the date of service of the notice of the petition and of the nature of the security, exclusive of the day of service.

XXII.

An objection to the recognizance must state the ground or grounds thereof, as that the sureties or any, and which of them, are insufficient, or that a surety is dead, or that he cannot be found, or that a person named in the recognizance has not duly acknowledged the same.

XXIII.

Any objection made to the security shall be heard and decided by the Master, subject to appeal within five days to a Judge, upon summons taken out by either party to declare the security sufficient or insufficient.

XXIV.

Such hearing and decision may be either upon affidavit or personal examination of witnesses or both, as the Master or Judge may think fit.

XXV.

If by order made upon such summons the security be declared sufficient, its sufficiency shall be deemed to be established within the meaning of the 9th Section of the said Act, and the petition shall be at issue.

XXVI.

If by order made upon such summons an objection be allowed and the security be declared insufficient, the Master or Judge shall in such order state what amount he deems requisite to make the security sufficient, and the further prescribed time to remove the objection by deposit shall be within five days from the date of the order, not including the day of the date, and such deposit shall be made in the manner already prescribed.

XXVII.

The costs of hearing and deciding the objections made to the security given shall be paid as ordered by the Master or Judge, and in default of such order shall form part of the general costs of the petition.

XXVIII.

The costs of hearing and deciding an objection upon the ground of insufficiency of a surety or sureties, shall be paid by the petitioner, and a clause to that effect shall be inserted in the order declaring its sufficiency or insufficiency, unless at the time of leaving the recognizance with the Master there be also left with the Master an affidavit of the sufficiency of the surety or sureties sworn by each surety before a Justice of the Peace, which affidavit any Justice of the Peace is hereby authorized to take, or before some person authorized to take affidavits in the Court of Common Pleas, that he is seised or possessed of real or personal estate, or both, above what will satisfy his debts of the

clear value of the sum for which he is bound by his recognizance, which affidavit may be as follows:

In the Common Pleas.

"Parliamentary Elections Act, 1868."

I, A. B., of [*as in recognizance*] make oath and say that I am seised or possessed of real [or personal] estate above what will satisfy my debts of the clear value of £ .

Sworn, &c.

XXIX.

The order of the Master for payment of costs shall have the same force as an order made by a Judge, and may be made a Rule of the Court of Common Pleas, and enforced in like manner as a Judge's order.

XXX.

The Master shall make out the Election List. In it he shall insert the names of the Agents of the Petitioners and Respondent, and the addresses to which notices may be sent, if any. The List may be inspected at the Master's Office at any time during office hours, and shall be put up for that purpose upon a notice board appropriated to proceedings under the said Act, and headed "Parliamentary Elections Act, 1868."

XXXI.

The time and place of the trial of each Election Petition shall be fixed by the Judges on the rota, and notice thereof shall be given in writing by the Master by sticking notice up in his office, sending one copy by the post to the address given by the Petitioner, another to the address given by the Respondent, if any, and a copy by the post to the Sheriff, or in case of a Borough having a Mayor, to the Mayor of that Borough, fifteen days before the day appointed for the trial.

The Sheriff or Mayor, as the case may be, shall forthwith publish the same in the County or Borough.

XXXII.

The sticking up of the Notice of Trial at the office of the Master shall be deemed and taken to be notice in the prescribed manner

within the meaning of the Act, and such notice shall not be vitiated by any miscarriage of, or relating to, the copy or copies thereof to be sent as already directed.

XXXIII.

The Notice of Trial may be in the following form:—

"Parliamentary Elections Act, 1868."

Election Petition of County [or Borough] of .

Take notice, that the above petition [*or* petitions] will be tried at on the day of , and on such other subsequent days as may be needful.

Dated the day of

By Order,

(Signed) A. B.,

The Master appointed under the above Act.

XXXIV.

A Judge may from time to time, by order made upon the application of a party to the petition, or by notice in such form as the Judge may direct to be sent to the Sheriff or Mayor, as the case may be, postpone the beginning of the trial to such day as he may name, and such notice when received shall be forthwith made public by the Sheriff or Mayor.

