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June 23.

LEE AND ANOTHER *v.* THE BUDE AND TORRINGTON JUNCTION
RAILWAY COMPANY.

Ex parte STEVENS. *Ex parte* FISHER.

Company—Sci. fa. under 8 & 9 Vict. c. 16, s. 36—Judgment Creditor—Discretion of the Court—Act of Parliament obtained by Fraud.

The discretion of the Court in granting or refusing a sci. fa. against a shareholder under s. 36 of the Companies Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 16), is to be a judicial discretion exercised according to the known rules of law. A vague suggestion of fraud, or that parliament was imposed upon by false recitals in the special Act, will not, where a fair *prima facie* case is made out by the plaintiff, induce the Court to withhold the writ; but the party will be left to plead to the sci. fa. any defence, legal or equitable, which he may have.

THE defendants were incorporated by the Bude and Torrington Railway Act, 1869, by the name of the Bude and Torrington Junction Railway Company. The plaintiffs, who had acted as solicitors for the company, on the 18th of April, 1871, obtained a judgment against them for 5375*l.* and 20*l.* costs. On the 29th of April, writs of fi. fa. against the company were delivered to the sheriffs of Devonshire and Cornwall respectively, which writs were on the 4th and 8th of May respectively returned nulla bona. The projected line of railway was limited to the counties named. The company possessed no lands upon which the judgment could be satisfied by *elegit*, nor had they entered on or purchased any land or commenced making their railway. The names of John C. Moore Stevens and Thomas Fisher were on the register of shareholders of the company as holders of 25 and 125 shares respectively, in respect of each of which shares the sum of 16*l.* remained unpaid.

Rules nisi for the issuing of writs of scire facias against these two shareholders, under s. 36 of the Companies Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 16), were obtained, against which

June 23. *Sir John Karlake, Q.C.*, and *Raymond*, for Stevens, and *Horace Lloyd, Q.C.*, and *A. L. Smith*, for Fisher, shewed cause.

Stevens' affidavit in opposition to the rule against him was in substance as follows :—

1. In the year 1865, the Okehampton Railway Company was authorized by an Act called "The Okehampton Railway (Extensions to Bude and Torrington) Act,

1865 (28 & 29 Vict. c. cxlix), to make and maintain certain works in that Act particularly described, for extending their railway to Bude, in the county of Cornwall, and to Great Torrington, in the county of Devon.

2. The powers given by that Act (which received the royal assent on the 29th of June, 1865,) for the compulsory purchase of land were to be exercised within three years from the passing of the Act; and the extension railways authorized by it were to be completed within five years from its passing.

4. By that Act the name of the company was altered from "The Okehampton Railway Company" to "The Devon and Cornwall Railway Company."

5. In October, 1865, being the owner of land through which the extension railway would pass, I was applied to by the directors to take shares in the Devon and Cornwall Railway Company, and consented to do so, and accordingly received a letter informing me that twenty-five shares created under "The Okehampton Railway (Extension to Bude and Torrington) Act, 1865," had been allotted to me; and I paid the deposit of 4*l.* per share thereon.

8. The Devon and Cornwall Railway Company have never done any work whatever upon the extension lines authorized by the said Act; nor have they entered into any contract whatever for the purchase of any land for the purposes thereof; nor have they ever issued any share or shares whatever in respect of the undertaking authorized by that Act, and in respect of which my application was made.

13. The plaintiffs were, as I am informed and believe, the solicitors of the Devon and Cornwall Railway Company, and acted for them in obtaining the before-mentioned Bude and Torrington Extensions Act.

14. In 1867, the Devon and Cornwall Railway Company obtained an Act of Parliament called "The Devon and Cornwall Railway Act, 1867 (30 & 31 Vict. c. cxxv), by which Act the Bude and Torrington extensions authorized by the Act of 1865 were divided into four sections, each section being made a separate and distinct undertaking, with separate and distinct capitals.

15. I took no part whatever in the application for or obtaining the said Act; nor did I in any way authorize the application to parliament for it; nor was I in any way consulted before it was applied for. I have never applied for any share or shares in any of the separate undertakings into which the original undertaking was by that Act divided; nor has any share or shares in any of those separate undertakings been allotted to me.

16. The said Act recites that the company had not raised any money under the Act of 1865, which is wholly inconsistent with any of the shares under the Act of 1865 having been allotted or there being any shareholders under that Act.

