LA'LBHA'I VALLABHBHA'I *et al.* .... *Plaintiffs.*
KA'VASJI NA'NA'BHA'I *et al.* .... *Defendants.*

1871. December 23.

Commission upon Sales—Dissolution of Partnership—Compensation for Loss of Commission—Implied Covenant—Wages—Fraud—Accounts referred to Master.

By an agreement, made on the 10th of January 1857, between K. N. and several other persons, it was agreed that they should form a copartnership for the purpose of erecting a mill for the manufacture of yarn. The capital of the partnership was fixed at Rs. 3,00,000, divided into 100 shares of Rs. 3,000 each.

By the 4th clause of the agreement it was provided that, in return for the trouble K. N. had been at in establishing the factory, "whatever cotton had to be purchased for the factory, K. N. was to purchase, and whatever yarn should be made in the factory, K. N. was to sell, and for whatever he should sell on account of the factory he was duly to receive from the copartnership his commission at the rate of 5 per cent. *during his lifetime*;" and it was also provided that though the purchases and sales by the copartnership should not be made through K. N., "yet upon the whole amount of the sales the copartnership was duly to pay 5 per cent. to K. N. *during his lifetime.*"

The factory was built, and its machinery procured and set up, by K. N., and both financially and otherwise the factory was wholly managed by him. Shortly after it commenced to work, it was found that the copartnership had expended all its capital and was heavily involved in debt—incurred by K. N. without the sanction of his copartners—and that the factory was working at a loss; and at the suit of some of them, but against the consent of K. N. and a minority of the copartners, the copartnership was ordered to be dissolved. K. N. then claimed to be entitled to compensation for the loss of the commission he should have earned upon the sale of the yarn of the factory *during his lifetime.*

Held that he was not so entitled; that as between his copartners and K. N. there was no obligation on the former to subscribe more capital after the original capital of the copartnership had been exhausted, and that there was no implied covenant on the part of the copartnership to continue to work the factory in order that K. N. should be in a position to earn his commission during his lifetime.

Distinction between right to compensation for loss of fixed wages, and right to compensation for loss of commission, pointed out.

Imputations of fraud should be disposed of at the hearing, and should not be left open to be proved before the Master on the taking of accounts.

When a partnership is wound up by the Court, all questions arising between the partners out of the partnership transactions should be disposed of in the winding-up suit.

THE facts of the case, briefly stated for the purpose of this report, were these:—

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In the month of January 1857, the defendant Kávasji Nánábhái Dávar, and a number of other persons at his request, agreed to form a partnership for the purpose of establishing a factory for manufacturing cotton twist.

The partnership agreement ultimately entered into was embodied by Kávasji Nánábhái in a Gujaráti writing of the 10th of January 1857. The material portions of this writing were substantially these :—

"To Pársi Kávasji Nánábhái Dávar, written by the undersigned. You are establishing a factory for the manufacture of 'water' cotton twist. For the same there have been made 100 allotments—that is, 100 shares. Each share has been fixed at Rs. 3,000."

The first clause of the agreement provided that ground for the factory was to be procured, a building erected, and machinery sent for from Europe, and proceeded thus :—" In regard thereto, whatever business may have to be transacted—that is, the employment of persons, and whatever outlays may have to be made for the factory—the whole management thereof we, the undersigned shareholders, having agreed, have intrusted to you. That management do you duly carry on during your lifetime, and the entire authority for signing, and carrying on the entire management of the factory, belongs to you." After his decease the shareholders were to appoint an agent or trustee in General Meeting.

The second clause, by reference to the signatures at the foot of the agreement, showed the number of shares held by each partner, and provided for a deposit of Rs. 500 being paid in respect of each share, at the execution of this agreement, by each shareholder.

The third clause provided that whatever might be expended for a building and machinery, and other outlays, the shareholders should duly pay in equal portions according to their shares. "The 'calls' which you make in respect of the same, as there may be need, we are duly to pay within fifteen days' time. If within the said time of fifteen days we should not pay the amount of each 'call' of those 'calls' which you may make, then the share or shares subscribed by us shall become 'forfeited'—that is, there shall not remain, on the part of those who may not pay the 'calls,' any right to the deposit to the amount of Rs. 500 per share, and the 'call' or 'calls' which may have been (already) paid; and the money paid for the same shall be credited to the profit account of this company. And hereafter should any shareholder, of the shareholders who have signed below, sell or 'make over' his 'share' or 'shares' to any individual, the party or parties purchasing the same hereafter is or are also duly to act up to this agreement."

The fourth clause was in the following words :—" All we shareholders have agreed to make this agreement or settlement, (namely) that, in return for the trouble you have been at in getting up this factory, we have appointed you for your life the agent or broker of this factory. As to that, it is to be understood as follows :—Whatever cotton may have to be purchased for this factory do you purchase, and whatever yarn may be made in this factory, all that do you sell. And for whatever you may sell

on account of the factory do you duly receive from this company your commission at the rate of Rs. 5 (namely, five) per cent. during your lifetime. But upon purchases you are not to receive anything from the company, yet on goods which you may purchase from merchants and sell, you yourself having received a percentage also agreeably to custom, do you duly give credit for the same to this company. Although we should not make the said purchases and sales through you, yet upon the whole amount of the sales we are duly to pay Rs. 5 (five) per cent. during your lifetime. And after this factory shall begin to work, an account, having been caused to be printed, shall be given to all the shareholders every six months: whatever profit may accrue do you duly allot therein."

The fifth clause provided that all the risk in respect of the company should be on the shareholders.

The sixth clause provided for the calling of meetings of shareholders by means of circulars, and further provided that no person whatever on the part of any shareholder or shareholders was to be allowed to join the said meetings.

The seventh clause provided for the resolutions of a majority of shareholders being binding on the minority, "the shareholders' votes being reckoned at one vote for each share."

The eighth clause provided that if any of the shareholders should sell his share, the purchaser should agree in writing to be bound by all the conditions of the writing.

The ninth and tenth clauses provided for a due observance of the conditions of the agreement, and were followed by the signatures of the original shareholders, thirty-five in number. Kávasji Nánábhai originally held 37 shares.

