RECENT ENGLISH DECISIONS.

In the Court of Exchequer—Trinity Term, June 12, 1857.

HILL *vs.* BALLS.

1. A declaration alleged that the defendant, being possessed of a horse which he knew to be afflicted with glanders, caused it to be sold by auction at a horse repository; that the plaintiff, believing it to be in a healthy state, purchased it; that by reason of the disease it was worthless to him, and he was put to expense in having a veterinary surgeon to examine it; and in consequence of its being put into a stable with another horse, that horse became infected and died, and the plaintiff was put to expense in endeavoring to cure it.—*Held*, that this declaration disclosed no ground of action, either at common law or under the 16 & 17 Vict. c. 62.
2. Per Martin and Bramwell, BB., (dubitante Pollock, C. B.)—The mere fact of selling a glandered horse is not an illegal act, either at common law or under the 16 & 17 Vict. c. 62.

The declaration alleged that the defendant was possessed of a horse which was afflicted with a certain infectious disease, to wit, the glanders, yet the defendant, well knowing the horse to be afflicted with the disease, caused it to be sold by auction at a certain horse repository; and the plaintiff, believing the horse to be in a healthy state and condition, became the purchaser thereof at the sale, and paid therefor a large sum of money, to wit, &c., and by reason of the diseased state and condition of the horse it was utterly worthless to the plaintiff, and he necessarily paid certain money, to wit, &c., to a veterinary surgeon for examining the horse and reporting as to its state and condition; and in consequence of the horse being put into a stable of the plaintiff wherein a certain other horse of the plaintiff, of great value, to wit, &c., then was, the last-mentioned horse became infected with the disease and died, and the plaintiff was forced and obliged to pay a large sum of money, to wit, &c., in and about endeavoring to cure this last-mentioned horse of the disease. To this declaration the defendant demurred, and the demurrer was argued in Easter Term.

Raymond, in support of the demurrer.—This declaration discloses no cause of action. If founded on the common law, it does

not allege either fraud, misrepresentation, or warranty. It states that the defendant took a glandered horse to a horse repository, and there sold it to the plaintiff; but the selling a glandered horse is not an unlawful act, for a party might want it to kill and anatomise. It would be different if such a horse were sold in a public place under circumstances rendering it dangerous to others; but the horse repository mentioned in this declaration may, for all that appears to the contrary, be a place for the sale of diseased horses. The principal question in the case, however, is, whether the declaration is good within the 16 & 17 Vict. c. 62, s. 1, continued by the 19 & 20 Vict. c. 101, which enacts, "Any person bringing or attempting to bring for sale any horse or other animal into any market, fair, or other open or public place where animals are commonly exposed for sale, knowing such horse or other animal to be infected with or labouring under the disease called glanders, &c., shall on conviction of any such offence forfeit and pay any sum not exceeding 20*l.*, &c." This declaration does not allege that the defendant brought or attempted to bring the horse to a public place for sale—it only says he caused the horse to be sold, which may have been through an agent. Again, it is not alleged that this repository was a market or fair, or other public place, which, according to the well-known rules of construction, must be understood to mean a public place ejusdem generis with a market or fair. Besides, this statute imposes a penalty for its violation; and it is a rule that wherever a statute creates an offence, and specifies a punishment for that offence, it cannot be punished except in the way provided by the statute. Lastly, even supposing the defendant's conduct wrongful, this declaration does not show any damage to the plaintiff resulting directly from it. The damage here was not the natural result of the sale of the horse, but arose from the acts of the plaintiff himself, over which the defendant had no control, namely, the buying the horse, and putting him into the stable with the other horse. The rule caveat emptor applies where a glandered horse is offered for sale as much as in any other case.

