aforethought, to kill and murder the said J. H., against the form of the statute," &c. The other counts varied the intent.

Huddleston, for the prisoner, before the case for the prosecution was opened, objected that the indictment was bad, for not averring, that at the time of attempting to discharge the pistol, it was loaded. The words " the said pistol " are words of reference merely, and not of description, and will not suffice without an averment that it was " so loaded as aforesaid "

Rolfe, B.—I think the indictment is sufficient, for it states, that, by pulling the trigger of a pistol loaded with powder and ball, the prisoner attempted to discharge the said pistol. That must mean, he attempted to discharge the contents of the pistol. The objection, however, is open to you on arrest of judgment.

It appeared from the evidence that the pistol flashed in the pan, but with a very faint flash, not more than would be produced by the striking of the flint and steel, it was afterwards examined, and found to be loaded with gunpowder and a piece of lead. It was admitted by the witnesses that there must have been a very small quantity of priming in the pan, if any at all

Huddleston addressed the jury for the prisoner, and argued that the prisoner could not be convicted unless they were satisfied that the pistol was in such a state that it would go off, and that the evidence was, that there was no priming, and that the light seen by the witness was **[256]** produced by the flint alone, and that under no circumstances could the pistol have gone off in that state. He also contended, that, even if they thought the prisoner had made an assault upon the prosecutor, they might find him guilty of that, as the charge was one which included an assault.

Rolfe, B. (in summing up) —You must consider whether the pistol, was in such a state of loading that, under ordinary circumstances, it would have gone off, but that from some accidental cause, the nature of which we cannot discover, it in fact did not go off. The statute under which the prisoner is indicted (7 Will. IV & 1 Vict. c. 85, sect 3) will then apply, for unless the statute were held to apply to cases of this kind, as well as those in which fire-arms are actually discharged, it would be absurd. The question for your consideration is, was the priming and loading of the pistol such, that, in the natural and ordinary course of things, it would have gone off ? If you think it was, you must find the prisoner guilty The learned counsel for the prisoner contends, that you may find the prisoner guilty of a common assault, but that I think you cannot do If presenting a pistol at a person, and pulling the trigger of it, is an assault at all, certainly, in the case where the pistol is loaded, it must be taken to be an attempt to discharge the pistol with intent to do some bodily injury, that is, it must amount to the offence laid in one or other of the counts of the indictment, according as you are of opinion the intention of the prisoner was. There does not seem to be any middle kind of intent that can be suggested.

Verdict—Not guilty (*a*)

Allen, for the prosecution

Huddleston, for the prisoner

[Attornies—Corser, and Boycot & Lucy]

[257] COURT OF QUEEN'S BENCH

Sittings in London after Hilary Term, 1844, before Lord Denman, C J

Feb. 22nd, 1844

INNES *v* WYLIE AND OTHERS.

(Any society may make any rules by which the admission and expulsion of its members are to be regulated, and the members must conform to those rules, but where there is not any property in which all the members of the society have a joint interest, and where there is no rule as to expulsion, the majority may, by resolution, remove any member, but, before that is done, notice must be given to him to answer the charge made against him, and an opportunity given to him for making his defence, where, therefore, a member of such a society had used menacing language towards another member of the society, and for this a majority of a general meeting of the society voted that he should no longer be considered a member of the society, but did not give him any notice

(*a*) See the cases of *Blake* v *Barnard*, 9 C. & P 626, *Regina* v. *St George*, *id* p 483; and *Regina* v *Oxford*, *id* p 525

of the intention to take his conduct into consideration, or any opportunity of making his defence:—Held, that this expulsion was invalid, and that he was still a member of the society. A policeman prevented a member of a society from entering the society's room:—Held, that, if the policeman was wholly passive, and merely obstructed his entrance as any inanimate object would, this was not an assault by the policeman)

[Referred to, *Wood* v. *Wood*, 1874, L. R. 9 Ex. 190.]