XXXV.

In the event of the Judge not having arrived at the time appointed for the trial, or to which the trial is postponed, the commencement of the trial shall, *ipso facto*, stand adjourned to the ensuing day, and so from day to day.

XXXVI.

No formal adjournment of the Court for the trial of an Election Petition shall be necessary, but the trial is to be deemed adjourned, and may be continued from day to day until the inquiry is concluded; and in the event of the Judge who begins the trial being disabled by illness or otherwise, it may be recommenced and concluded by another Judge.

XXXVII.

The application to state a special case may be made by rule in the Court of Common Pleas when sitting, or by a summons before a Judge at Chambers, upon hearing the parties.

XXXVIII.

The title of the Court of Record held for the trial of an Election Petition may be as follows:—

Court for the Trial of an Election Petition for the [County of or Borough of *as may be*] between , Petitioner, and , Respondent.

And it shall be sufficient so to entitle all proceedings in that Court.

XXXIX.

An officer shall be appointed for each Court for the trial of an Election Petition, who shall attend at the trial in like manner as the Clerks of Assize and of Arraigns attend at the Assizes.

Such officer may be called the Registrar of that Court. He by himself, or in case of need his sufficient deputy, shall perform all the functions incident to the officer of a Court of Record, and also such duties as may be prescribed to him.

XL.

The reasonable costs of any witness shall be ascertained by the Registrar of the Court, and the certificate allowing them shall be under his hand.

XLI.

The order of a Judge to compel the attendance of a person as a witness may be in the following form:—

Court for the Trial of an Election Petition for [*complete the title of the Court*] the day of . To A. B. [*describe the person*] You are hereby required to attend before the above Court at [*place*] on the day of at the hour of [*or* forthwith, *as the case may be*] to be examined as a witness in the matter of the said petition, and to attend the said Court until your examination shall have been completed.

As witness my hand,

A. B.

Judge of the said Court.

XLII.

In the event of its being necessary to commit any person for contempt, the warrant may be as follows:—

At a Court holden on at for the trial of an Election Petition for the County [*or Borough*] of before Sir Samuel Martin, Knight, one of the Barons of Her Majesty's Court of Exchequer, and one of the Judges for the time being for the trial of Election Petitions in England, pursuant to the "Parliamentary Elections Act, 1868."

Whereas A. B. has this day been guilty, and is by the said Court adjudged to be guilty, of a contempt thereof. The said Court does therefore sentence the said A. B. for his said contempt to be imprisoned in the Gaol for calendar months, and to pay to our Lady the Queen a fine of £ , and to be further imprisoned in the said Gaol until the said fine be paid. And the Court further orders that the Sheriff of the said county [*or as the case may be*] and all constables and officers of the peace of any county or place where the said A. B. may be found, shall take the said A. B. into custody and convey him to the said Gaol, and there deliver him into the custody of the Gaoler thereof, to undergo his said sentence. And the Court further orders the said Gaoler to receive the said A. B. into his custody, and that he shall be detained in the said Gaol in pursuance of the said sentence.

A. D.

Signed the day of

S. M.

XLIII.

Such warrant may be made out and directed to the Sheriff or other person having the execution of process of the Superior Courts, as the case may be, and to all constables and officers of the peace of the county or place where the person adjudged guilty of contempt may be found, and such warrant shall be sufficient without further particularity, and shall and may be executed by the persons to whom it is directed, or any or either of them.

XLIV.

All interlocutory questions and matters, except as to the sufficiency of the security, shall be heard and disposed of before a Judge, who shall have the same control over the proceedings under the Parliamentary Elections Act, 1868, as a Judge at Chambers in the ordinary proceedings of the Superior Courts, and such questions and matters shall be heard and disposed of by one of the

Judges upon the rota, if practicable, and if not, then by any Judge at Chambers.

XLV.

Notice of an application for leave to withdraw a petition shall be in writing and signed by the Petitioners or their Agent.

It shall state the ground on which the application is intended to be supported.

The following Form shall be sufficient:—

"Parliamentary Elections Act, 1868."