Hayes, Serjt., contra.—The knowingly taking a glandered horse to a public place is indictable as a nuisance at common law. In

Reg. vs. *Henson*, 1 Dears. C. C. 24, such an indictment was held good, even without an averment that the defendant knew the glanders was a disease communicable to man. That decision is partly founded on *Rex* v. *Vantandillo*, 4 Mau. & S. 73, where it was held indictable to carry a child affected with small-pox along a public highway where persons were passing and repassing. [*Pollock*, C. B. In *Rex* vs. *Burnett*, 4 Mau. & S. 272, even a medical man who inoculated children for small-pox, and while they were sick of it caused them to be carried along a public street, was held indictable.] The court will take notice that a horse repository is a public place; and whether the defendant took the animal there himself, or sent it by his servant, is immaterial. [*Martin*, B.—There is nothing illegal in the mere act of selling a diseased horse. If so, many a man who sells a horse to a knacker is indictable or liable to an action. The flesh may be of use for cats' or dogs' meat, or other purposes. There was a place in old Smithfield expressly for the sale of glandered horses; and there is nothing in this declaration to show that the horse repository at which this horse was sold was not a place of that nature.] The court ought to take notice that horses in the metropolis are always sold at repositories, seeing that there is no horse fair in it. But, in addition to this, it is clear law, that if a man knowingly keeps a dangerous animal, by which another person is injured, he is liable to an action. This is established by several cases, and especially by *May* vs. *Burdett*, 9 Q. B. 101, in which, however, there is a quære, whether the action lies when the injury is occasioned solely by the wilfulness of the plaintiff, after warning of the danger. In *Leame* vs. *Bray*, 3 East, 593, 595, also Lord Ellenborough says—"If I put in motion a dangerous thing, as if I let loose a dangerous animal, and leave to hazard what may happen, and mischief ensue to any person, I am answerable in trespass." [*Martin*, B.—Surely a man may sell a vicious bull, if he gives the buyer notice of the danger.] [*Bramwell*, B.—Then there is the other difficulty, that the mischief done here was not the unmixed result of the act of the defendant. For all that appears in this declaration to the contrary, the defendant may have told the plaintiff that the horse was glandered, or

had something the matter with him, but that the plaintiff, relying on his own judgment to the contrary, bought the animal, and took chance for the risk.] An action is maintainable wherever the damage is the natural and probable, though it be not the necessary consequence of the wrongful act of the defendant. A thing cannot be sold unless there is a buyer; but that does not relieve the seller from responsibility in selling it, if it is a thing which ought not to be sold. Besides, special demurrers are abolished, and objections like the above are only suited to the time when such demurrers were allowed. It is true that when a statute creates an offence and imposes a penalty, no other *punishment* except that penalty can be inflicted; but that does not affect *civil* proceedings by an injured party.

Raymond, in reply, observed that the allegations in the indictment in *Reg* v. *Henson* differed widely from those in the present declaration; and referred to *Caswell* vs. *Worth*, 5 El. & Bl. 849, as an authority, that in answer to an action for bodily injury caused by a breach of duty on the part of the defendant, it is a defence, that although the defendant was guilty of the breach of duty, the plaintiff, knowingly, wilfully, and contrary to the command of the defendant, committed the act which was the direct cause of the injury.

Cur. adv. vult.

Judgment was now delivered as follows:—

POLLOCK, C. B.—Some members of the court think that the declaration in this case is bad, on the ground that it does not state sufficient to show a cause of action against the defendant. It states that a certain horse was glandered, that the defendant knew that, and the plaintiff did not; that the defendant sold the horse to the plaintiff, and the plaintiff bought it. There is no fraud or misrepresentation charged against the defendant, nor is any warranty alleged. My brothers Martin, Bramwell, and Channell, think the declaration does not disclose a sufficient cause of action, so as to justify us in giving judgment for the plaintiff. And although I have some doubt

on the whole matter, for the reason that I think there may be some question whether the sale of a glandered horse is not in itself an illegal, as it certainly is an improper act, still, on the pleadings before the court, I am not prepared to dissent from the opinion of my brothers, and therefore consider judgment should be given for the plaintiff.

MARTIN, B.—This is a demurrer to a declaration. The material facts alleged are, that the defendant was possessed of a horse which he knew had the disease of glanders; that he caused it to be put up for sale by auction at a horse repository, and the plaintiff purchased it, believing it to be sound, and sustained damages in consequence of his becoming possessed of it.