Assault.—The declaration stated that the defendants, on the 30th day of November, 1843, "assaulted the plaintiff, he then being a member of a certain society of persons lawfully and voluntarily associated together, and called and known by the name of 'The Caledonian Society of London,' he the plaintiff then being about to enter into a certain room situated in and forming part of a certain hotel or public-house called and known by the name of Radley's Hotel, and situated in the city of London, for the purpose of attending at, and partaking of, a public general meeting and dinner of the members of the said society which was then about to be held and take place in the said room, and into which said room the said plaintiff as such member of the said society as aforesaid then was lawfully entitled and then had a legal right to enter, for the purpose of attending at, and partaking of, the said public general meeting and dinner of the members of the said [258] society, and which said public general meeting and dinner the said plaintiff, as such member of the said society as aforesaid, then was lawfully entitled, and then had a legal right to attend and partake of, and then pushed and shoved the plaintiff from the said room, and hindered and prevented the plaintiff from entering the said room, and from attending at, and partaking of, the said public general meeting and dinner of the members of the said society, whereby the plaintiff was totally hindered, prevented, and excluded from attending at, and partaking of, the said public general meeting and dinner of the members of the said society, and from enjoying and participating in the advantages, benefits, and privileges of the said society at the said public general meeting and dinner, and other wrongs to the plaintiff then did, against the peace," &c.

Pleas. 1st. not guilty; 2nd. "And for a further plea as to the assaulting the plaintiff, and hindering and preventing him from entering the said room, and as to the pushing and shoving the plaintiff, the defendants say, that, before and at the said time when &c, in the declaration mentioned, they the defendants were the lawful possessors of a certain room or apartment then hired by them for the use of a certain society, known as 'The Caledonian Society of London.' And the defendants further say, that just before, and at the said time when &c, the plaintiff having notice of the premises, and not then being a member of the said society, and being warned and requested by the defendants not to enter the said room or apartments, endeavoured, against the will and without the consent of the defendants, or any of them, or of the said society, with force and arms &c, to enter into the said room or apartment, and would then with force and arms have entered the said room or apartment, if they the defendants had not resisted such entrance of the plaintiff into the said room or apartment; and wherefore they the defendants at the same time when &c, being in the said room or apartment, did, in order to preserve the quiet possession thereof for the said society, resist and oppose the said entrance by the plaintiff into the said [259] room or apartment, and, in so doing, were unavoidably compelled gently to lay their hands on the plaintiff, and unavoidably a little pushed and shoved the plaintiff, and so hindered and prevented him from entering the said room or apartment, as they lawfully might for the cause aforesaid, they the defendants, on that occasion, using no violence whatever to the plaintiff, which are the same trespasses in the introductory part of this plea mentioned, and whereof the plaintiff has complained against the defendants, and this the defendants are ready to verify, &c."—3rd. "that before and after the said time when &c., one Mr. Radley was lawfully possessed of a certain hotel, and of a certain room or apartment therein, into which said room or apartment the plaintiff, against the will of the said Mr. Radley, with force and arms &c., endeavoured to enter, and would then have entered if they the defendants, as the servants of the said Mr. Radley, and by his command, had not resisted such entrance of the plaintiff into the said room or apartment, wherefore they the said defendants, at the said time when &c., being in the said room or apartment, did, as the servants of the said Mr. Radley, and by his command, and, in order to preserve the quiet possession thereof for the said Mr Radley, resist and oppose

the said entrance of the plaintiff into the said room or apartment," &c. Replication, *de injuria.*

It appeared that the plaintiff had been a member of a society called "The Caledonian Society of London," which had for its objects the extension of education in Scotland, and the preservation of the ancient Caledonian costume; and that, on the occasion of one of the dinners of the society, in the month of May, 1843, the plaintiff insisted on a seat at a particular part of the room, which being refused to him, he made use of some menacing expressions towards one of the defendants, and as the plaintiff would not apologize for this when asked to do so in the month of August, it was resolved, at a meeting of the committee of the society, held on the 9th of November, 1843, that the **[260]** plaintiff should cease to be considered as a member of the society; and this resolution of the committee was submitted to a general meeting of the society, held on the same day, at which fourteen members were present, and the resolution of the committee was confirmed by the votes of nine against five; but no notice had been given that this matter was to be taken into consideration at this meeting of the society. It appeared that the subscriptions of the members of the society became payable on the 1st of November in each year; but the second rule of the society as to its "financial department," was as follows:— "In order to secure a full attendance of members at the dress meetings, an annual subscription of one guinea shall be payable in the month of November, to defray the expenses of the dinners which follow the meetings in November. Any members joining after the 30th of November, and previous to the 24th of May, shall pay the sum of half-a-guinea as their subscription for the remainder of the season" There was no rule of the society as to the expulsion of its members; but among their rules were the following:—

"4th. No member shall be qualified to ballot for a new member, or to vote on any occasion whatever until his subscription for the current year be paid.

