[229] RICHARDSON v. MELLISH. July 2, 1824.

[See S. C. 3 Bing. 334, 346; 7 B. & C. 819; and in House of Lords, 9 Bing. 125; 1 Cl. & F. 224; 6 E. R. 900; 6 Bligh (N. S.), 70; 5 E. R. 525 (with note to which add, *Mogul Steamship Company* v. *M'Gregor*, [1892] A. C. 45; *In re Kelcey*, [1899] 2 Ch. 534); *In re Beard*, [1908] 1 Ch. 386; *Chaplin* v. *Hicks*, [1912] 1 K. B. 786.]

The Defendant having purchased twelve sixteenths of the East India ship "M." commanded by the Plaintiff, and chartered by the Company for four voyages, proposed to the Plaintiff, and the Plaintiff consented, to resign the command in favor of the Defendant's nephew, upon receiving in exchange the command of another ship, "E.," then chartered for one voyage. If the Company acceded to the exchange, it was agreed, that in case the nephew died or resigned before the expiration of the four voyages, the Plaintiff should succeed him: as a further inducement to the Plaintiff to resign the command of the "M.," the Defendant undertook to procure a beneficial alteration in the destination of the "E.," and the person who negociated the affair on the part of the Plaintiff undertook (as he asserted, without the Plaintiff's knowledge,) to pay the Defendant 2000l. if the Plaintiff should refuse to resign. The exchange was approved of by the Company, and the destination of the "E." altered. The Plaintiff and the nephew sailed on their respective voyages. The Plaintiff became bankrupt on his return from his voyage in the "E.," and the nephew died in the course of his second voyage in the "M." The Defendant having refused to appoint the Plaintiff to succeed him was sued in assumpsit for breach of agreement, and the value of a voyage having been proved to vary from 4000l. to 8000l., the jury gave 7500l. damages. On motion for a new trial and in arrest of judgment: Held,—First, That after verdict there was a sufficient consideration for the Defendant's agreement.—Secondly, That the agreement was not illegal.—Thirdly, That books containing lists of passengers, deposited at the India-house pursuant to 53 G. 3, c. 155, were admissible in evidence towards shewing the value of a voyage.—Fourthly, That the jury might give damages for the loss of the two remaining voyages, though the second had not been accomplished at the time of the action.

This was an action brought to recover damages for the breach of an agreement. The Plaintiff was formely captain of the ship "Minerva," which had been chartered by the East India Company for six voyages to India. When the vessel had performed two of these voyages, the Defendant purchased twelve sixteenths of her, and having a nephew (Captain Mills) whom he wished to serve, he proposed that the Plaintiff should give up the command of the "Minerva" to Captain Mills. In order to provide the Plaintiff a compensation for this sacrifice, an agreement was entered into, by which it was stipulated, that the Plaintiff should resign the command of the "Minerva" [230] to Captain Mills, and should receive in exchange the command of the "Marquess of Ely," another vessel belonging to the Defendant, and then chartered for one voyage by the East India Company: that, provided the East India Company should accede to this proposed exchange (*a*), and Captain Mills should be confirmed in the command of the "Minerva," and Captain Richardson in that of the "Marquess of Ely," it was then

(*a*) Bye-law, c. 13, s. 11.

"Item. It is ordained that hereafter no owner or part-owner of any ship, or any commander or other person, shall directly or indirectly sell or take any gratuity or consideration, nor shall any person or persons buy, pay, or give any gratuity or consideration for the command of any ship or ships to be freighted to the Company; and in case any such contract, payment, or gift shall be made, the commander or intended commander concerned therein shall from thenceforth be incapable of being employed or of serving the Company in any capacity whatever, and it shall be lawful for the court of directors to discharge the ship from the Company's service, if they shall think fit; and, moreover, the respective parties to such contract receiving, paying, or giving, or contracting to pay, receive, or give, shall severally pay damages to the Company at the rate of double the sum received or to be received, paid, or given; and all the parties shall be obliged to discover such transactions as aforesaid, and all the circumstances relating thereto, by answer upon oath to a bill in equity, and shall not plead or demur thereto, and for that purpose proper clauses shall be inserted in all shipping agreements."

