might be ordered to produce the persons on whose lives the lands were holden. The motion was made *ex parte*, but upon an affidavit such as the statute requires.

Mr. *Beames*, in support of the motion, cited *Ex parte Grant* (6 *Ves.* 512), and stated, that in that case, as appeared by the entry in the Reg. Lib. under the name of *Ex parte Grint and Others*, the place at which, the time when, and the persons before whom, the *cestui que vie* was to be produced, were inserted in the order. He proposed that the order should, in the present instance, be made in the same form.

The *Lord Chancellor* made the order accordingly.

[562] *Between* ROBERT HICHENS, JOHN MOXON, THOMAS HENRY PARKER, WILLIAM MORGAN, and JOHN FRYER, on behalf of themselves and all other Shareholders in the Arigna Iron and Coal Company, *Plaintiffs*, *and* Sir W. CONGREVE, Bart., JOSEPH CLARKE, HENRY CLARKE, JOHN DUNSTON, JOHN BENT, JAMES BROGDEN, JOSEPH MACLEAN, TIMOTHY FRANCIS POWER, AUBONE ALTHAM SURTEES, HENRY DES RIVIERES BEAUBIEN, and JOHN HINDE, and also JOHN SCHNEIDER the Younger (when within the Jurisdiction of the Court), *Defendants*. *May* 2, 3, 1828.

[S. C. 6 L. J. Ch. (O. S.) 167; 1 Russ. & My. 150, n. See *Imperial Mercantile Credit Association* v. *Coleman*, 1871, L. R. 6 Ch. 563; *Kimber* v. *Barber*, 1872, L. R. 8 Ch. 59; *Dunne* v. *English*, 1874, L. R. 18 Eq. 535; *New Sombrero Phosphate Co.* v. *Erlanger*, 1877, 5 Ch. D. 91.]

Some shareholders in a joint stock company may sue, on behalf of themselves and the other shareholders, for the purpose of compelling directors of the company to refund monies improperly withdrawn by them from the stock of the company, and applied to their own use. A demurrer to such a bill, on the ground that all the shareholders are not parties, cannot be sustained. A clause in an act of parliament, passed for the regulation of a joint stock company, provided, that all proceedings, whether at law or in equiry, to be carried on by or on behalf of the company against any person or persons, whether such person or persons should be a member or members of the company or not, should be instituted and carried on in the name of the chairman or of one of the directors as the nominal plaintiff: such a clause does not apply to a case in which directors appropriate to their own use part of the joint stock by charging the company with a much larger sum, as the price of property purchased by them, than was actually paid.

The bill stated, that *Roger Flattery*, the owner of certain mines near *Arigna*, being desirous of selling his interest in them, and anxious that a joint-stock company should be formed for the purpose of working them, proposed to Sir *W. Congreve*, in *June* 1824, to engage in the formation of such a company;—that various discussions took place between *Flattery* and *Congreve*, as to the terms on which the mines should be sold to the proposed company when formed;—that, on [563] the 30th of *June* 1824, a memorandum of agreement was drawn up by *Congreve*, or with his privity, but was not signed, whereby *Flattery* agreed to treat with him, and such persons as he should authorize, for the formation of a company for working the said mines, on certain terms therein alluded to, but not stated; and *Flattery* engaged not to treat with any other person for the disposal of these mines, unless it should be found impracticable to form a company, while Sir *W. Congreve*, on the other hand, undertook to use his utmost endeavours to establish a company in conformity to the conditions of that agreement;—that the terms of the purchase contemplated between the parties were afterwards set down in writing, and such terms were, that *Flattery* should receive £10,000 and one fifteenth of the profits of the concern, besides a thousand shares in it, and certain other advantages;—that Sir *W. Congreve* entered into a negotiation with *Joseph Clarke* and *Henry Clarke*, in order to procure their assistance in the formation of the company;—that they suggested that a profit should be secured for the benefit of the promoters of the speculation, by charging the company with a higher price for the mines than should be actually paid to *Flattery*; and this profit, it was proposed by Sir *W. Congreve*, should be divided amongst the directors;—that the Messrs. *Clarkes* and the agent

