Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Miles v. *McIlwraith, from the Supreme Court of Queensland, delivered 27th February* 1883.

Present:

LORD BLACKBURN.
SIR BARNES PEACOCK.
SIR ROBERT P. COLLIER.
SIR RICHARD COUCH.
SIR ARTHUR HOBHOUSE.

This is an appeal from an order of the Supreme Court of Queensland, which is in the following words:—

"Upon the motion of Mr. Griffith, Q.C., with whom was Mr. Garrick, Q.C., and Mr. Rutledge, of Counsel for the above-named Plaintiff, for a rule calling upon the Defendant to show cause why the judgment directed to be entered for him by His Honour Mr. Justice Harding at the trial of this cause at the Civil Sittings of this Court, at Brisbane, on the twenty-fifth day of August last, should not be set aside, and instead thereof a judgment entered for the Plaintiff for one thousand pounds, upon the ground that, upon the findings of the jury as entered, the judgment so directed is wrong, and the Plaintiff is entitled to judgment for the said sum of one thousand pounds, or why the judgment and the findings of the jury in answer to the questions numbers 7, 8, 15, and 16 should not be set aside and a new trial had between the parties upon the issues raised by these questions, upon the ground following of

"Misdirection in that

"1. The Judge directed the jury with respect to 7th and 15th questions that the Defendant must be shown to have had actual knowledge of the charter party or contract in question at the times when he sat and voted.

"2. The Judge ought to have directed the jury with respect to 7th and 15th questions that it must be shown that the Defendant at the times when he sat and voted had actual knowledge of the charter party or contract, or had had his attention called to

it in such a manner as to attract the attention of a reasonable man, whereas he did not do so.

"3. The Judge directed the jury with regard to the 8th and 16th questions that it must be shown that the Defendant intended knowingly to offend against the provisions of the Constitution Act of 1867, that the word 'presume' in that Act means 'knowing 'of and intending the consequences,' and that if the Defendant was ignorant of the effects of the documents he had given, his ignorance was to be taken into consideration by the jury in determining whether his sitting and voting was accompanied by the intention necessary to constitute an offence against the provisions of the statute.

"4. The Judge should have directed the jury that if the Defendant, when he sat and voted, knew of the said charter party, or had means of knowing of it, or had had his attention called to it, and wilfully shut his eyes or voted recklessly or defiantly, he presumed to sit and vote within the meaning of the statute, whereas he did not do so.

"And upon reading the record between the said parties, and this matter coming on by adjournment this day, it is ordered that the said rule be refused."

The terms of the rule are such as not to be intelligible without some previous statement of the nature of the case.

The Queensland Constitution Act of 1867 by Sect. 6 enacts that—

"Any person who shall, directly or indirectly, himself or by any person whatsoever in trust for him, or for his use or benefit, or on his account, undertake, execute, hold, or enjoy, in the whole or in part, any contract or agreement for or on account of the public service, shall be incapable of being summoned or elected, or of sitting or voting as a member of the Legislative Council or Legislative Assembly during the time he shall execute, hold, or enjoy any such contract, or any part or share thereof, or any benefit or emolument arising from the same; and if any person, being a member of such Council or Assembly, shall enter into any such contract or agreement, or, having entered into it, shall continue to hold it, his seat shall be declared by the said Legislative Council or Legislative Assembly, as the case may require, to be void, and thereupon the same shall become and be void accordingly. Provided always, that nothing herein contained shall extend to any contract or agreement made, entered into, or accepted by any incorporated company, or any trading company, consisting of more than twenty persons, where such contract or agreement shall be made, entered into, or accepted for the general benefit of such incorporated or trading company."

Then by Sect. 7 it is enacted that—

"If any person, by this Act disabled or declared to be incapable to sit or vote in the Legislative Council or Legislative Assembly, shall, nevertheless, be summoned to the said Council, or elected and returned as a member to serve in the said Assembly for any electoral district, such summons or election and return shall and may be declared by the said Council and Assembly, as the case may require, to be void, and thereupon the same shall become and be void to all intents and purposes whatsoever; and if any person, under any of the disqualifications mentioned in the last preceding section, shall, whilst so disqualified, presume to sit or vote as a member of the said Council or Assembly, such person shall forfeit the sum of five hundred pounds, to be recovered by any person who shall sue for the same in the Supreme Court of Queensland."