The partnership was not registered as a joint stock company. Act XLIII. of 1850 did not render registration compulsory, and Act XIX. of 1857 did not become law until the 10th of July 1857, *i.e.*, six months after the formation of the partnership.

In pursuance of the above partnership agreement, Kávasji Nánábhái obtained a piece of land at Tárdev, erected buildings upon it, and purchased and erected machinery for the purpose of carrying on the business of the copartnership. He from time to time made calls on the partners, and before the year 1860 had called up the whole of the original capital of Rs. 3,000 per share. In April 1860 he made an additional call of Rs. 1,000 per share, which was paid by the partners. The necessity for this call was occasioned, as Kávasji Nánábhái stated, by reason of the original capital of three lákhs proving insufficient for the original and current outlay of the

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partnership. The work of manufacturing cotton twist was stated by Kávásji Nánábhái to have commenced about June 1860, and the business was thenceforward carried on in the name of the Throstle Mill Company.

A general meeting of the partners was called, apparently for the first time, on the 2nd or 3rd of August 1861. It was then found that the whole of the stipulated capital of Rs. 3,000 per share that had been called up, and the extra voluntary contribution of Rs. 1,000 per share, had been expended, and that in addition the company had incurred debts amounting to Rs. 1,44,888-15-10.

At that meeting directors were appointed, the accounts were directed to be audited, and it was determined that, after the accounts were audited, the debt due by the company should be paid off by increasing the capital, or in such other way as the shareholders at a general meeting should determine, and the meeting was adjourned for that purpose.

The adjourned meeting was held on the 22nd of September 1861, when the audited accounts were laid before the meeting. Considerable discussion took place as to the affairs of the company, and finally the directors were empowered to consult upon the best course to be adopted for the interest of the shareholders. The meeting was then adjourned until the 2nd of October.

Kávasji Nánábhái attended the meeting of the 2nd of October, with several other shareholders, who were chiefly his nominees and holders of shares really belonging to him, and which he had transferred to them in order to qualify them as voters on his behalf. The meeting was a divided one, but ultimately a resolution was adopted, by 27 votes against 20, "that steps should be taken to wind up the affairs of the company, and to take the accounts of Kávasji Nánábhái by proceedings in the Supreme Court, and that Mr. Keir be instructed to take those proceedings."

On the 1st of November 1861 Kávasji Nánábhái made a further call on the shareholders of Rs. 500 per share, and threatened them with forfeiture of their shares if the call were not paid on or before the 16th day of the same month.

A suit was filed on the 6th of November 1861 on the Equity Side of the late Supreme Court, in which Lálbhái Vallabhbhái and the other shareholders who wished to dissolve the company were plaintiffs, and Kávásji Nánábhái and the shareholders who desired the company to continue to carry on business were defendants. The bill prayed for a dissolution of the company, the appointment of a receiver, an injunction prohibiting Kávasji Nánábhái from carrying on the business of the company, and from enforcing the call of Rs. 500 per share, an account of the partnership dealings, and a sale of its assets. The bill contained charges of fraud and dishonesty against Kávasji Nánábhái.

An injunction was granted on the 16th of November 1861 against enforcing the call of Rs. 500.

A subsequent motion to dissolve the injunction was made on the 6th of December 1861, and refused. Subsequently the cause was heard by Sir Matthew Sausse, C. J., and Couch, J., and on the 23rd of January 1863 a decree was made which declared the Throstle Mill Company dissolved from the date of the filing of the bill, and referred it to the Master, to take an account of the management by Kávasji Nânábhái of the affairs of the company from its commencement down to its dissolution, and from its dissolution down to thé date when a receiver should be appointed; declared Kávasji Nánábhái entitled to credit for all sums *bonâ fide* expended by him for the benefit of the company, and to a commission of 5 per cent. upon sales effected by him. The Master was further ordered to sell the property of the company, and out of the proceeds to pay the debt due by the company, and it was directed that whatever surplus should remain should be divided amongst the shareholders of the company, in proportion to the number of their shares. It was also ordered that the Master should appoint a receiver to wind up the affairs of the company (Kávasji Nánábhái being permitted to apply and to be appointed receiver). The decree reserved the consideration of the claim, if any, of Kavasji Nánábhái to commission upon the funds to be realised by the sale of the partnership property until after

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the Master should have made his report, and it was further ordered *that the Master should be at liberty to state any special circumstances connected with or touching the premises, and to make one or more separate report or reports, and the Court reserved the consideration of all further directions and of the costs until after the Master should have made his report,* and gave general liberty to apply.

The decree was silent as to the charges of fraud made by the plaintiffs against the defendant Kávasji Nánábhái.

In giving judgment, the Court, however, said that it did not consider that these charges had been as yet proved, but that it could not say what might appear on taking the accounts before the Master. The decree was also silent, as to the right of Kávasji Nánábhái to compensation for being deprived of the management of the partnership, and of commission during his life on its sales. In giving judgment, the Court, referring to *Aspdin* v. *Austin, Dunn* v. *Sayles, Pilkington* v. *Scott* (which it distinguished from the two former cases), and *Rashleigh* v. *The South-Eastern Railway Co.* (*a*), expressed an opinion against his claim in this respect, but added that if the articles of agreement contained any implied contract by the copartners to carry on the business during Kávasji Nánábhái's lifetime, the Court thought that he "should be left to the remedy by an action for damages," and on this point referred to *Emmens* v. *Elderton* (cited *infrà*). In support of the direction in its decree that the partnership should be dissolved, the Court mentioned *Van Sandau* v. *Moore* (*b*), *Wheeler* v. *Van Wart* (*c*), *In re The Electric Telegraph Co. of Ireland* (*d*), *Jennings* v. *Baddeley* (cited *infrà*), and *Bailey* v. *Ford* (*e*).

