1833.

SMITH v. WHITTINGHAM.

he saw the account, it is clear that the account cannot be relied on as a correct statement of what was received after the date of the bond, as it is in proof that one sum mentioned in it was received before; and that being so, an express promise to pay the sums mentioned in the account would be inoperative, unless the sums received after the date of the bond could be distinguished from those received before.

Verdict for the plaintiff—Damages 4*l.* 9*s.* 6*d.* with leave for the plaintiff's counsel to move to increase the amount of the verdict (*a*).

Bompas, Serjt., and ***Ball***, for the plaintiff.

Wightman, and ***Cowling***, for the defendant.

[Atornies—*Towne*, and *Adlington & Co.*]

(*a*) No motion was made.

OLD BAILEY JULY SESSION, 1833.

BEFORE MR. JUSTICE GASELEE, MR. JUSTICE J. PARKE, AND MR. RECORDER LAW.

REX *v.* FURSEY. *July 4th.*

INDICTMENT on the stat. 9 Geo. 4, c. 31, s. 12.— The first count charged that the prisoner did stab and

A riot is not the less a riot, nor is an illegal meeting the less an illegal meeting, because the proclamation from the Riot Act has not been read, the effect of that proclamation being to make the parties guilty of a capital offence if they do not disperse within an hour; but, if that proclamation be not read, the parties are guilty of the common law offence, which is a misdemeanor, and all magistrates, constables, and even private individuals, are justified in dispersing the offenders; and, if they cannot otherwise succeed in doing so, they may use force. Without any proclamation at all, if a meeting is illegal, a party who attends it, knowing it to be so, is guilty of an offence.

A meeting called "to adopt preparatory measures for holding a national convention," is an illegal meeting.

A. was indicted for stabbing B., there being another indictment against him for stabbing C.:—*Held*, that, on the trial of the indictment for stabbing B., both C. and the surgeon might be asked as to what kind of wound C. received, with a view of identifying the instrument used.

1833.

REX v. FURSEY.

wound John Brooke, with intent to disable him. The second count charged the stabbing and wounding of John Brooke, to be with intent to do him some grievous bodily harm. The third count charged that the prisoner did stab and wound John Brooke, he, the said John Brooke, being a constable duly appointed and sworn to act as a constable, under and by virtue of an act of parliament, passed in 10 Geo. 4, (The Metropolitan Police Act), with intent to resist and prevent the lawful apprehension and detainer of him, the said George Fursey, for an offence for which he was liable to be apprehended and detained; that is to say, for that he, together with divers other persons, to wit, five hundred other persons, to the jurors unknown, were tumultuously assembled, making a great tumult, riot, and affray, in the view of the said John Brooke, then and there being such constable as aforesaid.

The fourth count was similar to the third, except that it omitted to state that John Brooke was a constable, and that the riot, &c., was committed in his view.

The fifth count charged that the prisoner stabbed and wounded John Brooke, with intent to resist and prevent the lawful apprehension and detainer of the said George Fursey, for an offence for which he was then and there liable to be apprehended and detained.

The prosecutor, Brooke, was a sergeant of the Metropolitan police force: and, on the 13th of May, 1833, was with a very considerable number of the police at a vacant space of ground adjacent to the west side of the Cold Bath Fields Prison. It appeared that there was a meeting there, consisting of a number of persons, and that there were four flags. The prisoner carried an American flag, which a police constable, named Redwood, tried to take from him, when he stabbed both the prosecutor and Redwood with a sort of dagger with a triangular blade, similar to that of a court sword. It appeared, from the cross-examination of the witnesses for the prosecution, that many of the police constables were at the place in question in plain clothes.

1833.

REX v. FURSEY.

The counsel for the prosecution asked Redwood whether he had been wounded, and, having done so, proposed to ask what sort of a wound it was that he received.

C. Phillips, for the prisoner.—I must object to any evidence being given of a wound that this witness received, as that is the subject of another indictment. In the case of *Rex* v. *Smith* (*a*), the uttering of a second forged note was not allowed to be given in evidence, as it was the subject of a distinct indictment.