agreed, that should Captain Mills die, or resign his command, before the remaining four voyages should have been performed by the "Minerva," the Plaintiff should succeed him in the command of that vessel. As it appeared, however, that the benefit to be derived from the command of the "Marquess of Ely" was a very inadequate compensation for the loss of the command of the "Minerva," even for one voyage, the Defendant undertook to procure the Company's consent to change the destination of the "Marquess of Ely," and to send her to India, with liberty of calling at St. Helena and the Cape; and on the other hand, Mr. Fletcher, who negociated the agreement on [231] behalf of the Plaintiff, undertook to pay the Defendant a sum of 2000l., should the Plaintiff refuse to resign his command of the "Minerva;" he asserted, however, that the Plaintiff was ignorant of this undertaking. The exchange of commands having met with the approbation of the East India Company, and the destination of the "Marquess of Ely" having been altered, both vessels sailed on their respective voyages. The Plaintiff's voyage in the "Marquess of Ely" having been peculiarly unfortunate, he became bankrupt soon after his return to England. It was proved by Mr. Fletcher, that, in consequence of a conversation between him and the Defendant, in which the latter expressed his dislike of a captain being possessed of an agreement which he held as a rod over the head of his owners, the agreement was deposited with the Defendant, who promised that it should be produced whenever it was required. While the "Minerva" was on her return to England, in the fourth of her six voyages, Captain Mills, then in the command of her, died, and another officer brought her home. The Plaintiff then made a demand on the Defendant, requiring to be re-instated in his command of the "Minerva," according to the terms of their agreement; but the Defendant having declined to comply with his request, and having sold the ship, the present action was commenced. These facts having been proved at the trial, before Lord Gifford and a special jury, at the London sittings after Hilary term last, the defence relied on was, that the agreement had not been merely deposited with the Defendant, but had been positively given up to him, the Plaintiff having renounced it on account of the advantage it was supposed he would have derived from the change in the destination of the "Marquess of Ely;" and evidence was adduced to shew, that he had frequently spoken in warm commendation [232] of the Defendant's conduct towards him. The proof given at the trial of the value of one of these voyages consisted in the testimony of several captains, who described it as being worth from 4000l. to 8000l., and in the production of a book containing a list of passengers, made by the captain, and deposited in the India-house, pursuant to the act of 53 G. 3, passed for the better regulation of passengers by India vessels (a). This book was objected to at

(a) The 53 G. 3, c. 155, s. 15, enacts, "That no ship or vessel engaged in private trade under the authority of this act shall be permitted to clear out from any port of the said United Kingdom, or any place or places under the government of his majesty or of the said Company situate more to the northward than 11° S. latitude, and between 64° and 150° E. longitude from London, until the master or other person having the command of such ship or vessel shall have made out and exhibited to the principal officer of the customs or other person thereto authorised by such government as aforesaid at such port of clearance, upon oath (which oath such officer or other person is hereby authorised to administer) a true and perfect list, in such form as shall from time to time be settled by the said court of directors, with the approbation of the said board of commissioners, specifying and setting forth the names, capacities, and descriptions of all persons embarked or intended to be embarked on board such ship or vessel, and all arms on board or intended to be put on board the same, or be admitted to entry at any port in the said United Kingdom, or any such port within the limits last mentioned."

Sect. 16 enacts, "That in every case where any such list shall be received in any port of the said United Kingdom from any master or other person having the command of any such ship or vessel, the officer or other person receiving the same shall and he is hereby required with all reasonable dispatch to transmit a copy of such list to the secretary of the court of directors of the said United Company; and in case such list shall be received in any port in the East Indies or other place within the limits last mentioned, such officer or other person receiving the same shall and he is hereby required in like manner to transmit a copy of such list to the chief secretary of the government to which the port or place in which such list shall be received shall be subject."

the trial, but was admitted in evidence by the learned Judge. When about to sum up the evidence to the jury, he was interrupted by their [233] declaring themselves satisfied that the agreement had been merely deposited with the Defendant, in compliance with his earnestly expressed wish. They then found a verdict for the Plaintiff; and his Lordship having told them, that if they did so, they were at liberty to give damages for the two voyages remaining to be performed when the Plaintiff demanded the fulfilment of the agreement, they assessed the damages at 7500l.

The declaration was as follows: For that on, &c. at, &c. by an agreement then and there made, it was agreed between the Plaintiff and Defendant, that provided the Defendant should purchase the East India ship "Minerva," from Messrs. Smith, Timbrell, and Smith, of which ship the Plaintiff was then commander, and provided the consent of the Court of Directors of the East India Company could be obtained to the exchange, the Plaintiff would allow Captain John Mills to go as commander of the "Minerva," upon condition that the Defendant would give the Plaintiff the command of the ship "Marquess of Ely" belonging to the Defendant, and then taken up by the East India Company: it was also agreed between the said parties, that provided Mills should die, or should at any time thereafter not choose to proceed as commander of the "Minerva," either upon that or any future voyage, the command of the "Minerva" should be given to the Plaintiff, but only for his own personal use and not otherwise; provided he was in England, ready and willing to receive it in due time to enable the ship to proceed: it was also further agreed, that provided the court of directors should not assent to the exchange, the Plaintiff should proceed for that voyage as commander of the "Minerva," and immediately upon her return to England give up the command to Mills upon the same conditions, and with the same reversions as were thereby agreed in the event of the ex-[234]-change being completed for the then present voyage; and further it was thereby declared and agreed that the agreement was intended to relate only to the four voyages next ensuing, for which the "Minerva" was then engaged by the directors; that until their expiration it was to be in full force and to have effect as to the reinstating the Plaintiff in the command of the "Minerva," under whatever circumstances might prevent Captain Mills from proceeding; and that, when she should have completed her next four voyages, that agreement was to all intents and purposes to be null and void: and the agreement being so made, afterwards and in consideration thereof, and that the Plaintiff, at the special instance and request of the Defendant, had then and there undertaken, and faithfully promised the Defendant, to perform and fulfil the agreement in all things on his part and behalf to be performed, the Defendant undertook, &c. to perform and fulfil the agreement in all things on his part to be performed. And the Plaintiff in fact saith, that the Defendant did purchase the "Minerva" from Smith, Timbrell, and Smith; that the consent of the court of directors was obtained to the exchange; that the Plaintiff did allow Mills to go, and he did go as commander of the "Minerva"; and that the Defendant did give the Plaintiff the command of the "Marquess of Ely": and the Plaintiff further says, that before the expiration of the four voyages for which the "Minerva" was engaged, and when two of the voyages remained to be performed, Mills died, whereof the Defendant had notice; and although the Plaintiff was then in England, and able, and ready and willing, and offered to take and receive the command of the "Minerva" in due time to enable her to proceed, and the Plaintiff desired and wished to take the command thereof for his own personal use and not otherwise, and requested the Defendant that the command of the ship [235] might be given to him as aforesaid; and although the Plaintiff hath always well and truly performed and fulfilled all things in the agreement contained on his part to be performed, yet the Plaintiff in fact saith, that the Defendant contriving, &c. did not, nor would when he was so requested, or at any time thereafter, give the command of the "Minerva," nor was the same given to the Plaintiff; and the Defendant from thence hitherto hath wholly refused, and still doth refuse, to give the command, or to suffer or permit the same to be given to the Plaintiff; and the command hath been given to another person for the two remaining voyages, by means whereof the Plaintiff hath been deprived of certain pay, and divers great gains and profits amounting to 15,000l., which would otherwise have accrued to him from the command of the ship.