The Appellant as Plaintiff below sued for five penalties of 500*l.* each as being incurred by the Respondent, then Defendant, under the latter part of this section.

It is clear that the party suing for the penalty must show that the Defendant at the time when he sat or voted was under one of the disqualifications mentioned in the 6th section, it being a question of law depending on the construction of the statute whether the facts proved are such as to amount to a disqualification, and on this being proved the further question will arise whether the Defendant at the time when he sat or voted presumed to do so, it being a question of law depending on the construction of the statute what constitutes presuming within the meaning of the statute.

It appears from the Judge's notes, at page 30 of the record, that on the trial of this case the Judge summed up at considerable length, and then asked the jury 16 questions. After they had retired, the Counsel for the Plaintiff made some objections to part of the Judge's direction. The Judge, however, refused to alter his direction. The jury returned and gave answers to the 16 questions. The Judge then, in consequence of what had passed, asked a 17th question, to which the jury gave an answer. On these 17 findings

he directed judgment to be entered for the Defendant.

The rule moved for was in the alternative, that on the findings as entered the Plaintiff was entitled to judgment for two penalties, or that if the answers to the 7th, 8th, 15th, and 16th questions prevented his being so entitled on the ground that it was not found that the Defendant, though disqualified when he voted, had such knowledge of his disqualification as to make him when so voting "presume" within the meaning of the statute, there should be a new trial on the ground that there was misdirection as to what would be sufficient proof of presuming. And that there should be a new trial to ascertain whether in fact the Defendant had "presumed" to vote.

If the findings had amounted to finding that the Defendant was disqualified when he voted, it would have been necessary to ascertain what was the direction actually given (which on this record it is not easy to do); and then to decide whether the Judge had given the proper guide to the jury on that which would then have been an important issue. But if the Defendant was not disqualified, and was entitled to vote, it was not material what he knew, or what knowledge would have subjected him to the penalties if he had been disqualified. Their Lordships think that on those findings of the jury which are not impeached, judgment ought to be given for the Defendant on the ground that he was found not disqualified; and consequently that it is no longer material to inquire whether he knew so much that his voting would have amounted to presumption, within the meaning of the Act, if the findings of the jury had amounted to finding that he was disqualified; so that even if there was misdirection as to this, there ought not to be a new trial for the purpose of ascertaining

what is not material whilst the other findings stand. This is the only point on which their Lordships decide. It is necessary, in order to explain it, to say what the state of the record and of the evidence at the trial was.

The firm of McIlwraith, McEacharn, & Co. consisted of Andrew McIlwraith (a brother of the Defendant), and Malcolm Donald McEacharn. The Defendant Thomas McIlwraith was not a member of that firm, and had no interest in it.

The statement of claim was that by a contract or charter party made on the 23rd February 1880, between the Agent General of the Colony of the one part, and McIlwraith, McEacharn, & Co., "thereafter referred to as the "party of the second part, for and on behalf of "the owners of the ship 'Scottish Hero' of the "other part, it was agreed," and then it sets forth the stipulations of the charter party.

Though there was on the statement of defence a formal refusal to admit that such a charter party was made, it was not at the trial and is not now in dispute that there was such a charter party, and that it, on the face of it, was such as is asserted in the statement of claim. It was signed by McIlwraith, McEacharn, & Co., and by Mr. McAlister, the Agent General of the Colony. It is to be found at p. 53 of the record.

The statement of claim then proceeds:—

"The said Agent General and the said Andrew McIlwraith and Malcolm Donald M'Eacharn were respectively authorized by the Government of the said colony and the owners of the said ship to enter into and did enter into the said contract or charter party as agents for and on behalf of the said Government and the owners of the said ship respectively.

"At the time of the making of the said contract or charter party, and thenceforward to the time of the commencement of this action, the Defendant and Arthur Hunter Palmer and Andrew McIlwraith were registered as the joint owners of fourteen sixty-fourth shares in the said ship.

"At the time of the making of the said contract or charter party, and thenceforward to the time of commencement of this action, the total number of registered owners of the said ship,

including the Defendant and the said Arthur Hunter Palmer and the said Andrew McIlwraith, did not exceed fifteen.