From this decree Kávasji Nánábhái appealed to the Privy Council, and on the 29th day of February 1868 the Lords of the Privy Council generally affirmed the decree, with, however, two variations. The first was made by inserting at the beginning the words "This Court doth declare that the charges

(*a*) 10 C. B. 612, 632. (*b*) 1 Russ. 463.
(*c*) 2 Jur. 292, and 9 Sim. 193. (*d*) 22 Beav. 471.
(*e*) 13 Sim. 495.

of fraud and dishonesty against the defendant Kávasji Nánábhái, contained in the bill of the plaintiffs, are not proved by any evidence in the cause, and that the said defendant ought to receive from the plaintiffs the costs of and occasioned by such charges, and this Court directs the same to be taxed accordingly, but reserves any directions for the payment thereof until the further consideration of this cause;" their Lordships being of opinion that charges of fraud, if proved at all, should be so at the hearing, and not reserved until a later stage in the cause, as they should not be kept hanging over the defendant. The second variation was made by inserting, after the reservation of the consideration of the claim of Kávasji Nánábhái to commission upon the funds to be realised by a sale of the partnership property, the following words: "And this Court doth also, but without prejudice, reserve until further consideration the question whether Kávasji Nánábhái is entitled to any, and, if any, what compensation in respect of the engagement in the articles that the defendant Kávasji Nánábhái should have the management of the partnership, and should be the agent and broker thereof during his life." This variation was made because their Lordships were of opinion that it was more convenient that the question of right to compensation should be decided in the equity cause than by an action at law. The parties respectively were directed to bear their own costs of the appeal to the Privy Council.

In accordance with the directions in the decree, the Master realised the assets of the Throstle Mill Company, paid its debts, and took the accounts.

On Kávasji Nánábhái's account with the partnership from its commencement to its dissolution the Master found that there was due from Kávasji Nánábhái to the partnership the sum of Rs. 689-12-10.

On Kávasji Nánábhái's account with the partnership from its dissolution to the day when Kávasji Nánábhái commenced to act as receiver (20th February 1863) the Master found that there was due from Kávasji Nánábhái to the partnership the sum of Rs. 2,021-2-10.

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On Kávasji Nánábhái's account as receiver the Master found that the partnership was indebted to Kávasji Nánábhái in the sum of Rs. 589-9-2.

Neither side objected to the Master's report, and the case came on for further consideration, and for argument on the question of the right of Kávasji Nánábhái to commission on the funds realised by the sale of the partnership property, and to compensation for being deprived of his management of the partnership, and of the benefit of acting as its agent and broker.

The case was argued before WESTROPP, C.J., and BAYLEY, J.

McCulloch and *Latham* appeared for the plaintiffs and defendants in the same interest as the plaintiffs.

The Honorable A. R. Scoble and *Macpherson*, for Kávasji Nánábhái, admitted that it must be considered that the dissolution of the company, as decreed by the High Court and affirmed by the Privy Council, was a proper one in the interests of the shareholders, but contended that as it was brought about by the plaintiffs themselves, without the consent of Kávasji Nánábhái, he was entitled to compensation for the commission upon yarn, which during his lifetime the company had agreed to pay him. They relied upon *Stirling* v. *Maitland* (*f*), which, they contended, had in effect overruled *Aspdin* v. *Austin* and *Dunn* v. *Sayles* (*g*), previously much commented on in *Emmens* v. *Elderton* (*h*). They also relied upon *Pilkington* v. *Scott* (*i*), *Emmens* v. *Elderton*, *Reg*. v. *Welch* (*j*), and *M'Intyre* v. *Belcher* (*k*), and on remarks made by Lord Westbury upon the question of compensation during the argument of this case before the Privy Council, and said that the winding up of the company had been the wilful act of the company, and had not been occasioned by any misconduct on the part of Kávasji Nánábhái, and there was no reason why the ordinary rule

(*f*) 34 L. J., Q. B. 1. (*g*) 5 Q. B. 671, 685.
(*h*) 4 Ho. Lo. Ca. 624; S. C. 13 C. B. 495; 6 C. B. 160.
(*i*) 15 M. & W. 675. (*j*) 22 L. J., Mag. Ca. 145.
(*k*) 32 L. J., C. P. 254.

should not be followed, and compensation awarded to Kávasji Nánábhái for the loss he had sustained by the plaintiffs' breach of contract.

Latham, contrà, contended that, as there was no express covenant on the part of the company not to dissolve itself during the lifetime of Kávasji Nánábhái, the court would not imply such a covenant on their part. He relied upon *Aspdin* v. *Austin* and *Dunn* v. *Sayles* as binding authorities in his favour. He distinguished *Pilkington* v. *Scott, Reg.* v. *Welch,* and *M'Intyre* v. *Belcher,* and relied upon the following authorities :— *King* v. *The Accumulative Life Fund and General Assurance Co.* (*l*) ; *Beswick* v. *Swindells* (*m*) ; *Tasker* v. *Shepherd* (*n*) ; *Taylor* v. *Caldwell*. (*o*) ; Smith on Master and Servant, p. 54; *In re English Joint Stock Bank; Yelland's Case* (*p*) ; *In re London and Colonial Company, ex parte Clark* (*q*) ; *In re London and Scottish Bank, ex parte Logan* (*r*) ; *In re English and Scottish Insurance Company ex parte Maclure* (*s*) ; *Burton* v. *Great Northern Railway Co.* (*t*).

Scoble in reply.

Cur. adv. vult.

WESTROPP, C.J. (after stating the facts of the case, and the proceedings in Bombay, and on appeal to the Privy Council and subsequently in the Master's office, and after adverting to the state of the accounts of Kávasji Nánábhái as found by the Master, continued*) :—The result of the ordeal in the Master's office, therefore, is that Kávasji Nánábhái has, so far as his accounts are concerned, come out of it entirely free from imputation of fraud; for if, notwithstanding the

(*l*) 3 C. B., N. S., 151. (*m*) 3 Ad. & E. 868. (*n*) 6 H. & N. 575.
(*o*) 3 B. & S. 826. (*p*) L. Rep. 4, Eq. 350. (*q*) 7 *Ibid.* 550.
(*r*) 9 *Ibid.* 149. (*s*) L. Rep. 5, Ch. App. 737. (*t*) 9 Exch. 507.

