ORIGINAL CIVIL.

Before Sir Charles Sargent, Kt., Justice.

1881
September 24, 26, 27, 29, 30.

NUSSERWANJI MERWANJI PANDAY AND OTHERS, PLAINTIFFS, *v.* GORDON AND OTHERS, DEFENDANTS.*

Company—Injunction—Suit by agents of company to restrain it from carrying into effect d resolution of directors—Power to appoint solicitors to company—Practice—Joinder of causes of action—Same parties suing in different capacities—Civil Procedure Code Act X of 1877, *Sections* 26 *and* 31.

By the Memorandum and Articles of Association of the New Dhurumsey Poonjabhoy Spinning and Weaving Company, the plaintiffs' firm of M. F. & Co. were appointed agents of the company for twenty-five years, and it was provided that they should have the general control and management of the company. Clause 98 of the Articles provided that the said firm, as such agents, should have full power and authority *(inter alia)* to appoint and employ, in or for the purposes of the transaction and management of the affairs and business of the company, such solicitors as they should think proper. An agreement, dated 26th August, 1874, was also entered into between the company and the partners in the firm of M. F. & Co., their executors, administrators and assigns, *for the time being constituting the partnership firm of M. F. & Co.*, whereby it was agreed that the said firm should be agents to the company for twenty-five years to buy and sell, &c., and particularly to exercise all the powers contained in clause 98 of the Articles of Association. Messrs. C. & B. were duly appointed solicitors to the company, and acted as such for a considerable time. Merwanji Framji, one of the members of the said firm of M. F. & Co., died in the middle of March, 1876. The plaintiffs complained that G., one of the shareholders in the company, became desirous of ousting the plaintiffs from the position of agents of the company, and of becoming the managing director of the company ; that, in July 1881, he procured his own election, and that of certain nominees of his as directors of the company ; and on the 8th August, 1881, procured the passing of a resolution at a Board meeting to the effect that as Messrs. C. & B., the company's solicitors, were also the solicitors of the agents, it was desirable, for the interests of the company, that a change should be made, and that Messrs. H., C., & L. be appointed solicitors of the company. The plaintiffs alleged that the only object of passing the said resolution was to facilitate the design of G., of ousting the plaintiffs from their agency, and getting the management of the company for himself ; that Messrs. H.,C., & L. had been for a long time the solicitors of G., and had been advising him in his designs upon the company and upon the plaintiffs, and they contended that the resolution was a breach of the contract between the company and the plaintiffs and a violation of the Articles of Association of the company. The plaintiffs sued G. and two other directors of the company, and the company itself, and prayed for an injunction against the defendants to restrain them from committing any breach of the agreement of 26th August, 1874, and in particular from carrying into effect the resolution appointing Messrs. H., C., & L. as solicitors for the company, and to

* Suit No. 324 of 1881.

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restrain them from doing any thing inconsistent with the Memorandum and Articles of Association. The defendants contended that the contract of the 26th August, 1874, had been determined by the death of Merwanji Framji, and that the powers conferred on the agents by clause 98 of the Articles were, subject to the general powers of management, vested in the directors by the Articles, and that the case was not one in which an injunction could be granted.

Held, that, having regard to the Memorandum and Articles of Association, the contract was that the firm of M. F. & Co. for the time being should be the agents of the company for twenty-five years, and that the right to sue on the contract by its nature survived to the plaintiffs after the death of Merwanji Framji.

Held, also, that there being no provision either in the Articles of Association or the agreement of 26th August, 1874, that the power thereby conferred on the agents should be subject to the control or assent of the directors, there was no right in the directors to interfere with the agents in the exercise of their powers otherwise than as representing the company in virtue of their general powers of management.

It being admitted that the conduct of the defendants would be supported by the company in general meeting, owing to their having a preponderance of votes,

Held that, inasmuch as the Court would not, by a decree for specific performance or by injunction, compel the company to retain the plaintiffs in the confidential position of agents, it would not restrain the defendants or the company from appointing a solicitor, which was only a violation of what was ancillary or incidental to the principal part of the contract, viz., the agreement that the plaintiffs should be the agents of the company for twenty-five years ; and further, *semble* that on the merits of the case the Court would not interfere on behalf of the plaintiffs.

Counsel on behalf of the plaintiffs sought to obtain the injunction on the ground that the resolution of the 8th August, 1881, appointing Messrs. H., C., & L. solicitors of the company, was contrary to the Memorandum of Association, and, therefore, *ultra vires* ; and, in order that this point might be pressed against the defendants, it was proposed that the plaint should be amended by alleging a cause of action in two of the plaintiffs *as shareholders* as well as a cause of action in all the plaintiffs as *parties contracting* with the company.

Held that, under the provisions of sections 26 and 31 of the Civil Procedure Code (Act X of 1877), the amendment could not be allowed. The plaintiffs, as shareholders and contractors, had not the same cause of action, by which words were meant not only the act complained of, but also the right violated by that act. The rights of the plaintiffs as contractors, alleged to be violated by the resolution, were rights given to them by their agreement; but the rights of the plaintiffs as shareholders were rights secured to them by the Articles of Association.