17. The plaintiffs were the solicitors of the Devon and Cornwall Railway Company when the Act of 1867 was applied for and obtained; and they must have known either that there were no shares allotted and no shareholders under the Act of 1865, or that the recital in the Act of 1867, upon which that Act was in part founded, was false.

18. To the best of my knowledge, information, and belief, nothing whatever has been done towards making the extensions authorized by the before-mentioned Acts.

19. In the year 1869, an Act of Parliament was applied for and obtained, called "The Bude and Torrington Junction Railway Act, 1869" (32 & 33 Vict. c. cxxvii), whereby it is, amongst other things, enacted,—s. 4, that "all persons

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and corporations who have already subscribed or shall hereafter subscribe to the undertaking, and their executors, &c., shall be united into a company for the purpose of making and maintaining the railway to be called The Bude and Torrington Junction Railway, and for other the purposes of this Act; and for those purposes shall be incorporated by the name of The Bude and Torrington Junction Railway Company," and shall be a body corporate, &c. Sect. 5 is as follows:—"Subject to the provisions of this Act, on and from the passing of this Act all the lands acquired and all the works executed by the Devon and Cornwall Railway Company by virtue of the Act of 1865 and the Act of 1867, and all the powers, rights, and privileges conferred on the Devon and Cornwall Company by the said Acts and the Acts or parts of Acts incorporated therewith, whether for the construction and maintenance of the Bude and Torrington extensions, or for the purchase of lands for the purposes thereof, or for levying tolls and charges in respect thereof, or for any other purpose with relation thereto, together with the benefit, rights, privileges, obligations, claims, and demands of and under all contracts, agreements, and arrangements, shall be vested in the company, and shall be exercised by the company as fully and effectually as though the same powers, rights, and privileges had been originally conferred upon the company; and in like manner all the duties, obligations, and liabilities imposed upon or attaching to or incurred by the Devon and Cornwall Company with respect to the Bude and Torrington extensions shall be performed by and attach to the company; and the Act of 1865 and the Act of 1867, respectively, shall be read as though the name of the company had been used therein instead of the name of the Devon and Cornwall Company: Provided that the company and the shareholders thereof shall be exempt from the debts, duties, and liabilities with relation to the general undertaking of the Devon and Cornwall Company, and, subject to the provision next hereinafter contained, the Devon and Cornwall Company and the shareholders thereof shall be exempt from all debts, duties, and liabilities relating to the Bude and Torrington extensions, and shall be indemnified therefrom by the company, and all the powers of the Devon and Cornwall Company with respect to the Bude and Torrington extensions shall absolutely cease: Provided also that nothing contained in this Act shall take away or shall prejudicially affect the rights, claims, powers, or remedies possessed or enjoyed at the time of the passing of this Act by any person whatsoever, whether upon the Devon and Cornwall Company and their undertaking or upon the Bude and Torrington extensions."

20. Except as in this affidavit appears, I had not subscribed to the undertaking mentioned in the Act of 1869; and I was not when that Act passed a person who had subscribed to the undertaking mentioned in it.

21. I in no way authorized or assented to the application for the Act of 1869; nor have I in any way consented to either of the before-mentioned Acts of 1867 and 1869, or the applications for them.

23. I am informed and believe that at the time of the passing of the Act of 1869, no land had been acquired nor any contract made for the purchase of any land for the said extensions.

24. Although the said extension works had not been commenced, and the time limited for their completion by the Act of 1865 would expire in June, 1870, no provision is contained in the Act of 1869 for extending the time for completing the works, nor is the time limited by the Act of 1865 for the compulsory purchase of land extended by the Act of 1869, although, as I am informed and believe, no

land whatever had been bought or contracted for for the purpose of the said extensions when the Act of 1869 was applied for and obtained.

25. I have been informed and believe that the only persons now having any interest whatever in the existence of the company are, certain creditors consisting principally of the engineer, the present plaintiffs, and certain surveyors and local solicitors; and I am informed and believe that the plaintiffs' claim against the company, and upon which the judgment now sought to be enforced against me was obtained, was principally, if not entirely, for and in respect of their costs and charges in applying for and obtaining the Acts of 1867 and 1869: and, although the plaintiffs themselves caused it to be recited in the Act of 1867 that the company had not raised any money under the Act of 1865, they are now seeking to make me liable only in respect of my having consented to take shares under that Act.

