The Judges who usually sat in Banc in this Term were: Lord Campbell C.J., Coleridge J., Erle J., Crompton J.

LUMLEY *against* GYE. 1853. 1st and 2d counts of declaration, by lessee of a theatre: for maliciously procuring W. (who had agreed with plaintiff to perform and sing at his theatre and no where else for a certain term) to break her contract and not to perform or sing at plaintiff's theatre, and to continue away during the term for which W. was engaged. 3d count, averring that W. had engaged with plaintiff to be, and had become and was, plaintiff's dramatic artiste for a certain term, and complaining that plaintiff maliciously procured her to depart out of her said employment during the term. On demurrer:—Held, by Wightman, Erle and Crompton Js., that the counts were all good, and that an action lies for maliciously procuring a breach of contract to give exclusive personal services for a time certain, equally whether the employment has commenced or is only in fieri, provided the procurement be during the subsistence of the contract, and produces damage: and that, to sustain such an action, it is not necessary that the employer and employed should stand in the strict relation of master and servant. Semble, by the same Judges, that the action would lie for the malicious procurement of the breach of any contract, though not for personal services, if by the procurement damage was intended to result and did result to the plaintiff.—Coleridge J. dissentiente, and holding that the action for procuring a third person to depart from his engagement is founded on the Statute of Labourers, and is strictly confined to cases where the employer and employed stand in such relation of master and servant as was within that statute; and that, in all other cases, the remedy for a breach of contract is only on the contract, and against those privy to it. And that, as a dramatic performer is not a servant, therefore the counts were all bad.—The defendant had, under stat. 15 & 16 Vict. c. 76, s. 80, obtained leave to plead and demur also. On an application to postpone the trial of the issues in fact till the issue in law had been

(*b*) See *Reid* v. *Gardner*, 8 Exch. 651.

finally disposed of in a Court of Error:—Held: that the Court had no power to make such an order; inasmuch as the judgment on the demurrer had disposed of the issue in law, finally as far as regarded this Court.

[S. C. 22 L. J. Q. B. 463; 17 Jur. 827; 1 W. R. 432. Dictum approved, *Cattle* v. *Stockton Waterworks*, 1875, L. R. 10 Q. B. 457. Applied, *Bowen* v. *Hall*, 1881, 6 Q. B. D. 339; *Mogul Steamship Company* v. *M'Gregor*, 1889-91, 23 Q. B. D. 608; [1892] A. C. 25; *De Francesco* v. *Barnum*, 1890, 63 L. T. 515. Followed, *Temperton* v. *Russell*, [1893] 1 Q. B. 727. Commented on, *Allen* v. *Flood*, [1898] A. C. 1. Referred to, *Lyons* v. *Wilkins*, [1899] 1 Ch. 272. Approved, *Quinn* v. *Leathem*, [1901] A. C. 510. Applied, *Read* v. *Friendly Society of Operative Stonemasons*, [1902] 2 K. B. 97, 737. Discussed, *Glamorgan Coal Company* v. *South Wales Miners' Federation*, [1903] 1 K. B. 131; [1903] 2 K. B. 576; [1905] A. C. 253; *National Phonograph Company, Limited* v. *Edison-Bell Consolidated Phonograph Company, Limited*, [1908] 1 Ch. 348, 359; *Conway* v. *Wade*, [1908] 2 K. B. 849; [1909] A. C. 510.]

The 1st count of the declaration stated that plaintiff was lessee and manager of the Queen's Theatre, for **[217]** performing operas for gain to him; and that he had contracted and agreed with Johanna Wagner to perform in the theatre for a certain time, with a condition, amongst others, that she should not sing nor use her talents elsewhere during the term without plaintiff's consent in writing: Yet defendant, knowing the premises, and maliciously intending to injure plaintiff as lessee and manager of the theatre, whilst the agreement with Wagner was in force, and before the expiration of the term, enticed and procured Wagner to refuse to perform: by means of which enticement and procurement of defendant, Wagner wrongfully refused to perform, and did not perform during the term.

Count 2, for enticing and procuring Johanna Wagner to continue to refuse to perform during the term, after the order of Vice Chancellor Parker, affirmed by Lord St. Leonards (*a*)[1], restraining her from performing at a theatre of defendants.

Count 3. That Johanna Wagner had been and was hired by plaintiff to sing and perform at his theatre for a certain time, as the dramatic artiste of plaintiff, for reward to her, and had become and was such dramatic artiste of plaintiff at his theatre: Yet defendant, well knowing &c., maliciously enticed and procured her, then being such dramatic artiste, to depart from the said employment.

In each count special damage was alleged.

[218] Demurrer. Joinder.

The demurrer was argued in the sittings after Hilary Term last (*a*)[2].

Willes, for the defendant. The counts disclose a breach of contract on the part of Wagner, for which the plaintiff's remedy is by an action on the contract against her. The relation of master and servant is peculiar; and, though it originates in a contract between the employer and the employed, it gives rise to rights and liabilities, on the part of the master, different from those which would result from any other contract. Thus the master is liable for the negligence of his servant, whilst an ordinary contractor is not liable for that of the person with whom he contracts. And a master may lawfully defend his servant when a contractor may not defend his contractee. And so a master may bring an action for enticing away his servant. But these are anomalies, having their origin in times when slavery existed: they are intelligible on the supposition that the servant is the property of his master: and, though they have been continued long after all but free service has ceased, they are still confined to cases where the relation of master and servant, in the strict sense, exists. In the present case Wagner is a dramatic artiste, not a servant in any sense. (It is unnecessary to report the argument for the defendant further in detail, as the points made in it, and the authorities relied upon, are fully stated in the judgments of Crompton J. and Wightman J.)

Cowling, *contrà*. The general principle is laid down **[219]** in Comyns's Digest, Action upon the Case (A). "In all cases, where a man has a temporal loss, or damage by the wrong of another, he may have an action upon the case, to be repaired in damages." In Comyns's Digest, Action upon the Case for Misfeasance (A 6), an

(*a*)[1] See *Lumley* v. *Wagner*, 1 De G. McN. & G. 604.

(*a*)[2] February 4 and 5, 1853; before Coleridge, Wightman, Erle and Crompton Js.

instance is given: "If he threaten the tenants of another, whereby they depart from their tenures," citing 1 Rol. Abr. 108, Action sur Case (N) pl. 21. An action lies for procuring plaintiff's wife to remain absent; *Winsmore* v. *Greenbank* (Willes, 577). An action lay for ravishment of ward; and, if "a man procureth a ward to go from his guardian, this is a ravishment in law;" 2 Inst. 440. Now, as neither the tenants, the wife nor the ward are servants, it cannot be said that the action for procurement is an anomaly confined to the case of master and servant. "Every master has by his contract purchased for a valuable consideration the services of his domestics for a limited time: the inveigling or hiring his servant, which induces a breach of this contract, is therefore an injury to the master; and for that injury the law has given a remedy by a special action on the case: and he may also have an action against the servant for the nonperformance of his agreement." 3 Bl. Com. 142, Blackstone thus treats the action by a master as an example of a general rule that "inducing a breach of contract" is an injury for which an action lies. And surely any one, not a lawyer, would agree that the malicious and intentional procurement of a breach of contract was a wrong, and that the breach of contract intended to be procured was the direct consequence of that wrongful procurement. *Green* v. *Button* (2 C. M. & R. 707) is apparently an authority for that larger proposition; and **[220]** so is *Sheperd* v. *Wakeman* (1 Sid. 79). It is not accurate to say that the remedy for breach of contract is confined to those privy to the contract; *Levy* v. *Langridge* (*b*). In that case the son recovered though the warranty was to the father. It is true that the damage to the plaintiff must be the natural and immediate consequence of the wrong of the defendant, and that it is not often that the unjustifiable act of an independent party is the natural consequence of that wrong; but, when, as on this demurrer must be taken to be the fact, the defendant uses the contracting party as his tool to break the contract to the damage of the plaintiff, why should he not be answerable for the damage he thus intentionally produces? The procurement may in some cases be privileged, just as a libel or slander may be: but here it is malicious. It is, however, unnecessary to go so far in this case, as the contract is for exclusive personal services, and the authorities are clear that in such cases the action lies. (The arguments for the plaintiff on this part of the case, and the authorities cited, are so fully stated in the judgments that it is unnecessary to repeat them here.)

Willes, in reply. The averment of malice can make no difference. If the action does not lie without malice, it does not lie with it; and malice is never averred in actions for seducing servants. The passage cited from Comyns's Digest, Action upon the Case (A), does not throw much light on the matter. It is not disputed that damage resulting from a wrong gives a cause of **[221]** action; but the defendant's point is that the act complained of is not a wrong within the technical meaning of the word: and this is an instance of the rule, ex damno sine injuriâ non oritur actio. The instances cited, as supporting the general proposition, all range themselves under some well known class of wrongs. The reference in Comyns's Digest, Action upon the Case for Misfeasance (A 6), is to 1 Roll. Ab. 108. Action sur Case, (N) pl. 21; where it appears that the menaces were to "tenants at will, of life and limb." The tenants therefore were not bound to remain; and the threats of life and limb must have been an interference with the plaintiff's property. Ravishment of ward also proceeds on the ground that the guardian had a property in his ward. *Winsmore* v. *Greenbank* (Willes, 577) extends the law as to enticing servants to enticing a wife; but the principle is the same. The common law considers the wife the property and servant of the husband. In *Sheperd* v. *Wakeman* (1 Sid. 79) the action was for asserting that the plaintiff was already married, per quod she lost her marriage: but to assert that a woman is about to commit bigamy is actionable per se. *Levy* v. *Langridge* (4 M. & W. 337) was decided on the ground that there was what was equivalent to a fraudulent representation to the plaintiff as to an article which he was to use. The act complained of in *Green* v. *Button* (2 C. M. & R. 707) was also a wrong in itself. The injury done was analogous to slander of title. (The argument in reply, as to the effect of the contract being for exclusive service, is sufficiently shewn by the judgments.)