THE plaintiffs were the partners of the firm of Merwanji Framji and Company. The first three defendants were directors of the New Dhurumsey Poonjabhoy Spinning and Weaving Company, Limited, and the fourth defendant was the company itself.

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The plaint stated that by clause 4 of the Memorandum of Association(1) of the said company it was provided that the plaintiffs' firm should be appointed agents of the said company, and the said clause provided that the company should enter into an agreement with the plaintiffs' firm providing for the continuance of the plaintiffs' firm as such agents for the term of twenty-five years on the terms specified in the said clause.

By clause 97 of the Articles of Association(2) of the said company it was provided that the then members of the plaintiffs' firm of

(1) Clause 4.—Merwanji Framji Panday, Nusserwanji Merwanji Panday, Dorabji Framji Panday and Dhunjibhoy Pestonji Panday, and such other person or persons as shall for the time being constitute the firm of Merwanji Framji and Company, now carrying on business in Bombay, shall be appointed agents of the company for the purpose of carrying on the business of the company, and the company shall enter into an agreement with them providing for their continuance in such appointment during the term of twenty-five years at the remuneration of a commission of one-half anna on every pound of cotton yarn manufactured and sold by the company, equal or superior in quality to thirties, and of a commission of one-quarter of an anna on every pound of cotton yarn and cloth manufactured and sold by the company, inferior in quality to thirties, and of a commission on all other yarns, cloth and other fabrics manufactured by the company as the directors of the company for the time being, and the members of the said firm of Merwanji Framji and Company for the time being shall agree upon; and also providing that, in the event of the company being wound up during the said period of twenty-five years, the said firm of Merwanji Framji and Company shall be entitled to receive and shall receive from the said company or the liquidators thereof as compensation for the loss of their said appointment such a sum of money as will be the then present value of an annuity for the remainder of the said term of twenty-five years of an amount equal to the annual amount earned by them as commission as aforesaid on an average of the three years next preceding the winding up of the company if the company shall have so long existed, and, if not, on an average of the period during which the company shall have existed, which sum is to be ascertained by two actuaries, one to be named by the said company or the liquidators thereof, and the other by the said Merwanji Framji and Company, or, if they differ, by an umpire to be named by them.

(2) Clause 97—That Merwanji Framji Panday, Nusserwanji Merwanji Panday, Dorabji Framji Panday, and Dhunjibhoy Pestonji Panday, and such other person or persons as shall for the time being constitute the said firm of Merwanji Framji and Company shall, upon entering into an agreement with the company in that behalf, be the agents of the company during the term of twenty-five years, and they shall have the general control and management of the company at the remuneration and upon the terms and subject to the conditions to be specified in an agreement to be entered into between the company and the persons hereinbefore mentioned in pursuance of Clause IV of the Memorandum of Association.

Merwánji Frámji and Company, and such other persons as should for the time being constitute the said firm should, upon entering into an agreement with the company, be the agents of the company for twenty-five years, and should have the general control and management of the company; and by clause 98 it was provided(1) that the plaintiffs' firm, as such agents, should have full power and authority (*inter alia*) to appoint and employ in or for the purposes of the transaction and management of the affairs and business of the company such solicitors as they should think proper.

The following are the material portions of the agreement entered into between the plaintiffs' firm and the company in pursuance of clause 97 of the Articles of Association:—

"Articles of agreement made and entered into this twenty-sixth day of August, 1874, between the New Dhurumsey Poonjabhoy Spinning and Weaving Company, Limited, a joint stock company registered under the provisions of the Indian Companies Act, 1866, and hereinafter called the said company, their successors and assigns of the one part, and Merwánji Frámji Pánday, Nusserwánji Merwánji Pánday, Dorábji Frámji Pánday and Dhunjibhoy Pestonji Pánday and their executors, administrators and assigns, the persons for the time being *constituting the partnership firm of Merwánji Frámji and Company*, carrying on business in Bombay of the other part, hereinafter described as the said firm of Merwánji Frámji and Company, whereby it is mutually agreed and covenanted by and between the parties hereto as follows:—

"*First.*—The said firm of Merwánji Frámji and Company shall be and shall serve the said company, and hereby agree and covenant with the said company, their successors and assigns to

(1) Clause 98.—The agents shall have full power and authority to enter into such contracts and agreements as they may think proper for the purposes of the company, and to appoint and employ in or for the purposes of the transaction and management of the affairs and business of the company such secretaries, managers, bankers, solicitors, engineers, clerks, brokers and other officers as they shall think proper, with such powers and duties, and upon such terms as to duration of office, remuneration or otherwise as they shall think fit, and in like manner from time to time to remove or suspend them or any of them; and generally to appoint and employ any persons in the service or for the purposes of the company as they shall think fit, upon such terms and conditions as they shall think proper.

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serve the said company as agents of the said company for the purpose of carrying on the business of the said company during the term of twenty-five years from the date hereof for the consideration hereinafter mentioned, and as such agents the said firm shall have full powers and liberty to buy at all times and at their discretion raw cotton, jute, wool and other fibres and products and to sell the yarn, cloth and other fibres to be manufactured by the said company, *and particularly to exercise all the powers contained in clause* 98(*ninety-eight*) *of the Articles of Association*, and do all such other acts and things as may be necessary for the purpose of carrying on and promoting the business of the said company.

