

Dec. 1, 1883.]

[Co. Ct.]

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actment under which permission to amend had been asked; he pointed out that that section used the word "may" concerning one class of amendments, and "shall" as to another, and he spoke of the language which applies to amendments necessary to determine the real question in controversy as amounting to "a mandate," and he was "free from doubt" on the matter before the court.

I feel that if the defect pointed out by the defendant in this case is a material one, then I should be preventing the trial of the real question were I to refuse permission to amend.

The language on which that case turned is reproduced in Rule 178 of the Judicature Act: "All such amendments shall be made as may be necessary for the purpose of determining the real questions or question in controversy between the parties." Assuming then that the statement of claim was defective, as argued by the defendant, I think it would have been my duty at the trial, if asked, to allow its amendment.

The only other question is whether the defendant, having been silent on that occasion, is thereby strengthened in his present position. I think the proposition answers itself. If there is any difference in the rights of the parties then and now, his must be diminished who refrained from objecting to a fault at a time when it could be remedied, and if it were not possible to remedy it now, principle might require me to say that the objection was too late and would not be heard, but that difficulty is not in my way. Rule 474 of the Judicature Act declares that "the court or a judge may at any time and on such terms as to costs or otherwise, as to the court or judge may seem just, amend any defect or error in any proceedings; and all such amendments may be made as may be necessary for the advancement of justice, determining the real question or issue raised by or depending on the proceedings, and best calculated to secure the giving of judgment according to the very right and justice of the case." As the plaintiff has asked to amend his statement of claim if it be defective, I shall order under this rule that it be amended so as to conform to the requirements of the said section 182.

Passing now from matters of form, I understand the defendant's main contention to be that there is no evidence that the defendant did not

conscientiously believe it to be his duty to take the course he did, and that if he did so believe then he could not be liable to a penalty, especially as the statute visits the non-payment of it with imprisonment, in other words he argued that the statute should be construed as intending to punish only wilful offenders. If this is the true reading the plaintiff ought not to recover.

The statement of claim did not allege on the part of the defendant any wilful intention to neglect the formality or obligation imposed on him; if such an allegation was considered to be a necessary element in the case, its absence might have been made the ground for a demurrer, which would have been probably the most convenient as well as the most regular way to try the question; but the omission does not relieve me from deciding now whether such an intention is a *sine qua non*, for the plaintiff cannot have judgment if the facts alleged and proved are not sufficient in point of law to entitle him to recover. I may say that if there had been an issue involving the question I should have found at the trial that the defendant committed the wrong complained of under a conscientious belief that he was doing no wrong; but as I read the statute that would not help him.

This is an action of debt, and I do not think the addition of imprisonment to the usual method of enforcing the judgment authorizes me to treat the defendant as if he were being tried as a criminal, and nothing short of that would accord with his contention and enable me to say he is to go free because *mens rea* was not established.

The plaintiff cites *Pickering v. James*, L. R. 8 C. P. 489, in support of his right to recover. It is true that the plaintiff there was held entitled to judgment against an official acting under the Ballot Act who had unintentionally neglected his duty. That, however, does not go far enough to show any liability on the part of this defendant. In that case the discussion was mainly on the question whether the Act had cast certain duties on the defendant, which being found in the affirmative, the plaintiff, who had been aggrieved and had in fact lost his election through the error of the defendant, was held entitled to recover damages though the error had been without malice or want of reasonable care. That, however, was only following a principle well