County [*or* Borough] of Petition of [*state petitioners*] presented day of .

The Petitioner proposes to apply to withdraw his Petition upon the following ground [*here state the ground*], and prays that a day may be appointed for hearing his application. Dated this day of

(Signed)

XLVI.

The notice of application for leave to withdraw shall be left at the Master's office.

XLVII.

A copy of such notice of the intention of the Petitioner to apply for leave to withdraw his petition shall be given by the Petitioner to the Respondent, and to the returning officer, who shall make it public in the county or borough to which it relates, and shall be forthwith published by the Petitioner in at least one newspaper circulating in the place.

The following may be the form of such notice:—

"Parliamentary Elections Act, 1868."

In the Election Petition for , in which is Petitioner and Respondent.

Notice is hereby given that the above Petitioner has on the day of lodged at the Master's Office, Notice of an application to withdraw the Petition, of which notice the following is a copy (*set it out*). And take Notice that, by the Rule made by the Judges, any person who might have been a Petitioner in respect of the said Election may, within five days after publication by the Returning Officer of this Notice, give notice in writing of his intention on the hearing to apply for leave to be substituted as a Petitioner.

(Signed)

XLVIII.

Any person who might have been a Petitioner in respect of the election to which the petition relates, may, within five days after such notice is published by the Returning Officer, give notice, in writing, signed by him or on his behalf, to the Master, of his intention to apply at the hearing to be substituted for the Petitioner, but the want of such notice shall not defeat such application, if in fact made at the hearing.

XLIX.

The time and place for hearing the application shall be fixed by a Judge, and whether before the Court of Common Pleas, or before a Judge, as he may deem advisable, but shall not be less than a week after the notice of the intention to apply has been given to the Master as hereinbefore provided, and notice of the time and place appointed for the hearing shall be given to such person or persons, if any, as shall have given notice to the Master of an intention to apply to be substituted as Petitioners, and otherwise in such manner and at such time as the Judge directs.

L.

Notice of abatement of a petition, by death of the Petitioner or surviving Petitioner, under Section 37 of the said Act, shall be given by the party or person interested in the same manner as notice of an application to withdraw a petition; and the time within which application may be made to the Court or a Judge, by motion or summons at Chambers, to be substituted as a Petitioner, shall be one calendar month, or such further time as, upon consideration of any special circumstances, the Court or a Judge may allow.

LI.

If the Respondent dies or is summoned to Parliament as a Peer of Great Britain by a writ issued under the Great Seal of Great Britain, or if the House of Commons have resolved that his seat is vacant, any person entitled to be a Petitioner under the Act in respect of the election to which the petition relates, may give notice of the fact in the county or borough by causing such notice to be

published in at least one newspaper circulating therein, if any, and by leaving a copy of such notice signed by him or on his behalf with the Returning Officer, and a like copy with the Master.

LII.

The manner and time of the Respondent giving notice to the Court that he does not intend to oppose the petition, shall be by leaving notice thereof, in writing, at the office of the Master signed by the Respondent six days before the day appointed for trial, exclusive of the day of leaving such notice.

LIII.

Upon such notice being left at the Master's office, the Master shall forthwith send a copy thereof by the post to the Petitioner or his agent, and to the Sheriff or Mayor, as the case may be, who shall cause the same to be published in the county or borough.

LIV.

The time for applying to be admitted as a Respondent in either of the events mentioned in the 38th Section of the Act shall be within ten days after such notice is given as hereinbefore directed, or such further time as the Court or a Judge may allow.

LV.

Costs shall be taxed by the Master, or at his request, by any Master of a Superior Court, upon the Rule of Court or Judge's order by which the costs are payable, and costs when taxed may be recovered by execution issued upon the Rule of Court ordering them to be paid; or, if payable by the order of a Judge, then by making such order a Rule of Court in the ordinary way, and issuing execution upon such rule against the person by whom the costs are ordered to be paid, or in case there be money in the bank available for the purpose, then to the extent of such money by order of the Chief Justice of the Common Pleas for the time being, upon a duplicate of the Rule of Court.