* His Lordship also stated that he had sat in the case with reluctance, as he had originally been counsel in it for the plaintiffs, but that the learned counsel on both sides, and especially counsel for the defendant Kávasji Nánábhái, had requested that he should sit; that nevertheless he would not have done so if there had been another Judge available. It was considered desirable, as well by the parties as by the court, that two Judges should sit in the first instance, to avoid the necessity of an intermediate appeal if the parties should not be satisfied with the judgment of the Court.

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variation made in the decree by order of the Privy Council, it had been possible for the plaintiffs to have preferred charges of fraud in the accounts before the Master, it seems manifest that they would have failed in proving them. The accounts as found by the Master must be taken as correct. They have not been excepted to.

The balances against Kávasji are trivial, and merely such as might be expected in managing an undertaking so considerable as the Throstle Mill.

And now the question "whether Kávasji Nánábhái is entitled to any, and, if any, what compensation in respect of the engagement in the articles that he should have the management of the partnership, and should be the agent and broker thereof during his life," is substantially the only question of importance (except that of the costs of this suit so far as they have not been provided for by the order of the Privy Council) which awaits decision. A claim by Kávasji Nánábhái, as receiver, for commission on the proceeds of the sale of the mill, has been abandoned on his behalf by Mr. Scoble, those proceeds never having come into the hands of Kávasji Nánábhái. The question of compensation has been reserved for our consideration "without prejudice," and great pains were taken by Lord Westbury in wording the decree in such a manner, as to leave this court perfectly untrammelled. Some observations certainly fell from Lord Westbury in the course of the argument bearing on Kávasji Nánábhái's right to compensation, but it is to the reservation of the question of compensation, as expressed in the first variation made by their Lordships in the decree, that we must have regard. It is evident that Lord Westbury, as well as the other members of the Board, intended to leave the question completely open.

The question of compensation has been argued on both sides, before my brother Bayley and myself, with ability and research, and many cases have been cited, which have more or less bearing upon the question. But the greater number of these cases were simply between master and servant, and though some were not so, yet none of the cases

cited on either side are on all fours with this case. The agreement here is peculiar, and so are the circumstances which have occurred subsequently to its date and previously to the filing of the bill.

This is not the ordinary case of master and servant, but is that of the founder of a company, in which he is a partner, and of which he has become the manager, broker, and agent. We propose to consider the case in two ways; first we will consider what view an intelligent man of business, unenlightened by a knowledge of the authorities, and not interested in the agreement, would take of the meaning of that agreement. Would it not be that the weal or woe of the company should be the weal or woe of its founder? That his copartners had not joined in the undertaking merely for the purpose of providing commission for him, whether or not the enterprise itself resulted in loss. That, if it did result in loss, he could not have any rational claim for compensation against his copartners for leading them to disaster. And that the absence of any stipulation for the payment of wages to the founder, the dependence of his remuneration on commission upon sales, and the specification of the amount of capital to be invested, suffice to indicate that the copartners intended to make the welfare of the founder depend on that of the factory, of which he had the management.

The rational intention to infer from the agreement would be, that if the undertaking on its stipulated capital can produce yarn, yarn shall be produced, and the founder shall, during his life, have a commission upon the sale of it. But it would seem highly unreasonable to suppose that if that capital be insufficient to work the mill, nevertheless the copartners shall be compelled to increase the capital in order that yarn shall be made for the founder to sell, at all hazards and losses to the company, or to compensate him for the absence of sales and their consequent commission—an absence caused by the unsoundness of the basis on which he founded the enterprise.

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It does not, on the other hand, lie in his mouth to say that the capital, if properly and judiciously expended, would have sufficed to set the mill to work and to keep it so. He himself had the laying out and application of the capital, and if he have not judiciously managed it, the equity of the matter is that he should accept the consequences.

He would have, on that hypothesis, nothing to blame except his own negligence or want of skill, as the case might be.

The balance of legal authority is, we are happy to say, in our opinion, in favour of the view which we think common sense and common justice, unaided by authority, would take of such a case.

Before reviewing the authorities, we desire to say that we are quite satisfied that the capital of the company was fixed by the agreement of the 10th of January 1857 at three lákhs of rupees, namely, 100 shares of Rs. 3,000 each, and that without the consent of all the partners that capital could not be increased. "When the agreed amount of capital of a partnership has been exhausted, and the business cannot be carried on to a profit, the partnership will be dissolved. A partner cannot be compelled to furnish more capital than he has agreed to bring in and risk, although he cannot, by limiting the amount of his capital, limit his liability for debts incurred by the firm. The capital of a partnership cannot be either increased or diminished except with the consent of all the members of the partnership" (*u*). The amount of the capital is part of the constitution of the company, as said by Lord Denman in *Smith* v. *Goldsworthy* (*v*).

For the defendant Kávasji Nánábhái the case of *Stirling* v. *Maitland* (*w*), decided by the Court of Queen's Bench in November 1864, is mainly relied upon, and especially a passage in the judgment of Cockburn, C.J., at p. 852, where he says: "I look on the law to be that, if a party enters

(*u*) 1 Lindley on Partnership, 615, 379 (2nd ed.); *Jennings* v. *Baddeley*, 3 K. & J. 78.

(*v*) 4 Q. B. 430, 465.

into an arrangement which can only take effect by the continuance of a certain existing state of circumstances, there is an implied engagement on his part that he shall do nothing of his own motion to put an end to that state of circumstances under which alone the arrangement can be operative. I agree that if the company had come to an end by some independent circumstance, not created by the defendants themselves, it might very well be that the covenant would not have the effect contended for; but if it is put an end to by their own voluntary act, that is a breach of covenant for which the plaintiff may sue. The transfer of business and dissolution of the company was certainly the act of the company itself, so that they have by their act put an end to the state of things under which alone this covenant would operate." And it was argued with regard to those remarks that the dissolution of the Throstle Mill Company had been effected at the request of the plaintiffs, and that they had thus put an end to the company and broken their implied contract; but we have come to these conclusions—first, that there was no agreement by Kávasji Nánábhái's copartners to carry on the business at all hazards; and secondly, that the dissolution was occasioned by Kávasji Nánábhái's own fault, or by an error common to him and his copartners in founding the company. That case of *Stirling* v. *Maitland* was a very peculiar case, and greatly differing from the present case. The covenant there expressly contemplated the displacement of the agent. It did not stipulate that the insurance company should not displace the agent, but it provided what should be done in the event of his displacement. And he was displaced without any good or reasonable cause. Moreover, the covenant was not with the agent, Seton, himself, but with Stirling, who had paid off Seton's debt to the company, and to whom it was intended that repayment should be secured by the continuance of Seton in his office of agent, or by rendering the company liable to refund the amount, or so much of it as might remain unpaid by Seton to Stirling in the event of Seton's displacement before he

(*w*) 5 B. & S. 840; S. C. 34, L. J., Q. B. 1.