26. The proceedings taken by the plaintiffs in obtaining the before-mentioned Acts, in heaping up costs against the company, and in suing and obtaining judgment against them, were not proceedings taken in good faith, but mere schemes and devices to promote their own individual purposes only: and it would be unjust and inequitable, under the circumstances, to allow them to issue execution against me."

Fisher's affidavit, *mutatis mutandis*, was to the same effect.

It is discretionary with the Court to grant or to withhold the *sci. fa.* under 8 & 9 Vict. c. 16, s. 36,—*Scott v. Uxbridge and Rickmansworth Ry. Co.* (1), *Shrimpton v. Sidmouth Ry. Co.* (2),—and the circumstances of this case clearly justify the Court in withholding the writ. Nothing having been done pursuant to the Act of 1865 in furtherance of the undertaking thereby contemplated, to which undertaking alone Messrs. Stevens and Fisher agreed to become subscribers, and the time for exercising the powers of that Act having been suffered to expire, they are no longer liable as shareholders. The Acts of 1867 and 1869, of which the plaintiffs were the promoters, were obtained by means of fraudulent recitals and representations; and these are matters which, though they afford a good answer in equity, cannot be pleaded to the *sci. fa.*

H. James, Q.C., and *Bridge*, in support of the rule, were not called upon.

WILLES, J. This is an application for a writ of *sci. fa.* to try the question whether two persons, as shareholders in the Bude and Torrington Junction Railway Company, are bound to pay to the plaintiffs so much as may remain unpaid upon their respective

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(1) Law Rep. 1 C. P. 596.

(2) Law Rep. 3 C. P. 80.

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shares, in discharge of a debt in respect of which the plaintiffs have obtained a judgment against the company, pursuant to 8 & 9 Vict. c. 16, s. 36.

The mode of proceeding under that section is, to obtain a judgment against the company, and to use every available means to enforce that judgment against the property of the company; and then, failing to obtain satisfaction, to apply to the Court for leave to issue a *scire facias* to have execution against the property of the shareholders. It is obvious, therefore, that the proceedings under that section are meant as a supplement to the proceedings against the company, to enforce against the shareholders the payment of that which they are liable to pay towards the capital of the company. In reality they are no more than executions against a particular kind of property of the company.

I will assume that this judgment was obtained in respect of a claim by the plaintiffs as solicitors for the company for the costs and expenses incurred in applying for, obtaining, and passing the Acts of 1867 and 1869. I will assume that they were the persons who took those proceedings. There must have been meetings of the directors, and announcements in the newspapers of the day giving notice of the intended application for the Acts and of the several proceedings before parliament in reference to them, so as to give every one interested in opposing their passing an opportunity of being heard. Assume the plaintiffs were the guiding spirits, what is the judgment of parliament as to the costs incurred? The 30th section of the Act of 1867 and the 19th of the Act of 1869 expressly provide that "all costs, charges, and expenses of and incident to the preparing and applying for and the obtaining and passing of the Act shall be paid by the company." It is only necessary to refer to *Carden v. General Cemetery Co.* (1) to shew that those words have a distinct meaning, giving a remedy by action against the company, including the execution against unpaid calls on shares under s. 36 of the Companies Clauses Consolidation Act, 1845, viz. by *sci. fa.* against the shareholders. I entirely agree that the Court is not bound under that section absolutely to issue a *sci. fa.* against the alleged shareholders. It was intended that the Court should exercise a discretion; that is, a judicial discretion regulated

(1) 5 Bing. N. C. 253.

according to known rules of law. That is the meaning of the expression as usually found in the books. The *sci. fa.* is not a writ of right, to be obtained as of course; but it is of right, when the Court is satisfied that there is proper and just ground for allowing it to issue. And I apprehend that, where there is a *primâ facie* legal claim which is sought to be enforced without vexation or oppression, and the plaintiff is not in the same position as the person against whom he seeks to have execution, the Court is bound, in the exercise of a judicial discretion,—even though there may be circumstances in the case which incline them to look with disfavour upon the application,—to grant the rule, in order that the matter may be fully discussed. In so doing the Court in no degree prejudges the matter, but leaves it open to any substantial answer either at law or in equity. That is entirely consistent with all the cases which have been referred to. What this Court did in *Shrimpton v. Sidmouth Ry. Co.* (1) is quite intelligible. The applicant had himself been the holder of a large number of shares upon which nothing had been paid, and which it was suggested he had fraudulently assigned to a third person in trust for himself; and the Court declined to exercise its discretion in his favour until he had satisfied them that the suggestion was groundless. *Scott v. Uxbridge and Rickmansworth Ry. Co.* (2) was also a clear case: the applicant might have had all that he was entitled to without coming to the Court. As to the power of setting up fraud, either at law or in equity, as an answer to the proceeding, it is enough to refer to *Philipson v. Earl of Egremont*. (3) That case is observed upon in the elaborate judgment of Lord Romilly, M.R., in *Green v. Nixon*. (4) In the event of any vexatious attempt to enforce this remedy in a fraudulent manner, *Horn v. Kilkenny and Great Southern and Western Ry. Co.* (5) shews that the Court of Chancery has jurisdiction to grant relief, though that Court would probably require some more definite allegations of fraud than are contained in these affidavits.