The office-fees payable for inspection, office-copies, enrolment, and other proceedings under the Act, and these rules shall be the

same as those payable, if any, for like proceedings according to the present practice of the Court of Common Pleas.

LVI.

The Master shall prepare and keep a roll properly headed for entering the names of all persons entitled to practise as Attorney or Agent in cases of Election Petitions, and all matters relating to elections before the Court and Judges, pursuant to the 57th section of the said Act; which roll shall be kept and dealt with in all respects as the Roll of Attorneys of the Court of Common Pleas, and shall be under the control of that Court, as to striking off the roll and otherwise.

LVII.

The entry upon the roll shall be written and subscribed by the attorney or agent, or some attorney authorised by him in writing to sign on his behalf, who shall therein set forth the name, description, and address in full.

LVIII.

The Master may allow any person upon the Roll of Attorneys for the time being, and during the present year any person whose name, or the name of whose firm is in the Law List of the present year as a Parliamentary Agent to subscribe the roll, and permission to subscribe the roll may be granted to any other person by the Court or a Judge upon affidavit, shewing the facts which entitle the applicant to practise as agent according to the principles, practice, and rules of the House of Commons in cases of Election Petitions.

LIX.

An Agent employed for the Petitioner or Respondent shall forthwith leave written notice at the office of the Master of his appointment to act as such Agent, and service of notices and proceedings upon such Agent shall be sufficient for all purposes.

LX.

No proceeding under the "Parliamentary Elections Act, 1688," shall be defeated by any formal objection.

LXI.

Any rule made or to be made in pursuance of the Act, if made in Term-time, shall be published by being read by the Master in the Court of Common Pleas, and if made out of Term, by a copy thereof being put up at the Master's office.

Dated the 21st day of November, 1868.

SAMUEL MARTIN,
J. S. WILLES,
COLIN BLACKBURN,
The Judges for the trial of Election Petitions in England.

Read in open Court, Common Pleas,
the 23rd day of November, 1868.

MICHAELMAS TERM, 1868.

SUPPLEMENTAL GENERAL RULE

MADE BY

Sir Samuel Martin, Knight, one of the Barons of the Exchequer; Sir James Shaw Willes, Knight, one of the Justices of the Common Pleas; and Sir Colin Blackburn, Knight, one of the Justices of the Queen's Bench; the Judges for the time being for the trial of Election Petitions in England, pursuant to the Parliamentary Elections Act, 1868:—

That notice of the time and place of the trial of each Election Petition shall be transmitted by the Master to the Treasury and to the Clerk of the Crown in Chancery; and that the Clerk of the Crown in Chancery shall, on or before the day fixed for the trial, deliver, or cause to be delivered, to the Registrar of the Judge who is to try the Petition, or his deputy, the poll-books, for which the Registrar or his deputy shall give, if required, a receipt: and that the Registrar or his deputy shall keep in safe custody the said poll-books until the trial is over, and then return the same to the Crown Office.

Dated the 19th day of December, 1868.

Samuel Martin.
J. S. Willes.
Colin Blackburn.

PARLIAMENTARY ELECTIONS ACT, 1868.

Hilary Vacation, 1869.

SUPPLEMENTAL REGULÆ GENERALES

AS TO

THE DISPOSAL OF DEPOSIT-MONEY.

ADDITIONAL GENERAL RULES made by the Judges for the time being for the Trial of Election Petitions in England pursuant to the Parliamentary Elections Act, 1868:—

I.

All claims at law or in equity to money deposited or to be deposited in the Bank of England for payment of costs, charges, and expenses payable by the Petitioners pursuant to the 16th General Rule, made the 21st of November, 1868, by the Judges for the trial of Election Petitions in England, shall be disposed of by the Court of Common Pleas or a Judge.

II.

Money so deposited shall, if, and when the same is no longer needed for securing payment of such costs, charges, and expenses, be returned or otherwise disposed of as justice may require, by rule of the Court of Common Pleas or order of a Judge.

III.

Such rule or order may be made after such notice of intention to apply, and proof that all just claims have been satisfied or otherwise sufficiently provided for as the Court or Judge may require.