Pell Serjt. having in the last term obtained on several grounds a rule, calling on the Plaintiff to shew cause why a new trial should not be had, or the judgment be arrested,

Vaughan and Bosanquet Serjts., who were to have shewn cause, were stopped by the Court, and

Pell, Lawes, and Wilde, Serjts. were heard in support of the rule. They made five objections to the Plaintiff's recovering; first, that the contract on record was without consideration; second, that the consideration, if any, was illegal; third, that the contract in evidence was illegal; fourth, that improper evidence was received; fifth, that the jury gave damages for the loss of two voyages, when it was not clear that the second could ever have been performed.

First, there was no consideration for the Defendant's promise. The only consideration alleged is, that pro-**[236]**-vided the Defendant should purchase the ship, the Plaintiff would allow J. M. to go as commander; that is, he would allow the owner of a ship to appoint his own commander: but the Plaintiff had no interest to claim or communicate, and, therefore, had no right to insist on any such stipulation. A tenant at will, who is considered to have no interest, cannot make any stipulation concerning possession. 1 Roll. Abr. 23, pl. 27. [Best C. J. In the abridgment of the same case in Viner (1 Vin. Abr. 309), it is said, if there be any doubt or dispute whether the party is tenant at will or for years, that is sufficient to constitute a good consideration.] But then the doubt ought to appear on the record, which is not the case here.

Secondly, the consideration, if any, is illegal, being a violation of the bye-laws of the Company, a fraud upon other part-owners, and contrary to public policy. Under the bye-laws no person can make or take an appointment upon a valuable consideration, nor for more than one voyage at a time; and in *Card* v. *Hope* (2 B. & C. 661) an appointment made for the benefit of one part-owner, without the knowledge and concurrence of the others, was holden to be void.

With respect to public policy the concerns of the East India Company stand on the same footing as those of the government, of which it has always been deemed a limb. *Blachford* v. *Preston* (8 T. R. 89), *Card* v. *Hope*, *East I. C.* v. *Neave* (5 Ves. jun. 173), *Thomson* v. *Thomson* (7 Ves. jun. 470), *Morris* v. *M'Cullock* (Ambl. 432); and by 49 G. 3, c. 126, s. 1, 3, 4, all the provisions of the statute of 5 & 6 Ed. 6 against the sale of, and bartering for, offices, are extended to offices under **[237]** the East India Company. But the sale of an office of trust has always been deemed illegal. (*Blachford* v. *Preston*, and the cases there referred to by Kenyon C. J. and Lawrence J.) A trust of higher importance than the command of an East India ship can hardly be found, considering the number of passengers and crew, and the amount of property entrusted to the captain.

Thirdly, the transaction between the Plaintiff, Defendant, and Fletcher, was clearly a promise of an appointment, made on a valuable consideration, if not a sale. By the agreement, as, indeed, by any prospective engagement, the Defendant's discretion was shackled, and when a vacancy should occur, by the death of Mills, instead of looking out for a person fit to succeed him, he would be induced by the agreement to appoint the Defendant, though he were, of all persons, the most unfit, and even though he should labour under a disability, such as bankruptcy, which should render him unfit to be trusted with property to a large amount, and a person expressly excluded by the company's bye-law. But the Plaintiff actually stipulated to pay money if he failed to carry his engagement respecting the command into effect, for Fletcher was the plaintiff's agent; and the promise by Fletcher to pay the 2000l. amounts to the same thing as a promise by the Plaintiff, and avoids the whole transaction. As to the stipulation that the agreement should only be carried into effect provided the consent of the Company could be obtained, that consent applied only to the exchange, and not to the subsequent appointment. The appointment, however, being illegal, for the reasons above stated, the consent of the Company could not render it valid.

Fourthly, the captain's book, deposited in the Indiahouse pursuant to the terms of 53 G. 3, c. 155, is not such **[238]** a public document as to entitle the Plaintiff to give it in evidence against the Defendant. It is no more than the Company's voucher for the conduct of one of their servants, and such its original purpose being satisfied, it is not producible as evidence on a transaction between individuals.