Cur. adv. vult.

(*b*) 4 M. & W. 337; affirming the judgment of the Exchequer in *Langridge* v. *Levy*, 2 M. & W. 519.

[222] In this term (June 3) the learned Judges, being divided in opinion, delivered their judgments seriatim.

Crompton J. The declaration in this case consisted of three counts. The two first stated a contract between the plaintiff, the proprietor of the Queen's Theatre, and Miss Wagner, for the performance by her for a period of three months at the plaintiff's theatre; and it then stated that the defendant, knowing the premises and with a malicious intention, whilst the agreement was in full force, and before the expiration of the period for which Miss Wagner was engaged, wrongfully and maliciously enticed and procured Miss Wagner to refuse to sing or perform at the theatre, and to depart from and abandon her contract with the plaintiff and all service thereunder, whereby Miss Wagner wrongfully, during the full period of the engagement, refused and made default in performing at the theatre; and special damage arising from the breach of Miss Wagner's engagement was then stated. The third count stated that Miss Wagner had been hired and engaged by the plaintiff, then being the owner of Her Majesty's Theatre, to perform at the said theatre for a certain specified period as the dramatic artiste of the plaintiff for reward to her in that behalf, and had become and was such dramatic artiste for the plaintiff at his said theatre for profit to the plaintiff in that behalf; and that the defendant, well knowing the premises and with a malicious intention, whilst Miss Wagner was such artiste of the plaintiff, wrongfully and maliciously enticed and procured her, so being such artiste of the plaintiff, to depart from and out of the said employment of the plaintiff, whereby **[223]** she wrongfully departed from and out of the said service and employment of the plaintiff, and remained and continued absent from such service and employment until the expiration of her said hiring and engagement to the plaintiff by effluxion of time; and special damage arising from the breach of Miss Wagner's engagement was then stated. To this declaration the defendant demurred: and the question for our decision is, Whether all or any of the counts are good in substance?

The effect of the two first counts is, that a person, under a binding contract to perform at a theatre, is induced by the malicious act of the defendant to refuse to perform and entirely to abandon her contract; whereby damage arises to the plaintiff, the proprietor of the theatre. The third count differs, in stating expressly that the performer had agreed to perform as the dramatic artiste of the plaintiff, and had become and was the dramatic artiste of the plaintiff for reward to her; and that the defendant maliciously procured her to depart out of the employment of the plaintiff as such dramatic artiste; whereby she did depart out of the employment and service of the plaintiff; whereby damage was suffered by the plaintiff. It was said, in support of the demurrer, that it did not appear in the declaration that the relation of master and servant ever subsisted between the plaintiff and Miss Wagner; that Miss Wagner was not averred, especially in the two first counts, to have entered upon the service of the plaintiff; and that the engagement of a theatrical performer, even if the performer has entered upon the duties, is not of such a nature as to make the performer a servant, within the rule of law which gives an action to the master for the wrongful enticing away of his **[224]** servant. And it was laid down broadly, as a general proposition of law, that no action will lie for procuring a person to break a contract, although such procuring is with a malicious intention and causes great and immediate injury. And the law as to enticing servants was said to be contrary to the general rule and principle of law, and to be anomalous, and probably to have had its origin from the state of society when serfdom existed, and to be founded upon, or upon the equity of, the Statute of Labourers. It was said that it would be dangerous to hold that an action was maintainable for persuading a third party to break a contract, unless some boundary or limits could be pointed out; and that the remedy for enticing away servants was confined to cases where the relation of master and servant, in a strict sense, subsisted between the parties; and that, in all other cases of contract, the only remedy was against the party breaking the contract.

Whatever may have been the origin or foundation of the law as to enticing of servants, and whether it be, as contended by the plaintiff, an instance and branch of a wider rule, or whether it be, as contended by the defendant, an anomaly and an exception from the general rule of law on such subjects, it must now be considered clear law that a person who wrongfully and maliciously, or, which is the same thing, with notice, interrupts the relation subsisting between master and servant by procuring the servant to depart from the master's service, or by harbouring and keeping him

as servant after he has quitted it and during the time stipulated for as the period of service, whereby the master is injured, commits a wrongful act for which he is responsible at law. I think that the rule applies wherever [225] the wrongful interruption operates to prevent the service during the time for which the parties have contracted that the service shall continue: and I think that the relation of master and servant subsists, sufficiently for the purpose of such action, during the time for which there is in existence a binding contract of hiring and service between the parties; and I think that it is a fanciful and technical and unjust distinction to say that the not having actually entered into the service, or that the service not actually continuing, can make any difference. The wrong and injury are surely the same, whether the wrong doer entices away the gardener, who has hired himself for a year, the night before he is to go to his work, or after he has planted the first cabbage on the first morning of his service; and I should be sorry to support a distinction so unjust, and so repugnant to common sense, unless bound to do so by some rule or authority of law plainly shewing that such distinction exists. The proposition of the defendant, that there must be a service actually subsisting, seems to be inconsistent with the authorities that shew these actions to be maintainable for receiving or harbouring servants after they have left the actual service of the master. In *Blake* v. *Lanyon* (6 T. R. 221) it was held by the Court of King's Bench, in accordance with the opinion of Gawdy J. in *Adams* v. *Bafeald* (1 Leon. 240), and against the opinion of the two other Judges who delivered their opinions in that case, that an action will lie for continuing to employ the servant of another after notice, without having enticed him away, and although the defendant had received the servant innocently. It is [226] there said that "a person who contracts with another to do certain work for him is the servant of that other till the work is finished, and no other person can employ such servant to the prejudice of the first master; the very act of giving him employment is affording him the means of keeping him out of his former service." This appears to me to shew that we are to look to the time during which the contract of service exists, and not to the question whether an actual service subsists at the time. In *Blake* v. *Lanyon* (6 T. R. 221) the party, so far from being in the actual service of the plaintiff, had abandoned that service, and entered into the service of the defendant in which he actually was; but, inasmuch as there was a binding contract of service with the plaintiffs, and the defendant kept the party after notice, he was held liable to an action. Since this decision, actions for wrongfully hiring or harbouring servants after the first actual service had been put an end to have been frequent; see *Pilkington* v. *Scott* (15 M. & W. 657), *Hartley* v. *Cummings* (5 Com. B. 247). In *Sykes* v. *Dixon* (9 A. & E. 693), where the distinction as to the actual service having been put an end to was relied upon for another purpose, it does not seem to have occurred to the bar or the Court that the action would fail on account of there having been no actual service at the time of the second hiring or the harbouring; but the question as to there being, or not being, a binding contract of service in existence at the time seems to have been regarded as the real question.

The objection as to the actual employment not having commenced would not apply in the present case to the third count, which states that Miss Wagner had become [227] the artiste of the plaintiff, and that the defendant had induced her to depart from the employment. But it was further said that the engagement, employment or service, in the present case, was not of such a nature as to constitute the relation of master and servant, so as to warrant the application of the usual rule of law giving a remedy in case of enticing away servants. The nature of the injury and of the damage being the same, and the supposed right of action being in strict analogy to the ordinary case of master and servant, I see no reason for confining the case to services or engagements under contracts for services of any particular description; and I think that the remedy, in the absence of any legal reason to the contrary, may well apply to all cases where there is an unlawful and malicious enticing away of any person employed to give his personal labour or service for a given time under the direction of a master or employer who is injured by the wrongful act; more especially when the party is bound to give such personal services exclusively to the master or employer; though I by no means say that the service need be exclusive. Two Nisi prius decisions were cited by the counsel for the defendant in support of this part of the argument. One of these cases, *Ashley* v. *Harrison* (1 Peake's N. P. C. 194. 1 Esp. N. P. C. 48), was an action against the defendant for having published a libel against

a performer, whereby she was deterred from appearing on the stage: and Lord Kenyon held the action not maintainable. This decision appears, especially from the report of the case in Espinasse, to have proceeded on the ground that the damage was too remote to be connected with the defendant's act. This **[228]** was pointed out as the real reason of the decision by Mr. Erskine in the case of *Tarleton* v. *M'Gawley* (1 Peake's N. P. C. 207), tried at the same sittings as *Ashley* v. *Harrison* (1 Peake's N. P. C. 194. 1 Esp. N. P. C. 48). The other case, *Taylor* v. *Neri* (1 Esp. N. P. C. 386), was an action for an assault on a performer, whereby the plaintiff lost the benefit of his services; and Lord Chief Justice Eyre said that he did not think that the Court had ever gone further than the case of a menial servant; for that, if a daughter had left the service of her father, no action per quod servitium amisit would lie. He afterwards observed that, if such action would lie, every man whose servant, whether domestic or not, was kept away a day from his business could maintain an action; and he said that the record stated that Breda was a servant hired to sing, and in his judgment he was not a servant at all; and he nonsuited the plaintiff. Whatever may be the law as to the class of actions referred to, for assaulting or debauching daughters or servants per quod servitium amisit, and which differ from actions of the present nature for the wrongful enticing or harbouring with notice, as pointed out by Lord Kenyon in *Fores* v. *Wilson* (1 Peake's N. P. C. 55), it is clear from *Blake* v. *Lanyon* (6 T. R. 221) and other subsequent cases, *Sykes* v. *Dixon* (9 A. & E. 693), *Pilkington* v. *Scott* (15 M. & W. 657) and *Hartley* v. *Cummings* (5 Com. B. 247), that the action for maliciously interfering with persons in the employment of another is not confined to menial servants, as suggested in *Taylor* v. *Neri* (1 Esp. N. P. C. 386). In *Blake* v. *Lanyon* (6 T. R. 221) a journeyman who was to work by the piece, and who had left his work **[229]** unfinished, was held to be a servant for the purposes of such an action; and I think that it was most properly laid down by the Court in that case, that a person who contracts to do certain work for another is the servant of that other (of course with reference to such an action) until the work be finished. It appears to me that Miss Wagner had contracted to do work for the plaintiff within the meaning of this rule; and I think that, where a party has contracted to give his personal services for a certain time to another, the parties are in the relation of employer and employed, or master and servant, within the meaning of this rule. And I see no reason for narrowing such a rule; but I should rather, if necessary, apply such a remedy to a case "new in its instance, but" "not new in the reason and principle of it" (*a*), that is, to a case where the wrong and damage are strictly analogous to the wrong and damage in a well recognised class of cases. In deciding this case on the narrower ground, I wish by no means to be considered as deciding that the larger ground taken by Mr. Cowling is not tenable, or as saying that in no case except that of master and servant is an action maintainable for maliciously inducing another to break a contract to the injury of the person with whom such contract has been made. It does not appear to me to be a sound answer, to say that the act in such cases is the act of the party who breaks the contract; for that reason would apply in the acknowledged case of master and servant. Nor is it an answer, to say that there is a remedy against the contractor, and that the party relies on the contract; for, besides that reason also applying to the case of master and servant, the action on the contract **[230]** and the action against the malicious wrong-doer may be for a different matter; and the damages occasioned by such malicious injury might be calculated on a very different principle from the amount of the debt which might be the only sum recoverable on the contract. Suppose a trader, with a malicious intent to ruin a rival trader, goes to a banker or other party who owes money to his rival, and begs him not to pay the money which he owes him, and by that means ruins or greatly prejudices the party: I am by no means prepared to say that an action could not be maintained, and that damages, beyond the amount of the debt if the injury were great, or much less than such amount if the injury were less serious, might not be recovered. Where two or more parties were concerned in inflicting such injury, an indictment, or a writ of conspiracy at common law, might perhaps have been maintainable; and, where a writ of conspiracy would lie for an injury inflicted by two, an action on the case in the nature of conspiracy will generally lie; and in such action on the case the plaintiff is entitled to