IV.

The rule or order may direct payment either to the party in whose name the same is deposited, or to any person entitled to receive the same.

V.

Upon such rule or order being made, the amount may be drawn for by the Chief Justice of the Common Pleas for the time being.

VI.

The draft of the Chief Justice of the Common Pleas for the time being shall, in all cases, be a sufficient warrant to the Bank of England for all payments made thereunder.

Dated the 25th day of March, 1869.

SAMUEL MARTIN,
J. S. WILLES,
COLIN BLACKBURN,
The Judges for the trial of Election Petitions in England.

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CUSTOM OF STOCK EXCHANGE—*Sale of Shares—Indemnity against Calls.*] The plaintiff, the registered holder of shares in a joint-stock company, on the 10th of May, 1866, through his broker, sold on the Stock-Exchange twenty of them to one Paine (a jobber) for the settling-day, the 15th of May. The defendant, on the 2nd of May, through his broker, bought of Paine twenty shares in the same company for the same account; and, on the day before the settling-day, his broker, having learnt from Paine that the plaintiff's broker was to supply the twenty shares so purchased by him, instructed Paine to give the name of Cotton as the transferee. A transfer into the name of Cotton was prepared according to the custom of the Stock-Exchange, and duly executed by the plaintiff and by Cotton. Cotton neither paid nor agreed to pay the defendant any sum in respect of the shares; and, although there was no agreement as to the terms on which the defendant was to make use of the name of Cotton, the former had authority to have the shares transferred into the name of Cotton as his nominee.—A petition for winding up the company having been afterwards presented, the liquidators refused to register the transfer, and placed the plaintiff on the list of contributories, and he was consequently obliged to pay certain calls:—*Held*, that the plaintiff was not entitled to be indemnified by the defendant against such calls. VISCOUNT TORRINGTON *v.* LOWE - 26

2. —— *Persons employing Brokers to buy and sell thereon—Principal and Agent.*] The usage of the Stock-Exchange is that in transactions between members of it there is an implied understanding that, on the purchase of stock or shares, the buying jobber shall be at liberty by a given day, called the "name-day," to substitute another person as buyer, and so relieve himself from further liability on the contract, provided such substituted person be one to whom the original seller cannot reasonably except, and that such person accept a transfer of the stock or shares, and pay to the original seller the price:—*Held* (reversing the judgment of the Court of Common Pleas), a reasonable usage; as a usage founded on the general convenience of all persons engaged in a particular department of business, cannot, as regards such persons, be said to be unreasonable.—The plaintiff, the holder of shares in a company called Overend, Gurney, & Co., through a broker, sold them to the defendants, jobbers on the Stock-Exchange. After various sub-sales, the names of four persons were given to the plaintiff's broker as the persons to whom the shares were to be transferred. The plaintiff's broker thereupon prepared four transfers to those persons, and the plaintiff executed them, and the broker delivered them with the shares to the brokers of the proposed transferees, who thereupon accepted the shares, and paid the price to the plaintiff's broker. The transferees not having executed the transfers, or caused them to be registered, the plaintiff remained the registered holder of the shares, and was compelled to pay calls thereon. In an action against the defendants, claiming an indemnity against calls:—*Held* (reversing the judgment of the Court of Common Pleas), that the contract, as interpreted by the usage of the Stock-Exchange, was, that the defendants, the first buyers, were to be at liberty to transfer the contract, with all its rights and obligations, to any sufficient buyers who would take it upon them with all its incidents; and that as the plaintiff had transferred the shares to the defendants' nominees, and the latter had accepted and paid for them, though they had not executed or registered the transfers, the defendants were released from all further liability on their contract to the plaintiff. GRISSELL *v.* BRISTOWE - - - - Ex. Ch. 36