of Sir W. *Congreve* agreed with *Flattery*, that the mines should be sold to the intended company for £10,000, and that *Flattery* should further have 1000 shares in the company, a proportion of the profits, and certain other advantages ;—that it was arranged between the agent of Sir W. *Congreve* on his behalf, and the Messrs. *Clarkes*, that the mines, so purchased for £10,000, should be charged to the company at £25,000, and that the surplus of £15,000 should be divided amongst Sir W. *Congreve* and Messrs. *Clarkes*, their friends and agents ; that, for the purpose of carrying the aforesaid arrange-[564]-ment into effect, two agreements in writing were prepared, dated respectively the 30th of *October* 1824 ;—that one of these agreements was made between *Flattery* of the one part, and *John Vivian*, who had been for many years in the service of *Henry Clarke*, and was named for that purpose by him, and *Henry Joseph Besouth Hinde*, who was an agent of Sir W. *Congreve*, and nominated on his behalf, of the other part ; and that it was thereby agreed, that *Flattery* should sell and assign his interest in the *Arigna* mines and other property to *Vivian* and *Hinde* for £10,000, to be paid by instalments ; and that a company should be formed for the purpose of working the mines, in which *Flattery* was to have a thousand shares, besides being entitled to one fifteenth of the profits ; —and that this agreement was signed by *Flattery*, but was not signed by *Vivian* or *Hinde*, who, in truth, had no knowledge of it ; their names being inserted in it merely as agents, and in lieu of the names of Messrs. *Clarkes* and Sir W. *Congreve*, and in order to conceal the fact, that Sir W. *Congreve* and Messrs. *Clarkes*, who were afterwards to affect to purchase the mines for the sum of £25,000, had really bought the same for the sum of £10,000.

The other agreement, made between and signed by the solicitor of Sir W. *Congreve* on his behalf, and *Henry Clarke*, on behalf of himself and *Joseph Clarke*, after reciting that the parties had agreed to form a company for the purpose of working the *Arigna* mines in *Ireland*, and that Sir W. *Congreve* was to be the chairman, and certain other persons directors, proceeded as follows :—"Whereas the said mines were originally purchased by the said Sir W. *Congreve*, *Joseph Clarke*, and *Henry Clarke*, of the said *Roger Flattery* for the sum of £10,000, and subject to other charges, as is particularly mentioned in the conveyance thereof, which [565] was, by direction of the said parties, made to a nominee on their parts : and whereas the said Sir W. *Congreve*, *Joseph Clarke*, and *Henry Clarke*, by their nominees as aforesaid, have agreed for the sale of the said mines for the sum of £25,000 to the said company so intended to be formed ; and it has been agreed, that the sum of £15,000, being the difference in the said purchase-monies, shall, when received, be divided in manner hereinafter mentioned, that is to say, that £1000, part thereof, be paid to *John Hinde*, one other £1000, other part thereof, be paid to Mr. *Beaubien*, as the agents of Sir W. *Congreve*, and that £2000, further part thereof, be paid to Messrs. *Clarke*, to be divided by them amongst their agents ; that the three several respective sums of £2000, making together £6000, be paid and divided equally between Sir W. *Congreve*, *Joseph Clarke*, and *Henry Clarke* ; and that the further and remaining sum of £5000 be divided by the said Sir W. *Congreve* and Messrs. *Clarke*, either amongst the directors generally, Sir W. *Congreve* being one of them, or equally amongst themselves."