"*Second.*—The said company for themselves, their successors and assigns shall and hereby agree and covenant with the said firm of Merwánji Frámji and Company to *retain the said firm of Meránji Frámji and Company as such agents* as hereinbefore mentioned, for and *during the full term of twenty-five years* from the date of these presents, and to pay to them for their services as such agents as aforesaid, by way of remuneration, a commission of one-half anna on every pound of cotton yarn manufactured and sold by the company, equal or superior in quality to thirties, and a commission of one quarter of an anna on every pound of cotton yarn and cloth manufactured and sold by the company inferior in quality to thirties, and on all other yarns, cloth and other fibres manufactured by the company such commission as the directors of the said company for the time being and the said firm of Merwánji Frámji and Company shall agree upon."

Merwánji Frámji, one of the members of the firm of Merwánji Frámji & Co., died in the month of March, 1876.

The plaint further alleged that the first defendant had bought a large number of shares with the object, as the plaintiffs believed, of ousting the plaintiffs' firm from the position of agents of the company, and with the purpose of himself becoming the managing director of the company; that in consequence of his arrangements with other shareholders, especially with one Cássumbhoy Dhurumsey, he was able to command a majority at any meeting of shareholders and to carry any resolution.

In the month of July, 1881, the first defendant procured his own election and that of certain nominees of his as directors of the said company. The following paragraphs of the plaint state the material part of the plaintiffs' case :—

"The first defendant has made no secret of his intentions, but has openly avowed that he will cause the Board of Directors, on which he has now a majority, to pass a resolution depriving the plaintiffs of their agency; although he is perfectly aware that such a resolution would be *ultra vires* and of no effect." . . . . . At a Board meeting held on 8th August, 1881, it was proposed by the first defendant and seconded by the said Jumabhoy Lalji, the third defendant, that as Messrs. Crawford and Boevey, the company's solicitors, were also the solicitors of the agents, it was desirable, for the interests of the company, that a change should be made, and that Messrs. Hearn, Cleveland, and Little be appointed solicitors of the company.

"10. The first and second plaintiffs, who were present at the said Board meeting in their capacity of directors, protested against any such resolution being put or passed, upon the ground that no notice whatever had been given of any such resolution, and on the ground that any such resolution was *ultra vires*, and a direct infringement of the plaintiffs' rights as agents of the company. They expressed their willingness to entertain and consider any suggestion made by the Board as to the desirability of changing the solicitors of the company, but objected altogether to the Board interfering with the rights of the agents. The said resolution was, in spite of the protests of the first and second plaintiffs, carried by the votes of the first, second and third defendants.

"11. The plaintiffs submit that the said resolution was beyond the powers of the Board to pass, and was a direct breach of the contract between the said company and the plaintiffs, and a violation of the articles of association of the said company. The only object of passing the said resolution was to facilitate the designs of the first defendant of ousting the plaintiffs from their agency and getting the managership of the said company for himself. Messrs. Hearn, Cleveland and Little have for a long time past been the solicitors for the first defendant, and have been advis-

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ing him throughout in his attempts to get upon the direction of the said company and in his designs upon the said company and the plaintiffs."

"12. The plaintiffs themselves believe that the interests of the company are perfectly safe in the hands of Messrs. Crawford and Boevey, but they are nevertheless (without prejudice to their rights) willing to appoint any independent firm of solicitors as solicitors of the company in case it is thought desirable that the solicitors of the company should be different from the solicitors of the agents. They certainly, however, will not appoint Messrs. Hearn, Cleveland and Little as solicitors of the said company, as the plaintiffs say they are and have been the solicitors and advisers of the first defendant; and the only result of appointing them will be that the first defendant's views will be carried out, and his intention to oust the plaintiffs from their position as agents will be attempted to be carried out. Such attempt must, the plaintiffs are advised, be most detrimental to the company, as it will embark the company in expensive litigation without a hope of success.

"13. There is no dispute whatever between the company and the plaintiffs' firm as agents aforesaid, though the plaintiffs have little doubt that the first defendant and his nominees and those in his interests will do their utmost to invent and get up imaginary disputes and complaints against the plaintiffs."

The following was the prayer of the plaint:—

"1. That it may be declared that the resolution passed on the 8th August, 1881, appointing Messrs. Hearn, Cleveland, and Little solicitors of the company, is *ultra vires* and void.

"2. That the defendants may be restrained by the order and injunction of this honourable Court from committing any breach of the said agreement of the 26th August, 1874, between the plaintiffs and the said company, and, in particular, from carrying into effect the resolution appointing Messrs. Hearn, Cleveland, and Little as solicitors for the company, and that they be restrained, by the like order and injunction, from doing anything inconsistent with the Memorandum and Articles of Association of the said company.

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"3. That the defendants may be restrained, by the order and injunction of this honourable Court, from employing the said Messrs. Hearn, Cleveland, and Little as solicitors of the said company, and from paying any of the moneys of the said company to the said Messrs. Hearn, Cleveland, and Little."