(*a*) Per Holt C.J., in *Keeble* v. *Hickeringill*, 11 East, 573, 575, note (*a*) to *Carrington* v. *Taylor*, 11 East, 571.

recover against one defendant without proof of any conspiracy, the malicious injury and not the conspiracy being the gist of the action (*a*). In this class of cases it must be assumed that it is the malicious act of the defendant, and that malicious act only, which causes the servant or contractor not to perform the work or contract which he would otherwise have done. The servant or contractor may be utterly unable to pay anything like the amount of the damage sustained entirely from the wrongful act of the defendant: and it would seem unjust, and contrary to the general princi-**[231]**-ples of law, if such wrongdoer were not responsible for the damage caused by his wrongful and malicious act. Several of the cases cited by Mr. Cowling on this part of the case seem well worthy of attention.

Without however deciding any such more general question, I think that we are justified in applying the principle of the action for enticing away servants to a case where the defendant maliciously procures a party, who is under a valid contract to give her exclusive personal services to the plaintiff for a specified period, to refuse to give such services during the period for which she had so contracted, whereby the plaintiff was injured.

I think, therefore, that our judgment should be for the plaintiff.

Erle J. The question raised upon this demurrer is, Whether an action will lie by the proprietor of a theatre against a person who maliciously procures an entire abandonment of a contract to perform exclusively at that theatre for a certain time; whereby damage was sustained? And it seems to me that it will. The authorities are numerous and uniform, that an action will lie by a master against a person who procures that a servant should unlawfully leave his service. The principle involved in these cases comprises the present; for, there, the right of action in the master arises from the wrongful act of the defendant in procuring that the person hired should break his contract, by putting an end to the relation of employer and employed; and the present case is the same. If it is objected that this class of actions for procuring a breach of contract of hiring rests upon no principle, and ought not to be extended beyond the cases heretofore decided, and that, as those have related **[232]** to contracts respecting trade, manufactures or household service, and not to performance at a theatre, therefore they are no authority for an action in respect of a contract for such performance; the answer appears to me to be, that the class of cases referred to rests upon the principle that the procurement of the violation of the right is a cause of action, and that, when this principle is applied to a violation of a right arising upon a contract of hiring, the nature of the service contracted for is immaterial. It is clear that the procurement of the violation of a right is a cause of action in all instances where the violation is an actionable wrong, as in violations of a right to property, whether real or personal, or to personal security: he who procures the wrong is a joint wrong-doer, and may be sued, either alone or jointly with the agent, in the appropriate action for the wrong complained of. Where a right to the performance of a contract has been violated by a breach thereof, the remedy is upon the contract against the contracting party; and, if he is made to indemnify for such breach, no further recourse is allowed; and, as in case of the procurement of a breach of contract the action is for a wrong and cannot be joined with the action on the contract, and as the act itself is not likely to be of frequent occurrence nor easy of proof, therefore the action for this wrong, in respect of other contracts than those of hiring, are not numerous; but still they seem to me sufficient to shew that the principle has been recognised. In *Winsmore* v. *Greenbank* (Willes, 577) it was decided that the procuring of a breach of the contract of a wife is a cause of action. The only distinction in principle between this case and **[233]** other cases of contracts is, that the wife is not liable to be sued: but the judgment rests on no such grounds; the procuring a violation of the plaintiff's right under the marriage contract is held to be an actionable wrong. In *Green* v. *Button* (2 C. M. & R. 707) it was decided that the procuring a breach of a contract of sale of goods by a false claim of lien is an actionable wrong. *Sheperd* v. *Wakeman* (1 Sid. 79) is to the same effect, where the defendant procured a breach of a contract of marriage by asserting that the woman was already married. In *Ashley* v. *Harrison* (1 Peake's N. P. C. 194. 1 Esp. N. P. C. 48) and in *Taylor* v. *Neri* (1 Esp. N. P. C. 386) it was properly decided that the action did not lie, because the battery, in the first case, and the libel, in the

(*a*) See note (4) to *Skinner* v. *Gunton*, 1 Wms. Saund. 230.

second case, upon the contracting parties were not shewn to be with intent to cause those persons to break their contracts, and so the defendants by their wrongful acts did not procure the breaches of contract which were complained of. If they had so acted for the purpose of procuring those breaches, it seems to me they would have been liable to the plaintiffs. To these decisions, founded on the principle now relied upon, the cases for procuring breaches of contracts of hiring should be added; at least Lord Mansfield's judgment in *Bird* v. *Randall* (3 Burr. 1345) is to that effect. This principle is supported by good reason. He who maliciously procures a damage to another by violation of his right ought to be made to indemnify; and that, whether he procures an actionable wrong or a breach of contract. He who procures the non-delivery of goods according to contract may inflict an injury, the same as he who procures the abstraction of goods after delivery; and both ought on the same ground to be made **[234]** responsible. The remedy on the contract may be inadequate, as where the measures of damages is restricted; or in the case of non-payment of a debt where the damage may be bankruptcy to the creditor who is disappointed, but the measure of damages against the debtor is interest only; or, in the case of the non-delivery of the goods, the disappointment may lead to a heavy forfeiture under a contract to complete a work within a time, but the measure of damages against the vendor of the goods for non-delivery may be only the difference between the contract price and the market value of the goods in question at the time of the breach. In such cases, he who procures the damage maliciously might justly be made responsible beyond the liability of the contractor.

With respect to the objection that the contracting party had not begun the performance of the contract, I do not think it a tenable ground of defence. The procurement of the breach of the contract may be equally injurious, whether the service has begun or not, and in my judgment ought to be equally actionable, as the relation of employer and employed is constituted by the contract alone, and no act of service is necessary thereto.

The result is that there ought to be, in my opinion, judgment for the plaintiff.

Wightman J.(*a*). This was a demurrer to a declaration in an action against the defendant for, maliciously, and with intent to injure the plaintiff, causing, procuring and enticing Miss Wagner, who had contracted with the plaintiff to sing at his theatre, to break her contract and refuse to sing, by which he sustained damage.

[235] The declaration contained three counts. The two first are for, wrongfully and maliciously, enticing and procuring Miss Wagner to refuse and make default in the performance of an executory contract, entered into by her with the plaintiff to sing and otherwise perform at his theatre, and to depart from and abandon her contract with the plaintiff and all service thereunder, without alleging that Miss Wagner was in the service and employ of the plaintiff, and that she left such service and employ by the procurement and enticement of the defendant. The third count states that Miss Wagner, before the committing the grievances complained of by the plaintiff, had been and was hired and engaged by the plaintiff to sign and perform at his theatre, from the 15th April 1852 to the 15th July following, as the dramatic artiste of the plaintiff, and that she had become and was such dramatic artiste of the plaintiff, and that the defendant, well knowing the premises, wrongfully and maliciously enticed and procured the said Miss Wagner to depart from and out of the said employment of the plaintiff, and to continue absent from it until the end of the period for which she was engaged. The two first counts are for maliciously procuring Miss Wagner to break a contract for service, and to refuse to perform it; and the third is for maliciously procuring her to depart from the employment of the plaintiff.

It was contended, for the defendant, that an action is not maintainable for inducing another to break a contract, though the inducement is malicious and with intent to injure; and that the breach of contract complained of is, in contemplation of law, the wrongful act of the contracting party, and not the consequence of the malicious persuasion of the party charged; which ought **[236]** not to have had any effect or influence; and that the damage is not the legal consequence of the acts of the defendant. It was further urged, that the cases in which actions have been held maintainable for seducing servants and apprentices from the employ of their masters are exceptions

(*a*) Lord Campbell C.J. read this judgment, Wightman J. being absent in consequence of indisposition.

to the general rule, and are not to be extended; and that the present case, as it appears upon the declaration, is not within any of the excepted cases.