The bill, after setting forth this agreement, alleged, that the statement contained in it, that the mines had been assigned to a nominee of Sir W. *Congreve* and Messrs. *Clarke*, and that they, by such nominee, had agreed to sell the same to the intended company for £25,000 was totally untrue ; that, for the purpose of giving colour to the transaction, and concealing the truth from the persons who should become members of the proposed company, it was at that time intended, that an assignment of the mines should be made either to *Vivian* and *Hinde*, or some other person, on behalf of Sir W. *Congreve* and Messrs. *Clarke*, and that then a pretended agreement should be made with such individual, on the part of the company, for the purchase of the mines at the price of £25,000 ; but that it was afterwards con-[566]-sidered that such a course might lead to a discovery of the truth, and that it was therefore agreed by *Congreve* and the *Clarkes*, with the consent of *Flattery*, that the transaction should be represented as a purchase, on the part of the company, from *Flattery*, but that the price paid to him should be misrepresented to the shareholders, and that the sum of £25,000 should be charged to the company, as paid to *Flattery*, and that the sum of £15,000, the difference

between the real price and the pretended price, should be secretly divided in the manner before mentioned ;—that, afterwards, a prospectus of the company was printed, and a deed for vesting the mines and other property in trustees for the company, and a deed for establishing it, were prepared, and all the Defendants (except *Beaubien* and *Hinde*) were appointed directors and accepted the office ;—that, at a meeting of the directors, held on the 5th of *November* 1824, at which *Hinde* was present as the agent of Sir *W. Congreve*, certain resolutions were entered into, one of which was, that the purchase of the mines from *Flattery* at the price of £25,000, on the conditions therein mentioned, should be completed ;—that the parties present at the meeting well knew, that the sum of £25,000 was not to be paid to *Flattery*, but that he was to receive £10,000 only, and that the resolutions were passed for the purpose of concealing and disguising the truth ;—that, in pursuance of these resolutions, the conveyance from *Flattery* to the trustees of the company was executed :—that, before this time, the plaintiffs had become proprietors of shares in the company, and were wholly ignorant that £25,000 was not the sum actually agreed to be paid to *Flattery* for the mines ;—that, by means of the deposits paid by or on account of the Plaintiffs and the other shareholders, a sum of £30,000, or thereabouts, was, previously to the month of *December* 1824, raised and paid to the bankers of the company ;—that the directors agreed to pay [567] to *Flattery*, for materials furnished and work alleged to have been done by him the sum of £1650, making, with £25,000, the pretended consideration for the purchase, £26,650 ;—that drafts to that amount were drawn by the proper number of directors upon the bankers of the company, payable to *Flattery* or bearer, all of which drafts were dated on the 8th of *December* 1824 ;—that all these drafts were paid by the bankers of the company out of the funds thereof, and were all charged and entered as paid to *Flattery* ; though none of them were, in fact, ever delivered to *Flattery*, or paid to him or for his use, but all of them were delivered to or taken by *Henry Clarke*, who received the amount from the bankers of the company out of the company's funds ;—that the sum of £10,000 was paid to *Flattery* in the following manner,—£150, when the agreement of the 30th of *October* 1824 was signed ; £5000, by payments to the bankers in respect of his deposit on 1000 shares ; and the residue, by payments made by *Henry Clarke*, partly in cash and partly by drafts ;—that, after such payments, there remained in *Henry Clarke's* hands the sum of £15,000, out of which certain expenses to the amount of £30 were defrayed, leaving a balance of £14,970 ;—that, out of this balance of £14,970, £1000 was paid by Sir *W. Congreve*, *Henry Clarke*, and *Joseph Clarke*, or some or one of them, according to the agreement of the 30th of *October* 1824, to *Henry des Rivieres Beaubien*, and another sum of £1000 to *John Hinde* ; that £2500 was handed over to *Congreve*, and converted by him to his own use ; that it was agreed that the remaining sum of £10,470 should be divided equally amongst the directors of the company, exclusive of Sir *W. Congreve* ; that, accordingly, *Henry Clarke* and *Joseph Clarke* retained each the sum of £1047, and paid a like sum of £1047 to each of the Defendants, *John Bent*, *James Brogden*, *Joseph Maclean*, *John Dunston*, [568] *Timothy Francis Power*, and *Aubone Altham Surtees* ;—that they paid over another sum of £1047 to Sir *W. Congreve* on behalf of *John Schneider*, but without the knowledge of *Schneider*, and they retained in their hands the like sum of £1047 for the Plaintiff *William Morgan*, who had been appointed a director, but was then abroad and had not assented to the appointment, if he should think proper to accept the same ; that *Beaubien*, *Hinde*, *Bent*, *Brogden*, *Maclean*, *Power*, *Dunston*, and *Surtees*, when they respectively received these sums, believed, or had good reason to believe, that £25,000 had not been really paid to *Flattery*, and that the monies so received by them, were part of the difference between the sum actually paid to *Flattery*, and the sum charged to the company as paid to him ;—and that these transactions were kept secret from the Plaintiffs and the other shareholders, and were not discovered by them, till *November* 1825.