The arguments in support of the declaration were—first, that by the stat. 16 & 17 Vict. c. 62, continued by the 19 & 20 Vict. c. 101, it is illegal to sell a glandered horse; but this is not so. It is illegal to knowingly bring, or attempt to bring, a glandered horse for sale into any market, fair, or other open or public place where animals are commonly exposed for sale; but there is nothing in the statute to enact that a single sale of such a horse is prohibited; and there is, I think, nothing in this declaration to show that this horse was brought to be sold in such a place. It is alleged that he was caused to be sold by the defendant by auction, at a horse repository; but there does not seem to me a sufficient allegation that this place was such a public place. The place contemplated by the statute is apparently a place open for the public to sell and buy horses; such auction marts as Tattersall's or Aldridge's may be such places, but a horse repository is not necessarily such a place; and for all that appears in the declaration, it may have been a place intended for the sale of diseased horses.

There was no authority of any kind cited to show that it is illegal at common law to sell a glandered horse. Surely such a horse may be sold for the purpose of being destroyed—the skin must be worth something, and I am not aware that the carcase is not useful for the ordinary purposes for which horse-flesh and the other parts of the dead horse are used. The case of *Reg.* v. *Henson* (1 Dears. C. C. 24) was relied on, but the offence there was the taking the

diseased horse into a public place, and there is nothing in that case to show that the simple sale of such a horse is illegal. Another case cited was *May* v. *Burdett*, (9 Q. B. 101,) but I do not think the principle of it bears upon the present; for it is quite consistent with everything averred in this declaration that the defendant told the auctioneer that the horse was glandered, and to sell him as such; and indeed, that the plaintiff may have been so told, but that, relying upon his own judgment, he believed the horse was sound, notwithstanding he had notice that the horse was unsound.

The declaration is in a form entirely new; and without the least desire to return to the system of special demurrers, I think that where there is a well-known, plain, simple and intelligible form for stating causes of action in respect to sales of animals, any deviation from it ought to be narrowly watched, otherwise one meaning will be alleged to belong to the pleadings when they are demurred to, and another when the issues joined upon are being tried at Nisi Prius. In my view of the law, when there is no warranty the rule caveat emptor applies to sales; and except there be deceit, either by a fraudulent concealment or fraudulent misrepresentation, no action for unsoundness lies by the vendee against the vendor upon the sale of a horse or other animal.

BRAMWELL, B.—I understand the plaintiff to make out his case thus—the defendant did an unlawful act, and that act caused me damage. Now, the act of the defendant, stated by the plaintiff, and supposed to be unlawful, is causing a horse to be sold by auction at a horse repository, the horse being glandered, and the defendant knowing it. I am of opinion that shows no illegality within the statute, as I think the "public place" in the 16 & 17 Vict. c. 62, s. 1, means a place to which the public have a right to come, as a fair or market, which this horse repository is not stated to be, and probably was not. For a similar reason I think no offence at common law is shown—I know of no prohibition of merely selling a glandered horse.

But assuming that the declaration shows an unlawful act, I am also of opinion that no damage flowing from it is stated. The damage is stated thus:—"The plaintiff, believing the horse to be in

a healthy state, became the purchaser thereof, and paid therefor, and the horse was utterly worthless, and the plaintiff paid a veterinary surgeon for examining the horse, and in consequence of the horse being put into a stable, another horse became infected and died, and the plaintiff was obliged to pay for endeavoring to cure it." It is to be observed, that consistently with this the defendant may have told the plaintiff that the horse was glandered. But my brother Hayes so indignantly says that that remark suits rather the days of special demurrer than the present time, that I will assume merely that the defendant committed no fraud, though I not see why, if this action is maintainable, it would not be though the defendant had told the plaintiff the horse was glandered, as the act of exposing to sale would have been equally illegal, and the damage would as much have resulted from it. But how does the damage flow from the act complained of? In truth, it all flows from the plaintiff buying the horse and dealing with it as he did. Had he not bought it he would have sustained none of the losses he complains of. Having bought it, had he thought fit at once to kill it, he would have sustained no loss but his first loss. But his buying it, and dealing with it as he did, are entirely his own acts, and not the result in any sense, certainly not the natural or necessary result, of any act of the defendant. The plaintiff, therefore, in my opinion, fails in both his propositions, and there must be judgment for the defendant.

But it may be said, that though no indictable offence is shown, yet that a sale of a glandered horse, knowing it to be so, gives a right of action to a buyer ignorant of the defect. In considering this, it is to be borne in mind that no fraud of any sort is to be assumed, no suppression of the marks of the disease, or other falsity or concealment; and it is said that if this were not so, many things with most mischievous defects not apparent, might be knowingly sold to innocent purchasers. But in truth the buyer knows of the possible existence of the defect, or he does not. If he does, he has no right of complaint if he chooses to purchase without a warranty; and if he does not, he ought not to be any better off for his ignorance. In short, the rule caveat emptor as reasonably applies to

the sale of a glandered horse as to any other case. I am of opinion, therefore, that the defendant is entitled to judgment.

