

*His Honour* : You contend that demanding a penalty shows an election to forfeit ?

*Mr. Haggitt* : Yes, and certainly that suing for it does !

*His Honour* : Well, does it ? Supposing they sue for a penalty, and the penalty is recovered and paid, then there is no forfeiture.

*Mr. Haggitt* : That is so ! But the Act provides : “ If such rent and penalty be not paid within one month after such rent become due ”—and more than a month has elapsed—“ the said Board shall,” &c. So that they have the option either to follow section 187 or section 188 ; and my contention is that if they follow section 188 they are bound to forfeit if the rent and penalties are not paid within three months.

*His Honour* : Yes ; I see the point.

*Mr. Chapman* : Well, I was saying the penalties were accruing from day to day. There is among those admitted in the allegations of the statement of claim one that there was due for rent £190, for penalties at £1 per day, £80, and for rabbiting, and in addition there were still penalties accruing from day to day. That is admitted in the statement of defence ; and my learned friend has added the fact not proved, and which is a fact, that judgment has been entered up for this amount—I believe, for the £80. Probably Mr. Scott confessed—I suppose he confessed judgment for whatever he was sued for. However, a matter of this kind is more conveniently discussed upon settling the minutes of the decree than upon argument now. I have never gone minutely into that question, or satisfied myself whether my learned friend is right about it. Curiously enough it is to be added to the amount of rent recovered, apparently, in some way ; and it looks rather odd to go to Justices to fix the penalty, and to recover the rent before another Court having sole jurisdiction. There are difficulties in the way of construing the section from any point of view.

*His Honour* : Of course, it has to be ascertained first. That is the only thing quite clear about the Act—that it must be ascertained by a Court.

*Mr. Chapman* : It must be if your Honour attaches any importance to the words “ not more than.”

*His Honour* : I suppose they mean what they say. What might be a reasonable penalty in one case might be unreasonable in another.

*Mr. Chapman* : That is a matter for after consideration. What we ask for mainly is a decree respecting the sums referred to. My learned friend is raising a difficulty which is quite unnecessary as to which of the defendants the decree should be against. Your Honour sees why these parties were all made defendants. It was necessary from a pleader's point of view. Under an implied obligation, Mr. Ritchie clearly proved the company liable ; but if Mr. Ritchie's statement was accepted that he made the arrangement, he would be liable, and, in so far as an express promise has been given, that would give rise to a different kind of action, and Mr. Henderson or the company or both would be liable under that ; but in reality there is no question about this : that if any one is liable the company is liable. The defendants themselves have taken care to make that perfectly clear—if any one is liable the company is liable, and nothing can be gained substantially by throwing out these other gentlemen, which would only affect a trifling question of costs. Now, inasmuch as they have joined in one defence—joined in employing solicitors and counsel—there could be no question of costs arise, and if they did they would be entitled to recover those costs, not against Mr. Scott, but against the company ; or, if they received an order for costs against Scott, Mr. Scott would be permitted to include it in the claim against the company. Nothing can be clearer than this, after the evidence of Messrs. Ritchie and Henderson : that in any point of view if they are rendered liable they are entitled to indemnity against the company, because they were acting as they believed in the best interests of the company ; indeed, on the question of morality, about which your Honour was enlightened—on the question of morality, the only complaint a moralist would be likely to make would be that their sense of duty to the company had dulled their sense of morality. These points are of no importance, inasmuch as my learned friend admits that if there was a promise to bear the liability, once the liability has arisen, we are entitled to ask for immediate payment, and payment to us ; but we have offered by the prayer to be satisfied with payment to the Crown ; so that my learned friend need not make himself uneasy about that. Then, if it were necessary for us to rely upon it, the Court would have no difficulty in saying that “ I will see you through it ” means “ I will bear your burdens ”—all those burdens such as might have been contemplated, and reasonably were contemplated, at the time. As to the other matters touched upon, I have little to say. Your Honour pointed out to my friend Mr. Haggitt that the early incubus of a fine was one of the things that the parties actually seem to have contemplated as likely to occur within the six months. They all knew that Scott would be liable to that ; and the burden of Mr. Ritchie's evidence, and the burden of Mr. Henderson's evidence, is—and it also comes out in Mr. Scott's evidence—that this liability in respect of the rabbits was the thing principally talked about. Mr. Henderson says that the rent was not mentioned, and apparently, so far as he was concerned, was not thought of, because he never heard or dreamt of a man failing to escape without paying rent when he really tried to. Now, your Honour has been asked to contrast Mr. Scott's story and the story of Messrs. Ritchie and Henderson. All I can say is that I again repeat this : that Mr. Scott has told a consistent story, and he has told a story consistent with the documents throughout, and that these gentlemen are working up-stream against their own documents. So in connection with the question raised now as to whether Mr. Scott could have stuck to this lease after six months if it had become profitable. Supposing, your Honour, Mr. Scott had gone as Mr. Henderson suggested, and had succeeded in selling this lease to Mr. Preston, and had netted a profit of £200 or £300, could it be said for a moment that he could have stuck to that profit, after he had gone upon a suggestion emanating from Mr. Henderson for the purpose of earning a commission on the sale ? On the other hand, where is our difficulty ? My learned friend says we must show this with great clearness, and cites “ Lewin on Trusts.” Where is the want of clearness, in face of the fact that Mr. Martin actually tried to sell what they say was Scott's run—that he actually assumed the