The bill further stated that an act of parliament was passed and received the royal assent on the 22nd of *June* 1825, intituled " An Act to encourage the working of mines in *Ireland* by means of *English* capital, and to regulate a joint stock company for that purpose, to be called the *Arigna Iron and Coal Company*," whereby it was amongst other things enacted, that Sir *W. Congreve*, *Joseph Clarke*, *Henry Clarke*, the Plaintiff *William Morgan*, and the several other persons before named as directors

of the company, and various other individuals, to the number in the whole of about two hundred, and their executors, administrators, and assigns, and all persons who should, from time to time, hold shares in the company, so long as they should hold such shares, should be a joint stock company, by the name and description of the *Arigna Iron and Coal Company*; and various powers were given to them, and various provisions were made for the regulation of the association.

[569] The bill insisted, that the parties, who concurred in charging the company with £25,000 as the price of the mines, when £10,000 only was paid, had committed a fraud upon the other shareholders; that *Congreve* and the two *Clarkes* were each of them answerable to the company for the whole of the £15,000, with interest thereon at £5 per cent.; and that *Bent*, *Brogden*, *Maclean*, *Power*, *Surtees*, *Dunston*, *Beaubien*, and *Hinde*, were each answerable for such part of that sum as had been received by them respectively, with interest. It charged, that, in fact, there never was any bargain made by *Congreve* and the *Clarkes* with the company, or any members of it, for the sale of the mines, and that the true plan and contrivance was, that the mines should be charged to the company at a price different from that at which they were really bought; that, at the meeting of the 5th of *November* 1824, the company had not been actually formed, and the only persons present were directors and agents, who were parties and privies to the fraud intended to be practised; and that it never was communicated or disclosed to the Plaintiffs, or any of them, or to any of the other shareholders, at the time when they became proprietors, and paid their instalments (except only to those who participated in the profits of the fraud), that the sum of £25,000 was not to be paid to *Flattery*, or that *Congreve* and the *Clarkes*, or any of them, had any interest in the monies, or were to derive any benefit from the purchase.

The prayer was, that it might be declared that such appropriation of £15,000 out of the funds of the company was a fraud upon the Plaintiffs and the other shareholders: that *Congreve* and the two *Clarkes* were liable, jointly and severally, to make good the whole amount to the company with interest at 5 per cent., and that each of the Defendants was answerable for the sum received by [570] him; that they might be decreed to pay the same accordingly, and that such sum, with interest, might be paid to the bankers of the company, to the company's account and for the company's use.

Beaubien and *Hinde* demurred for want of equity, and because all the shareholders were not parties to the suit.

July 17, 1827. Sir *Anthony Hart*, Vice-Chancellor, overruled the demurrer.

The Defendants appealed.

Mr. *Twiss* and Mr. *L. Lowndes*, for the demurrer. First, the transaction in substance amounts to no more than this, that Sir *Wm. Congreve* contracted for the purchase of these mines for £10,000; that afterwards a company was formed, who agreed to pay £25,000 for them; and that Sir *Wm. Congreve* and his friends have shared the profit. It is not alleged that the mines are not worth £25,000. It might be prudent in *Flattery* to sell them for £10,000, because he had not the capital requisite for deriving benefit from them; to a joint stock company, with funds sufficient for working them on a great scale, they may be worth four times that sum. It was of no importance to the company from whom the purchase was actually made, or what previous agreement may have subsisted between *Flattery* and Sir *Wm. Congreve*: the only points, which concerned the shareholders, were—the price to be paid, and the value of the property which was to be given in exchange. When Sir *Wm. Congreve* made his arrangement with *Flattery*, the company did not exist; in no part of the transaction was he their agent.