" In pursuance of the said charter party, the said ship sailed on the voyage therein mentioned, carrying emigrants for the said Government as therein stipulated.

" On the 6th day of July 1880, the 7th day of July 1880, the 8th day of July 1880, the 13th day of July 1880, and the 14th day of July 1880, while the said contract or charter party was in full force and effect, the Defendant knowing of the said contract or charter party did, contrary to the provisions of 'The Constitution Act of 1867,' sit in the said Legislative Assembly as a member thereof and vote therein, whereby and by force of the said statute the Defendant for each and every such offence, to wit, on each and every of the aforesaid days, became liable to forfeit, and forfeited the sum of 500*l.* to the Plaintiff.

" All things have happened, all times have elapsed, and all things have been done to entitle the Plaintiff to recover from the Defendant the said sums of 500*l.*, and each and every of them.

" And the Plaintiff claims 2,500*l.* forfeited by the Defendant as aforesaid."

The statement of defence was as follows:—

" 1. The said contract or charter party in the claim mentioned, purporting to be made by the said Andrew McIlwraith and Malcolm Donald McEacharn for and on behalf of the owners of the ship 'Scottish Hero,' if it ever was made (which Defendant does not admit), was so made without authority from the owners of the said ship, and contrary to the express directions of the Defendant, and the Defendant says that the said Andrew McIlwraith and Malcolm Donald McEacharn were not, nor was either of them, authorized by the owners of the said ship or by the Defendant to enter into the said contract or charter party, or any contract or charter party, with the Government of Queensland for or on behalf of the owners of the said ship 'Scottish Hero' or of the Defendant.

" 2. The Defendant admits that he did sit and vote in the said Legislative Assembly on the days in para. 8 of the claim mentioned, but he does not admit that he did so sit and vote knowing of the said contract or charter party, or contrary to the provisions of 'The Constitution Act of 1867.' And he says that before the days or any of the days or times in the said paragraph mentioned, to wit, before the 6th day of July 1880, the voyage in the said contract or charter party and in para. 7 of the claim mentioned had terminated, and that the emigrants carried by the said ship had been landed with their luggage at Townsville, in accordance with the provisions of the said charter party, and that all the stipulations and conditions in the said contract or charter party contained, to be performed by the party thereto of the second part and by the owners of the said ship 'Scottish Hero,' had been faithfully performed

and completed, and that such performance and completion had been accepted by the Government of Queensland as and for a due performance of the said contract or charter party, but the said Government had not paid the second moiety of the passage money payable under the same. Save as aforesaid the Defendant does not admit that, on the days or any of the days or times in the said para. 8 of the claim mentioned, the said contract or charter party therein mentioned was in full or of any force or effect, and does not admit any of the allegations in the said para. 8 or in para. 9 of the claim contained."

To this the Plaintiff replied,—

"The Plaintiff joined issue upon so much of the Defendant's statement of defence as does not contain admissions of the Plaintiff's case, or any part thereof."

The material part of the issue as to authority was whether the contract or charter party was made so as to make the Defendant party to a contract with the Government. Whether the other part owners of the "Scottish Hero" were or were not parties to such a contract was not material, though it is made part of the statement of defence. Nor was it material that the firm had made the contract professedly for and on behalf of the owners (that is, all the owners, including the Defendant), unless they had authority on behalf of the Defendant to do so. Some evidence was given that they had such authority.

It was proved that the firm were the general agents for the Defendant to charter ships in which he held shares, and it was proved that Malcolm Donald McEacharn was, in compliance with 39 & 40 Vict., c. 80, s. 31, registered as the managing owner of the "Scottish Hero." These facts were evidence from which the jury might have inferred actual authority to make all ordinary contracts for the chartering the ships. But the Defendant and his brother Andrew McIlwraith gave evidence that when the firm of McIlwraith, McEacharn, & Co. entered into an agreement with the Colonial Secretary, acting as Agent for the Colony of Queensland, on 28th February 1876 (which is set out at p. 65