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had repaid Stirling. It was argued that the Court of Queen's Bench must be regarded as having there overruled *Aspdin* v. *Austin* (*x*) and *Dunn* v. *Sayles* (*y*); but those cases were not there mentioned, and it does not appear to have occurred to either the counsel or the court that the principle of those cases was involved in that case of *Stirling* v. *Maitland*. And none of the cases of the same class as *Aspdin* v. *Austin* and *Dunn* v. *Sayles* were there cited.

There were also relied upon for the defendant Kávasji Nánábhái *Pilkington* v. *Scott* (*z*), *Reg.* v. *Welch* (*a*), and *Hartley* v. *Cummins* (*b*). Those were very special cases, and that fact is noticed by Mr. Manley Smith in his work on Master and Servant. But that text-writer deduces—and, as we think, correctly—the general rule to be collected from *Aspdin* v. *Austin* and *Dunn* v. *Sayles*, and other cases, as follows:—"Where the contract for hiring merely contains an undertaking on the part of the master to pay certain stipulated wages in proportion to the work done by the servant, there is no implied obligation on the part of the master to find work so as to enable the servant to earn wages. But where the contract of hiring provides for the payment of certain wages (not in proportion to the work done), although it is optional on the part of the master to find work, and he may, if he pleases, discontinue his business, yet he must nevertheless pay the wages agreed on, whether he find work for the servant or not, or he will render himself liable to an action for such damages as a jury may think proper to give." In the present case there is no contract on the part of the company to pay any fixed wages to Kávasji Nánábhái. He is left for his remuneration to his commission on the sales of yarn that he may effect, and we do not think that we can in this case infer an agreement on the part of the company to continue to manufacture yarn for the purpose of allowing Kávasji Nánábhái to earn his commission. There is no such provision, with reference to notice, as was found in *Pilkington* v. *Scott* and the cases that followed it.

(*x*) 5 Q. B. 671. (*y*) *Ibid.* 685.
(*z*) 15 M. & W. 657. (*a*) 2 El. & B. 357. (*b*) 5 C. B. 247.

In *Aspdin* v. *Austin* (c) the facts were that, by an agreement between the plaintiff and the defendant, the plaintiff agreed to manufacture, for the defendant, cement of a certain quality; and the defendant, on condition of the plaintiff's performing such engagement, promised to pay him £4 weekly during the two years following the date of the agreement, and £5 weekly during the year next following, and also to receive him into partnership as a manufacturer of cement at the expiration of three years; and the plaintiff engaged to instruct the defendant in the art of manufacturing cement. Each party bound himself in a penal sum to fulfil the agreement. The defendant afterwards covenanted by deed for the performance of the agreement on his part. It was in that case held that the stipulations in the agreement did not raise an implied covenant that the defendant should employ the plaintiff in the business during three or two years, though the defendant was bound by the express words to pay the plaintiff the stipulated wages during those periods respectively if the plaintiff performed, or was ready to perform, the condition precedent on his part. Lord Denman, in giving judgment in that case, after referring to several cases, says: "We have examined these and several earlier cases which were ctied in the argument in the latter case, and upon consideration they do not appear to us to support the proposition, for which the plaintiff contends, to the extent to which it is necessary for him to carry it. It will be found in those cases that where words of recital or reference manifested a clear intention that the parties should do certain acts, the courts have, from these, inferred a covenant to do such acts, and sustained actions of covenant for the nonperformance, as if the instruments had contained express covenants to perform them. But it is a manifest extension of that principle to hold that, when parties have expressly covenanted to perform certain acts, they must be held to have impliedly covenanted for every act convenient, or even necessary, for the perfect performance of their express covenants. *Where parties have entered into written engagements with expressed*

(c) 5 Q. B. 671.

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stipulations, it is manifestly not desirable to extend them by any implications. The presumption is that, having expressed some, they have expressed all the conditions by which they intend to be bound under that instrument. It is possible that each party to the present instrument may have contracted on the supposition that the business would in fact be carried on, and the service in fact continued, during the three years, and yet neither party might have been willing to bind themselves to that effect: and it is one thing for the court to effectuate the intention of the parties to which they may have, even imperfectly, expressed themselves, and another to add to the instrument all such covenants as upon a full consideration the court may deem fitting for completing the intention of the parties, but which they, either purposely or unintentionally, have omitted. The former is but the application of a rule of construction to that which is written. The latter adds to the obligations by which the parties have bound themselves, and is, of course, quite unauthorised, as well as liable to great practical injustice in the application."

In *Dunn* v. *Sayles* (*d*) the declaration, which was in covenant, stated that by a deed between the defendant John Dunn the younger, the son of the plaintiff, and the plaintiff, the plaintiff covenanted that John Dunn the younger should for five years serve the defendant in the art of a surgeon-dentist, and attend for nine hours each day; and the defendant, in consideration of the services to be done by John Dunn the younger, covenanted that he, the defendant, would, during the five years, pay John Dunn at certain rates per week during the five years; that John Dunn the younger was in the service for some time after the making of the deed till dismissed, and during that time faithfully performed service, but the defendant, during the term, refused to permit John Dunn the younger to remain in his service, and dismissed him. The judgment given in that case was in accordance with that given in *Aspdin* v. *Austin*, and it was held that the declaration did not show any covenant corresponding to the breach.

(*e*) 5 Q. B. 685.