With respect to the first and second counts of the declaration, it was contended, for the plaintiff, that an action on the case is maintainable for maliciously procuring a person to refuse to perform a contract, into which he has entered, and by which refusal the plaintiff has sustained an injury; and, though no case was cited upon the argument in which such an action had been brought, or directly held to be maintainable, it was said that on principle such action was maintainable; and the authority of Lord Chief Baron Comyns was cited, that in all cases where a man has a temporal loss or damage by the wrong of another he may have an action on the case. In the present case there is the malicious procurement of Miss Wagner to break her contract, and the consequent loss to the plaintiff. Why then may not the plaintiff maintain an action on the case? Because, as it is said, the loss or damage is not the natural or legal consequence of the acts of the defendant. There is the injuria, and the damnum; but it is contended that the damnum is neither the natural nor legal consequence of the injuria, and that, consequently, the action is not maintainable, as the breaking her contract was the spontaneous act of Miss Wagner herself, who was under no obligation to yield to the persuasion or procurement of the defendant. **[237]** And the case of *Vickers* v. *Wilcocks* (8 East, 1), which though it has been much brought into question has never been directly overruled, was relied upon as an authority upon this point for the defendant. That case, however, is clearly distinguishable from the present upon the ground, suggested by Lord Chief Justice Tindal in *Ward* v. *Weeks* (7 Bing. 211, 215), that the damage in that case, as well as in *Vickers* v. *Wilcocks* (8 East, 1), was not the necessary consequence of the original slander uttered by the defendants, but the result of spontaneous and unauthorized communications made by those to whom the words were uttered by the defendants. The distinction is taken in *Green* v. *Button* (2 C. M. & R. 707), in which it was held that an action was maintainable against the defendant for maliciously and wrongfully causing certain persons to refuse to deliver goods to the plaintiff, by asserting that he had a lien upon them and ordering these persons to retain the goods until further orders from him. It was urged for the defendant in that case, that, as the persons in whose custody the goods were were under no legal obligation to obey the orders of the defendant, it was the mere spontaneous act of these persons which occasioned the damage to the plaintiff: but the Court held the action to be maintainable, though the defendant did make the claim as of right, he having done so maliciously and without any reasonable cause, and the damage accruing thereby. In *Winsmore* v. *Greenbank* (Willes, 577) the plaintiff in his first count alleged that, his wife having unlawfully left him and lived apart from him, during which time a considerable fortune was left for her separate use, and she being willing to return to the plaintiff, whereby he **[238]** would have had the benefit of her fortune, the defendant, in order to prevent the plaintiff from receiving any benefit from the wife's fortune and the wife from being reconciled to him, unlawfully and unjustly persuaded, procured and enticed the wife to continue absent from the plaintiff, and she did by means thereof continue absent from him, whereby he lost the comfort and society of the wife and her aid in his domestic affairs, and the profit and advantage he would have had from her fortune. Upon motion in arrest of judgment this count was held good, and that it sufficiently appeared that there was both damnum and injuria: it was primâ facie an unlawful act of the wife to live apart from her husband; and it was unlawful, and therefore tortious, in the defendant to procure and persuade her to do an unlawful act: and, as the damage to the plaintiff was occasioned thereby, an action on the case was maintainable. This case appears to me to be an exceedingly strong authority in the plaintiff's favour in the present case. It was undoubtedly primâ facie an unlawful act on the part of Miss Wagner to break her contract, and therefore a tortious act of the defendant maliciously to procure her to do so; and, if damage to the plaintiff followed in consequence of that tortious act of the defendant, it would seem, upon the authority of the two cases referred to, of *Green* v. *Button* (2 C. M. & R. 707) and *Winsmore* v. *Greenbank* (Willes, 577), as well as upon general principle, that an action on the case is maintainable. A doubt was expressed by Lord Eldon, in *Morris* v. *Langdale* (2 Bos. & Pul. 284, 289), whether in an action on the case for slander the plaintiff could succeed upon an allegation of special damage, that, **[239]** by reason of the speaking of the words, other persons refused to perform their contracts with him; Lord Eldon observing that that was a damage which

might be compensated in actions by the plaintiff against such persons. It has, however, been remarked with much force by Mr. Starkie, in his Treatise on the Law of Libel, vol. 1, p. 205 (2nd edition), that such a doctrine would be productive of much hardship in many cases, as a mere right of action for damages for non-performance of a contract can hardly be considered a full compensation to a person who has lost the immediate benefit of the performance of it. The doubt indeed is hardly sustainable on principle; and there are many cases in which actions have been maintained for slanderous words, not in themselves actionable, on the ground of the speaking of the words having induced other persons to act wrongfully towards the plaintiffs; as in the case of *Newman* v. *Zachary* (Aleyn, 3), where an action on the case was held to be maintainable for wrongfully representing to the bailiff of a manor that a sheep was an estray, in consequence of which it was wrongfully seized. Upon the whole, therefore, I am of opinion that, upon the general principles upon which actions upon the case are founded, as well as upon authority, the present action is maintainable.

It is not, however, necessary, for the maintenance of the third count of the declaration at least, to rely upon so general a principle; for the case, at all events, appears to me to fall within the cases which the defendant considers are exceptions to a general rule, and in which actions have been held maintainable, for procuring persons to quit the service in which they have been retained and employed. The defendant con-**[240]**-tends that the exception is limited to the cases of apprentices and menial servants and others to whom the provisions of the Statutes of Labourers would be applicable. It appears to me however, upon consideration of the cases cited upon the argument, that the right of an employer to maintain an action on the case for procuring or inducing persons in his service to abandon their employment is not so limited; but that it extends to the case of persons who have contracted for personal service for a time, and who during the period have been wrongfully procured and incited to abandon such service, to the loss of the persons whom they had contracted to serve. The right to maintain such an action is by the common law, and not by the Statute of Labourers, which however gives a remedy, which the common law did not, in cases where persons, within the purview of the Statute, have voluntarily left the service in which they were engaged, and have been retained by another who knew of their previous employment. In Brooke's Abridgement, tit. Laborers, pl. 21 (*a*), it is said: In trespass it was agreed that at common law, if a man had taken my servant from me, trespass lay vi et armis; but if he had procured the servant to depart and he retained him, action lay not at common law vi et armis, but it lay upon the case upon the departure by procurement. In the case of *Adams* v. *Bafeald* (1 Leo. 240), where the plaintiff declared that his servant departed his service without cause and the defendant knowing him to be his servant retained him, two Judges out of three held that the action did not lie at common **[241]** law unless the defendant procured him to leave the service. In all these cases the words "servant" and "service" are used; but there is nothing to indicate the kind of servant or of service in respect of which the dicta and decisions occurred. There is a case in the Yearb. Mich. 10 H. 6, pl. 30, fol. 8 B., in which it is said that an action does not lie against a chaplain upon the Statute of Labourers for not chaunting the mass; for it is said he may not be always disposed to sing, and can no more be coerced by force of the statute than a knight, esquire or gentleman. There is no doubt but that the Statute of Labourers only applied to persons whose only means of living was by the labour of their hands. It was passed in the 25th year of Edward the 3rd (stat. 1), and recites that so many of the people, especially workmen and servants, had died of the plague that those that remained required excessive wages, and that there was lack of ploughmen and such labourers, and then obliged every person within the age of sixty, not living in merchandise, nor exercising any craft, nor having of his own whereof he may live, nor proper land which he may till himself, to serve whoever might require him at such wages as were paid in the twentieth year of the King's reign or five or six other years before. The remedies and penalties given by this and the next subsequent Statute of Labourers were limited to the persons described in them; but the remedies given by the common law are not in terms limited to any description of servant or service. The more modern cases give instances, and contain dicta of Judges, which appear to warrant a more extended application of the right of action for **[242]** procuring a

(*a*) See the case more fully stated in the judgment of Coleridge J., post, p. 255.

servant to leave his employment than that contended for by the defendant. In *Hart* v. *Aldridge* (1 Cowp. 54) the plaintiff brought an action for enticing away the plaintiff's servants who worked for him as journeymen shoemakers. It appeared that they worked for the plaintiff for no determinate time, but only by the piece, and had, at the time of the enticing away, each a pair of shoes of the plaintiff unfinished. It was contended that a journeyman hired not for time but by the piece was not a servant; but Lord Mansfield said that by being found to be the plaintiff's "journeymen" they were found to be the plaintiff's servants. "The point turns upon the jury finding that the persons enticed away were employed by the plaintiff as his journeymen. It might perhaps have been different if the men had taken work for every body." In the present case, Miss Wagner was, as stated in the third count and admitted by the demurrer, employed by the plaintiff as his dramatic artiste. Can it make any real difference that in *Hart* v. *Aldridge* (1 Cowp. 54) the persons enticed were employed by the plaintiff as his journeymen shoemakers, and that in the present case Miss Wagner was employed by the plaintiff as his dramatic artiste? In both cases the services were the personal services of the persons engaged; and, though the description of the services was very different, the personal service being in the one case to make shoes, and in the other to sing songs, it seems to me difficult to distinguish the cases upon any principle: it is the exclusive personal service that gives the right. In *Blake* v. *Lanyon* (6 T. R. 221), which was a case very similar in respect to the nature of the service to that of *Hart* v. *Aldridge* (1 Cowp. 54), it was stated by the Court, **[243]** as a general proposition, that "a person who contracts with another to do certain work for him is the servant of that other till the work is finished." These cases appear to me to be very strong authorities in favour of the plaintiff, as far at least as regards the third count. Two cases however were cited for the defendant, as direct authorities against the maintenance of the present action. The first was that of *Ashley* v. *Harrison* (1 Peake's N. P. C. 194. 1 Esp. N. P. C. 48), in which the plaintiff declared that he had retained Madam Mara to sing publickly for him in certain musical performances which he exhibited for profit at Covent Garden Theatre, but that the defendant, contriving to lessen his profits and to deter Madam Mara from singing, published a libel concerning her which deterred her from singing, as she could not sing without danger of being assaulted and ill treated in consequence of the libel. Lord Kenyon held, at Nisi priùs, that the action was not maintainable, as the injury was too remote. The case does not appear to have undergone much discussion; it was only a decision at Nisi priùs; but it is clearly distinguishable from the present, as Madam Mara was deterred from singing, not directly in consequence of any thing done by the defendant, but in consequence of her fear that what he did might induce somebody else to assault and ill treat her. The injury in that case may have been well held to be too remote; but it does not at all resemble this, where the loss is the direct consequence of the defendant's act. The other case was that of *Taylor* v. *Neri* (1 Esp. N. P. C. 386), which certainly bears more directly upon the present. The declaration stated that the plaintiff, being manager **[244]** of the Opera house, had engaged Breda to sing; that the defendant beat him; whereby the plaintiff lost his service. Lord Chief Justice Eyre expressed a doubt whether the action was maintainable, observing that, if such an action could be supported, every person whose servant, whether domestic or not, was kept away a day from his business could maintain an action. He was of opinion that Breda was not a servant at all. The case was very little discussed, was a decision at Nisi priùs, and does not appear to have undergone much consideration; and, without adverting to some distinctions between that and the present case, it can hardly be considered as an authority of much weight for the defendant.

