

Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Smallbones v. Edney and Lunn, from the Arches Court of Canterbury; delivered the 10th day of December, 1870.

Present :

SIR JAMES W. COLVILLE.
LORD JUSTICE JAMES.
LORD JUSTICE MELLISH.

THIS is an Appeal from the Judgment of the Court of Arches in a suit brought by the Churchwardens of the Parish Church of Whitchurch, for subtraction of an alleged rate made under the 5th Geo. IV, c. 36, s. 1, against James Smallbones, the Appellant, by which the Appellant was ordered to pay his assessment to the rate and the costs of suit. It appeared that, in 1867, the sum of 2,000*l.* was borrowed from the Commissioners authorized to make advances for Public Works, under the Provisions of the Act for the purpose of repairing and enlarging the Parish Church of Whitchurch, and that on the 7th February, 1868, the Churchwardens and Overseers of the Parish of Whitchurch, made a rate of sixpence in the pound upon the inhabitants and parishioners of the Parish of Whitchurch for the purpose of paying the annual instalment, and the interest of the said sum of 2000*l.*, which became due to the Commissioners on the 18th of March. The Appellant occupied a house in the parish, and was rated at the sum of 5*s.* 6*d.* The defence to the suit was, that Melville Portal, Esq., the owner of a tithe rent charge of the rateable value of 1,189*l.* arising out of lands in the parish, was not assessed to the rate in respect of such tithe rent charge, and it was

admitted that if he ought to have been so assessed the rate was bad, and that the Appellant would be entitled to succeed. The question therefore is, whether according to the true construction of the 5th Geo. IV, c. 36, the owner of a tithe rent charge in a parish is liable to be assessed to the rates made for the repayment of money borrowed under the provisions of the Act? The first and second sections of the Act are as follows:—

By the 5th George IV, c. 36, sec. 1, it is enacted that "From and after the passing of this Act it shall and may be lawful for the Churchwardens or Chapelwardens and Overseers of the Poor of any parish in England or Wales, with the consent of the major part of the inhabitants and occupiers assessed to the relief of the poor, in vestry assembled, and with the consent of the bishop of the diocese, and the Incumbent of such parish, to make application to the Commissioners authorized and empowered to make advances for public works under the provisions of the said recited Acts, for any loan or advance under the powers, authorities, provisions, and regulations of the said Acts, and this Act, for such sum or sums in Exchequer bills or money, as shall be necessary for defraying the expense, or any part of the expense, of rebuilding, repairing, enlarging, or otherwise extending the accommodation in any church or chapel of any such parish. And if such Commissioners shall think fit to entertain such application, and shall be satisfied that such consent as required by this Act has been given and obtained, it shall and may be lawful for such Commissioners, and they are hereby authorized and empowered to make and grant any such loan or advance for the purposes aforesaid, in such manner as such Commissioners are empowered to make any loan or advance under the authority of the said recited Acts or any of them; and it shall be lawful for such Churchwardens or Chapelwardens, together with the Overseers of the Poor, of or for any such parish with respect to which such application shall be made and granted, to receive the sum or sums so advanced, and to apply the same for the purposes mentioned in such application; and from and after the grant of any such loan or advance, it shall be lawful for the Churchwardens or Chapelwardens, and Overseers of the Poor of the parish in respect of which such loan or loans shall be advanced as aforesaid, and their successors from time to time for the time being, and they are hereby authorized and required to make such annual or half-yearly rates for the repayment of the sums so advanced, in such proportions and at such times as shall be directed and appointed by the said Commissioners on that behalf, and to assign the rates so to be made as aforesaid as a security for repayment of the sums so advanced, in such manner and form as the said Commissioners shall direct and appoint, and so as to secure the repayment of all sums so advanced, with interest thereon, at and after the rate of 4l. per centum per annum, by annual or half-yearly instalments, on the amount of the principal money advanced, within the period of twenty years at the farthest from the advancing of any such sums respectively."

And by sec. 2 of the said Act it is enacted "That it shall be

lawful for any Churchwarden or Chapelwarden, or Overseer in any parish in which any rates shall be made under the provisions of this Act, to collect, demand, and receive, sue for, levy, and recover all such rates, by all such ways and means as any Church Rates may by law be collected, demanded, received, sued for, levied, and recovered, as fully and effectually as if all power, authorities, provisions, penalties, and forfeitures relating to the collecting, demanding, suing for, levying, receiving, and recovering of any Church Rates, or relating to any refusal to pay any like rates were specially repeated and enacted in this Act, any law, statute, usage, or custom to the contrary notwithstanding."

The learned Judge in the Court below has held that though the Act does not specify the property on which the rate is to be levied, yet it is to be implied, that it is only to be levied on those on whom a church rate is to be levied, and that as the owner of a tithe rent charge was not liable to be rated to an ordinary Church Rate, he was not liable to be rated to a rate made under the Act. The Act, however, nowhere describes the rates as Church Rates. On the contrary, it expressly distinguishes between the rates made under the provisions of the Act and Church Rates, and, although their Lordships agree, there are strong reasons for holding that every person liable to be assessed to a Church Rate is also liable to be assessed to a rate under the Act, because every such person is benefited by money being borrowed for the repair or building of the church, yet it does not follow that every person who is exempted from liability to a Church Rate is also to be exempted from a liability to pay a rate under the Act, unless the reason for his exemption is equally applicable. Now a tithe owner is exempted from an ordinary Church Rate for the repair of the body of a church because he is under a particular liability to repair the chancel. He is not less liable, but more liable than the owners of other property in the parish to repair the church, being under a personal liability to repair a particular part of it. He is therefore not less benefited, but more benefited than the owners of other property in the parish by money being borrowed under the Act for the repairing, rebuilding, or enlarging the whole church including the chancel, and in this very case it is admitted that the money borrowed was expended in rebuilding the chancel as well as the rest of the church. Moreover, the owner of a tithe rent charge, being an occupier of property assessed to the relief

of the poor, is by the express words of the statute entitled to be present and to vote in the vestry on the question whether the money should be borrowed; and it would be strange if a person who, in respect of particular property, is entitled to vote on the question whether the money should be borrowed, and being in fact one of the borrowers, should not also be liable to be rated in respect of the same property to the rates made for the repayment of the money. It is indeed true that, in the case of an ordinary Church Rate also, a tithe owner is entitled to be present and to vote in the vestry which imposes the rate, and, nevertheless, is not assessed to it; but, then, the money raised by an ordinary Church Rate cannot be expended in the repair of the chancel, and the tithe owner by the ancient custom of the realm is to be considered as having compounded for his liability to contribute to the Church Rate by having taken upon himself the exclusive liability to repair the chancel.

On the whole, their Lordships are of opinion that the owner of a tithe rent charge being the occupier of property in the parish in respect of which he is entitled to vote upon the question whether money should be borrowed under the Act, and receiving as much or more benefit from the money being borrowed as the owners of other property in the parish, ought to be held liable to be rated to the rates made under the Act; and they will accordingly advise Her Majesty that the Judgment of the Court of Arches ought to be reversed, and that Judgment should be entered for the present Appellant with costs in the Court below, and the costs of this appeal.