PARKE, J.—It is offered as evidence to identify the instrument.

GASELEE, J., (having conferred with Mr. Justice J. PARKE).—My brother PARKE and myself agree that it is evidence, so far as to identify the instrument; and we think that this is quite different from the case cited.

PARKE, J.—The evidence is merely given to identify the instrument.

The witness stated that the wound he received was of a triangular shape.

The dagger was produced; it was found in the place to which the prisoner was taken, as soon as he was apprehended.

Mr. Fisher, the superintendent surgeon to the Metropolitan police, stated, that the wound received by the prosecutor was of a triangular shape.

The counsel for the prosecution proposed to ask him as to the shape of the wound inflicted upon the witness Redwood.

C. Phillips objected.

(*a*) Ante, Vol. 2, p. 633.

1833.

REX v. FURSEY.

PARKE, J.—We decided this in effect just now.

Mr. Fisher stated, that both the wounds were triangular, and might have been inflicted by the instrument produced.

For the defence, it was stated by Mr. Stallwood, who had been a magistrate for the county of Middlesex, that a considerable number of the police constables behaved with considerable violence, striking every body they met with. He also stated, that there was no order given to the people to disperse, nor was the proclamation from the Riot Act read. In answer to questions put by *Campbell*, S. G., Mr. Stallwood stated that he saw a paper fixed up to the wall of Cold Bath Fields, cautioning persons not to attend an illegal meeting.

Campbell, S. G., was proceeding to examine into the contents of this caution.

C. Phillips.—As this was a printed paper the manuscript from which it was printed ought to be produced.

Campbell, S. G.—We cannot bring the wall of Cold Bath Fields here; and there is no proof that there ever was any manuscript.

C. Phillips.—The best evidence would be the original. It is suggested that this paper was published by the government, and that this is a government prosecution. If so, there can be no difficulty about it.

GASELEE, J.—In Mr. *Hunt's* case (*a*), parol evidence was given of the inscriptions on the banners.

(*a*) 3 B. & A. 566. In that case it was held, that parol evidence of inscriptions and devices on banners and flags, displayed at a meeting, is admissible, without producing the originals.

1833.

REX v. FURSEY.

Campbell, S. G.—This was affixed to a wall.

PARKE, J.—The usual way in such cases is to give a copy to the witness, and ask if it is a copy of what he saw. I do not say that parol evidence is inadmissible. The paper was affixed to a wall.

Campbell, S. G.—If my friends wish to have a copy put in, I will do so.

A printed copy of the paper was handed to the witness. It was to the following effect:

" Whereas printed papers have been posted up and distributed in various parts of the metropolis, advertizing that a public meeting will be held in Coldbath Fields on Monday next, May 13th, to adopt preparatory measures for holding a national convention, as the only means of obtaining and securing the rights of the people; and whereas a public meeting holden for such a purpose is dangerous to the public peace and illegal, all classes of his Majesty's subjects are hereby warned not to attend any such meeting, nor to take any part in the proceedings thereof; and notice is hereby given, that the civil authorities have strict orders to maintain and secure the public peace, and to apprehend any persons offending herein, that they may be dealt with according to law.

" *By Order of the Secretary of State.*"

It was further stated by Mr. Stallwood, that he did not consider this a proclamation, because it was not signed, and that therefore it was to be disregarded, and that he had never seen a proclamation published by the government without the name of some Secretary of State to it, or its being headed, " By the King in Council." This witness further stated, that he heard the chairman of the meeting say, that he (the chairman) was much obliged to the Whig government for advertizing their meeting, for it gave them an importance they did not possess.

1833.

REX v. FURSEY.

It was proved by other witnesses, that some of the police constables behaved with great violence; though none of them spoke to any violence used by the prosecutor or Redwood; and it was stated by one of the witnesses for the defence, Mr. Courtney, on his cross-examination, that he saw a death's head and cross bones on one of the flags, and the inscription—"Liberty or Death:" and it was also proved on the cross-examination of another of the witnesses for the defence, Mr. Carpenter, that he knew of the intended meeting before he went to the ground, as he had seen it stated to be the intention of the meeting to establish a national convention; that he had seen it stated in various publications, advertisements, and bills; and he further stated that it was notorious.