Fifthly, with respect to the damages, there was no proof that the Plaintiff had lost more than one voyage, and a sum was given equivalent to the profits of two; but it could not be ascertained that the second would ever have been performed. According

to the rules of the Company a commander can only be appointed for one voyage at a time; and the Plaintiff might have died, or have become incompetent, or the ship might have perished before the period for the second voyage arrived. On a bond conditioned for the payment of money by instalments, an action will not lie for the whole on the failure of one instalment.

BEST C. J. The questions which we are to decide, are, first, whether the jury have been improperly directed as to the damages; secondly, whether evidence has been received which ought to have been excluded; thirdly, whether the contract, as it appeared in evidence given at the trial, was illegal; fourthly, whether the contract, as set out on the record, appears to be without consideration; and, fifthly, whether, if it contains a consideration, that consideration is illegal and void.

I will, in as few words as possible, address myself to every one of these objections. I agree, that if my Lord Chief Justice Gifford was not warranted in telling the jury that they might take into their consideration what would be lost by the voyage succeeding the first of which the Plaintiff was deprived, the present verdict ought not to stand; because we are bound to sup-[239]-pose that the jury acted under that direction, and that part of the damages which have been given in this case (even though from the nature of the evidence we could not see that they had given damages for a second voyage) might have been given for a second voyage; and, therefore, that would have been a ground for a new trial. Was Lord Gifford, then, warranted in telling the jury that they might take into their consideration the second voyage, or was he bound to say, "all that you can take into consideration in estimating the damage is the loss of one voyage?" The argument that has been pressed on us to-day is, that they could only take into consideration one voyage, and there is a great deal of speciousness in it. It is clear that the Plaintiff could only be appointed for one voyage, for the appointment of master is renewed every voyage. But though that is the case, may not parties look to that which is the practice of the East India Company, that though they renew the appointment, they renew it in the same person. If that practice be legal, may I not say, if you had appointed me for the first voyage, I should have continued for the second? You have deprived me of the profits I should have made not only on the first voyage, but on the second also. It requires no legal head to decide this: common sense says, you are not to be paid for consequences which might not turn up in your favour; but the Plaintiff is entitled to have a compensation for being deprived of that which almost to a certainty happens in these cases. I am clearly of opinion that Lord Gifford was strictly warranted in telling the jury they might take into their consideration, that by the breach of this agreement the plaintiff had been not only clearly prevented going the first voyage, but in all probability prevented going the second; and, therefore, in making up their minds on the damages, they ought to take into their consider-[240]-ation that which he might have lost from the second. If my Lord Gifford had not told them so, I should have thought a new trial ought to be granted; for he would not have presented the case to the jury in a manner that would enable the Plaintiff to recover all that he was in justice entitled to. This case has been likened to the case of stipulated payments at different times; there, undoubtedly, a new cause of action arises; but here, the cause of action is complete, for the whole thing has but one neck, and that neck was cut off by one act of the defendant, which entitled the Plaintiff to maintain this action. It would be most mischievous to say—it would be increasing litigation to say—you shall not have all you are entitled to in your first action, but you shall be driven to bring a second, a third, or a fourth action.

I come now to the next question, that is, as to the admissibility of evidence. For the purpose of proving the damage, the plaintiff put in a list returned by a captain under the authority of the 53 G. 3, c. 155, s. 15, 16. It is contended, that that paper was not evidence against third parties. I am decidedly of opinion that there is no foundation for that objection. This is a public paper made out by a public officer, under a sanction and responsibility which impel him to make that paper out accurately; and that being the case, it is admissible in evidence on the principle on which the sailing instructions, the list of convoy, and the list of the crew of a ship are admissible. But it may be said, Aye, but those are papers which come from government officers: — I go on, — but the books of the bank of England have been made evidence; all those are evidence that are considered as public papers, made out by persons who have a duty to the public to perform, and whose duty it is to make them

out ac-[241]-curately. On account of that duty and responsibility, credit is given to them. These papers are of as high authority as any of those I have referred to; higher than those of the books of the bank of England, the books at Lloyd's, or the lists of convoy, which have been received as evidence. These are papers which the captain is ordered by the fifteenth section of the statute, to which we have been referred, to make out upon oath, which oath an officer of the customs is authorised to administer:—for what purpose? for the purpose of informing the East India Company (who, though subjects in England, are great sovereigns in India,) what kind of persons, and with what sort of arms these persons are going to settlements, the administration of the affairs of which is committed to them. If these are not public papers made with a view to great principles of public policy, I am at a loss to know what are public papers. If so, credit must be given to all papers so made: consequently these papers, I think, were properly received in evidence.