[571] Secondly, supposing the shareholders to have a ground of complaint, they ought to sue, as in *Colt* v. *Woollaston* (2 *P. Wms.* 154), each for the sum of which he conceives himself to have been defrauded; and one or two have no right to claim redress for all the shareholders. If the money of the persons, who, in *December* 1824, had subscribed for shares in this speculation, has improperly found its way into the pockets of the Defendants, those persons may, perhaps, have some title to recover their aliquot proportions. But this bill does not profess to seek relief for individuals: it affects to assert the rights of all the present shareholders, whoever they may be: and its object is, to bring back certain monies into the joint stock of the concern.

Thirdly, this company, not being incorporated by the act of parliament, is a mere partnership; and therefore all the partners ought to have been made parties to the suit; the more especially that its only purpose is, to regulate to a certain extent a partnership transaction. The case does not come within the exception, which, under certain circumstances, permits some, out of a great number, to sue on behalf of themselves and others; first, because it nowhere appears in this bill, that the shareholders are so numerous, that they might not all be brought before the court without inconvenience; and, secondly, because a few have been permitted to sue on behalf of themselves and others, only where an account was to be directed, in the prosecution of which every individual interested would, if he pleased, have an opportunity of becoming substantially a party to the proceeding. Here there is no account asked, nor, according to the case stated by the bill, will any account be decreed. [572] Were this suit to proceed, the single question in it would be, whether the Defendants are or are not to refund £15,000; and that point would be decided at the hearing on the evidence in the cause; so that the rights of all the partners would be finally determined, in a form of proceeding, in which the great mass of the shareholders would have no opportunity of watching over their own interests. The bill prays that the £15,000, with interest, may be paid to the bankers of the company for the use of the company; many of the shareholders may choose rather to receive with their own hands their proportions of the sum.

Fourthly, if the suit is to be considered as, in substance, a suit by the company to assert the rights of the company against individuals, the form of proceedings which the act of parliament has prescribed, ought to have been followed. The act referred to in the bill (6 *G.* 4, *c.* clxxxi.) is declared to be a public act; and the third section provides,(1) that all proceedings, whether in law or in equity, to be carried on by or on behalf of the company against any person or persons, whether such person or persons [573] shall be a member or members of the company or not, shall be instituted and carried on in the name of the chairman, or of one of the directors as the nominal Plaintiff. This clause afforded every facility for obtaining full relief. But the Plaintiffs have chosen, neither to adopt the course prescribed by the act of parliament, nor to comply with the general rules of the court by making all the shareholders parties.

Mr. *Horne*, Mr. *Sugden*, Mr. *Lee*, and Mr. *Pemberton*, for the Bill.

The cases cited in the argument were,—*Chancey* v. *May* (*Prec. in Cha.* 592), *Good* v. *Blewitt* (13 *Ves.* 397), *Cockburn* v. *Thompson* (16 *Ves.* 321), *Blain* v. *Agar* (1 *Sim.* 37), *Gray* v. *Chaplin* (2 *Sim. & Stu.* 267, and 2 *Russell*, 126), *Van Sandau* v. *Moore* (1 *Russell*, 441).

[574] The *Lord Chancellor* [Lyndhurst]. Upon the face of the bill I cannot help considering the transactions stated in it to be fraudulent. Sir *William Congreve* entered into a negotiation with *Flattery* for the purchase of the property in question at the price of £10,000 for a joint stock company of which he was to be a member and director. After the treaty was begun, the two *Clarkes* associated themselves with Sir *William Congreve* in the scheme; and the negotiation with *Flattery* went on. The object was, the purchase of the *Arigna* mines, in order that they might be conveyed to a company by whom they were to be worked; and the company was to consist, not of *Congreve* and the *Clarkes* alone, but of a considerable body of shareholders.