It is then said that the plaintiffs have been guilty of fraudulent devices with a view to their own advantage. That involves a very

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(1) Law Rep. 3 C. P. 80.

(4) 23 Beav. 530; 27 L. J. (Ch.) 819.

(2) Law Rep. 1 C. P. 596.

(5) 1 K. & J. 399; 24 L. J. (Ch.)

(3) 6 Q. B. 587.

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serious imputation, which we could not dispose of upon a conflict of affidavits.

It is further urged that the company was a mere nonentity, and there never were any shares or shareholders. That resolves itself into this, that parliament was induced by fraudulent recitals (introduced, it is said, by the plaintiffs,) to pass the Act which formed the company. I would observe, as to these Acts of Parliament, that they are the law of this land; and we do not sit here as a court of appeal from parliament. It was once said,—I think in Hobart (1),—that, if an Act of Parliament were to create a man judge in his own case, the Court might disregard it. That dictum, however, stands as a warning, rather than an authority to be followed. We sit here as servants of the Queen and the legislature. Are we to act as regents over what is done by parliament with the consent of the Queen, lords, and commons? I deny that any such authority exists. If an Act of Parliament has been obtained improperly, it is for the legislature to correct it by repealing it: but, so long as it exists as law, the Courts are bound to obey it. The proceedings here are judicial, not autocratic, which they would be if we could make laws instead of administering them. The Act of Parliament makes these persons shareholders, or it does not. If it does, there is an end of the question. If it does not, that is a matter which may be raised by plea to the sci. fa. Having neglected to take the proper steps at the proper time to prevent the Act from passing into a law, it is too late now to raise any objections to it.

As far as regards the suggestions impugning the conduct of the plaintiffs themselves, I have assumed that there is foundation for them; but I have done so merely for argument sake. If they can be sustained, recourse may be had to the proper proceedings for calling them in question: but we cannot discuss them upon this motion. I think the rule must be made absolute.

BYLES, J. I am of the same opinion. The parties against whom these rules are moved are *primâ facie* shareholders in the company.

(1) In *Day v. Savadge* (Hob. 87): man judge in his own case, is void in itself; for, *jura naturæ sunt immutabilia*, and they are *leges legum*.”

The plaintiffs have obtained a judgment against the company. Writs of fi. fa. have been issued against the company and returned nulla bona; and the plaintiffs have satisfied us that they have no means of obtaining the fruits of their judgment out of any goods or property of the company. Under these circumstances the plaintiffs are entitled to have recourse against any persons who are shareholders, upon the terms mentioned in 8 & 9 Vict. c. 16, s. 36. The statute says that execution may issue against them; but the practice of the Courts requires it to be done by means of a writ of scire facias, against which the parties are at liberty to shew any defence they may have, whether legal or equitable. If the defence is neither, of course it will fail, and execution will issue.

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KEATING, J. I am of the same opinion. The cause shewn against this rule is entirely novel. Two Acts of Parliament have said that all the costs, charges, and expenses of and incident to the preparing and applying for and the obtaining and passing of the Act shall be paid by the company. The persons to whom the costs are due have obtained a judgment against the company for the amount, and have issued execution against them, but have failed to obtain satisfaction. They now seek to avail themselves of the mode of enforcing their claim against certain shareholders of the company as pointed out by the Companies Clauses Consolidation Act, 1845. The only substantial answer offered to the sci. fa. issuing is, that parliament has been imposed upon. I agree with the whole of my Brother Willes's judgment; but I base my opinion especially upon the impossibility of giving effect to that argument.

Rule absolute.

Attorneys for plaintiffs: *Bircham & Co.*

Attorney for Stevens: *P. Karlake.*

Attorney for Fisher: *S. Spofforth.*