I am therefore of opinion that upon the whole case, as it appears upon these pleadings, the plaintiff is entitled to our judgment.

Coleridge J. The plaintiff in this case, by the first count of his declaration, shapes his case in substance as follows: he alleges a contract made between himself and Johanna Wagner for her to perform in his theatre in operas for a specified time, i.e. from the 15th April to the 15th July, on certain terms, and, among these, one that she was not during the time to sing or use her talents elsewhere than in his theatre without his written authority. He then complains that the defendant, knowing the premises, and maliciously intending to injure him and to prevent Johanna Wagner from performing according to her contract, whilst the agreement was in full force, but before the commencement of the term, on the 8th April, enticed and procured her to

make default in singing or performing at the theatre, [245] and to depart from and abandon her contract, against his will and without his written authority, by means of which enticement and procurement she unlawfully and wrongfully wholly refused to perform her contract, and he sustained special damage. The 2d count applies to an enticement, after certain proceedings in equity, to Johanna Wagner to continue her default for the residue of the term. The 3d count states that Johanna Wagner was hired and engaged by the plaintiff to sing and perform at his theatre, for a certain time, as his dramatic artiste for reward, and had become and was such dramatic artiste, and complains that defendant, maliciously intending to injure him, enticed and procured her to depart from and out of his said employment. These counts are demurred to; and the demurrers raise the questions, Whether an action will lie against a third party for maliciously and injuriously enticing and procuring another to break a contract for exclusive service as a singer and theatrical performer: in the first place, while the contract is merely executory; in the second, after it is in course of execution? I make no distinction between the counts, and am of opinion that it will not in either case, and that the defendant is entitled to our judgment generally.

In order to maintain this action, one of two propositions must be maintained; either that an action will lie against any one by whose persuasions one party to a contract is induced to break it to the damage of the other party, or that the action, for seducing a servant from the master or persuading one who has contracted for service from entering into the employ, is of so wide application as to embrace the case of one in the position and profession of Johanna Wagner. After much consi-[246]-deration and enquiry I am of opinion that neither of these propositions is true; and they are both of them so important, and, if established by judicial decision, will lead to consequences so general, that, though I regret the necessity, I must not abstain from entering into remarks of some length in support of my view of the law.

It may simplify what I have to say, if I first state what are the conclusions which I seek to establish. They are these: that in respect of breach of contract the general rule of our law is to confine its remedies by action to the contracting parties, and to damages directly and proximately consequential on the act of him who is sued; that, as between master and servant, there is an admitted exception; that this exception dates from the Statute of Labourers, 23 Edw. 3, and both on principle and according to authority is limited by it. If I am right in these positions, the conclusion will be for the defendant, because enough appears on this record to shew, as to the first, that he, and, as to the second, that Johanna Wagner, is not within the limits so drawn.

First then, that the remedy for breach of contract is by the general rule of our law confined to the contracting parties. I need not argue that, if there be any remedy by action against a stranger, it must be by action on the case. Now, to found this, there must be both injury in the strict sense of the word (that is a wrong done), and loss resulting from that injury: the injury or wrong done must be the act of the defendant; and the loss must be a direct and natural, not a remote and indirect, consequence of the defendant's act. Unless there be a loss thus directly and proximately connected with the act, the mere intention, or even the endeavour, to [247] produce it will not found the action. The existence of the intention, that is the malice, will in some cases be an essential ingredient in order to constitute the wrongfulness or injurious nature of the act; but it will neither supply the want of the act itself, or its hurtful consequence: however complete the injuria, and whether with malice or without, if the act be after all sine damno, no action on the case will lie. The distinction between civil and criminal proceedings in this respect is clear and material; and a recollection of the different objects of the two will dispose of any argument founded merely on the allegation of malice in this declaration, if I shall be found right in thinking that the defendant's act has not been the direct or proximate cause of the damage which the plaintiff alleges he has sustained. If a contract has been made between A. and B. that the latter should go supercargo for the former on a voyage to China, and C., however maliciously, persuades B. to break his contract, but in vain, no one, I suppose, would contend that any action would lie against C. On the other hand, suppose a contract of the same kind made between the same parties to go to Sierra Leone, and C. urgently and bonâ fide advises B. to abandon his contract, which on consideration B. does, whereby loss results to A.; I think no one will be found bold enough to maintain that an action would lie against C. In the first case no loss has resulted; the malice has been ineffectual; in

the second, though a loss has resulted from the act, that act was not C.'s, but entirely and exclusively B.'s own. If so, let malice be added, and let C. have persuaded, not bonâ fide but malâ fide and maliciously, still, all other circumstances remaining the same, the same reason applies; for it is malitia sine **[248]** damno, if the hurtful act is entirely and exclusively B.'s, which last circumstance cannot be affected by the presence or absence of malice in C. Thus far I do not apprehend much difference of opinion: there would be such a manifest absurdity in attempting to trace up the act of a free agent breaking a contract to all the advisers who may have influenced his mind, more or less honestly, more or less powerfully, and to make them responsible civilly for the consequences of what after all is his own act, and for the whole of the hurtful consequences of which the law makes him directly and fully responsible, that I believe it will never be contended for seriously. This was the principle on which Lord Kenyon proceeded in *Ashley* v. *Harrison* (1 Peake's N. P. C. 194. 1 Esp. N. P. C. 48). There the defendant libelled Madame Mara: the plaintiff alleged that, in consequence, she, from apprehension of being hissed and ill treated, forbore to sing for him, though engaged, whereby he lost great profits. Lord Kenyon nonsuited the plaintiff: he thought the defendant's act too remote from the damage assigned. But it will be said that this declaration charges more than is stated in the case last supposed, because it alleges, not merely a persuasion or enticement, but a procuring. In *Winsmore* v. *Greenbank* (Willes, 577) the same word was used in the first count of the declaration, which alone is material to the present case; and the Chief Justice who relied on it, and distinguished it from enticing, defined it to mean "persuading with effect;" and he held that the husband might sue a stranger for persuading with effect his wife to do a wrongful act directly hurtful to himself. Although I should hesitate to be **[249]** bound by every word of the judgment, yet I am not called on to question this definition or the decision of the case. Persuading with effect, or effectually or successfully persuading, may no doubt sometimes be actionable—as in trespass—even where it is used towards a free agent: the maxims, qui facit per alium facit per se, and respondeat superior, are unquestionable; but, where they apply, the wrongful act done is properly charged to be the act of him who has procured it to be done. He is sued as a principal trespasser, and the damage, if proved, flows directly and immediately from his act, though it was the hand of another, and he a free agent, that was employed. But, when you apply the term of effectual persuasion to the breach of a contract, it has obviously a different meaning; the persuader has not broken and could not break the contract, for he had never entered into any; he cannot be sued upon the contract; and yet it is the breach of the contract only that is the cause of damage. Neither can it be said that in breaking the contract the contractor is the agent of him who procures him to do so; it is still his own act; he is principal in so doing, and is the only principal. This answer may seem technical; but it really goes to the root of the matter. It shews that the procurer has not done the hurtful act; what he has done is too remote from the damage to make him answerable for it. The case itself of *Winsmore* v. *Greenbank* (Willes, 577) seems to me to have little or no bearing on the present: a wife is not, as regards her husband, a free agent or separate person; if to be considered so for the present purpose, she is **[250]** rather in the character of a servant, with this important peculiarity, that, if she be induced to withdraw from his society and cohabit with another or do him any wrong, no action is maintainable by him against her. In the case of criminal conversation, trespass lies against the adulterer as for an assault on her, however she may in fact have been a willing party to all that the defendant had done. No doubt, therefore, effectual persuasion to the wife to withdraw and conceal herself from her husband is in the eye of the law an actual withdrawing and concealing her; and so, in other counts of the declaration, was it charged in this very case of *Winsmore* v. *Greenbank* (Willes, 577). A case explainable and explained on the same principle is that of ravishment of ward. The writ for this lay against one who procured a man's ward to depart from him; and, where this was urged in a case hereafter to be cited (*b*), Judge Hankford (*c*) gives the answer: the reason is, he says, because the ward is a chattel, and vests in him who has the right. None of this reasoning applies to the case

(*b*) Mich. 11 H. 4, fol. 23 A, pl. 46, post, p. 255.