"6th. The committee to have full power to discuss and determine on all business connected with the society; but their proceedings to be afterwards subjected to the approval of the members at a general meeting.

"7th. No business shall be proposed or decided upon at any general meeting of the society, excepting only the confirmation or rejection of the proceedings of the committee, and the election of new members.

"10th. Whenever occasion shall require, a special general meeting may be held by order of the committee, not less than two days' notice of the same being given to the members of the society"

It appeared that of the nine members of the society who voted on the 9th of November for the confirmation of the **[261]** plaintiff's expulsion, only one of them had paid his subscription on the 1st of November, 1843, but that the whole of the five who voted against it had paid their subscriptions on that day

It further appeared that the plaintiff, on the 30th of November, 1843, went to a dinner of the society at Radley's Hotel, and was prevented by a policeman named Douglas, from entering the room; and it was proved by the policeman that he acted by order of the defendants

It was objected on the part of the plaintiff that he was a member of the society on the 30th of November, 1843, and that the defendants were not justified in excluding him from the dinner; 1st, because no notice had been given that the subject of the plaintiff's expulsion would be taken into consideration at the general meeting of the society on the 9th of November; 2ndly, that the plaintiff had not been called on to make any defence or shew cause why he should not be expelled; and 3rdly, because, out of the nine members that voted on the 9th of November for the confirmation of the vote of the committee for expelling the plaintiff, one only had paid his subscription due on the 1st of November, and the others, therefore, were not entitled to vote or exercise any of the rights of members; and that the majority of good votes was therefore against the expulsion. With respect to the alleged assault, the policeman said, "the plaintiff tried to push by me into the room and I prevented him"; but some of the other witnesses stated that the plaintiff tried to enter the room and was pushed back.

Erle addressed the jury for the defendant —There is no assault here The policeman who must best know what was done, says that the plaintiff tried to push into the room and he prevented him, and preventing a person from pushing into a room is no

assault; the assault, if any, being rather on the other side. And even if there was an assault it was justifiable. The committee had come to a [262] vote that the plaintiff should be no longer a member of the society, and that vote had been confirmed at the general meeting, and with respect to the votes of the eight persons who had not paid their subscriptions, I submit that by the rules they had the whole month of November to pay them, and they were not in default till after the 30th, and were therefore members of the society on the 9th.

Lord Denman, C. J (*in summing up*)—I am of opinion that where there is not any property in which all the members of a society have a joint interest, the majority may by resolution remove any one member I think that in this instance the members of this society had that power, in case the plaintiff had misconducted himself. Then had he done so? On the facts of the case, as they appear in evidence, I think that he had, by using menacing language as to one of the other members. Then what was done? There was a resolution of the committee declaring that he had ceased to be a member of the society; but by the regulations of the society no resolution of a committee is valid unless it has been confirmed by the general body There was a meeting of the general body and this resolution of the committee was considered, and it was confirmed by a majority of nine to five; but it further appears that all the five had paid up their subscriptions before the time when that meeting took place, but that only one of the nine had paid up his subscription at the time of that meeting. It is therefore contended that the resolution of the committee cannot be considered as lawfully confirmed. However, it does not appear to me that that objection is well-founded. The subscriptions are nominally due on the 1st of November, but not payable till the 30th, and I think that they cannot be considered in arrear before the 30th. So far the resolution would be valid; but I think that it was rendered altogether invalid by the want of notice to Mr. Innes of the intention to remove him from the society. It is true he was once required to apologize, [263] which he refused to do; but no notice was given to him that the subject of his removal from the society was to be taken into consideration, nor was he called on to shew why such a course should not be pursued. The society was, in my opinion, wrong in removing him without giving him distinct and positive notice that he was to come and answer the charge that was made against him, and I hold that he should have been told what the charge was, and called on to answer it, and told that it was meant to remove him if he did not make his defence No proceeding in the nature of a judicial proceeding can be valid unless the party charged is told that he is so charged, is called on to answer the charge, and is warned of the consequences of refusing to do so. As no such notice was given here, I think that the removal is altogether a void act, and I am therefore of opinion that the plaintiff is still a member of the society. Being so, it appears that he went to one of its meetings on the 30th of November, 1843, and was then prevented, by a policeman acting under the orders of the defendants, from entering the room. You will say, whether, on the evidence, you think that the policeman committed an assault on the plaintiff, or was merely passive. If the policeman was entirely passive like a door or a wall put to prevent the plaintiff from entering the room, and simply obstructing the entrance of the plaintiff, no assault has been committed on the plaintiff, and your verdict will be for the defendant. The question is, did the policeman take any active measures to prevent the plaintiff from entering the room, or did he stand in the door-way passive, and not move at all.