It was contended on behalf of Kávasji Nánábhái that there were observations made in the case of *Emmens* v. *Elderton* (*e*) which overruled these two cases. In that case the original decision was given by the Court of Common Pleas. That decision was reversed in appeal by the Court of Exchequer Chamber, where the judgment of the court was delivered by Parke, B., and he most carefully saves alive *Aspdin* v. *Austin* and *Dunn* v. *Sayles*. The facts in the case of *Emmens* v. *Elderton* were these. The action was brought against the secretary of a joint stock company, and the declaration stated that it had been agreed between the plaintiff and the company that from the 1st of January 1845 the plaintiff, as the attorney and solicitor of the company, should receive and accept a salary of £100 per annum in lieu of rendering an annual bill of costs for general business transacted by him for the company, and should, for such salary, advise and act for the company in all matters connected with the company, *with the exception of the prosecuting and defending of suits, and certain other matters, for which the plaintiff was to be allowed to make the usual and regular charges of an attorney and solicitor.* It then proceeded to state that the said agreement being so made, in consideration that the plaintiff had, at the request of the company, promised the company to perform and fulfil the same in all things on his part, the company promised to perform and fulfil the same in all things on their part, and to retain and employ him as such attorney and solicitor of the company on the terms aforesaid, and assigned as a breach that the company, without reasonable cause, dismissed the plaintiff from such employment and retainer, and refused to employ and retain him as their attorney and solicitor. It was held in that case that the agreement was sufficiently alleged as an agreement by the company creating the relation of attorney and client, and a promise to continue that relation at least for a year; but though it was held that the company was bound to continue the relation for a year, and to pay the fixed sum of £100 for the year's work, whether it was performed by him or

(*e*) 6 C. B. 160; 12 *Ibid.* 495; 4 Ho. Lo. Ca. 624,

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not, it was considered quite clear, both by the Exchequer Chamber and the House of Lords, that the company was not bound to supply the plaintiff with business as an attorney and solicitor, and to use his services as such, though they were bound to keep him and pay him his annual salary. And that case, in that respect, is in point here. If the company could, without incurring loss, have produced yarn, Kávasji Nánábhái would perhaps have been entitled to receive his commission, and if it were not given, the company might have been liable to suit; but the company did not covenant with him to produce yarn, and the authorities show that such a covenant will not be implied.

If there had been an agreement to pay Kávasji Nánábhái wages, the case would be different as to them, but the distinction is broadly drawn between commission and wages. Baron Parke was, as already said, careful, in giving the judgment of the court, to keep alive *Aspdin* v. *Austin* and *Dunn* v. *Sayles*. In his judgment he says: "Our decision in this case does not conflict with that of the Queen's Bench in *Aspdin* v. *Austin* and *Dunn* v. *Sayles*. Both these cases turned upon the construction of the covenants of the parties. In the former the defendant covenanted with the plaintiff to perform all the stipulations in a former agreement between the defendant, a third person, and the plaintiff; and the question was whether the former agreement—which was on the part of the plaintiff to make cement for the defendant and one Hales, and to teach them how to do so, and on the defendant's and Sealey's part to pay a weekly salary for three years, and then to take the plaintiff into partnership, implied a promise by them to continue to employ him to manufacture cement for the intermediate period. The court could not draw any such inference: and Lord *Denman*, in giving judgment, assigns a very strong reason, that the breach assigned by the plaintiff assumed that the defendant, at however great loss to himself, was bound to continue his business for three years: but the defendant had not covenanted to do so; he covenanted only to pay weekly sums for three years, on condition of his performing the conditions pre-

cedent; and that he would be entitled to recover those sums, whether he performed them or not, so long as he was ready and willing and offered to perform them, and was prevented only by the defendant from so doing. The other case also depends on the construction of the defendant's contract: the indenture there did not contain the terms 'it was agreed,' which would have made them the words of both parties. It was a simple covenant by the defendant. The plaintiff covenanted that his son should serve as an apprentice to a surgeon-dentist; the defendant, in consideration of his services, covenanted to pay weekly sums for five years: and the court held that there was no covenant to be implied, from the covenant to pay, that the defendant should continue him in the employment of assistant. Lord *Denman* says the reasons assigned in the former case equally applied to that: and, indeed, it would be a strong thing to say that the plaintiff covenanted to carry on the business of surgeon-dentist, at whatever loss or inconvenience, for five years."

And so we say here that it would be a strong thing to say that the shareholders covenanted with Kávasji Nánábhái to manufacture yarn for his benefit during his lifetime, and for that purpose to subscribe capital indefinitely beyond the amount named in the agreement. In the judgment which Baron Parke delivered in the House of Lords he repeats those remarks which he had made in the Exchequer Chamber, and he is not the only Judge who refers to *Aspdin* v. *Austin* and *Dunn* v. *Sayles*. Crompton, J., says: "The cases of *Aspdin* v. *Austin* and *Dunn* v. *Sayles* must, I think, be considered as decided upon the construction of the particular covenants and the peculiar circumstances in those cases. If they are to be taken as deciding that there is no obligation on the part of the employer to continue the relation between the parties, in cases like the present, or that, where there is an agreement to employ and serve for a specified time at a specified salary, an action is not maintainable against the employer immediately for a wrongful termination of the relation, but that the party discharged, instead of suing for damages immediately, must wait and remain idle till the end

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of the specified period, and then sue for the salary as a sum certain, I should think that they ought not to be supported in a court of error."

And Erle, J., speaks to the same effect: "It has been contended, on the authority of *Aspden* v. *Austin*, and *Dunn* v. *Sayles* that in cases of contracts for service and for salary during a time, the employer may put an end to the employment before the time is expired, and is not liable to any action if at the period for payment of salary he pays the amount. But I presume that no such general doctrine was intended to be laid down at the time when the Court put a construction upon the contracts in those two cases. If it was, I must express my dissent from it." And there was no such doctrine, in fact, laid down. No doubt, if a man is to be paid a fixed salary for a fixed time, he is entitled to be paid that salary, but during that time his employers would not be bound to find business for him in order that he might earn his fees for performing it. In the case of *Emmens* v. *Elderton, Maule*, J., differing from the other Judges, adhered to the opinion he had expressed below, and it is impossible to read his judgment without thinking that there are weighty considerations to support his view, and so thought Lord Truro, but the still more weighty considerations on the other side prevailed.