GASELEE, J., (in summing up.)—The question for you to consider will be, whether there was sufficient provocation to reduce the offence of the prisoner below the crime of murder, if death had ensued; and although it is not mentioned in the indictment, you are at liberty to inquire whether the meeting was an illegal meeting or not; for if it was, the police would be justified in taking away the flag; but if the meeting was not an illegal one, then they would have no right to take the flag away from the prisoner. Taking it that the meeting was a legal one, this question will arise, whether the taking away of the flag was a sufficient provocation to justify the prisoner in striking with such a deadly weapon; and it makes a great difference whether a man under provocation takes up a deadly weapon on the sudden, or whether he goes out with the weapon, intending to use it to prevent the taking away of the flag. It will be for you to say whether the conduct of the prisoner shewed that malignity of purpose which would, if death had ensued, have constituted the crime of murder. If you are of opinion, that he took this deadly weapon with an intention to resist, under all circumstances, the taking away of the flag, I feel justified in telling you, and

I believe that my learned brother will agree with me, that, if death had ensued, the crime of the prisoner would not have been less than the crime of murder; however, you ought also to consider, whether there was sufficient provocation before the blow was given, to reduce the offence, had death ensued, to the crime of manslaughter. A great deal has been said of the impropriety of sending out policemen in plain clothes. I own that it does not strike me that there is any impropriety in it; for those who have to prevent disturbances, would not do their duty, if they did not take every means of discovering the persons who were concerned in them. For, although it would be improper, as suggested on the part of the prisoner, if persons were sent out to lead others into the commission of offences; yet when the object is to prevent the commission of crime, parties would not do their duty, if they did not take every means of finding out the parties concerned, by sending those in among them who might be able to make the discovery.

On the part of the prisoner a great deal of evidence has been given to shew that the conduct of the policemen was very violent and very outrageous. You will have, therefore, to consider whether their conduct was a sufficient provocation to the prisoner to resist as he did, or whether, from the fact of his having taken the weapon out with him, there was that malignity of purpose which would have made the offence of the prisoner amount to murder, if death had ensued.

It appears, from the evidence of Mr. Stallwood, that the proclamation contained in the Riot Act was not read. Now, a riot is not the less a riot, nor an illegal meeting the less an illegal meeting, because the proclamation of the Riot Act has not been read, the effect of that proclamation being to make the parties guilty of a capital offence if they do not disperse within an hour; but, if that proclamation be not read, the common law offence remains, and it is a

1833.

REX v. FURSEY.

misdemeanor; and all magistrates, constables, and even private individuals, are justified in dispersing the offenders; and, if they cannot otherwise succeed in doing so, they may use force. I do not lay down this as the law, for the first time; the law has been so laid down by the Judges on the special commissions. There has also been given in evidence a proclamation issued by order of one of the Secretaries of State; and in that proclamation it is stated that printed papers have been posted up, advertizing that a public meeting would be held to adopt preparatory measures for holding a national convention. Now, that proclamation is not evidence that the meeting was to be held for the purposes there mentioned. It is, in effect, only a notice given by the Secretary of State, and is evidence in this case in no other way; but, if placards convening the meeting were posted up, stating that the meeting was for those purposes, then it is an illegal meeting. If it was intended by force to make any alterations in the laws of the country, that would be a much more serious offence, as it would be high treason. The proclamation states it to be an illegal meeting, and commands all constables and others to disperse it. If such a notice be given, and a party chooses to treat it as of no effect, he does it at his own risk.

Clarkson, for the prisoner.—The Solicitor-General did not offer any evidence to shew that this proclamation was issued by the Secretary of State.

GASELEE, J.—That is true; but, without any proclamation at all, if a meeting is illegal, a party who attends it, knowing it to be so, is guilty of an offence. There may be a difficulty in saying in what way this meeting was illegal, but it was either illegal as a misdemeanor or a higher offence; and, whichever it was, it justifies the dispersion of the meeting. One of the witnesses has stated that the purpose of the meeting was to adopt preparatory