Judgment for the defendant.

In the Court of Chancery, April 29, 1857.

[Before the LORD CHANCELLOR (Lord CRANWORTH) and the LORDS JUSTICES.]

THE UNIVERSITY OF LONDON *vs.* YARROW.

1. A bequest for the founding, establishing, and upholding an animal sanatory institution within a mile of either Westminster, Southwark, or Dublin, for investigating, studying, and, without charge beyond immediate expenses, endeavoring to cure maladies, distempers, and injuries any quadrupeds or birds useful to man may be found subject to—Held to be a good charitable bequest within the meaning of the statute of Elizabeth.

2. Semble, that had the bequest been bad, as implying the purchase of land near Westminster or Southwark, and therefore violating the Mortmain Act, the option for the trustees to establish the institution in Ireland, where the statute of mortmain does not apply, would have prevented the bequest from being invalid.—Per the lord Chancellor.

This was an appeal from the decision of Sir J. Romilly, M. R., (2 Jur., N. S., 1125, where the will of Thomas Brown, on whose bequest the questions arose, is fully set out.) The questions were, whether the objects of the testator's benevolence could be good objects of a charity, and whether the will did not violate the Mortmain Act. The bequest was of 20,000*l.* of 3*l.* per cent. Consols to the chancellor, vice-chancellor, and fellows of the University of London, and their successors in the said University, and all residue of personal property not consisting of lands, houses, or other real estate, and belonging to the testator at the time of his decease, "for the founding, establishing, and upholding an institution for investigating, studying, and, without charge beyond immediate expenses, endeavoring to cure maladies, distempers, and injuries any quadrupeds or birds useful to man may be found subject to; for and towards which purpose of founding, establishing, and upholding such animal sanatory institution, within a mile of either Westminster, Southwark,

or Dublin, as may, at the time for making a decision as to locality by the chancellor, vice-chancellor, and fellows for the time being of the University of London, or the governing majority thereof, be then thought most consistent and expedient," &c. The Master of the Rolls decided that it was a good charity, and decreed in favor of its establishment. Against that decree the next of kin of the testator appealed.

Amphlett, (*R. Palmer* was with him), for the plaintiffs, the London University, contended that it was a good charitable object; and that, there being the option of founding the charity in England or Ireland, the mortmain statute was out of the question, as it did not apply to Ireland; and further, that as the legacy could be applied on a subsisting institution, it was not necessary to purchase land for the establishment of the institution. (*Sorrisby* vs. *Hollins*, 9 Mod. 221; *Edwards* vs. *Hall*, 11 Hare, 1, 6 De G., Mac., & G. 74; S. C., 1 Jur., N. S., 1189; *The Mayor of Faversham* vs. *Ryder*, 5 De G., Mac., & G. 350; S. C., 18 Jur. 587; *Longstaff* vs. *Rennison*, 1 Dru. 28; *In re Clancy*, 16 Beav. 225; *The Church Building Society* vs. *Barlow*, 3 De G., Mac., & G. 120; *The Attorney-General* vs. *Williams*, 2 Cox, 387).

Selwyn and *Pearson* appeared for the University of Dublin.

The Attorney-General and *Wickens*, for the Crown.

Cairns and *Cotton*, for the appellants.—First, this is not a charity within the decided cases. Secondly, if it be a charity, it is within the Mortmain Act. First, there is nothing to stamp this bequest with the character of a charity, unless it be the words "useful to man;" it is mere benevolence to animals, and in terms much too vague, as it must apply to all animals, as they must all be presumed to be useful to man. In *Browne* vs. *Yeall*, 7 Ves. 50, note, the bequest was for the purchase of books which might have a tendency to promote the interests of virtue and religion, and the happiness of mankind, and yet it was declared not to be a charity. Surely such a bequest as that was more likely to promote the benefit of mankind than the present. If such an establishment as the present be founded, the rich are more likely to be benefitted than the poor. *Morrice* vs. *The Bishop of Durham*, 9 Ves. 406; *The Attorney-General* vs.