Beswick v. *Swindells* (*f*) shows how averse the courts are to insert a condition into an agreement which the parties to it did not actually contemplate at the time of entering into it. That was an action on a bond for payment of £400, wherein it was recited that the obligor was about to marry a linen-draper, and thereby to become possessed of a considerable stock in trade, and that it was agreed that in consideration thereof he should execute a bond to the obligee to pay to the children of his future wife by her former husband £300 within twelve months after his wife's death, and the condition of the bond was that if the obligor should, within twelve months next after the decease of his wife, pay to her child or children £300 if upon an account of the stock in trade,

(*f*) 3 Ad. & E. 868.

if then carried on by the obligor, the same should amount to £400; but in case the stock in trade should amount to less than that sum, then if the obligor should pay to the children £120, the obligation should be void. The plea was that the wife had died, and that the obligor had, both before her death and ever since, ceased to carry on the business, and that he had not, at the time of her death, or since, any stock in trade. The replication was that at the end of twelve months after the wife's death there were children of the wife by her former husband alive. It was held in demurrer that the obligor might discharge himself by pleading that he had discontinued the business. No doubt, in the case before us, words similar to "if then carried on by the obligor," which are found in the bond in *Beswick* v. *Swindells* do not occur in the agreement, but a passage in the judgment of Tindal, C. J., is very applicable :—"The event," he says, "which has actually happened, namely, that the trade and business were actually given up and abandoned long before the wife's death, appears to us to be an event not provided for by the agreement. It is a *casus omissus,* and we think we should make an agreement for the parties, instead of putting a construction upon that which they have made for themselves, if we should hold that the defendant was bound, under this condition of the bond, to pay either of the two sums therein mentioned in the event which has actually taken place. The construction contended for by the plaintiff would either make it compulsory on the husband to carry on the trade during the life of his wife, though it became a failing or even a ruinous concern to the husband; or would render him liable to the payment of the money in the event of his yielding to the pressure of unforeseen circumstances, and of his giving up the business. And we think if the parties had intended this, they would have used the very simple expedient of making the bond conditional for the payment of a certain sum of money within twelve months after the death of the wife." And so, in this case, we think that, if the shareholders had intended that Kávasji Nánábhái should have had his commission in the event of the company proving unsuccessful, they would have expressed it in strong terms in the

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agreement. In *Tasker* v. *Shepherd* (*g*), decided in 1861, the Court of Exchequer approved of *Beswick* v. *Swindells*. Both show the disinclination of the court to extend the contract that the parties to it have entered into, and to imply terms which the parties might have, but have not, expressed. To the like effect is *Burton* v. *The Great Northern Railway Co.* (*h*), where the plaintiff, on the 1st of October 1851, entered into an agreement with the defendant's company to provide all horses, wagons, &c., necessary for the cartage of grain and merchandise between Hatfield and Ware, and to convey all that might be presented to him for that purpose between the above points at the rate of five shillings per ton, and it was mutually agreed that the agreement should continue in force for twelve months from the date of the agreement. The plaintiff purchased horses and wagons, but the railway company, in consequence of their having leased a portion of their line to another company, and bound themselves not to carry between Hatfield and Ware, gave the plaintiff notice that the arrangement would cease from the 1st of April 1852, and after that date presented no more goods for the defendant to carry,—having in fact none to present; and it was held that the only contract on the part of the defendants was to pay the stipulated price for the carriage of such goods between Hatfield and Ware as might be presented to the plaintiff for that purpose, and that there was no breach of that contract committed; for no goods were presented. Parke, B., likens it to the case of *Aspdin* v. *Austin*, and in the course of the argument says that it would be a parallel case if a person agreed with a wine-merchant to purchase from him all the wine which the former might choose to drink during a year, and before six months expired he gave notice that he would discontinue drinking wine. That (*Burton* v. *The Great Northern Railway Co.*) was a hard case on the plaintiff, who was a stranger to the company. The company had no reason for discontinuing the carriage of goods, and yet, as the company had not expressly covenanted to supply goods, it was held that the plaintiff was not entitled

(*g*) 6 H. & N. 575. (*h*) 9 Exch. 507.

to damages. The dissolution here operates as a notice to the plaintiff that no more yarn will be manufactured for him to sell.

King v. *The Accumulative Life Fund and General Assurance Company* (*i*), cited by Mr. Latham, is an important case, and has much bearing upon the one before us. The plaintiff effected a policy with the company upon, and for twenty years' continuance of, the life of himself. By the terms of the policy it was provided that "the capital stock and other securities, funds, and property of the company remaining at the time of any claim or demand unapplied and undisposed of, and inapplicable to prior claims or demands, should alone be liable to answer and make good all claims and demands upon the company, and that no director, officer, or shareholder should be individually or personally liable. The plaintiff, as a policy-holder, was entitled to a share in the profits of the company. The directors having transferred its funds and property to another company, who were to take over their liabilities, the plaintiff brought an action against the original company, charging them with having wrongfully aliened and transferred their property and ceased to carry on business, whereby the plaintiff lost the moneys and profits he would otherwise have made from the continuance of the contract. It was held that there was no implied contract on the part of the company to continue to carry on the business. On this point Cockburn, C. J., says: "It has been contended that an implied covenant on the part of the defendants to continue the business of an insurance company, and to keep its funds available to answer claims on policies, arises on that part of the policy which provides that 'the capital stock and other securities * * * shall alone be liable to answer and make good all claims and demands upon the company, and that no director, shareholder, &c., shall be personally liable or subject to any such claims or demands, or in any wise charged by reason thereof, beyond the amount unpaid of his shares in the said capital stock, nor longer than he shall retain the said

(*i*) 3 C. B., N. S., 151.

