Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Fry and Greata v. *Treasure, from the Court of Arches; delivered* 11*th February*, 1865.

Present:

LORD CRANWORTH.
LORD CHELMSFORD.
LORD JUSTICE KNIGHT BRUCE.
LORD JUSTICE TURNER.

THE question raised in this case was, as to the right of one of two Churchwardens to use the name of his co-Churchwarden, in a suit against a parishioner for subtraction of church-rate.

The case came before the Court of Arches, by letters of request from the diocese of Bath and Wells, purporting to have been issued at the special instance and desire of Bruges Fry and Robert Greata, the churchwardens of the parish of Cheddar in that diocese. The decree of the Court of Arches, citing the defendant Levi Treasure, a parishioner of Cheddar, to appear and answer a charge of subtraction of church-rate, issued pursuant to these letters of request, which purported to have been accepted on the petition of the proctors of the said Fry and Greata. This decree bears date the 16th of February, 1864.

On the 18th of April, 1864, the decree was returned by the proctor of Greata, who then exhibited a proxy under the hand and seal of Greata only, alleging that Fry, whom he described as the other of his parties, proceeded no further in the cause.

On the same day Treasure, the defendant, appeared by his proctor under protest, alleging that the suit was improperly constituted, inasmuch as it was the suit of Greata alone, and not, as it ought to have been, of Fry and Greata jointly.

At this stage of the proceedings the suit was clearly a suit by one churchwarden only. It was indeed contended at the bar that Fry was a party in obtaining the letters of request, and must therefore be treated as a party in the cause, until discharged by some order dismissing him, and we were referred to several cases, in which it has been laid down that a party in a cause does not cease to be a party by merely alleging in Court that he proceeds no further. Of the soundness of these decisions we entertain no doubt. A person who embarks in litigation incurs liabilities in its progress, by the consequences of which, prospective as well as retrospective, he must be bound, until discharged by the Court. But in order to make this doctrine applicable, it was incumbent on the appellant Greata to show that Fry was at some time before the 18th of April, 1864, a party in the cause. And this he failed to do. It was contended that Fry by joining in the letters of request had become a party in the cause, but this is a mistake. It does not appear, except as may be inferred from the letters of request themselves, that Fry was a party to the obtaining of them. But, even if he was, they form no part of the cause. Letters of request are issued not in a pending cause, but on an allegation that the parties applying for them intend to enter into litigation, and wish to go to the superior Court at once *per saltum*. And when the superior Court accepts the letters of request, and issues its decree citing the party complained of to appear, they are recited in the decree only for the purpose of showing how the superior Court has acquired original jurisdiction. The cause originates to all intents and purposes in the superior Court. The letters of request, when accepted, enable the superior Court to authorize the persons who have obtained them to institute a suit, but they do no more, and till a suit is instituted in the superior Court, litigation has not begun.

But it was further argued that, even independently of the letters of request, Fry must be taken to have been a party in the cause up to the 18th of April, 1864, for that on that day the proctor alleged, not that Fry had never been a party, but that he would proceed *no further*. These latter words, it was said, contained in themselves a negative pregnant, and showed that up to that time he had

been a party proceeding in the cause. But, even if this were a reasonable inference, still it must be shown that they were the words of a person to whom Fry had given authority to speak or act for him; and as no proxy from Fry had been exhibited, the words are inoperative against him, and he has a right to treat them as the words of a mere stranger. On the first appearance of the defendant in obedience to the decree, he in substance objected that he was called on to answer a charge purporting to be made by Fry and Greata, but which was really made by Greata alone. The only answer as matter of fact to such an objection would have been the production of a proxy from Fry, and as no such proxy was or could be produced, the only question was one of law, whether the concurrence of Fry was necessary, *i.e.*, whether one churchwarden alone could sustain such a suit. We need not discuss this question; the case is too plain for argument, and was hardly contended for at the bar. In enforcing a demand in which two persons are jointly interested, whether beneficially or as trustees, each must, either as Plaintiff or Defendant, be before the Court, and the circumstance that the persons interested are churchwardens cannot make any difference.

It was, no doubt, from feeling that the law on this point was against him, that Greata, after the Defendant had appeared under protest, endeavoured to cure the defect insisted on, by exhibiting a further proxy which, though under the hand and seal of Greata only, yet purported to appoint proctors to appear for Fry as well as for himself. And the second point urged for the Appellants was that this second proxy cured the defect insisted on.

The general rule of the Ecclesiastical Court requires every proxy to be signed by the party himself, or by some one duly authorized to sign for him. Neither of these requisites has been complied with here. No proxy was exhibited under the hand and seal of Fry, or of any person authorized to act for him. But necessity, it was urged, requires that in the case of two churchwardens, each should be deemed to be invested with an implied authority to use the name of the other in suits for the benefit of the parish, or at all events in suits for subtraction of church-rate—for that otherwise it might be impossible to collect the rate.

There is, however, nothing to warrant such an argnment.

It was endeavoured to show that such a power might be considered to exist by analogy to what is done in the Courts of Common Law, where a Plaintiff has taken on himself to join as a co-Plaintiff the name of another person who stands in the position of a trustee for him as to the subject matter of the action. There the Court will in general permit the Plaintiff, who alone is the party substantially interested, to go on using the name of the other Plaintiff, whose name is introduced for conformity, on the terms of full indemnity against costs being given to the party whose name is thus used. But this is only done when a special case has been made showing that substantial justice requires such a course to be taken, and is never done in the case of two persons jointly interested beneficially in the subject matter of the action.

In the case now before us no special circumstances are stated, and the course pursued can only be justified on the assumption that in every suit for subtraction of church-rate, one churchwarden may always use the name of a co-churchwarden as a co-Plaintiff without any authority from him. For such a proposition there is no warrant either in principle or on authority.

It was argued that the result of this decision will be to prevent the possibility of recovering church-rates, if an obstinate churchwarden refuses to concur in a suit. Perhaps if such concurrence were corruptly, or even vexatiously refused, there might be good grounds for removing the churchwarden from his office. But that question is not now before us. There is nothing to show that the non-concurrence of Fry has arisen from motives either corrupt or vexatious. His refusal to concur may have been the result of an honest desire to save the money of the parishioners. He may have been satisfied, for instance, that the rate is invalid, or that the person sued is insolvent. The contention of Greata allows no exception for such cases.

On these grounds we have no hesitation in expressing our concurrence in the conclusion at which the learned Dean of the Arches has arrived, and we shall report to Her Majesty that, in our opinion, this Appeal ought to be dismissed with costs.