The Haberdashers' Company, 1 My. & K. 120. Here the object of the testator is expressed clearly to be mere *benevolence* to animals; and we submit that this object cannot be restricted to *charitable* purposes. This was expressly decided in *James* vs. *Allen*, 3 Mer. 17. To be a charity, it must be for purposes within the meaning of the statute of Elizabeth. Secondly, this bequest clearly points to the establishment of an institution in a particular locality; and such a purpose cannot be effected without the purchase of land. *The Attorney-General* vs. *Hull*, 9 Hare, 647; *Dunn* vs. *Bownas*, 1 Kay & J. 596; *The Attorney-General* vs. *Hodgson*, 15 Sim. 146. But then the other side say that there is an option to found the institution in Ireland, where the Mortmain Act does not apply. There are two answers to that—first, the effect of that is nothing more than as if the testator had directed the money to be laid out on land already in mortmain; but in such a case there must be an express direction by the testator that the money is to be expended on land in mortmain. *Giblet* vs. *Hobson*, 3 My. & K. 517. But here there is no such direction, for there is the option to the trustees.

Should the decision of the court be against us on both points, still we submit that the next of kin are entitled to their costs. *Moggridge* vs. *Thackwell*, 7 Ves. 36.

In the course of the argument,

Sir J. L. KNIGHT BRUCE, L. J., remarked that any bequest for public useful purpose was a charity.

Sir G. J. TURNER, L. J., mentioned that it was decided that a bequest for building a bridge was a good charity.

LORD CHANCELLOR, (without hearing the reply).—I cannot say that I have any doubt about this case. Two objections have been raised. One is, that this is not a charity. Now, what is ordinarily called a charity has sometimes given rise to very difficult questions; but I think those questions have generally turned upon the point, whether the object of the testator has been too vague, as in a gift to the poor, and equivalent expressions, it has been difficult for the court precisely to define any object as that which the testator distinctly contemplated; but when the testator points out what he contemplated, and that which he contemplates is something highly

beneficial to the community at large, I do not know that any question has been raised as to whether it was within the statute of Elizabeth or not. The statute of Elizabeth only enumerates those objects to which well-disposed persons have been in the habit of devoting property; but the objects there enumerated are not to be taken as the only objects of charity, but are given as instances. If that were not so, a cursory glance at the statute has satisfied me that no hospital would be within the statute, because the only allusion is to the cure of sick soldiers and mariners. Nobody ever doubted that that was only put as an instance of those objects to which pious and well-disposed persons had theretofore devoted their property. The courts have always looked to objects of the same nature as those; and I cannot entertain for a moment a doubt that the establishment of an hospital in which animals which are useful to mankind should be properly treated and cured, and the nature of their diseases investigated, with a view to public advantage, is a charity; and the doubt which is raised cannot, I think, be entertained for a moment by any rational mind; and so, I understand, thought the Master of the Rolls. It is said that this would extend to all animals, and Mr. Cairns, illustrated it in this way. He said there is now prevailing a disease amongst grouse. I do not think they would come within the terms of this charity, for I think the testator, when he speaks of animals useful to mankind, means domestic animals. That is the reasonable interpretation of it. But if he did, I should not at all say that it would be a bad charity, except that you could not catch them, and so you could not investigate the mode of curing them. But as to animals which are ordinarily kept for use and amusement, that an establishment which could be effectual to cure diseases amongst them would be a good charity is a matter upon which I entertain no doubt whatever. I do not entertain a doubt that it would be a good charity if you could establish an institution for investigating and removing the causes of the potato disease, or of the vine disease, and anything that would tend to the improvement of vegetables. If any theory were to arise from it, I have no doubt that that would be a most beneficial establishment for mankind in general. A hospital such as the one proposed already exists—the