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shares.' It does not appear to me that any implied covenant, such as is contended for, arises from that proviso." To the same effect speaks Vaughan Williams, J., at p. 165 : "The question then is whether there is any implied covenant—there being none expressed—that they will continuenso to carry on their business. I am of opinion that there is not. Even if the deed of settlement were out of the question, it seems to me to be impossible to say that the policy amounts to anything more than a contract that the plaintiff or his executors shall receive the sum assured when the time for payment shall have arrived. *It is difficult to imply, from the circumstance of the policy-holder being entitled to a share of profits, a contract on the part of the company that they will, in order to give him a better chance of profits, continue to carry on the business supposing it should turn out to be disadvantageous to them to do so.* The difficulty is still further increased by the consideration that if such a covenant is to be implied, it might equally be implied that the company bound themselves to carry on the business with diligence. I see many cogent reasons why we should not infer a covenant such as is suggested." Crowder, J., was of the same opinion.

In *Taylor* v. *Caldwell* (*h*), the facts of which are not in point in the present case, there are certain observations made by Blackburn, J., which are both reasonable themselves, and correctly indicate the rule of law by which the courts are guided in coming to a conclusion with reference to implied contracts. "There seems no doubt that where there is a positive contract to do a thing not in itself unlawful, the contractor must perform it or pay damages for not doing it, although, in consequence of unforeseen accidents, the performance of his contract has become unexpectedly burdensome, or even impossible. But this rule is only applicable when the contract is positive and absolute, and not subject to any condition either express or implied; and there are authorities which, as we think, establish the principle that where, from the nature of the contract, it appears

(*h*) 3 B. & S. 826.

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that the parties must from the beginning have known that it could not be fulfilled, unless, when the time for the fulfilment of the contract arrived, some particular specified thing continued to exist, so that, when entering into the contract, they must have contemplated such continuing existence as the foundation of what was to be done; there, in the absence of any express or implied warranty that the thing shall exist, the contract is not to be construed as a positive contract, but as subject to an implied condition that the parties shall be excused in case, before breach, performance becomes impossible from the perishing of the thing without default of the contractor. There seems little doubt that this implication tends to further the great object of making the legal construction such as to fulfil the intention of those who entered into the contract. For, in the course of affairs, men, in making such contracts, in general would, if it were brought to their minds, say that there should be such a condition." Now, in the case before us, if the matter had been before their minds, would the partners in the Throstle Mill have agreed to pay Kávasji Nánábhái in the case of the mill turning out unprofitable, or being unable to continue to work on the agreed capital? Adopting the reasoning in the case we have last referred to, we think they would not have so agreed, and that, unless so compelled by the words used, we ought not to make or infer such an agreement for them. This review of the cases brings us clearly to the opinion that the partners in the Throstle Mill Company were not, either by reason of anything they have expressed, or by reason of any covenant that the law will imply, bound to continue the working of the mills in order that Kávasji Nánábhái might obtain a commission on the yarn manufactured by the mills, or to pay compensation for the loss of that commission.

I shall now turn to the consideration of a class of cases in which compensation has been given to servants of a company when it has been wound up. The conclusion we draw from these cases is in accordance with the views we have expressed already.

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In *Yelland's Case* (*i*), where compensation was given to the manager of a bank which was being wound up by order of court, he had been engaged for a fixed period (five years) at a fixed salary (£500 per annum). In *Ex parte Clark* (*j*) there was also an engagement for a fixed period (five years) at a fixed salary (£50 per annum), and also certain commission; but, in the order directing an account to be taken of what was due to him, no provision seems to have been made for estimated commission which might have become payable during the unexpired portion of his term of service, if he had not lost his appointment by the winding up of the company. In *Ex parte Logan* (*k*) there was a fixed salary of £800 per annum, with a proviso for its being increased to a certain extent in the event of certain profits being realised by the bank, and an express stipulation for compensation to him, in the event of loss of his office for any other cause than gross misconduct, to the extent of three years' salary, to which, on the winding up of the bank, he was declared entitled.

In *Hartland* v. *The General Exchange Bank* (*l*), not cited in argument, it was held, at *Nisi Prius*, in 1866, by Willes, J., that in estimating damages for the wrongful dismissal of a servant, the jury should take into account the salary, and not any commission, obtained by him. That is a clear authority for the conclusion at which we have arrived.

Independently of the frame of the contract here, we are of opinion, that, even if the company had covenanted to carry on business during the lifetime of Kávasji Nánábhái, yet, inasmuch as Kávasji Nánábhái mainly contributed to the dissolution of the company, he is not entitled to compensation. We think he did this, and in the following manner:—

I. He incurred an unauthorised debt nearly equal in amount to half of the original stipulated capital. And he did this without consulting the shareholders, or ascertaining from them whether they would consent to a further extension of the capital. They had once previously increased it, and

(*i*) L. R. 4, Eq. 350. (*j*) L. R. 7, Eq. 550. (*k*) L. R. 9, Eq. 149. (*l*) 14 L. T., N. S., 863.

were not for that reason bound to do so again, unless such were their pleasure.

II. He pertinaciously insisted upon making calls after all the capital and one lákh of rupees more had been subscribed, and threatened to forfeit the shares if the calls as made by him were not paid.

III. He manufactured voters, in violation of the spirit of the 6th clause of the Agreement.

His Lordship stated the facts in connection with these matters, and concluded by saying that for these reasons the Court was of opinion that Kávasji Nánábhái forced the dissolution of the company—a company which he had himself founded upon an insufficient basis—and that he was not entitled to compensation.*

Attorneys for the plaintiffs: *Keir, Prescot, and Winter.*

Attorneys for Kávasji Nánábhái: *Manisty and Fletcher.*

* As to costs, the Court stated that, as directed by the Privy Council, Kávasji Nánábhái should have the costs of and incidental to the charges of fraud, and that the plaintiffs should have from him the costs of and incident to his claim for compensation, and that these two classes of costs might be set off against each other, and the balance paid by the party against whom it might be, and that the parties should respectively have their costs in the Master's office, and the costs of suit other than above mentioned, out of the partnership estate. The costs of the appeal had already been provided for by the Privy Council.

In lieu, however, of the above direction, the following order was, upon the consent and at the desire of the parties, substituted:—The defendant Kávasji Nánábhái waiving his right to costs of the charges of fraud made against him, let all parties have, out of the funds in court in this cause, their costs as between solicitor and client (including the costs of the resistance of the plaintiffs to the application made, in October 1863, by the purchaser of the Mill), excepting the costs of the appeal already provided for by the Privy Council.