Saturday, June 19th.

EVERETT and Others *v.* EYRE, Gent. one, &c.

The plaintiffs, being treasurers and share-holders of the *Stone Pipe Company*,

THIS was an action of debt, and brought by the plaintiffs, bankers in *London*, against the defendant, an attorney, who were indebted to them in a large sum, and also treasurers and shareholders of a *Spring Water Company*, on which only 30*l. per* share had been paid, sold to the latter Company pipes of the former to a considerable amount; and to effect the payment, entered up in their books as paid, the remaining 70*l. per cent.* on the shares of the latter, and afterwards transferred to their own account a sufficient sum to discharge their own debt with the former Company, and afterwards sold certain shares in the latter Company, and took a bond in which the defendant was a surety, for securing the payment of the amount, reciting that 30*l. per cent.* had been already paid, and that the plaintiffs had agreed to pay up and complete the remaining instalments *forthwith*," the condition being for payment of the amount of the shares, together with the interest thereon from the time of the advance or payment thereof by the plaintiffs:—Held, that it was properly left to the jury to say, whether the remaining instalments had been in any way paid or satisfied; the bond itself shewing that the plaintiffs were under an engagement to pay such instalments forthwith.

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ney of this Court, to recover the sum of 2200*l.* and interest upon a joint and several bond entered into by him and Mr. *George Bolton Mainwaring* to the plaintiffs, dated the 10th *September*, 1814, in the penal sum of 4400*l.* The plaintiffs declared on the bond, and assigned for breach, non-payment of the above sum of 2200*l.* by the defendant or *Mainwaring*.

The defendant craved oyer of the condition, which recited that the plaintiffs were possessed of, or interested in, sixty-six shares of 100*l.* each, in the capital stock agreed to be raised for carrying on an undertaking for supplying the cities of *London* and *Westminster* and their environs with spring water; upon which several shares, the sum of 20*l. per cent.* deposit had then been paid; and that the plaintiffs had agreed *forthwith* to pay up and complete the remaining instalments thereon:—and that *George Bolton Mainwaring*, together with *Henry Wright* and *Samuel Hill*, had agreed with the plaintiffs for the purchase of the several shares above mentioned, in the said undertaking, at the price or sum of 6600*l.*, which sum was to be secured to be paid to the plaintiffs within the space of four years, to be computed from the 1st *June*, 1814, together with legal interest for all monies which should have been advanced or paid by the plaintiffs in respect of such shares, from the respective times at which the same should have been respectively advanced or paid; and the above sum of 6600*l.* and interest, was to be secured by the several bonds of the said respective parties with a competent surety; and also, that it had been agreed by and between *Mainwaring*, *Wright* and *Hill*, and the plaintiffs, that twenty-two of the said shares should be and become the individual property of *Mainwaring;* and that the sum of 2200*l.* being the purchase money thereof, with interest, should be secured by the joint bond of *Mainwaring* and the defendant:—The condition of the bond was, that if *Mainwaring* or the defendant, or either of them, their or

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either of their heirs, executors, or administrators, should and would well and truly pay or cause to be paid to the plaintiffs, their executors, &c. the full sum of 2200*l.* on the 1st *June*, 1818, together with lawful interest in the mean time upon the 2200*l.*, from the time of the advance or payment thereof by the plaintiffs, such interest to be paid and payable half-yearly, on the 1st of *June* and 1st of *December* in every year;—then the bond was to be void.

The defendant pleaded, *first, non est factum. Secondly* and *Thirdly*, that the bond was delivered as an escrow on certain conditions. *Fourthly*, performance of the condition by *Mainwaring*, by payment of the sum of 2200*l.* with interest. *Fifthly*, that the defendant and *Mainwaring* paid 20*l. per cent.* deposit on the shares, and that the plaintiffs did not pay or advance any further sum for the remaining instalments. *Sixthly*, that the sum of 2200*l.* in the condition mentioned, was not, nor was any part thereof ever advanced or paid by the plaintiffs or either of them for instalments, or otherwise, in respect of the supposed shares in the condition mentioned. And *Seventhly* and *Lastly*, that the bond was void under the statute 6 *Geo.* 1, c. 18, ss. 18 & 19.—The plaintiffs took issue on all these pleas, and replied to the sixth, that the said sum of 2200*l.* was on the 1st *October*, 1814, and on divers other days afterwards, advanced and paid by them for instalments in respect of the shares in the condition mentioned, and on which issue was also joined.