It appears that, in the course of these negotiations, *Congreve* and the *Clarkes* became desirous of making a profit out of the original transaction for the purchase of *Flattery's* interest in the mines. The first plan, which occurred to them, was, that a conveyance for the sum of £10,000 should be made to persons nominated by them, who were afterwards to convey to the company for £25,000. If such a transaction had taken place, and the particulars had been concealed from the company, it could not have been sustained; for, considering the situation in which *Congreve* and the *Clarkes* stood with reference to the company, it would have been incumbent on them to have communicated the real price at which the mines had been purchased of *Flattery*. This objection seems to have occurred to them; and, accordingly, another shape was given to the proceedings. The plan now adopted was this,—that a conveyance should be executed directly from *Flattery* to trustees for the company; and although *Flattery* had agreed to convey the property for £10,000, that in this conveyance it should [575] be stated that the purchase-money

was £25,000, in order that the difference might be put into the pockets of Sir *William Congreve* and the two *Clarkes*, and some other individuals whom they might choose to nominate. Such a transaction is so incorrect, that it is quite impossible that any court of justice could permit it to stand: and if, after the conveyance had been so made, reciting that the price paid to *Flattery* was £25,000, a company of shareholders was formed, who acted upon that representation, they could, in justice, be chargeable only with the money actually paid to *Flattery*; and if a larger sum was taken out of their funds, they would be entitled to call on the individuals, into whose hands it came, to refund it. In substance, therefore, the plaintiffs are entitled to relief.

The only other question is, Whether, in point of form, there is any objection to this bill?

The suit is instituted by certain shareholders on behalf of themselves, and all others who may choose to come in and take the benefit of the suit. It has been argued, that the case comes within the clause of the act of parliament. I doubt whether the terms of the clause are sufficient to comprehend it; and the spirit of the act does not extend to transactions such as are in question here. That clause was introduced, in order that, where the company was concerned on one side, and individuals contracting with it, being, perhaps at the same time members, were concerned on the other, suits might be carried on, without being impeded by the objections which would otherwise have arisen.

Here is a fund in which all the shareholders are interested; £15,000 has been improperly taken out of it: a fraud has been committed on them all. Is it necessary [576] that all should come into a court of justice, for the purpose of joining in a suit with a view to obtain redress? It is possible that the number of shareholders may be six thousand, for the capital of the company is fixed by the act of parliament at £300,000, divided into shares of £50 each; and justice never could be obtained, if any very great number of Plaintiffs were put on the record.

It is said that there is nothing on the face of the bill which shews that the shareholders are so numerous, that they could not all be joined as parties without inconvenience. I think it does appear sufficiently, that, if all were joined, the number of complainants would be inconveniently great; first, because the shares are six thousand in number, and, secondly, because it appears by the act of parliament that there were then upwards of two hundred shareholders. It is clear, therefore, that justice would be unattainable, if all the shareholders were required to be parties to the suit.

It is said, each shareholder might file a bill to recover his proportion of the money. Such a course would produce enormous inconvenience. Are two hundred bills to be filed, in order to do justice in this matter? If justice can be done in one suit, the Court will sustain such a proceeding; for to require all the shareholders to be parties, or to leave each shareholder to file a separate bill to redress his own wrong, would, in substance, be a denial of justice.

In the present case, it appears to me that justice may be done in one suit. All the shareholders stand in the same situation; the property has been taken out of their common fund; they are entitled to have that property brought back again for the benefit of the concern. When all parties stand in the same situation, and have [577] one common right, and one common interest, in what respect can it be inconvenient that two, or three, or more, should sue in their own names for the benefit of all?