EMBLEMENTS—*Landlord and Tenant—Distress—14 & 15 Vict. c. 25, s. 1.*] Section 1 of 14 & 15 Vict. c. 25, provides that, where the lease of "any farm or lands" shall determine by the death or cesser of the estate of any landlord entitled for his life or for any uncertain interest, instead of claims to emblements, the tenant shall continue to hold such farm or lands until the expiration of the then current year of his tenancy, and shall then quit upon the terms of his lease, as if it had expired by effluxion of time or otherwise; and the succeeding landlord shall be entitled to recover and receive of the tenant a fair proportion of the rent, for the period since the lessor's death or cesser of estate. H. held as tenant from year to year of A., tenant for life, a cottage with about an acre of land, which was partly cultivated as a garden, and partly sown with corn and planted with potatoes. A. died in the middle of a year of H.'s tenancy, and M. thereupon became entitled to the reversion; and, at the expiration of the then current year of H.'s tenancy, distrained for the proportion of the rent due since the death of A.:—*Held*, that the Act applied to all tenancies in respect of which there might be a claim to emblements; that, but for the Act, there might have been a substantial claim for emblements here, and that the premises were, therefore, "a farm or lands" within section 1.—*Held*, also, that that section gave a right to distrain for the rent, as well as to recover it by action. HAINES *v.* WELCH 91

ESTATE IN FEE BY IMPLICATION—*Construction—Will—Defeazance on Death under Twenty-one.*] A testator devised three freehold houses to trustees, in trust, as to the first two, to receive the rents and to pay the same to his wife during her life or widowhood, and, after her decease or second marriage, as to the first, "upon trust to convey and assign the same to his daughter E. A. M., her heirs and assigns for ever;" as to the second, in similar terms, to his daughter C. R. M.; and, as to the third, "upon trust to apply the rents for the advancement and benefit of my grand-daughter, M. A. C., until she attains the age of twenty-one years; but, in case my said grand-daughter should die under that age, then I devise the said dwelling-house, &c., to my daughters E. A. M. and C. R. M., their heirs and assigns, as tenants in common."—He afterwards appointed his son H. M. and his daughters Mary Clarke and Annie Cropton executor and executrixes of his will, to whom he bequeathed all the residue of his real and personal estate not thereinbefore specifically bequeathed, and he declared that such residue should be subject to his debts, legacies, and funeral expenses, and to the payment of an annuity to S.:—*Held*, that the trustees took a legal estate in fee in the three houses; **ESTATE IN FEE BY IMPLICATION**—*continued.* and that the grand-daughter M. A. C. took an equitable estate in fee in the third house, subject to defeazance in the event of her dying under twenty-one. CROPTON *v.* DAVIES - - 159

EVIDENCE OF NEGLIGENCE—*Railway Company—Negligence of Servants—Injury to Passenger.*] The plaintiff, a passenger by the defendants' railway, in getting into a railway carriage at a station, placed his left hand on the back of the open door to aid him in mounting the step. There was conflicting evidence as to whether there was a proper handle affixed to the carriage, to the right hand of the door. The night was dark, and the plaintiff did not see any handle. He had a parcel in his right hand. Before he had completely entered the carriage, the guard, without any previous warning, closed the door, and crushed his hand between the back of the door and the door-post. In an action for the injury thus sustained:—*Held* (affirming the judgment of the majority of the Court of Common Pleas), that there was evidence of negligence on the part of the company's servant, and no evidence of such contributory negligence on the part of the plaintiff as to entitle the defendants to a nonsuit. FORDHAM *v.* THE LONDON, BRIGHTON, &c., RAILWAY COMPANY - - - - Ex. Ch. 619

FACTORS ACTS—6 *Geo.* 4, *c.* 94, *and* 5 *&* 6 *Vict. c.* 39—*Authority of Factor to Pledge Goods—Revocation.*] An agent "intrusted with and in possession of goods, or of the documents of title to goods" within the Factors Acts, is a person who is intrusted as agent for sale; and consequently one whose authority to sell has been revoked cannot make a valid pledge of goods which had been intrusted to him for sale, but which he has wrongfully retained after his authority has been revoked, and the goods demanded from him by his principal. FUENTES *v.* MONTIS Ex. Ch. 93

*** For REGULÆ GENERALES under the Judgments Extension Act, 1868, *See* Law Rep. 4 Q. B. 739.

END OF VOL. IV.

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