At the trial, before Mr. Justice *Burrough* at *Guildhall*, at the adjourned sittings after the last *Hilary* Term, it appeared that the plaintiffs were bankers in *London*, and constituting the firm of Messrs. *Everett, Walker & Co.*, and that they were also interested as share-holders in a company called the *Stone Pipe Company*, to which they were bankers and treasurers; that, as such, they had made considerable advances to that company, which remained unliquidated, to the amount of 16,000*l.*, that the

purposes for which that company was established turning out to be wholly unproductive and abortive, the plaintiffs joined another company, intended to be formed for the purpose of supplying the cities of *London* and *Westminster*, and their environs, with spring water, and to be called the *Bayswater Spring Water Company*, and in which the pipes belonging to the *Stone Pipe Company* were to be employed, and the plaintiffs were also the treasurers to the *Bayswater Company*, and possessed sixty-six shares of 100*l.* each, which they afterwards sold out to different individuals, and for twenty-two of which *George Bolton Mainwaring* agreed to become a purchaser for the sum of 2200*l.*, to be paid to the plaintiffs in four years, and on which the bond in question was executed by him and the defendant as his surety.—Both these companies eventually failed; but long previously thereto, the plaintiffs, who had not then paid up on regular calls on account of the *Bayswater Company*, more than 30*l.* on each share they held, *viz.* 20*l.* before the execution of the bond, and 10*l.* about a month afterwards, prevailed on the *Spring Water Company* to purchase the pipes of the *Stone Pipe Company*, and which they accordingly did, to the amount of 23,824*l.* The plaintiffs in order to pay for these pipes in part, without any calls having been actually made on them, entered up in their books as paid, the remaining 70*l. per cent.* due on the *Spring Water Company's* shares, which originally belonged to them, and having made this entry, they proceeded to pay the *Stone Pipe Company*, deducting and transferring to their own account a sum sufficient to discharge the debt due from the *Stone Pipe Company* to them. *Mainwaring* not having paid for his twenty-two shares so purchased from the plaintiffs, and having left the country, the plaintiffs commenced this action against the defendant as his surety on the bond.—It was contended for him, that both these companies were mere speculative or fraudulent contrivances, and within the spirit and operation

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of the statute 6 *Geo.* 1, c. 18, (commonly called the bubble act), and that the plaintiffs had not in reality paid up more than 30*l.* upon each of their shares, and to which extent only the defendant could be considered as liable. But the plaintiffs having proved by their book-keeper and clerk, that the charge of 70*l. per cent.* had actually been entered in their books to the account of the company, after the execution of the bond, although it was admitted that none of the other shareholders had paid more than 30*l. per cent.* and no evidence having been offered by the defendant in support of any plea but the sixth, and the seventh and last having been abandoned, the learned Judge told the Jury, that he considered it to be an extremely plain case, and almost amounting to an undefended cause; and having stated to them the recitals and condition of the bond, and that the defendants had offered no evidence to rebut the testimony of the plaintiffs' two witnesses, the only question was, as to whether the remaining instalments of 70*l.* on each of the shares sold to *Mainwaring*, had been in any way paid or satisfied by the plaintiffs according to the terms of the bond; and as he intimated a strong opinion that they had, the Jury accordingly found a verdict for the plaintiffs, damages 3284*l.*, being the amount of the principal and interest secured by the bond.

Mr. Serjeant *Pell*, having in the last Term obtained a rule *nisi* that this verdict might be set aside and a new trial granted, or that the damages might be reduced 70*l. per cent.*, on the ground that it was not sufficiently left to the Jury, whether the plaintiffs had actually made such payments or not, or in what respect they were made—

Mr. Serjeant *Vaughan* was now about to shew cause, when the Court called on Mr. Serjeant *Pell*, (and Mr. Serjeant *Cross* was with him), to support the rule.

They submitted, that the only question was, whether

the instalments amounting to 70*l. per cent.* had been *bond fide* paid by the plaintiffs or not, or whether the entry made in their books was a mere pretence to enable them to secure their own debt due to them from the *Stone Pipe Company;* and if these instalments had not been actually paid, it is quite clear that the plaintiffs could not call on the defendant on the bond; and more particularly so, as he merely stood in the situation of surety for *Mainwaring.* The evidence was imperfect and mutilated, and by no means satisfactory or conclusive to shew, that any monies were actually advanced by the plaintiffs in respect of the instalments in question, subsequently to the execution of the bond. The books of the *Stone Pipe Company* were not produced, to which the plaintiffs were treasurers, as well as to the *Spring Water Company;* and they should have expressly shewn that the sum in question was actually paid in respect of the instalments; and more particularly so, as none of the other share-holders had been called on to pay more than 30*l. per cent.*, nor were the plaintiffs ever actually called on beyond that amount, but they merely made an entry in their books charging 70*l. per cent.* to the account of the concern. That did not constitute a payment in respect of the instalments within the terms of the sixth plea, and on which the plaintiffs took issue; and at all events, it should have been left to the Jury to say, whether it amounted to such payment or not, and they would then have exercised their discretion accordingly; but as the learned Judge who tried the cause intimated so strong an opinion, they were bound to find a verdict for the plaintiffs. On these grounds, the defendant is entitled to have the damages found by the Jury reduced as prayed for.