Merwanji Framji Panday, one of the parties in the plaintiffs' firm, died in March, 1876.

On the 11th August, 1881, the plaintiffs obtained a *rule nisi* calling on the defendants to show cause why they should not be restrained from carrying into effect the resolution of the 8th August, 1881, appointing Messrs. Hearn, Cleveland, and Little as solicitors for the company, and from employing the said Messrs. Hearn, Cleveland, and Little as solicitors of the said company.

The rule now came on for argument.

Marriott (Advocate General) and *Lang* for the first three defendants showed cause.—We contend that the agreement of the 26th August, 1874, under which the plaintiffs' firm was appointed agents, is an agreement for personal service. Merwanji Framji, one of the persons therein appointed, died in March, 1876, and the agreement then determined. In no case can an injunction be granted to prevent the breach of such an agreement: Specific Relief Act I of 1877, sec. 21, cl. (*b*). It is also an agreement for more than three years: see clause (*g*): *Mair* v. *Himalaya Tea Company*(1); Lindley on Partnership, p. 1013. The plaintiffs can be removed from the agency although appointed by the memorandum of association. The memorandum of association can be altered as to matters which are not necessarily contained in it: *Duke's Case*(2).

[SARGENT, J.—The question here is not whether the agents can be removed, but whether the plaintiffs, being agents, have not the power to appoint the solicitors to the company.]

The directors have a right to prevent the agents exercising this power. This is a matter of internal regulation, and the Court will not interfere. Counsel referred to the following cases:—*Johnson* v. *Shrewsbury*(3); *Lumley* v. *Wagner*(4); *Hills* v.

(1) 1 L. R. 1 Eq. 411.
(2) 1 Ch. Div. 620.
(3) 3 De G. M. & G.
(4) De G. M. & G. 604.

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Croll (1); *Wolverhampton and Walsall Railway Company* v. *London and N. W. Railway Company* (2); *Eley* v. *The Positive Government Security Company* (3); *Orton* v. *The Cleveland Fire Brick Company* (4); *Melhado* v. *Porto Alegre Railway Company* (5); *South Wales Railway Company* v. *Wythes* (6); *Ogden* v. *Fossick* (7); *Peto* v. *Brighton Company* (8); *Ferguson* v. *Wilson* (9); *Spackman* v. *Evans* (10); *Anderson's Case* (11).

The Court will not interfere merely to restrain anticipated injury: *Earl of Ripon* v. *Hobart* (12); *Haines* v. *Taylor* (13); *Pattison* v. *Gilford* (14); Indian Companies Act X of 1866, secs. 8, 9, 10.

Jardine, for the company, did not address the Court.

Inverarity, for the plaintiffs, in support of the rule.—We contend the directors had no power to pass the resolution. The directors have only the powers which are given to them by the articles of association: *Bennett's Case* (15); *Ernest* v. *Nicholas* (16).

[SARGENT, J.—The plaintiffs here do not sue as shareholders and complain of the acts of the directors as *ultra vires*. They complain of a breach of contract entered into with the company.]

We complain both as shareholders and as outsiders; if necessary, the plaint can be amended. Two of the plaintiffs are shareholders in the company, and they can sue in that capacity as well as in the capacity of persons contracting with the company. The same act which injures the three plaintiffs as contractors, gives two of them a cause of action also as shareholders. The grievance complained of by them in both capacities rests on the same facts. Counsel referred to the Civil Procedure Code (Act X of 1877), secs. 26,31,53,45,46; *Booth* v. *Briscoe* (17); *Durham* v. *Spence* (18); *Umfreville* v. *Johnson* (19); *Vale of Neath Colliery Co.* v. *Furness* (20);

(1) 2 Phil. 60.
(2) L. R. 16 Eq. 433.
(3) 1 Ex. Div. 20—88.
(4) 3 H. & C. 868.
(5) L. R. 9 C. P. 503.
(6) 5 De G. M. & G. 880.
(7) 4 De G. F. & J. 426.
(8) 1 H. & M. 468.
(9) L. R. 2 Ch. 77.
(10) L. R. 3 Eng. & Ir. Ap. 171.
(11) 7 Ch. Div. 93.
(12) 3 May & R. 369.
(13) 2 Phil. 209.
(14) L. R. 18 Eq. 263.
(15) 5 De G. M. & G. 297.
(16) 6 H. L. 417.
(17) 2 Q. B. D. 496.
(18) L. R. 6 Ex. 46.
(19) L. R. 10 Ch. 580.
(20) 45 L. J. Ch. Div. 276.

English Rules and Orders, Order 16, Rule 1 ; *Harry* v. *Davey*(1). As to the right of amendment, *Budding* v. *Murdoch* (2) ; *Ruston* v. *Tobin* (3).