This brings me to the third question, whether there is any illegality in the transaction. I agree with the argument put to us, that if the Defendant has clearly and satisfactorily made out by evidence a fraud in this case, or if it appears by the record in this case that this is a corrupt agreement, or that this agreement is manifestly in contravention of public policy,—whatever we may say as to the raising this objection, the objection must prevail. I am of opinion he makes out neither; I am of this opinion, giving the fullest effect to the argument urged. When I come to consider the record, I see not the least pretence for this objection. It is said, it is a fraud on the East India Company, and that it is a fraud on the co-owners. It cannot be a fraud on the East India Company, for they are apprised of the whole of the [242] transaction. They knew that both these gentlemen were commanders of ships, and they knew that the whole effect of this contract (as far as we have any evidence of it on which the jury have acted) was to exchange the command of one ship for the command of another. Is there any thing on the face of it that is corrupt, illegal, or impolitic? For any thing that appears, in this transaction, from the testimony of Mr. Fletcher, this might have been done from a due regard to the service; from any thing that appears in this transaction, one of the gentlemen might have been deemed fit to command on one voyage, and the other fit to command on the other. On such grounds we are not to presume corruption. Corruption is to be made out. But I see no proof of any fraud or corruption. We have heard much of this being a contravention of public policy, and that, on that ground, it cannot be supported. I am not much disposed to yield to arguments of public policy: I think the courts of Westminster-hall (speaking with deference as an humble individual like myself ought to speak of the judgments of those who have gone before me) have gone much further than they were warranted in going in questions of policy: they have taken on themselves, sometimes, to decide doubtful questions of policy; and they are always in danger of so doing, because courts of law look only at the particular case, and have not the means of bringing before them all those considerations which ought to enter into the judgment of those who decide on questions of policy. I therefore say, it is not a doubtful matter of policy that will decide this, or that will prevent the party from recovering:—if once you bring it to that, the plaintiff is entitled to recover; and let that doubtful question of policy be settled by that high tribunal, namely, the legislature, which has the means of bringing before it all the considerations [243] that bear on the question, and can settle it on its true and broad principles. I admit, that if it be clearly put upon the contravention of public policy, the Plaintiff cannot succeed: but it must be unquestionable,—there must be no doubt:—looking at all the facts of this case, I can see no unquestioned principle of policy that stands in the way of the Plaintiff to hinder him recovering in this action.

I come, then, to the other observations which I shall make on this part of the case. Fletcher has stated a contract between him and the Defendant, on which he may be indicted for conspiracy. The question is, does that corruption extend itself to the Plaintiff? There is no evidence that it does; on the contrary, Fletcher's evidence distinctly is, that the Plaintiff did not know of it. But it has been argued to-day, (and a reference has been made to another subject, to which I admit there is a fair analogy,) that though the Plaintiff did not know it, yet that if his agent makes a corrupt contract, the principal must answer for all the consequences. It is not necessary for me to decide that point to-day. I am aware, certainly, that if the agent promises, the principal is liable. I do not say that there is not a great deal of weight in the analogy,

but my answer to that objection is this, that that point was never raised at Nisi Prius. My Lord Gifford should have been desired to tell the jury, "Remember, that though corruption is not brought home to the principal, if it is brought home to the agent, that will be sufficient." To that point the attention of the jury was not called. In such a case as this we will not, where justice is all on one side, grant a new trial for the purpose of giving to the Defendant an opportunity of raising that objection.

I come now to the points that have been made in arrest of judgment. I think there is no foundation for **[244]** either of these objections: the first is, that no consideration appears on the record. I think there would scarcely have been ground for the objection if the declaration had been specially demurred to; but I am clearly of opinion there is sufficient in the declaration to raise a presumption of consideration after verdict. We were referred to a case yesterday in Roll. Abr.: I have looked at that case; but in Vin. Abr. (vol. i. p. 309) that case is also stated, and stated in the following terms, namely, that if a man is tenant at will, and makes a bargain with his landlord on the foundation of that tenancy at will, it is not a good consideration. No, for this plain reason; because we always can take notice of the extent of the interest of a tenant at will; we know that it is determinable at a word; the breath of the landlord's mouth annihilates that tenancy in a moment. An agreement to hold, when the landlord might say, you shall not hold an instant longer, is no consideration. But the compiler of Viner says, if there be any doubt of the tenancy at will, it would have been a good consideration. It is not necessary he should have a right to hold, but if it be doubtful whether he had a right to hold, that is a good consideration. That answers the objection; when he takes as a tenant at will, the law takes notice of what his interest is; but we cannot take notice of the interest of a captain of an East India ship; we cannot know that there might not be covenants which would secure him in possession of that for a great length of time. I think we should presume that after verdict; I do not say this merely on my own opinion; but I will state a case in which it appears to me the Court presumed a great deal more after verdict. It **[245]** is *Evans* v. ——— (1 Vent. 211). "In an action upon the case: whereas the Plaintiff pretended title to certain goods in the custody of one Susan Prickett, and claimed them to be his own, intending to remove them; the Defendant, in consideration that he would suffer them to continue there, assumed to see them forthcoming, and that they should not be embezzled, but safely kept to the use of the Plaintiff, and shews that afterwards the goods were eloigned, &c.; upon non assumpsit and verdict for the Plaintiff, it was moved to stay judgment, that it doth not appear that the property of these goods was in the Plaintiff, for it is alleged only that he pretended to them, and claimed them to be his own: sed non allocatur, for the declaration is full enough; at least, it must be intended he proved they were his own, or the jury would not have found for him." May not we presume (after verdict), that the captain had a right to hold this ship against the Defendant? It appears the case I have cited is stronger. I think there is abundant consideration stated on the record in this case; unquestionably, there is a consideration which will be sufficient after verdict. But then it is said, if there is any consideration it is illegal. Now we must look at the whole record, and see if it is so or not. It appears on the record that Mr. Mellish is sole owner, and therefore he could commit no fraud on co-owners. Could he commit a fraud on the East India Company? For the reasons I have given, I think not. It appears to me the attention of the East India Company was called to the whole proceeding. Is there any fraud in the proceeding? Sift it from the top to the bottom, what does it amount to? Nothing more than this, that a man who has the sole interest in one ship, and is about to procure an interest in another, **[246]** makes a bargain with the captain of the ship to exchange it for another. Is there any fraud in that? I say no. I am aware of the difference between a legal and a moral fraud. I see no legal fraud. I see nothing in public policy against this sort of exchange being effected. It appears to me there would be nothing corrupt,—nothing improper in it; if not, then there is nothing to arrest the judgment on the ground of illegality. But we have been referred to many cases, and to an act of parliament. That act confirmed the view I had taken of the case. I had thought that a contract of this description was not to be set aside on what persons refining and refining might imagine to be fraud, but that there must be that clear, broad, palpable, corrupt proceeding which is spoken of in that act. That act shews the utmost extent to which the legislature intended to go, and beyond which we cannot go. In that act, which applies to offices of the East