(*c*) William Hankford, Justice of the Common Pleas in 1398, afterwards, in 1414 (1 H. 5), Chief Justice of England.

of a breach of contract: if it does, I should be glad to know how any treatise on the law of contract could be complete without a chapter on this head, or how it happens that we have no decisions upon it. Certainly no subject could well be more fruitful or important; important contracts are more commonly broken with than without persuaders or procurers, and these often responsible persons when the principals may not be so. I am aware that with respect to an action on **[251]** the case the argument primæ impressionis is sometimes of no weight. If the circumstances under which the action would be brought have not before arisen, or are of rare occurrence, it will be of none, or only of inconsiderable weight; but, if the circumstances have been common, if there has been frequently occasion for the action, I apprehend it is important to find that the action has yet never been tried. Now we find a plentiful supply both of text and decision in the case of seduction of servants: and what inference does this lead to, contrasted with the silence of the books and the absence of decisions on the case of breach of ordinary contracts? Let this too be considered: that, if by the common law it was actionable effectually to persuade another to break his contract to the damage of the contractor, it would seem on principle to be equally so to uphold him, after the breach, in continuing it. Now upon this the two conflicting cases of *Adams* v. *Bafeald* (1 Leon. 240) and *Blake* v. *Lanyon* (6 T. R. 221) are worth considering. In the first, two Judges against one decided that an action does not lie for retaining the servant of another, unless the defendant has first procured the servant to leave his master; in the second, this was overruled; and, although it was taken as a fact that the defendant had hired the servant in ignorance and, as soon as he knew that he had left his former master with work unfinished, requested him to return, which we must understand to have been a real, earnest request, and only continued him after his refusal, which we must take to have been his independent refusal, it was held that the action lay: and this reason is given: "the very act of giving him employment is **[252]** affording him the means of keeping out of his former service." Would the Judges who laid this down have held it actionable to give a stray servant food or clothing or lodging out of charity? Yet these would have been equally means of keeping him out of his former service. The true ground on which this action was maintainable, if at all, was the Statute of Labourers, to which no reference was made. But I mention this case now as shewing how far courts of justice may be led if they allow themselves, in the pursuit of perfectly complete remedies for all wrongful acts, to transgress the bounds which our law, in a wise consciousness as I conceive of its limited powers, has imposed on itself, of redressing only the proximate and direct consequences of wrongful acts. To draw a line between advice, persuasion, enticement and procurement is practically impossible in a court of justice; who shall say how much of a free agents' resolution flows from the interference of other minds, or the independent resolution of his own? This is a matter for the casuist rather than the jurist; still less is it for the juryman. Again, why draw the line between bad and good faith? If advice given malâ fide, and loss sustained, entitle me to damages, why, though the advice be given honestly, but under wrong information, with a loss sustained, am I not entitled to them. According to all legal analogies, the bona fides of him who, by a conscious wilful act, directly injures me will not relieve him from the obligation to compensate me in damages for my loss. Again, where several persons happen to persuade to the same effect, and in the result the party persuaded acts upon the advice, how is it to be determined against whom the action may be brought, whether they are to be sued **[253]** jointly or severally, in what proportions damages are to recovered? Again, if, instead of limiting our recourse to the agent, actual or constructive, we will go back to the person who immediately persuades or procures him one step, why are we to stop there? The first mover, and the malicious mover too, may be removed several steps backward from the party actually induced to break the contract: why are we not to trace him out? Morally he may be the most guilty. I adopt the arguments of Lord Abinger and my brother Alderson in the case of *Winterbottom* v. *Wright* (10 M. & W. 109); if we go the first step, we can shew no good reason for not going fifty. And, again, I ask how is it that, if the law really be as the plaintiff contends, we have no discussions upon such questions as these in our books, no decisions in our reports? Surely such cases would not have been of rare occurrence: they are not of slight importance, and could hardly have been decided without reference to the Courts in Banc. Not one was cited in the

argument bearing closely enough upon this point to warrant me in any further detailed examination of them. I conclude therefore what occurs to me on the first proposition on which the plaintiff's case rests.

I come now to the second proposition, that the decisions in respect of master and servant, and the seducing of the latter from the employ of the former, are exceptions grafted on the general law traceable up to the Statute of Labourers. This is of course distinct from the question of the extent of the exception, that is, to what classes of servants it applies: **[254]** but the enquiries are so connected together in fact, and the latter has so obvious a bearing in support of the former, that it will be better to take them both together.

Now, in the first place, I cannot find any instance of this action having been brought before the statute passed; the weight of which fact is much increased by finding that it was of common occurrence very soon after. The evidence for it is not merely negative; for the mischief and the cause of action appear to have been well known before, and the want of the remedy felt. The common law did give a remedy in certain cases; and Judges are found pointing out what that remedy was, and to what cases it applied. From the cases collected in Fitzherbert's Abridgement, tit. Laborers, it appears that the distinction between the action at common law and the action upon the statute was well known: wherever the former action lay it was in trespass, and not on the case: in saying which I do not rely merely on the words, —writ of trespass,—which might be applicable to trespass on the case; but I rely on the operative words of the writ, which stated a taking vi et armis: it might be joined with trespass quare clausum fregit or trespass for the asportation of chattels or false imprisonment. The count necessarily charged the taking of the servant out of the service of the plaintiff; whereas the writ upon the statute, as appears from Fitzherbert's Natura Brevium, 167 B, charges the retainer and admission of the servant into the defendant's service after he has been induced to withdraw, or has withdrawn without reasonable cause, from that of the plaintiff. I do not wish unnecessarily to multiply citations from the Year Books; but it will **[255]** be necessary to refer to some, and at greater length than they are found in the abridgments. I begin with one out of the order of time, because it is so full to the purpose, and because it may be referred to as abridged by Brooke (Abridgement, tit. Laborers, pl. 21), I think incorrectly in a material point. He says that it was agreed in it, that case lay for the departure by procurement, but not where the servant departed without procurement and was afterwards retained. The case is Year Book Mich. 11 H. 4 (A.D. 1409), fol. 23 A, pl. 46. Not, as he cites it with a slight inaccuracy, 21, 22. "Thomas Frome brings writ of trespass at the common law against defendant for his close broken, and one J. his servant taken out of his service (pris hors de son service), and certain sheep driven away with force and arms." There were different pleadings and much discussion as to the separate causes of action, which introduces some confusion into the case. As to the servant, Tremain pleaded: "we found him wandering in a certain place in another county; and there he came and offered his service to us, and made covenant with us to serve us; and so demands judgment." Skrene, for the plaintiff, replies: "he has admitted that the servant was in our service, and that he has received him into his service; and so he has admitted our action." Hankford (*b*)[1] says, however: "When the servant was wandering, if the defendant had not cognizance that he was in your service, then this first receiver cannot be adjudged a wrong done by the defendant but by the servant." Upon this Skrene amends his pleading, and says that the servant made a covenant with the plaintiff to serve him **[256]** in the office of "Berchier" (*a*) "for a whole year, within which year the defendant procured our servant to go out of our service, by force of which procurement he went out of our service within the year, and the defendant retains him in his service; which matter we wish to aver;" and demands judgment: on which Hill (*b*)[2] says: "his writ of trespass as to the servant does not lie upon the matter shewn; for the plaintiff says that the defendant did nothing but procure the servant to go out of his service, by which procurement he went out of his service, and was retained with the defendant, in which case action on the Statute of Labourers is given, and not this action." Skrene argues:

(*b*)[1] Then Justice of Common Pleas. See ante, p. 250, note (*c*).
(*a*) Shepherd.
(*b*)[2] Robert Hill, Justice of the Common Pleas in 1408.

"If a man procures my servant to go out of my service, and retains him upon that, he does me wrong." Hankford and Hill both say, "True it is that he does you wrong: but you shall not have a remedy on this manner of writ as it is here." Culpeper (*c*): "This action is taken upon an action at the common law;" "and the actions which were at the common law before the Statute of Labourers are not taken away by that statute; and, if a man procure and abet my servant to go with him in his service, action at common law lies well. Hill: No certes, action at common law of trespass does not lie on such a case; for such a procurement cannot be said in any manner to be against the peace. Thirning (*d*): If my servant before the statute went out of my service, I suppose well that no action is given to the master; but if a man took my servant out of my service, there action of trespass lay at the common law, and still lies; and, if **[257]** I am beaten by the abettment and command of a man, the commander is guilty of trespass: so in the case here, when he shall procure the servant to depart and retains him with him, he seems guilty of trespass." But Hill answers him: "Sir, in your case there is no marvel, because the principal actor in your case is guilty of trespass: but the case at bar is different; for the procurement only is not a trespass against the peace, nor is the departure of the servant a trespass against the peace; then, if the cause of action is not against the peace, the remainder which follows after it is not trespass against the peace: and I well agree that the defendant in this case is guilty, as of a thing done against the provisions of the statute; and this matter is as clearly within the statute as it could be, both as to the servant, who has departed from his service, and as to the defendant, who has presumed to retain him in his service against the statute. Hankford: I am of the same opinion, as my master has expressed, that, if my servant depart out of my service, at common law I have no action, and the cause was for that between my servant and me the contract sounds in the manner of a covenant in itself (en luy meme), upon which no action was given at the common law without a specialty; and for this mischief was the statute ordained and action given on it; wherefore, if you will not say that he took your servant out of your service, as you have supposed by your writ, this writ is not maintainable." Culpeper says: "if a man procure my ward to go from me, and he goes by his procurement, I shall have ravishment of ward against him." Hankford admits this, and says: the reason is, because the ward "is a chattel and vests in him who has the right." After some more discussion, Skrene amends, and says: "he came to our house, and procured our **[258]** servant, and took him, as we have supposed by our writ." And Tremain, being ordered to answer, pleads: "he was wandering, and offered his service to us; and we received him: without this that we took him in manner as he has alleged." And upon this, in the end, they seem to have gone to the country. There were several points in this case: and it is not clear whether on this part the Court was ultimately divided or not: but it is clear that the judges who argued in support of the count as first pleaded contended only that it shewed a trespass. Thirning admits that, before the statute, if a servant went out of the service no action lay, but if he was taken trespass did; and then contends that the procuring in the case at bar was a taking and made the party guilty of trespass; in which he was clearly wrong. Now, if at this time case lay at common law for procuring the servant to depart, what becomes of the argument of the necessity for the statute. Or if, where one party broke a covenant at the instigation of another, case lay, why was not that applicable to the case of a covenanted servant. But it is clear that all agreed in this: if the defendant has taken the servant under such circumstances, you may have trespass at common law now as before the statute; but, if you cannot lay it as a trespass, your only remedy is under the statute. I may as well add Fitzherbert's Abridgement (tit. Laborers, pl. 16), which is fuller, and I think more accurate, than Brooke's. "Trespass at common law of his servant taken out of his service with force. Tremain: We found him vagrant in a certain place in another county, and there he came and proffered his service to us, and made covenant with us to serve. Judgment if action &c. Skrene: He was retained with us to serve us in the office of a bergier for a year, **[259]** within which the defendant procured him to go out of our service; by reason of which he went out of our service within the year and hired himself with the defen-