Veterinary College, where they cure not only horses, but all animals of a domestic nature; and that the establishment of an institution having those objects in view is a good charity within the meaning of the statute of Elizabeth, is a point upon which I entertain no doubt whatever. There is more plausibility in the argument that this charity is void under the Statute of Mortmain, because it is said it points to a foundation which requires the purchase of land. I think it is a complete answer to that, that it points only to the purchase of land either in the neighborhood of London or in the neighborhood of Dublin—that neighborhood of Dublin not having been inserted at all fraudulently to save the operation of the statute, because I collect from the will that this gentleman was a resident himself in Dublin. He speaks of his Irish stock, and is evidently a person to whom the usages of society in that country were entirely familiar. He therefore gives the option of having that establishment either in London or in Dublin; and, putting it at the worst, he cannot be held to have said more than this—it shall be established at one of two places, thinking both of them lawful; whereas only one is lawful. Then as to the doctrine of that case of *Sorrisby* vs. *Holins*, before Lord Hardwicke; there have been innumerable other cases where a testator has given an option to trustees to invest property in one of two ways, the one lawful and the other not, and it has never been held that the Statute of Mortmain interfered with the validity of that bequest. I do not wish to commit myself to say that if there had been no such allusion to Ireland this would have been bad, but I am not at all clear that the establishment of such a sanatory institution as necessarily implies the acquiring of land, would vitiate the gift under the Statute of Mortmain. It appears to me so entirely correctly decided by the Master of the Rolls, and the appeal so thoroughly without foundation, that it must be dismissed, with costs.

Sir J. L. KNIGHT BRUCE, L. J.—I have no recollection of an appeal more unjustifiable, or more plainly void of sense and reason; and were it not dismissed with costs it would be privately unjust, and mischievous against the public.

Sir C. J. TURNER, L. J.—I have nothing to add to what has fallen from the rest of the court.—*Appeal dismissed, with costs.*

In the Vice-Chancellor Wood's Court, April 18, 1857.

WEBSTER *vs.* DILLON.

D., an actor, contracted with W., the manager of a theatre, to play at W.'s theatre for twelve consecutive nights, commencing on a certain day, stipulating that he should be at liberty during those nights to perform (among other characters) three which were named; but there was no express condition that D. should not act elsewhere during the twelve nights. On the approach of the day appointed for commencing the engagement, D. declared that he would only act in a piece which could not be produced at W.'s theatre; and when told that was impossible, declared that he would not act at all for W., and advertised himself to act at another theatre on the night appointed for the commencement of his engagement.

Held, that an injunction might be granted to prevent D. acting during the twelve nights at any other theatre during the ordinary hours at which W.'s theatre was open for public performance.

The bill in this suit was filed for the purpose of obtaining an injunction to restrain the defendant Charles Dillon, from violating or committing any breach of an agreement, whereby he had stipulated with the plaintiff, the lessee of Sadler's Wells Theatre, to play for twelve nights at Sadler's Wells Theatre, and from acting or playing at Drury-lane Theatre, or any other theatre or place, without the sanction or permission of the plaintiff. The agreement was contained in a letter to the plaintiff, signed by the defendant, and in the following terms:—

"Theatre Royal, Lyceum, April 8, 1857.

"My dear Sir,—I agree to play for you at the Sadler's Wells Theatre for twelve consecutive nights, commencing Monday, April 20, 1857; that provided I provide Mr. Barrett to play the old men in the pieces, you will allow me a clear half of the gross receipts, after you have deducted 20*l.* per night; provided also that I play among my pieces the characters of William Tell, Rolla, and Ingomar."

The bill, the statements in which were substantiated by an affidavit of the plaintiff, alleged that the plaintiff had incurred considerable expense in making preparations for the performance of the defendant at Sadler's Wells; that he had engaged other actors to

act with the defendant in the pieces mentioned in the agreement; that he was ready and willing to perform the agreement on his part; that upon the 15th April the defendant, through an agent, had informed the plaintiff that he would act Virginius at Sadler's Wells on the evening of the 20th April, and declined to act in any other play that evening: that Virginius was a play in five acts, and that the plaintiff was, as the defendant well knew, precluded by his contract with the lessor from producing five-act plays at that theatre: that on the 16th April, the defendant positively stated to the plaintiff that he would not play at Sadler's Wells Theatre on the evening of the 20th, and that he intended to play at Drury-lane Theatre during the hours of the performance at Sadler's Wells Theatre. A playbill of Drury-lane Theatre was produced as an exhibit, wherein the defendant was advertised to play in Macbeth at that theatre on the evening of the 20th. Leave to serve notice of motion for the 18th April had been obtained from the Vice-Chancellor the day before.