India Company, as well as offices under government, it is enacted that if there is a sale of any office, it is void. In every section it appears there must be some corrupt pecuniary consideration. I agree that it is not necessary the party should directly get money by it,—if it is done circuitously,—if by the interest made, the pecuniary advantage can be got at, that will do. But the legislature never meant to carry this doctrine of corruption further; that is quite clear from the words they have used; for the word is "money"; and the terms relating to money are used in every section with that extent of phraseology which embraces every case, (whatever artifice is used,) where the basis of the transaction is corruption between the parties. That is the species of corruption which the act has described. That gives us the rule; beyond that we are not warranted in going; for if the legislature had thought that every bargain of this description was to be prevented, the legislature would not have said, you are to consider if there **[247]** is a mere pecuniary corruption, or something in the nature of pecuniary corruption, *sufficient* to avoid the bargain, but they would have gone on to say, there shall be no bargain, no tying up of the hands of those who have to do with the appointment to the command of East India ships—all those appointments shall be made without bias, the party shall come uninfluenced, and not restrict himself from appointing again as soon as the voyage is made. It is quite clear the legislature would use words of that sort if they had intended it. But they knew how impossible it was to regulate transactions by such visionary notions as these. They introduced only corruption as the thing which they could act upon, that is personal corruption, pecuniary advantage, or something in the nature of it. It is not proved that Captain Richardson ever did derive from this transaction any pecuniary advantage. It does not appear on the record that either of these parties is to derive from it any pecuniary advantage or emolument whatever. The act, instead of being an authority in favor of the Defendant, is an authority against him. We were referred also to a great number of cases. I will not trouble the Court with going over them, because I stated when they were cited it was unnecessary to cite them, as they only proved that to which the Court acceded. I never have doubted that it is an offence at common law to sell offices. I have never doubted that if a man sells an office he cannot maintain an action growing out of such contract. That is all that has been decided by any one of the cases. The case of *Blachford* v. *Preston* was a direct sale. In *Card* v. *Hope* it was not a direct sale; it is distinguishable from *Blachford* v. *Preston* in that respect. It was decided on the principle of *Blachford* v. *Preston*. Why? Because in *Card* v. *Hope*, though there was not a direct sale, there was an indirect sale of the appointment. It was said to the Plaintiff, if **[248]** you will buy these shares you shall be the captain. It will occur to every man, if the shares were sold under such circumstances, something was added to the price of the shares; it was a colorable sale of the command of a ship. There are expressions used by the Chief Justice in that case which seem to bear on the present; but the expressions of every judge must be taken with reference to the case on which he decides, otherwise the law will get into extreme confusion. That is what we are to look at in all cases. The manner in which he is arguing it is not the thing; it is the principle he is deciding. If ever I could have imagined it could have been extended to such a case as this, I would have protested against, though I could not have prevented, the decision. I would in my place have protested against it, for I should have seen the injustice and confusion to which such a doctrine would have been liable to be extended. I am quite satisfied, that not one of the learned Judges who decided that case ever conceived that its authority could be pressed to the extent to which it has been pressed in this case. All that was decided in that case was before decided in *Blachford* v. *Preston*, with this difference, in *Blachford* v. *Preston* the sale was direct, and in *Card* v. *Hope* the safe was indirect. All that the Court decides in those cases is, that that species of sale is void in point of law. For the reasons which I have given, I am decidedly of opinion that this rule for a new trial, and in arrest of judgment, ought to be discharged.

PARK J. I am of opinion that none of the grounds taken for a new trial are tenable here. One of the points taken, and which would be a good ground for a motion, was, that Lord Gifford received evidence which he ought not to have received; that was a list of the passengers which was given in with a view to damages. Captains' charges vary according to the situations and capacities to **[249]** pay, of those who come on board the ship, and the situation they hold, either as cabin or steerage

passengers. It is well known, that, according to the East India regulations, hardly a person goes to the East India settlements whose death (if death has taken place) is not immediately recorded in the East India Company's books. What is it that the act passed in the fifty-third of the late king has in view? It imposes on the captains of these ships the following regulations: The captain shall, on each voyage, under certain penalties, see that lists are transmitted to the India house of all the passengers who go out in the particular ships: the words are, "names, capacities, and descriptions of all persons on board, or who shall have been on board, such ship or vessel, from the time of the sailing thereof to the time of arrival; and all arms on board, or which shall, during such time, have been on board, such ship or vessel, and the several times and places at which such of the said persons as may have died or left the said ship or vessel, shall have so died or left such ship or vessel, or such of the said arms as have been disposed of, have been so disposed of." What is the meaning of this? Are not these public documents? They are transmitted to the Company for general inspection, and have become public documents, and have been so held by my Lord Chief Justice, in the course of his judgment, as those which are received every day at Guildhall. On that ground I see no objection.