(*c*) John Colepeper, Justice of the Common Pleas in 1406.
(*d*) William Thirning, Chief Justice of the Common Pleas in 1396.

dant. Hill: This action does not lie on the matter. Skrene: If a man procure my servant to go out of my service, and retains him, he does me wrong. Hill and Hankford: That is true; but you shall not have remedy on such a writ as this is. Culpeper: The action which was at common law is not taken away by the Statute of Labourers. Thirning: At common law, before the statute, if my servant went out of my service, no action was given me; but, if a man took him out of my service, an action was given at the common law, and still is; and, if I am beaten by the command of another, the commander is a trespasser. Hill: The procurement only is not trespass against the peace, nor the departure of the servant: then, if the cause of the action is not against the peace, the remnant, to wit the retainer, cannot be: but this case here is openly within the statute, as it may be against the servant upon the departure, and against the master upon the retainer. Hankford and Hill (*a*)[1]: There was no action at the common law upon the departure, because the contract between the servant and me sounds in covenant in a manner; and for that mischief was the statute made; wherefore, if you will not say that he took your servant, this action does not lie. Whereupon the plaintiff said that the defendant procured his servant &c. and took him: and the other side traversed this: et alii e contra." But, says Fitzherbert, it seems that the defendant should have traversed the taking at first in his plea in bar. In a case (A.D. 1373) in Yearb. Mich. 47 E. 3, fol. 14 A, pl. 15, which was, on the Statute **[260]** of Labourers, against a servant for departing within the term for which he was retained, the plea was "we were never in your service;" and the question was whether that was good without a traverse of the retainer; and Finchden (*a*)[2] said this, which was agreed to by the whole Court: "At common law, before the statute, if a man took my servant out of my service, I should have writ of trespass there, where he was in my service bodily: now the statute was made for this mischief, that if he never comes into my service, after he has made covenant to serve me, but he eloignes himself from me, I shall have such writ and suggest that he was retained in my service and departed, as here is: wherefore it is necessary to traverse the retainer;" which accordingly was done by the defendant, issue taken, and sic ad patriam.

Any one, I am certain, who will go through the cases abstracted by Fitzherbert under the title Laborers, will be satisfied that at common law, before the Statute, such an action as the present could not be maintained. Under that title 61 cases are abridged: many of them are for the seduction of servants; but there is no instance of any one in which the action at common law was sustained, unless an actual trespass was charged: and it is clear, from the case which I have cited at so much length, that the distinction between taking and procuring to go was familiar to the lawyers of that day. I can hardly imagine that this could have been said, if the common law would have given relief in such a case: and, if it could, the rapid growth of the action after the Statute of Labourers had passed would be difficult to account for.

I come then to the Statute of Labourers (23 Ed. 3); **[261]** and my object now is to shew that nothing in the provisions or policy of that statute will warrant the action under the circumstances of this case; and that the older authorities are decidedly against it. As we learn from the preamble, it was enacted in consequence of the great mortality among the lower classes, especially workmen and servants, in a pestilence which had prevailed in 1348-9. This pestilence will be found mentioned in our historians. And in the preamble it is said: "Many seeing the necessity of masters, and great scarcity of servants, will not serve unless they may receive excessive wages, and some rather willing to beg in idleness, than by labour to get their living; we considering the grievous incommodities, which of the lack especially of ploughmen and such labourers may hereafter come, have" &c. "ordained." This preamble is followed by an enactment, that every person of whatever condition, free or bond, able in body, and under the age of sixty, not living by merchandise nor having any certain craft, nor having of his own wherewith to live, nor land of his own on the cultivation of which he may occupy himself, and not being in service, shall be compelled to enter into service when required on customary wages. By the second section it is made penal by imprisonment for any mower, reaper, or other labourer or servant of whatsoever state or condition he shall be, to depart from service before the expiration of the term agreed on; and no one is to receive or retain such offender in his service

(*a*)[1] Qe. "as Hill has said?"
(*a*)[2] William de Fincheden, Chief Justice of the Common Pleas; April 14, 1372.

under like pain of imprisonment. This ordinance is the foundation of the action for the seduction of a hired servant. Upon reference to Fitzherbert, Natura Brevium, 167 B, it will be seen that the writ in such an action always recited the statute. Now it will be observed that, in order to bring a person within the first section, he must have been one **[262]** who was not living by merchandise, nor having any certain craft, "certum habens artificium," nor having of his own wherewith to live, "habens de suo proprio unde vivere possit," or land of his own in the culture of which he can occupy himself: and these limitations are more pointed by the second chapter, which speaks of "messor falcator aut alius operator vel serviens." Looking at these words, and the language of the preamble, it is clear that mechanics and labourers in husbandry were the principal objects of the statute: and the decisions were accordingly. Fitzherbert (Natura Brevium, 168 E) says: "And so a gentleman by his covenant shall be bound to serve, although he were not compellable to serve. For if a gentleman, or chaplain, or carpenter, or such which should not be compelled to serve, &c. covenant to serve, they shall be bound by their covenant, and an action will lie against them for departing from their service." And Lord Hale in a note refers to Yearb. Mich. 10 H. 6 (A.D. 1431), fol. 8 B, pl. 30, as shewing that a writ does not lie on the statute for the departure of a chaplain who is retained to say the mass. Several cases will be found earlier in the Year Books to the same effect. In Yearb. Trin. 50 E. 3 (A.D. 1376), fol. 13 A, pl. 3, is a case in which the parson of B. sued Thomas F., a chaplain, on the Statute of Labourers, and counted of a covenant made with him to serve in the office of seneschal, and to be his parochial chaplain for a certain term, and complained of a departure within the term. As to the office of seneschal, the defendant traversed the covenant; and, as to the residue, contended that the statute was only made for labourers and artificers, and he was neither the one nor the other, but the servant of God, and so was not bound by the statute. Clopton, for the plaintiffs, took a distinction between a **[263]** parochial and a private chaplain, contending that the former, from the variety and daily pressure of his duties, was in many respects to be regarded as a labourer, and within the Statute "as any other person of the people" (an early authority by the way for the modern distinction of the working clergy) (*a*). The case was adjourned, and the Judges of the King's Bench were consulted: and the decision was that a chaplain was not bound by the statute; and as to that part of the writ he was discharged. The same law will be found in Yearb. Mich. 4 H. 4 (A.D. 1402), fol. 2 B, pl. 7, where the count on the statute, against a chaplain, was that he was retained by the plaintiff to be **[264]** his chaplain, and also his proctor, and collector of tithes, and to serve him "as pees et as maines" for a certain time. The retainer to be

(*a*) This part of the case is as follows.

Hanimer [counsel]: And as to what he has surmised: that we made covenant with him to be parochial chaplain, and that we departed out of his service: we apprehend that the statute was not to any other intent than as to those who are labourers artificers; and this is neither one nor other, but the servant of God; so he is not bound by the statute: so we apprehend not that this action lies against us; for every one of the other sorts of servants (chescun auter servant), if he be in health and bodily power, he is bound to do his service, and his work from day to day; but the Chaplain is not bound to sing every day, if he will not, for divers causes which lie in his conscience (i.e. to judge of the sufficiency of which causes is left to his conscience): and so he may cease to sing for one day or two, so that he is in quite a different degree from a labourer or artificer. Clopton [counsel]: This man, who is his parochial chaplain, may more readily be adjudged a labourer than another chaplain who is to serve only as private priest (ou parson singuler). For a parochial priest has many other things to do besides to sing the mass and other divine services; for it behoves him to visit the sick of the parish in their houses, to administer to them the rights of Holy Church, and so it behoves that Parsons of the Holy Church should have their needful assistance, for they cannot do it themselves. Wherefore it seems in divers respects that he is as much within the statute as any other person of the people. Belknap [Robert Bilknap, Chief Justice of Common Pleas, October 10, 1375]: This was a case and the matter was adjourned, in the other term, till now: and it is our opinion, and that of our fellows of the King's Bench also, that he is not bound by the statute as another person is: wherefore as to this point we dismiss you; and, as to the remainder on which you are at issue, keep your day, &c.

proctor and collector was specially traversed: and it was pleaded that his retainer as chaplain was only to do divine service. The decision is not very clearly stated: but Fitzherbert (Abridgement tit. Laborers, pl. 51) appears to have understood that it was against the defendant; for he abstracts the case very shortly, and adds: "quod mirum, for he shall not be compelled to serve, but the statute is in servitio congruo." Immediately after this he abstracts Pasch. 12 H. 6 (*a*)[1] thus—"Action on the Statute of Labourers is not maintainable against an esquire." And in Yearb. Hil. 19 H. 6, fol. 53 B, pl. 15 (A.D. 1441) is a case on the Statute, where the count charged a retainer in the office of labourer; and the plea was: he retained us to collect his rents in a certain place, without this that we were retained with him in the office of labourer. Newton (*c*) says: "he cannot be required to serve him in the office of collecting his rents, nor to be his seneschal; which proves that he cannot be punished by this action; for this action lies only against those who can be required to serve the party as a labourer." And then, by the advice of all, the issue was held well tendered.