Clement Swanston now moved for an injunction in the terms of the bill, having on the previous day obtained special leave for that purpose. The defendant did not appear. An affidavit of service of the leave to move thus obtained, was produced. He cited *Lumley* vs. *Wagner*, 1 De G., Mac., & G. 604, in the agreement in which case, however, there was an express negative stipulation to abstain from performing at other theatres; but Lord St. Leonards p. 618 intimated his opinion that even in the absence of such a negative stipulation, a person who had stipulated to perform at a particular theatre might, although the agreement was of such a nature that the court could not enforce its specific performance, be restrained from executing engagements manifestly incompatible with the spirit and true meaning of his agreement.

Sir W. P. Wood, V. C., thought that the words of Lord St. Leonards were sufficiently strong to justify his making an order in the present case, and granted an injunction restraining the defendant from acting at any other place than the plaintiff's theatre during the ordinary hours of performance there for twelve consecutive nights, commencing on the 20th April, the plaintiff undertaking to abide by such order as to damages as the court might direct.

In the Court of Common Pleas, July 4, 1857.

CAHILL *vs.* DAWSON.

Where an agent, who has received instructions from his principal to effect a policy of insurance, employs a third person for that purpose, who gets the policy effected through his own broker, but shows to him at the time the instructions which the principal had given, the broker has no right to retain the money he may receive under the policy, upon a loss occurring, against a debt due to him from such third person; and such retention being, therefore, unlawful, will not give the principal any right of action against his agent to recover the whole amount received by the broker under the policy.

Quere, whether an agent employed by his principal to effect a policy of insurance is liable for a breach of his duty as agent if he employ another person to get the policy effected by a policy broker?

This was an action by the executors of Lucas Beck, against the defendant as his agent, for not properly insuring a cargo of fruit according to the instructions of his principal. The first count stated that the defendant was retained by the testator Beck, as agent for reward, to effect a good and available insurance on a certain cargo of oranges shipped by the testator to the defendant for sale or return, upon the terms that the defendant should use due and reasonable care and diligence in and about effecting the said insurance, and in taking all necessary steps to enable the said testator to obtain payment of the moneys which might become due in the event of the loss of the cargo by any of the perils insured against, and should, in the event of the inability of the defendant to effect the said insurance, give notice thereof to the testator within a reasonable time in that behalf. Breaches—first, that the defendant did not use due and reasonable care and diligence in effecting the said insurance; secondly, that he did not give the testator or the plaintiffs notice of his inability to effect the same; and, thirdly, that he did not use due and reasonable care and diligence in and about taking the steps necessary to enable the testator and the plaintiffs to obtain payment of the moneys due in respect of the loss of the cargo by the perils insured against. There were also counts for money had and received, &c. The defendant pleaded, inter alia, pleas traversing the breaches alleged in the first count, leave and

license, and also a plea of discharge before breach. At the trial, before Willes, J., at the London Sittings, after Hilary term last, the following facts were proved: The defendant, who resided at Liverpool, and to whose care the cargo in question had been consigned, received a letter from the testator requesting him to effect an insurance on the cargo. The defendant, finding that the premium for an insurance on fruit was higher in Liverpool than in London, wrote to Mr. Lewis, who was the testator's agent in London, with instructions to effect the policy, explaining also to him the order he had received from the testator. Lewis employed a policy broker by the name of Nail, who accordingly effected the policy in Lewis's name. This was communicated afterwards to the defendant, who subsequently advised the testator of the policy having been effected. The vessel was damaged, and a loss was sustained on the cargo, in respect of which the underwriters paid the sum of 326*l.* This was received by the broker Nail, but he refused to hand it over to any one, claiming a set-off against Lewis in respect of premiums which he had paid for him on other policies. There was some conflict of evidence at the trial as to whether Lewis showed in the first instance to Nail the letter of instructions which he had received from the defendant. The opinion of the jury was not taken upon this point, as the learned judge thought it immaterial, being of opinion that the defendant had violated his duty by employing another agent in London to effect the insurance. A verdict was accordingly entered for the plaintiffs for the full amount received by Nail under the policy, viz. 326*l.*, leave being reserved to the defendant to move to set this aside and enter the verdict for the defendant. In Easter term last,

Wilde, Q. C., obtained a rule nisi to that effect, pursuant to the leave reserved, or for a new trial, citing *Westwood* vs. *Bell*, (4 Camp. 349;) *Snook* vs. *Davidson*, (2 Camp. 218;) and *Manass* vs. *Henderson*, (1 East, 335.)