The next point was as to the extent of damages, and this branches itself into various considerations. It is argued, that the Lord Chief Justice ought not to have directed the jury to find damages for the two voyages. Now, I am of opinion that he not only might, but that he was bound to do so. Where is the objec-**[250]**-tion? Unless there be something of illegality founded on the latter point, where is there any objection to a man's reciting in an agreement, that he has contracted with another, for four voyages? Those circumstances introduced in the argument, viz. the loss of the ship, that she might be wrecked, that the captain might die, and many other circumstances of that sort, if they had happened, might have been a good answer, for you cannot deal with impossibilities; and if Mr. Mellish could have shewn these things, or that Captain Richardson had a "permanent infirmity," as it is called in an act of parliament, all that would have gone to the action itself. But then they say there is bankruptcy, and how could he contract under that disability? Is it to be supposed the Company would allow a man under such circumstances to go on such a voyage as this? to which I answer this, (inasmuch as the agreement has this very proviso, "If the company shall agree to it,)" if Mr. Mellish could have shewn that on account of the Company's refusal to let the bankrupt go, he could not comply with his contract, then the plaintiff could not have recovered; but Mr. Mellish has no right to defend himself by saying, that he has put it out of his own power to fulfil his engagement. I am of opinion upon that ground there is no color for the objection.

The next point is a matter in which is introduced the question of legality. This is in arrest of judgment. Now, I agree with my Lord Chief Justice, if there be corruption in the agreement, Mr. Mellish, being a Defendant, has a right to take advantage of it, for in pari delicto potior est conditio defendentis. But I see no evidence to affect the plaintiff with that at all. I do not find that, but the contrary. We have been pressed with a variety of cases, two only of which I will mention; the others really have no bearing. It is for the principle that I refer to those cases, and not for the facts. **[251]** The case of *Card* v. *Hope* is the last case, and *Blachford* v. *Preston* is the other; I concur, as far as is necessary, in the judgments given in those respective cases. The judgment given by my Lord Chief Justice Abbott was very elaborate; but though I concur with the judgment in that case, I am by no means prepared to agree with every dictum in that judgment. I am quite satisfied that the reference to general policy in that case, by my Lord Chief Justice Abbott, was going further than was absolutely necessary, and I think there is nothing here to shew illegality. I enter no further into the question now than to say, that it strikes me the mutual engagements contained on the face of this agreement, declaring, that provided you will do so and so, I will do so and so, are a sufficient consideration to support the declaration. Is there any corruption in them? I cannot say that any thing is corrupt in the agreement, unless it be considered as corrupt, or as a wicked and a wrong thing for any man to appoint a respectable person, whose merits and abilities he knows, for a prospective voyage. I cannot go along with that. On the contrary, I am quite satisfied that if a man has an object in view, for such and such of his relations, or for any respectable man skilful in the navigation of ships, he may reasonably be anxious to secure his services for all the voyages that the ship has to perform under the

Company, provided they should consent. So far from thinking it an illegal consideration, it seems to me a most meritorious one, one which a sensible, prudent, judicious ship-owner would be very likely to act upon. For these reasons I am of opinion, the rule ought to be discharged.