I am tempted to add one case more from Yearb. Mich. 10 H. 6 (A.D. 1431), fol. 8 B, pl. 30. The Prior of W. brings writ on the Statute of Labourers against a chaplain, and counts that he was retained in his service with him for a year to do divine service, and that he departed within the year &c. Defendant's counsel demands judgment **[265]** of the writ: "for you see well how he brings this action against a chaplain upon the Statute of Labourers; and the statute is only to be understood against Labourers in Husbandry. Strange (*a*)[2]: The writ is not maintainable by the statute; for you cannot compel a chaplain to sing in mass; for that at one time he is disposed to sing it, and at another not; wherefore you cannot compel him by the statute. Cottesmore (*b*): To the same intent; for it was not made but for labourers in husbandry: as in case of a knight, an esquire, or gentleman, you cannot compel them to be in your service by the statute, for that the statute is not to be understood but of labourers, who are vagrant, and have nothing whereby to live; these shall be compelled to be in service; but a chaplain hath whereof he may live in common understanding as a gentleman:" wherefore the writ is abated, by the whole Court. Brooke (Abridgement, fol. 57, tit. Laborers, pl. 47), abstracting this, gives, as the reason of the judgment, "for it is to be understood that he hath whereof he may live, and is not always disposed to celebrate divine service." It will be observed that many of these cases are with respect to chaplains: in one of them it is said that a chaplain is the servant of God; in another that the service for which the retainer is alleged must be a service congruous to his condition. At this distance of time, it may be difficult, without more inquiry into history, to assign a reason why there should be such a majority of cases relating to chaplains. It must be referable of course to some circumstances in the state of society at those periods. It may be collected, from a **[266]** royal mandate to the Archbishops and Bishops, that the services of stipendiary chaplains were at the date of the statute much in request; the Bishops are required to enforce their serving for their accustomed salary under pain of suspension and interdict. This mandate is printed in the Statutes at Large at the end of the statute: but none of the cases refer to it. But it is clear that the Courts were not laying down any rule of law applicable to chaplains only. They are repeatedly put in the same category with knights, squires, gentlemen, all who must be understood to have means of living of their own. The Courts construed the statute, and as it seems to me quite correctly. They said: if any of these covenants to serve, he will be bound by his covenant, and an action will lie at common law for the breach; but, if you rely on the compulsion of the statute, such persons are not within it. These authorities, of a date when the statute must have been well understood, might be multiplied: and, whatever may be said of the uncertainty and often conflicting nature of decisions from the Year Books, and, however we may now smile at some of the reasonings of the Judges, probably not without their weight when uttered, they seem to me satisfactorily to establish the principle, that actions framed on the statute were governed by a consideration of the object and language of the statute, and that these pointed only to

(*a*)[1] A.D. 1434. There is no Yearbook of this term.

(*c*) Richard Newton, Justice of Common Pleas; 3d November 1439.

(*a*)[2] James Strangeways, Justice of the Common Pleas; February 6, 1426.

(*b*) John Cottesmore, Justice of the Common Pleas; 15 October 1430: afterwards, in 1439 (17 H. 6), Chief Justice of the Common Pleas.

the compulsion of labourers, handicraftsmen, and people of low degree who had no means of their own to live upon, and who, if they did not live by wages earned by their labour, would be vagrants, mendicants or worse. If this be so, I apprehend it is quite clear that Johanna Wagner could not have been compelled, while the statute was unrepealed, to serve the plaintiff in any of the capacities stated in this declaration. Nor, I think, can **[267]** it be successfully contended that we may not take judicial cognisance of the nature of the service spoken of in the declaration. Judges are not necessarily to be ignorant in Court of what every one else, and they themselves out of Court, are familiar with; nor was that unreal ignorance considered to be an attribute of the Bench in early and strict times. We find in the Year Books the Judges reasoning about the ability of knights, esquires and gentlemen to maintain themselves without wages: distinguishing between private chaplains and parochial chaplains from the nature of their employments: and in later days we have ventured to take judicial cognisance of the moral qualities of Robinson Crusoe's "man Friday" (*a*) and Esop's "frozen snake" (*b*). We may certainly therefore take upon ourselves to pronounce that a singer at operas, or a dramatic artiste to the owner and manager of Her Majesty's theatre, is not a messor, falcator, aut alius operarius vel serviens, within either the letter or the spirit of the Statute of Labourers. And, if we were to hold to the contrary, as to the profession of Garrick and Siddons, we could not refuse to hold the same with regard to the sister arts of Painting, Sculpture and Architecture. We must lay it down that Reynolds when he agreed to paint a picture, or Flaxman when he agreed to model a statue, had entered into a contract of service, and stood in the relation of servant to him with whom he had made the agreement. But here we are not without authority. In *Taylor* v. *Neri* (1 Esp. N. P. C. 386), where the declaration in case stated that the plaintiff, being manager of the Opera House, had engaged **[268]** one Breda as a public singer during the season at a salary, that the defendant had assaulted and beaten Breda, by which plaintiff lost his service as a public performer, Eyre C.J. nonsuited the plaintiff, saying the record stated Breda was a servant hired to sing, and he was of opinion he was not a servant at all. It seems to me that this is the language of common sense; and no case has been cited which conflicts with it. But, if Johanna Wagner be not within the statute, and could only have been sued, as at common law, upon her contract for the breach of it, it will follow, I conceive, that the present action could not have been maintained against the defendant while the statute was in force, and of course cannot now, if, as I contend, the action arises from and is limited by the purview of the statute. Under the statute the one depended on the other: if a party sued on the second branch of the second section, he was bound to shew the servant, received or retained wrongfully, was such a one as was spoken of in the first branch; for so were the words, talem in servitio suo recipere vel retinere presumat. In the action accordingly against the seducer, the condition of the servant seduced, and the character of the service, were always material; if not stated in the count, the defendant introduced them in his plea, where they were such as were thought to take the servant out of the statute.

I conclude then that this action cannot be maintained, because: 1st. Merely to induce or procure a free contracting party to break his covenant, whether done maliciously or not, to the damage of another, for the reasons I have stated, is not actionable; 2d. That the law with regard to seduction of servants from their masters' employ, in breach of their contract, is an ex-**[269]**-ception, the origin of which is known, and that that exception does not reach the case of a theatrical performer.

I know not whether it may be objected that this judgment is conceived in a narrow spirit, and tends unnecessarily to restrain the remedial powers of the law. In my opinion it is not open to this objection. It seems to me wiser to ascertain the powers of the instrument with which you work, and employ it only on subjects to which they are equal and suited; and that, if you go beyond this, you strain and weaken it, and attain but imperfect and unsatisfactory, often only unjust, results. But, whether this be so or not, we are limited by the principles and analogies which we find laid down for us, and are to declare, not to make, the rule of law.

I think, therefore, with the greatest and most real deference for the opinions of my Brethren, and with all the doubt as to the correctness of my own which those

(*a*) See *Forbes* v. *King*, 1 Dowl. P. C. 672.
(*b*) See *Hoare* v. *Silverlock*, 12 Q. B. 624.

opinions, added to the novelty and difficulty of the case itself, cannot but occasion, that our judgment ought to be for the defendant: though it must be pronounced for the plaintiff.

Judgment for plaintiff.

The defendant had obtained leave to plead, as well as demur.

Creasy, on a subsequent day (June 6th), moved, on behalf of the defendant, for a rule to shew cause why the trial of the issues in fact should not be postponed till the issue in law was finally disposed of in a Court of **[270]** Error. He referred to stat. 15 & 16 Vict. c. 76, s. 80. [Lord Campbell C.J. The meaning of sect. 80 is that it shall be in the discretion of the Court to direct which issue shall be first disposed of in that Court. The issue in law has been, as far as this Court is concerned, finally disposed of by the judgment on the demurrer. Crompton J. Sect. 80 was framed to meet a point which might have been raised on the practice, when there were issues of law and fact, to leave to the plaintiff to determine which should be disposed of first. There is a note on that subject in Williams's Saunders (*a*). But it would be very strong if we were to construe the words in sect. 80 so as to give a writ of error before the whole of the issues were finally disposed of in this Court.]

Per Curiam (*b*). There will be no rule.

Rule refused.

[271] WILLIAM DAVIES *against* GEORGE CHARLES FLETCHER, WILLIAM PRITCHARD AND FREDERICK KEENE. Tuesday, May 24th, 1853. S. sued D. in the county court, and recovered. D. did not pay the amount adjudged against him. A judgment summons issued against D. who did not appear as required by it, and the judge ordered him to be committed for seven days. A warrant issued to arrest him. Then D. paid S., the plaintiff in the plaint, the amount of debt and costs, and S. wrote to F., the clerk of the county court, to say he was paid. Afterwards D. was arrested under the warrant, and detained for a few minutes till F., the clerk of the county court, who had forgotten the receipt of the notice from S., found that notice and ordered his discharge. D. brought an action for the imprisonment against F. and the bailiff.—Held, that payment to the party, after the warrant issued, did not operate as a supersedeas, and that the arrest and detention were both justified.—Semble, that the discharge of the prisoner, after the letter from the party was found, was irregular.

[S. C. 22 L. J. Q. B. 429; 17 Jur. 894.]

Action for false imprisonment. Plea: Not Guilty, by statute. Issue thereon.

On the trial, before Coleridge J., at the last Surrey Assizes, it appeared that the defendant Fletcher was clerk of the county court of Surrey, holden at Southwark, the defendant Pritchard was the high bailiff of the same court, and the defendant Keene one of the bailiffs. Davies, the plaintiff in this action, was sued in that county court by two persons named Sumfield and Jones; and the judge, on 1st April 1852, made an order, in that plaint, that Sumfield and Jones should recover 2l. 2s. 1d., and that Davies, the now plaintiff, should pay that sum on 8th April 1852. Default was made in the payment. Execution against Davies's goods issued; and there was a return of Nulla bona. A judgment summons issued in the plaint, on 28th May 1852, calling on Davies to appear on 21st June 1852 in the county court. Davies was served with it, but did not appear. The judge of the county court, on affidavit of service, made an order that, for not appearing, he should be committed for seven days. In pursuance of **[272]** that order a warrant, under the seal of the county court, issued, entitled in the plaint. It was addressed to the high bailiff and bailiffs of the county court and the keeper of Horsemonger Gaol, Surrey; and, after reciting all the previous proceedings, concluded thus: "And whereas it was duly proved, upon oath, at the said last mentioned court, that the said defendant was personally served with the said summons; and whereas the defendant did not attend as required by such summons, or allege any sufficient excuse for not so attending; and thereupon it was ordered by the judge of the said court that the defendant should be committed for the term of

(*a*) See note (3) to *The Dean and Chapter of Windsor* v. *Gover*, 2 Wms. Saund. 300.

(*b*) Lord Campbell C.J., Erle and Crompton Js.