Against this rule, in Trinity term last,

Honyman (June 8) showed cause.—The merchant had a right to expect that the insurance would have been effected in his own name,

and it was the defendant's duty to have done so; and it is submitted that the correspondence which afterwards passed between the parties does not show a ratification by the plaintiffs of what the defendant did. It is said that the plaintiffs should have sued Nail; but it is submitted that they could not have sued him, for he was only the person employed by the defendant's agent, and there was no privity of contract between Nail and the plaintiffs, or their testator. (*Stevens* vs. *Badcock*, 3 B. & Ad. 354; *Ireland* vs. *Thompson*, 4 C. B. 149.) The other side, however, will contend, as they did on moving for the rule, that Nail received the money under this policy for the person who was interested in it, and whom he knew was the plaintiffs' testator; but that turns on the question whether Nail knew, when Lewis employed him to effect the insurance, for whom Lewis was acting, and what were the instructions the defendant had received from the testator. If the defendant, however, means to rely on that, he should at the trial have required the matter to have been left to the jury, and it is too late now to set it up. Besides, supposing the plaintiffs might have sued Nail, why should that destroy their right of suing also the defendant? Then there is a count for money had and received, so that if the money was received by Nail as the defendant's agent, it is the same as if the defendant had himself received it, and he is therefore liable to the plaintiffs for money received to their use.

Wilde, Q. C, and Tomlinson, (June 9,) in support of the rule.—The defendant, it is submitted, obtained an available insurance for the plaintiffs' testator, which was all that he was bound to do as such agent. That it was an available insurance which he obtained is evident, for the underwriters paid the amount of the loss. Then the next charge against the defendant is, that he did not take the necessary steps to enable the testator and the plaintiffs to obtain the money so paid by the underwriters. [CRESWELL, J.—That turns upon whether the defendant's letter was shown by Lewis to Nail. That was not determined by the jury one way or the other; and though it was the foundation of the defendant's case, his counsel never asked it to be left to the jury.] At the trial Lewis stated that he did show this letter to Nail, and he was not cross-

examined as to that, the plaintiffs' counsel contending, that notwithstanding the letter was shown to Nail, the plaintiffs were still entitled to recover. After the opinion expressed by the learned judge, it was said by the plaintiffs' counsel that there were no facts in dispute; and it was agreed then on both sides, that as there was therefore nothing to go to the jury, the question of liability should be left to the court. The main contention by the plaintiffs at the trial was, that the defendant should not have employed an agent. The usage, however, is always to employ a broker to effect an insurance. (1 Arn. Ins. 108.) There was, therefore, no breach of the defendant's duty in getting another person to procure the policy; nor were the plaintiffs prejudiced by this, if Nail knew Lewis was only an agent for them, as the cases show he could have no right to set off the debt due to him from Lewis. (*Snook* vs. *Davidson*, 2 Camp. 218; *Manass* vs. *Henderson*, 1 East, 335; *Mann* vs. *Forrester*, 4 Camp. 60; *Westwood* vs. *Bell*, Ib. 349.) With respect to the count for money had and received, the money never was received by the defendant, in fact; and as to its having been constructively received by him through the hands of Nail, the answer is, that it never was so received by him to the plaintiffs' use. *Cur. adv. vult.*

CRESWELL, J., (July 4,) delivered the following judgment:—This was an action brought by the plaintiffs, as executors of Beck, a merchant who resided at Seville, against Dawson, his agent at Liverpool, charging the defendant with negligence in effecting a policy of insurance. It appeared that Beck had written to Dawson requesting him to effect a policy on fruit. Dawson, thinking it could be effected on more advantageous terms in London than in Liverpool, wrote to a person of the name of Lewis, in London, explaining to him the nature of the order he had received, and instructing him to effect the policy. Lewis employed a policy broker of the name of Nail to effect the same; and there was a controversy at the trial as to whether or not Lewis showed this letter of instructions to Nail. Nail effected the policy, and a loss having occurred, Nail received the money from the underwriters, but refused to pay it over to Dawson, insisting on a lien against Lewis in respect of premiums due on other policies. The learned judge reports to us