[SARGENT, J.—I cannot allow an amendment in this case. The plaintiffs in the plaint sue as parties who have made a contract with the company who are defendants, and they complain of the breach of that contract on the part of the directors of the company. Now, it is argued that the act which constitutes the breach of the contract was *ultravires* ; and in order that this point may be pressed against the defendants, it is proposed that the plaint should be amended by alleging a cause of action in two of the plaintiffs as shareholders as well as a cause of action in all the plaintiffs as parties contracting with the company. I do not think such an amendment can be permitted. Section 26 of the Civil Procedure Code allows all persons to be joined as "plaintiffs in respect of the same cause of action." The question is, therefore, whether the plaintiffs, as shareholders, would have the same cause of action as is alleged in the plaint as now framed. No doubt the plaintiffs, both as shareholders and as contractors, would complain of the same act, viz., the passing of the resolution in question by the directors. But the words "cause of action" mean not only the act complained of, but also the right violated by that act. Now, in this plaint, the rights of the plaintiffs which are alleged to be violated by the resolution, are rights given them by their agreement; but the rights of the plaintiffs as shareholders would be the rights secured to them by the articles of association. The causes of action, therefore, cannot be said to be the same. They are perfectly distinct ; and if the amendment asked for were permitted, the result would be such a misjoinder of plaintiffs as is contemplated by the latter part of section 31 of the Code. I, therefore, refuse to allow any amendment, and the suit must proceed, framed as it is at present, viz., as a suit by parties contracting with the company, and not as a suit by shareholders.]

Inverarity resumed.—The Court can enforce the contract by restraining the company from employing other agents or solicitors.

(1) 5 Ch. D. 697. (2) 1 Ch. D. 42.
(3) 49 L. J. Ch. Div. 262.

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Counsel referred to *Hill* v. *Croll*(1); *Catt* v. *Tourle* (2); *Dietrichsen* v. *Cabburn* (3); *Rolfe* v. *Rolfe* (4); *Great Northern* v. *Manchester Railway Company* (5); *Webster* v. *Dillon* (6); *Montague* v. *Flockton*(7); *Fechter* v. *Montgomery* (8); *Wolverhampton and Walsall Railway Company* v. *London and N. W. Railway Company* (9); *Doherty* v. *Allman* (10); *De Mattos* v. *Gibson* (11); Contract Act (IX of 1872), secs. 40 and 42; *Pritchard's Case* (12); *Orton* v. *Cleveland Fire Brick Company* (13).

SARGENT, J.—The question which I have to determine is whether the plaintiffs, who are the agents of the New Dhurumsey Poonjabhoy Spinning and Weaving Mill, are entitled to an interlocutory injunction of this Court to restrain the three first defendants, who are three of the directors of the company, and also the company itself from carrying into effect the resolution passed at a Board meeting held on the 8th August, 1881, appointing Messrs. Hearn, Cleveland and Little as solicitors for the company, and from employing the said Messrs. Hearn, Cleveland and Little as solicitors of the company.

The grounds upon which the plaintiffs base their right to this injunction are stated in para. 11 of the plaint. (His Lordship read the paragraph above set forth.) At the hearing of the rule it was stated that two of the plaintiffs were shareholders, and it was sought to maintain the injunction also, on the ground that the appointment was contrary to the memorandum of association, and, therefore, *ultra vires*, and I was asked to allow the plaint to be amended by alleging that two of the plaintiffs were such shareholders. I, however, expressed my opinion that a plaint framed with such a double aspect would amount to such a misjoinder as is contemplated by the latter parts of section 31 of the Civil Procedure Code, and having refused to allow the amendment, confined the plaintiffs to the case as originally made by the plaint, viz., that the appointment was a breach of their contract with the company.

(1) 2 Phil. 60.
(2) L. R. 4 Ch. 654.
(3) 2 Phil. 52.
(4) 15 Sim. 88.
(5) 5 De G. & J. 138, 149
(6) 3 Jur. N. S. 432.
(7) L. R. 16 Eq. 189.
(8) 33 Bea. 26.
(9) L. R. 16 Eq. 433.
(10) L. R., 3 Ap. Cas. 709.
(11) 4 De G. & J. 276.
(12) L. R. 8 Ch. 956.
(13) 3 H. & C. 868.

Now, by clause 4 of the memorandum of association of the company, it is provided that (his Lordship read the clause : see *supra*, p. 268, *note* (1).) In pursuance of this provision an agreement was entered into by the firm with the company on 26th August, 1874, to the following effect. (His Lordship read the agreement above set forth.) Clause 98 of the articles of association, referred to in the agreement, is as follows. (His Lordship read the clause : see *supra*, p. 269, *note* (1).)

It was contended for the plaintiffs that the resolution of the Board of 24th August, 1881, appointing Messrs. Hearn, Cleveland, and Little, solicitors of the company, was in breach of this agreement, and that the directors and company should be restrained from carrying into effect the said resolution.

On the part of the defendants it was said that the contract had been determined by the death of Mr. Merwanji, and further that the powers conferred on the agents by clause 98 of the articles were subject to and subordinate to the powers of management vested in the directors by clause 94 of the articles of association(1), but that in any case an injunction could not be granted consistently with the principles upon which relief is given by injunction either by English Courts or under the Specific Relief Act.