It is said that the prayer of the bill is incompatible with this form of proceeding; for it asks that the transaction may be declared fraudulent, and that the Defendants may be ordered to pay the £15,000, with interest, to the bankers of the company, on the account and for the use of the company. Whether, ultimately, the decree will be in that precise form, is not now the question. The Court may think it right to direct the money to be repaid with interest; or it may direct inquiries; and it is not improbable that the money may be ordered to be brought back into the general funds of the society. But, whatever may be the particular form of relief, which may ultimately be given, there is no doubt that, if, at the hearing, it appears that this £15,000 was obtained by fraud, the Court will make a decree, the

effect of which will be to compel those, who were parties to the transaction, to refund the money to those to whom it rightfully belongs.

Demurrer overruled.

(1) " And be it enacted, that all actions, suits, and proceedings, whether at law or in equity, or otherwise, to be commenced, instituted, and prosecuted or carried on by or on behalf of the said company, against any person or persons, body or bodies politic or corporate, whether such person or persons, body or bodies politic or corporate, is or are or shall then be a member or members of the said company or not, shall and lawfully may be commenced, instituted, and prosecuted or carried on in the name of the person who shall be for the time being the chairman of the directors of the said company, or in the name of any one director for the time being of the said company, as the nominal plaintiff or party proceeding for and on behalf of the said company ; and that all actions, suits, and proceedings, whether at law or in equity, or otherwise, to be commenced, instituted, and prosecuted or carried on against the said company by or on behalf of any person or persons, body or bodies politic or corporate, whether such person or persons, body or bodies politic or corporate, is or are or shall then be a member or members of the said company or not, shall and lawfully may be commenced, instituted, and prosecuted or carried on against the person who shall be for the time being such chairman, or against any one director for the time being of the said company, as the nominal defendant or party proceeded against for and on behalf of the said company ; and that all prosecutions to be commenced, instituted, or carried on by or in behalf of the said company, against any person or persons, for embezzlement, robbery, or stealing of the monies, goods, effects, or property of the said company, or for fraud upon or against the said company, or for any other crime or offence committed against or with intent to injure or defraud the said company, shall and lawfully may be so commenced or instituted and carried on in the name of such chairman, or any such director for the time being of the said company : " &c.

[578] GARDNER *v.* ROWE. *May* 19, 1828.

An attachment is irregular, if it is sealed and delivered out by the sealer before, though it is not parted with till after, the requisite affidavit is filed.

This was a motion to discharge an attachment for irregularity, on the ground that it had issued before an affidavit was filed.

On the 22d of *August*, a *subpœna* for costs was served on the Plaintiff *Collins*, and the amount demanded from him. He paid the amount to his own solicitor, who took upon himself to pay it into the hands of the under sheriff of *Middlesex*, though no attachment had then issued. On the 4th of *September*, an attachment was bespoken, and an affidavit of the service of the *subpœna* was left with the clerk in court. He did not file the affidavit till the 6th of *October*, and did not deliver out the attachment till the 7th of *October*. It had been sealed upon the 3d of that month.

Mr. *Agar*, in support of the motion. The general order of the 23d of *January* 1629 (*Beames' Orders*, 57), provides, " that neither the six clerks, nor any of the cursitors, nor the registrar of the court, their clerks or deputies, do make, pass, or enter any orders for attachments, commissions of *dedimus potestatem*, or other commissions, writs, processes, or proceedings, grounded upon an affidavit, unless the said affidavit be first filed and registered in the affidavit office as aforesaid." That order was confirmed and enforced by the general order of the 28th of *February* 1632 (*Beames' Orders*, 62); and another order of the 20th of *May* 1659 (*Beames' Orders*, 142), says, " neither shall any process [579] of contempt issue, before such affidavit be duly filed with the said register of affidavits, whereby recourse may be had to the same as occasion may require." The order of the 15th of *November* 1660 (*Beames' Orders*, 147), is to the same effect. In *Broomhead* v. *Smith* (8 *Ves.* 357), which occurred in 1803, it was suggested that these orders had fallen into disuse, and that for many years it had been considered to be the established practice, that the process was regular, if the affidavit was left with the clerk in court, and filed at any time before the return of the writ. A practice,