BURROUGH J. When they argued this case at the bar in arrest of judgment, it was said there was no con-**[252]**-sideration, and if there was it was illegal. Now the count happens to be framed in a way that avoids all possible question. It states the whole agreement as it existed, and then states mutual promises; and it is clear that there is something to be done on each side: the one is a good consideration for the other. Whoever reads the count will see something is to be done on each side; that has been held to be a good consideration. The declaration is framed upon that. Then the next point is, that it is illegal. I am of opinion, that on the face of this count there is no legality. If it be illegal, it must be illegal either on the ground that it is against public policy, or against some particular law. I, for one, protest, as my Lord has done, against arguing too strongly upon public policy;—it is a very unruly horse, and when once you get astride it you never know where it will carry you. It may lead you from the sound law. It is never argued at all but when other points fail. Why should you not enter into such a contract, independent of public law? I know no law against it; I see no public policy against it at all. The Legislature do not consider the East India Company as a public company; they may in some senses, but not in all. They have the exclusive trade to the East Indies, and employ persons (not in what may be considered as offices) to command ships; they own ships; all this is in the course of private trade, and so far public policy does not relate to such a subject. They have a right to make bye-laws to regulate that trade. As to the point of public policy, a great deal has been said, many cases have been mentioned, and in *Blachford* v. *Preston*, a great number of general phrases were made use of by the learned Judge. But you ought not to govern courts of justice by general expressions used in the administration of the law. They may have some weight, but they ought not to govern; you must **[253]** look to what the point of decision was. I only need read the point of decision from the digest of the case, which puts it out of question that it has any thing to do with this case. The Digest says (1 Moore, Dig. 361), "A sale (by the owner) of the command of a ship employed in the East India Company's service, without the knowledge and against the bye-laws of the Company, is illegal; and the contract of sale cannot be the foundation of an action." Every body knows, when you are on the bye-laws, when a party is contracting, with a view to the bye-law, a sale against it would be void. We know that all these captains of ships act under charter-parties; if the charter-parties incorporate the bye-laws in them, that is a matter which is to govern the contract; if they act against the bye-law, there is an end of the contract beyond all question. We then come to the bye-law itself: whoever looks at it will see that it has nothing to do but with pecuniary sales. Suppose the Defendant is driven out of that, then he resorts to another point, under the act of parliament 49 G. 3. I know the act to which it relates was an act relating to the sale of public offices; the statute of Edw. 6. This act of 49 G. 3 is made to extend that act to other matters. What does it extend to? It extends to offices belonging to the East India Company. Who ever heard of the situation of a captain being an office? The East India Company stand in a two-fold situation, they are a trading company and they are a territorial company; and this statute relates to offices in the latter respect. It will turn out to have no relation to the office of a captain of a ship; that is an employment, not an office. Then we come to damages. It is enough to say, with respect to damages, that the contract is for four voyages, and the breach is, "you have by your **[254]** own act, by the disposal of the ship, prevented the possibility of complying with your own contract." The question is, what damages shall be awarded for the breach of this contract? That the contract is broken, no one can doubt. You cannot appoint because you have sold your ship. The quantum of damages is for the jury; whether they give more or less is nothing to us. They have judged of that and have given 7500l., which goes to comprehend the whole loss of the first and second voyages. They may have given a greater part for the first and less for the second; they have given that sum, however, which does not seem more than they were warranted to give by the evidence. Then we come to the question as to the admissibility of evidence. Enough has been said on that subject; it is impossible to maintain any objection to the list of passengers. That list is made out under oath,

it is preserved for public purposes, for the use of all the kingdom; for every individual. It is a public paper, and must be governed by the same rules as other public papers. Considering the whole of the case, it does appear to me, after all the arguments we have heard, that there is no ground for a new trial, or for arresting judgment.

Rule discharged.

[255] RUMSEY *v.* TUFNELL. July 2, 1824.

[S. C. 9 Moore, 425.]

Semble, that under 43 G. 3, s. 46, expences of execution include expences of levying.—There is no statute of 29 Eliz.

This was an action against the sheriff of Essex, for alleged extortion in the execution of a fi. fa. against the Plaintiff. The declaration commenced by stating, that by a certain act of parliament, made at the parliament of the Lady Elizabeth, late queen of England, at a certain session thereof, holden at Westminster, in the county of Middlesex, and begun on the 29th day of October, in the twenty-ninth year of her reign, entitled "an act to prevent extortion in sheriffs, &c., it was enacted, &c.," and then alleged that the writ against the Plaintiff was indorsed, "to levy 78l. 12s. 6d., besides interest, to accrue due on the sum of 73l. 3s., from the 10th day of February, 1823, and besides, &c., to wit, sheriff's poundage, officer's fees, and expences of levying." At the trial, Essex Lent assizes, 1824, it appeared, that in fact the writ was indorsed, "Levy 78l. 12s. 6d., besides interest, to accrue due on the sum of 73l. 3s., from the 10th of February, 1823, and besides, &c." The warrant to the sheriff's officer was in the same words. Under this warrant the Plaintiff's goods were, at his own request, upon his agreeing to pay the usual charges, and upon his signing an authority, sold by auction, and the officer made deduction for the following charges:

	£	s.	d.
Levy fees, three journeys	2	2	0
Taking an inventory	1	1	0
Keeping possession fourteen days	2	9	0
Sheriff's poundage	3	8	6
Postage and expences	0	4	6

[256] A verdict having been found for the Plaintiff,

Lawes Serjt., in the last term, obtained a rule nisi to set aside this verdict and enter a nonsuit, or to arrest the judgment, on the following grounds. First, that the indorsement on the writ, and the statute and common law, only authorised the sheriff's officers to levy the expences of execution, and not the expence of levying; that the expences of execution comprised only the costs of the writ, sheriff's poundage, and officer's fees; and that, therefore, where the declaration added "expences of levying," it was a variance from the writ.

Secondly, that the recital of the statute of Elizabeth was erroneous, as there was no session of parliament which commenced on the 29th of October, in the 29th year of Elizabeth.

Taddy Serjt., who shewed cause, contended, that since the 43 G. 3, c. 46, which authorises the Plaintiff to levy poundage, fees, and expences of execution, over and above the sum recovered by the judgment, expences of levying were expences of execution within the spirit of that act; but that at all events those words having been inserted in the declaration under a scilicet, might be rejected as surplusage.

Lawes and Wilde Serjts. were heard in support of the rule.

BEST C. J. We ought to see our way clearly before we determine this to be a variance, which always goes against the justice of a case; and though it is sometimes difficult to make out the meaning of words in an act of parliament, I cannot think that "expences of execution" means only the costs of the writ: but at all events, the **[257]** words introduced into the declaration are only surplusage, and may be struck out. However, as to the point urged in arrest of judgment, there is a case in 2 Bl. Rep.(*a*), and another in Anderson, which clearly shew that there was no parliament

(*a*) *Savage* v. *Smith*, 2 Bl. 1101.