As to the first of the defendants' objections, I think that, having regard to the memorandum and articles of association, the contract, however informally and clumsily worded, was that the firm, for the time being, should be the agents of the company for twenty-five years. The right, therefore, to sue on the contract would, by its nature, survive to the three plaintiffs after the death of Merwanji.

(1) Clause 94.—The business of the company shall be managed by the Board who in addition to the powers and authorities by the said Act, or by these presents expressly conferred upon them, may exercise all such powers, give all such consents, make all such arrangements, and generally do all such acts and things as are or shall be by the said Act and these presents directed or authorized to be exercised, given, made or done by the company, and are not thereby expressly directed to be exercised, given, made or done by the company in general meeting, but subject, nevertheless, to the provisions of the said Act and of these presents, and subject also to such (if any) regulations as are from time to time prescribed by the company in general meeting; but no regulation made by the company in general meeting shall invalidate any prior act of the Board which would have been valid if the regulation had not been made.

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It is to be remarked that clause 4 of the memorandum of association, clauses 97 and 98 of the articles of association, and the agreement entered into between the company and the firm, from which several instruments the agents derive their powers, contain no provision that the exercise of those powers should be subject to the assent or control of the directors. The powers are given absolutely and unconditionally, and to be exercised as the agents may think fit. Again, clause 94 of the articles of association, which determines the powers of the directors and confers on them the management of the business of the company and the power to do all acts which the company are authorized to do (otherwise than in general meeting), expressly makes such powers subject to the provisions of the articles themselves, and, therefore, in subordination to those powers which are by clauses 97 and 98 of those articles, and the agreement expressly conferred by the company itself on the agents. It is plain, I think, that the directors have no other right to interfere with the agents in the exercise of their powers otherwise than as representing the company in virtue of their general powers of management of the business of the company, and in such character to watch over the interests of the company, and take care that those powers are properly and efficiently exercised by the agents in accordance with their contract. The directors, therefore, in taking upon themselves to appoint Messrs. Hearn, Cleveland, and Little as solicitors were exceeding their powers.

However, it seems to have been admitted throughout, that the defendants and Cassumbhoy Dhurumsey have sufficient votes to control the company in general meeting, and there is, therefore, no practical reason for separating the company from the defendants in the consideration of the question of injunction, although the conduct of the directors may well affect the question of costs. The real question, therefore, to be determined is, whether the Court will interfere by injunction to prevent the company from appointing a solicitor.

The wording of the resolution of 8th August, 1881, shows that the intention of the Board was not to appoint an additional solicitor to represent their interests as distinct from those of the agents, but to effect a change in the solicitors of the company.

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Had the action of the Board been confined to appointing an additional solicitor, I think it may well be doubted whether that would be in violation of the agreement with the agents, although it might well be a course which the shareholders themselves might object to. The appointment, however, of a firm of solicitors to be the solicitors of the company *in substitution* for the firm already appointed by the agents, was clearly an interference with the powers of the agents, and, therefore, in breach of their contract. The Specific Relief Act purports to deal only with perpetual injunctions, leaving temporary injunctions to be regulated by Chapter XXXV of the Code of Civil Procedure. Sections 492 and 493 of that Code state the particular cases in which a temporary injunctions may be granted. In the latter section it is provided that an application may be made for a temporary injunction to "restrain a breach of contract". It is plain, however, that, apart from the special circumstances which determine whether the Court should, in its discretion, grant an injunction before the hearing of the suit, the same general principles must equally apply to the granting of a temporary injunction as to a perpetual injunction, and those principles must, therefore, be sought in the Specific Relief Act itself.

Now, the contract between the plaintiffs and the company is in the affirmative form throughout. The firm agree to serve the company as agents for the purpose of carrying on the business for twenty-five years, for the consideration therein named; the firm to have full power to exercise all the powers contained in clause 98 of the articles of association and to do all such other acts and things as may be necessary for carrying on and promoting the business of the company. The company, on the other hand, undertake to retain the firm as such agents as aforesaid for the term of twenty-five years, and to pay them for their services as such agents a certain remuneration or commission. The object of the enumeration of the particular powers conferred on the firm would appear to have been to define with greater accuracy the nature of the agency they were to administer. In other words, the company undertakes that the firm shall be their agents with certain powers, and the Court is now asked to interfere, by injunction, to restrain the company

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from usurping one of those powers in violation of their contract.

A great deal of learned argument was addressed to me as to the cases in which the Court of Chancery has been in the habit of granting relief by injunction in the cases of an affirmative agreement such as the present. It is not necessary to refer to any other authorities than the cases of *Catt* v. *Tourle*(1) before the Lords Justices; *Wolverhampton and Walsall Railway* v. *London and North Western Railway Company* (2) before Lord Selbourne; and *Doherty* v. *Allman*(3) before the House of Lords, to show, that the Court, as Lord Cairns says in the latter case, "although it cannot enforce affirmatively the performance of a covenant, will, in special cases, interfere to prevent that being done which would be a departure from and violation of the contract." The two former cases are good illustrations of the circumstances in which the Court will thus interfere. This statement of the practice of the Court of Chancery is adopted in section 57 of the Specific Relief Act.