of the record), by which that firm agreed to supply ships to carry emigrants on behalf of the colony, the Defendant required them not to employ any ships in which he had shares for that purpose, lest he, being a member of the Assembly, should be thereby made a contractor with the Government. And thereupon it was agreed that the firm might themselves charter the ship from the owners, including the Defendant, and afterwards sub-charter it to the Government, and that, in all such cases, the remuneration of the Defendant for the use of his share in the ship should be paid for to him by the firm, according to a rate independent of the amount which the firm received from the Government. This was embodied in a memorandum set out in the record, p. 73. It was proper to be considered by the jury what this arrangement amounted to, whether it was *bonâ fide* come to, and whether it was still in force. The jury found, in answer to the third question asked by the Judge at the trial, that the contract was made in the shape in which it was made on behalf of the owners (which would include the Defendant), "contrary to the express directions of the Defendant," and not only was this finding quite justified by the evidence above briefly stated, but it was not impeached or complained of in the colony, though an ineffectual attempt was made at the bar here to get rid of its effect. It is impossible to hold the Defendant bound by a contract, though purporting to be made on his behalf, if made contrary to his express directions. No doubt the Defendant might, on becoming aware of it, have ratified the contract, but no evidence was given that the Defendant did anything that could amount to a ratification.

It was contended that it was within the scope of the authority of the firm as general agents for

the Defendant to make such a charter party as this on his behalf with the Colonial Government, and that, no notice having been given to the Agent General of the restriction on this apparent authority, the Defendant was as much bound to the Government as if there had been no such restriction. It is not to be taken that their Lordships express any opinion, either one way or the other, as to whether, if this were made out, it would follow that the Defendant was as much disqualified as if the contract had been made by an agent on whose authority there were no restrictions. It is not necessary to consider that question, for there is neither allegation nor evidence here of what would have entitled the Government to hold the Defendant bound to them in the same way as if there had been no restriction on the firm's authority.

The principle on which a person, having clothed an agent with apparent general authority, but restricted it by secret instructions, is bound (if the other party chooses to hold him so) to one who, in ignorance of the restrictions, contracts through the agent, on the faith of the agent having the authority he seems to have, is well explained in Freeman *v.* Cooke, 2 Exch., 654. The principal does not actually contract, but the person, who thought he did, has the option to preclude him from denying that he contracted, if the case is brought within the very accurate statement of the law by Parke, B. (p. 663), "if the person "means his representation to be acted upon, and "*it is acted upon accordingly;* and if, whatever "a man's real intention may be, he so conducts "himself that a reasonable man would take the "representation to be true, and believe that it "was meant that he should act upon it, and *did* "*act upon it as true,* the party making the "representation would be equally precluded

"from contesting its truth; and conduct by "negligence or omission, where there is a duty "cast upon a person by usage of trade or other- "wise to disclose the truth, may often have the "same effect."

In the present case, there is evidence that the Defendant had made the firm his general agents, and that they were still so in all cases to which the restriction did not apply; and there would be a duty cast upon him to inform any one who had dealt with him through the firm as his general agents of the restriction on their authority. But though Mr. McAlister, the Agent General for the Colony, was called and examined as a witness, there is no suggestion whatever made that he knew that the firm were general agents for the Defendant, or that Donald Malcolm McEacharn was on the register as managing owner for the owners of the "Scottish Hero." He knew that, by the terms of the agreement with the firm (set out on the Record at page 65), they were to procure ships answering a particular description to carry emigrants, and that the firm were bound to the Colonial Government to cause those ships to perform the agreement. It was not part of that agreement that there should be any privity of contract established between the Government and the shipowners (though the firm seem to have thought it was), and in all probability he did not care whether or not there was such privity. If he had asked, he would, no doubt, have been told that one particular part owner, the Defendant, refused to allow any privity to be established between him and the Government, but that that part owner had chartered his share to the firm, and that they had full authority to employ it, and the Colonial Agent would in all probability have been satisfied. But it is enough to say that there is no evidence

that the Government or their agent ever knew that the firm or any individual of it had general authority to bind the Defendant, and acted upon the belief that such general authority continued unrestricted. It is not, therefore, shown that the circumstances were such that the Government could have held the Defendant bound to them.

Their Lordships, therefore, think that the rule was properly refused, on the ground that the judgment for the Defendant was right, whether there was or was not misdirection on the question as to what would have amounted to presumption if the answer of the jury to the third question had been the other way.

They will, therefore, advise Her Majesty that the Order of the Supreme Court should be affirmed, and the appeal dismissed, with costs.