Lord Chief Justice BEST.—I am of opinion that this case was most properly left to the Jury, and that the learned Judge who tried it, was warranted in saying, that it was so plain a case that it almost amounted to an unde-

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fended cause. Although the facts might at first sight appear intricate and complicated, yet there can be no doubt when the bond and pleadings are looked at. The real question was short and simple, and all the evidence was in favour of the plaintiffs. The action was brought on a bond, the condition of which recited, that 20*l. per cent.* had already been paid upon certain shares in the *Spring Water Company* of which the plaintiffs were possessed, and that they *had agreed* to pay up and complete the *remaining* instalments *forthwith;* and although it has been said, that there was no time specified at which these instalments were to be paid, yet the plain and obvious meaning of the parties was, that they should be paid as soon as possible. This therefore appears to me to be a complete answer to the objection, that the instalments were never called for. It was also recited, that *Mainwaring*, *Wright*, and *Hill*, had agreed to purchase these shares for the sum of 6600*l.*, to be secured to be paid to the plaintiffs within four years from the 1st of *June*, 1814, together with interest for all monies which should have been advanced by them in respect of such shares, from the time they should be advanced; and the condition itself was, that if *Mainwaring* or the defendant should on the 1st *June*, 1818, pay the plaintiffs the sum of 2200*l.* together with interest in the mean time upon that sum from the time of the advance or payment thereof by the plaintiffs, such interest to be paid half-yearly, the bond was to be void. Surely, therefore, it was for the interest of *Mainwaring* and the defendant, that the plaintiffs should not wait till called on, but that they should pay the remaining instalments forthwith, according to their agreement, and thereby prevent the accumulation of interest, which was to be computed from a specified day, and not when the instalments were to be paid or completed.—The material question then arises on the sixth plea, which states that the sum of 2200*l.* was never advanced by the plaintiffs, or either of them, for instalments *or otherwise* in respect of the supposed shares in the con-

dition of the bond mentioned. On this the plaintiffs have taken issue in their replication, alleging, that the said sum of 2200*l.* was advanced, and paid by them for instalments, in respect of these shares. The only question therefore the Jury had to try was, whether that sum had been paid or not; and it was proved by the plaintiffs' clerk and book-keeper, that the whole had been actually paid, and the defendant had no evidence whatever to meet or rebut that statement, but their testimony remained wholly uncontradicted; and if that be so, the verdict is according to the only evidence in the cause.—The defendant, however, considers, that it is a great hardship to call on him for the payment of this sum, as he was merely a surety for another, who has turned out to be unworthy of confidence. Still, however, the person who confides on the honour or character of his principal must suffer, and not the party who has no knowledge of him, and who therefore calls upon him for a further security. The only thing that perplexed me at first was, that the plaintiffs were concerned for two companies. As to the *Stone Pipe Company*, although it turned out to be an unfortunate concern, yet it will not affect this question. There appears to have been no fraud whatever in the formation of either of the companies; and even assuming it to have been so, the only question is, whether the sum in question has been paid by the plaintiffs for the instalments on their shares, according to their undertaking. If it has been, it is immaterial from whence it came; and I am therefore of opinion that the plaintiffs are entitled to retain their verdict.

Mr. Justice PARK.—It has been said, that the question in this case was not properly left to the Jury; but I am of opinion that it was, and that my brother *Burrough* was fully warranted in expressing the opinion he did, and that the Jury found their verdict according to the evidence before them. The only issue they had to try was, whether the

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plaintiffs had paid the sum of 2200*l.* in respect of the instalments in question. Although it has been said that no call was made on them for the instalments, yet it must be inferred that they were paid, as, by the terms of the bond, it appears that the plaintiffs had agreed to pay them up and complete them *forthwith;* and it was also admitted by that instrument, that 20*l. per cent.* had been previously paid on the shares in question; and as it was proved at the trial, and not contradicted, that the whole of the instalments had been actually paid by the plaintiffs; although the facts of the case might appear at first sight to be perplexing and complicated, yet, on looking at the condition of the bond and issue raised on the sixth plea, and the evidence adduced by the plaintiffs in its support, I am quite clear that the law must take its course, and that there is no ground for disturbing the verdict found for the plaintiffs at the trial.

Mr. Justice BURROUGH declined giving any opinion.

Rule discharged.