Before considering whether the present case is one in which the Court would grant an injunction, I may allude to an objection which was taken for the defendants, viz., that the Court would not assist the defendant, as there was no mutuality of remedy; the Court not having any power to compel the plaintiffs to perform their part of the contract. The remarks, however, of Lord Cottenham in *Dietrichsen* v. *Cabburn*(4) dispose of this objection, as it is not alleged that the plaintiffs have not performed their contract up to the present time. Lord Cottenham says: "The equitable jurisdiction to restrain by injunction an act which the defendant by contract or duty was bound to abstain from, cannot be compared to cases in which the Court has jurisdiction over the acts of the plaintiff; for, if that were so, it could not interfere to restrain the violation of contracts by tenants or of duty by agents as in the cases of *Yovatt* v. *Winyard*(5) and *Green* v. *Folgham*(6), or by an attorney as in *Cholmondeley* v. *Clinton*(7), in none of which cases was there

(1) 4 Ch. App. 654.
(2) L. R. 16 Eq. 439.
(3) L. R. 3 App. Cases 709.
(4) 2 Phil. 52.
(5) 1 J. & W. 394.
(6) 1 Sim. & St. 398.
(7) 19 Ves. 261.

anything to be done by the plaintiff which equity could enforce. Such also are cases of injunctions sought by tenants against their landlords as *Rankin* v. *Huskisson*(1), where there was a negative agreement, and *Squire* v. *Campbell*(2), where one was attempted to be raised by the exhibition of a plan. In none of these cases was there any equity to be administered against the plaintiff, and yet the jurisdiction was assumed." Moreover, the proviso at the end of section 57 of the Specific Relief Act shows that the injunction may be granted, "provided the applicant has not failed to perform the contract so far as it is binding on him."

The circumstances of *Hill* v. *Crolls*(3), decided by Lord Lyndhurst, which was relied on for the defendants, were very special. The case is explained by Lord St. Leonards in *Lumley* v. *Wagner*(4). However, it may well be doubted whether it was rightly decided.

It is to be remarked that the power, the violation of which is complained of by the plaintiffs, is ancillary to the agency which the plaintiffs have to administer. At the close of clause 1 of the agreement it is said the plaintiffs are to exercise all the powers contained in clause 98 of the articles of association, and all such other acts and things as may be necessary for the purpose of carrying on and promoting the business of the company, *i.e.*, necessary for the proper exercise of the agency vested in the plaintiffs. That being so, I apprehend that the propriety of granting an injunction to restrain the company from doing an act in usurpation of one of the powers mentioned in section 98, must greatly depend upon whether the Court would compel the company to retain the plaintiffs in their service on the business of the company. The question arises, therefore, whether the Court, consistently with principle and authority, could compel the company to retain the plaintiffs as their agents?

In *Johnson* v. *The Shrewsbury and Birmingham Railway Company*(5) the Court was asked to restrain the company from determining a contract with the plaintiffs who had contracted to work the line and keep the engines and rolling plant in repair at a

(1) 4 Sim. 13.
(2) 1 My. & Cr., 459.
(3) Phil. 60.
(4) 21 L. J.
(5) 3 De G. M. & G.

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specified remuneration. Lord Justice Knight Bruce describes the inadvisability of enforcing such a contract by injunction in the following terms :—"We are asked to compel one person to employ against his will another person as his confidential servant for duties, with respect to the due performance of which the utmost confidence is required. Let him be one of the best and most competent persons that ever lived, still, if the two do not agree—and good people do not always agree—enormous mischief may be done." In *Mair* v. *Himalaya Company*(1) the plaintiffs had contracted with the company to act as managers of their tea estates. A dispute having arisen between the plaintiffs and the company as to the terms upon which they had recognized the agency, the directors appointed a new manager in the room of the plaintiffs' firm, and refused to recognize them any longer as their agents, and the plaintiffs filed then a bill to restrain the company from acting upon and enforcing his voluntary resignation. Wood, V. C., refused the injunction, and in his judgment referring to *Johnson* v. *The Shrewsbury and Birmingham Railway Company*(2) says: "Even assuming, in favour of the plaintiff, the construction given by him to the articles that he was to be irremovable, except by the authority of a general meeting, or that his acceptance of shares was conditional on his being retained as agent, the Court cannot act in his favour, as the duties of an agent are in the nature of personal service, and, as such, incapable of being enforced in equity." In *Stocker* v. *Brocklepant*(3) we find Lord Truro expressing his opinion that the contract between the parties being one of service and hiring, the Court could not interfere to compel the continuance of the relationship. The contract in that case was that the plaintiff should manage for the defendants business of working certain patents which had become vested in them.

Now, I apprehend that the principle to be deduced from these cases is that the Court will not compel one man to continue to employ another in services of a personal nature, by which I understand services of such a nature as to depend for their efficiency upon the personal qualities of those with whom the contract is entered into, and more especially when they are services of trust

(1) L. R. 1 Eq. 411. (2) 3 De G. M. & G. 914.
(3) 20 L. G. Ch. 409.

and confidence. It was said that the agency in this case was not a personal service, because it was vested by the company in a firm, whose members might be ever changing. But the efficiency of the agency will none the less depend upon the members of the firm for the time being, and the company may fairly be supposed (if, indeed, this company can be said to have had any share in the appointment of the plaintiffs under the circumstances of this case,) to have selected the firm as their agents from the confidence in the members of the firm and their successors. Applying this principle to the present case, is it possible to conceive any duties of a more confidential character than those of a manager of a spinning and weaving company, to whom the entire business of buying raw material, creating the manufactured articles, and selling the outcome of the mill is entrusted, together with the largest possible powers for the efficient discharge of those duties. Would it be possible to impose a heavier burden on a company of this character, than by compelling it to retain a firm in the exercise of such duties after it had forfeited the confidence of the directors and shareholders. I can come to no other conclusion than that this Court would not, either by decreeing specific performance or by injunction, compel a company to retain its agents in its employ, but would leave the latter to their action for damages.

If this be so, ought the Court to restrain the company from doing that which is only a violation of what is ancillary to, or incidental to the principal part of the contract, viz., the agreement that the plaintiffs should be agents for twenty-five years. The case of *Brett* v. *East India and London Shipping Company*(1) has, I think, a distinct bearing on this question. Here the exercise of the powers mentioned in clause 98 of the articles is but an adjunct to the agency, and if the Court could not compel the company to retain the plaintiffs as their agents, would it not be worse than futile to restrain them from doing acts which are equivalent to carrying on the business of the company, simply because they are in violation of the agents' powers. It is to be remarked that V. C. Wood reserves his opinion as to what the Court would do if the term in the agreement, the violation of which he sought to be restrained, were

(1) 2 H. & M. 404.

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quite distinct from the rest, by which I understand him as meaning if there had been no question of removing the agents. In the present case the agents have not been removed; but it is evident, from the affidavits on both sides, that the appointment of the firm of Messrs. Hearn, Cleveland and Little is with a view to that end. [His Lordship here read the affidavits.] The perusal of these affidavits can leave no doubt on my own mind that the appointment of new solicitors to the company is regarded by both parties as the first active operation against the position of the plaintiffs as agents—the first parallel against the fortress at present occupied by them, and from which they are able to dominate over the affairs of the company. Under these circumstances it would not be, in my opinion, in accordance with the principles which determine the action of Courts in Equity of England (and which are always treated as our best guides in such matters) if I were to interfere by injunction with the resolution of the directors of the 8th August, 1881.

This suffices to dispose of the rule; but I cannot help remarking that, independently of the above considerations, I doubt much whether the merits of the case would not preclude the interference of the Court on behalf of the plaintiffs. This contract is certainly not one which, to use the language of Lord Cairns in *Eley* v. *Positive Government Security Life Assurance Company*(1), "ought to receive any special favour from the Court." The appointment of the plaintiffs as agents was the result of a previous arrangement between them and Cassumbuhoy Dhurumsey, the previous agent, who had a commanding influence in the old company, just as, in the case cited, it was one between the agents and the promoters, and under circumstances which were the same. In this case there is the additional circumstance that by the arrangement (and this term in the arrangement could not, in any possible view of the subject, be denied to have been brought to the notice of the shareholders) half of the remuneration to be paid to the plaintiffs, which the shareholders would naturally suppose was the necessary one to obtain the entire and efficient services of their agents, was to be paid over to Cassumbhoy. In other words, the transaction was one entered into to suit exclu-

(1) 1 Exch. Div. 20.

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sively the interests of the old and new agents, and with little or no regard to the real interests of the company and behind the backs of the shareholders. The rule must, therefore, be discharged, but without costs, as I consider the directors to blame in acting, as they did, without first calling a general meeting to decide upon a matter which was provided for by the articles of association. The three first defendants must pay the costs of the company.

Rule discharged.

Attorneys for plaintiffs.—Messrs. *Crawford and Boevey.*

Attorneys for the first three defendants.—Messrs. *Hearn, Cleveland, and Little.*

Attorneys for the fourth defendant.—Messrs. *Craigie, Lynch, and Owen.*

CRIMINAL JURISDICTION.

Before Sir Charles Sargent Kt., Justice.

EMPRESS *v.* BAL GANGADHAR TILAK.

1882 *March* 9.

Commission—Criminal trial—Evidence of Government servant ordered on service taken by commission previously to departure—High Court Criminal Procedure Act X of 1875, *Section* 76.

Where a Government servant who had executed his recognizance to appear and give evidence for the prosecution at a criminal trial to take place in the High Court of Bombay was subsequently ordered to a distant station on the public service, and could not, with due regard to the public interests, return to Bombay in time for the trial.

Held, on the application of Government, that his evidence might be taken by commission before his departure from Bombay, under the provisions of section 76 of the High Court Criminal Procedure Act X of 1875.

THE accused was charged by Rao Bahadur Mahadev Wasudev Barve with defamation.

One of the witnesses for the prosecution was Brigade Surgeon Joynt. He was examined on the 22nd February at the preliminary inquiry in the Police Court, but counsel for the defence declined then to cross-examine him, wishing to reserve the cross-examination until the case came on for trial at the Sessions.