Verdict for the plaintiff, damages 40s.

Platt, Pickering, and Worlledge for the plaintiff.

Erle, and F. V. Lee, for the defendant.

[Attornies—Innes, and T. Gaunt.]

[264] In the ensuing term, Erle moved for a new trial; but the Court, after taking time to consider, refused a rule; and Lord Denman, C. J, said, "Any society may undoubtedly make any rules by which the admission and expulsion of its members are to be regulated; and the members must conform to, and cannot question, them. But where there are no directions on the subject contained in the rules, a party expelled may lawfully complain, that his expulsion has been effected contrary to the general principles of law; and a member is not to be expelled by vote, unless there be regular notice given to him, and an opportunity of his being heard This has been the case here; the plaintiff has been expelled without being called on for his defence before the general meeting. This course was one which could not be legally

adopted; and the trespass sought to be justified by it must be considered as illegally committed."

Feb. 23rd, 1844.

TURPIN v. HEALD.

(*Semble*, that on the trial of a cause a party ought not to be allowed to go into evidence to shew why he could not procure the attendance of a particular person as a witness, or to shew what steps he has taken to procure such person's attendance at the trial.)

Assumpsit. The first three counts of the declaration were on three policies of insurance; the first of them being on the ship "Thereza"; the second, on her furniture; and the third, on specie on board The declaration also contained counts for money had and received, and on an account stated

Pleas:—1st, *non-assumpsit*; 2nd, a denial of the plaintiff's interest in the ship; 3rd, a denial of the interest in the specie; 4th, that no specie was put on board; 5th, that the ship was not lost by peril of the seas; nor was the specie or furniture lost; 6th, that the ship was not seaworthy; 7th, that the policies were obtained by fraud and wilful concealment of material information, 8th, that the loss was occasioned by the fraudulent and wilful and improper conduct of the plaintiff.

[265] It was opened by Platt, for the plaintiff, that Mrs Ralph, a daughter of the plaintiff, could give important evidence as to the putting of the specie on board the "Thereza"; but that she had not arrived from Hamburg, but was expected to arrive before the present trial was over.

Mrs. Ralph not having arrived in time to be examined as a witness for the plaintiff, Platt proposed to call Mr Brown, the clerk of the plaintiff's attorney, to prove what steps he had taken to procure the attendance of Mrs Ralph at the present trial.

Lord Denman, C. J.—I very much doubt whether this is evidence. If we are to examine into questions why particular witnesses are not here, where are we to stop? I find this kind of examination was allowed in the Court of Common Pleas yesterday (*a*); but I have the greatest doubt about it, indeed, if I were to allow this witness to be examined, the other side would very likely wish to go into evidence to shew that the witness's attendance might have been easily procured.

The witness was not examined.

Verdict for the plaintiff.

Platt, E. James, and Lush, for the plaintiff.

Thesiger, and W. H. Watson, for the defendant.

[Attornies—H Ashley, and Meggison & Co]

[266] Feb. 26th, 1844.

JONES v. MORRELL.

(A. directed a police officer to take B. into custody on a charge of embezzlement, and the officer having done so, the officer and A went together to a box of B., and the officer, in the presence of A., searched the box, and took from it a sovereign.—Held, that, in an action by B. against A. for the trespass in opening of the box and taking the sovereign, proof of these facts was evidence to go to the jury of A.'s participation in the trespass. In an action by B. against A. for false imprisonment, A. pleaded a justification, that B. had been guilty of embezzlement. B. and his witnesses having made the charge before a magistrate, depositions were taken in the hearing of B., and he made a statement in answer:—Held, that, on the trial of the action for false imprisonment, these depositions, and the plaintiff's statement in answer, were receivable in evidence for the defendant, as being matters stated in the hearing of the plaintiff, to which he made an answer, but that the depositions were no proof of any fact therein stated.)

False imprisonment.—The first count of the declaration stated, that the defendant assaulted and imprisoned the plaintiff, and caused him to be taken to a station-house and to a police court; 2nd count, that the defendant opened a certain box of the plaintiff, and took from it a sovereign; 3rd count, for again imprisoning the plaintiff, and taking him to Reading.

Pleas:—1st, to the whole declaration, not guilty, 2nd, to the first count, that

(*a*) In the case of *Fraser, Esq.* v. *Bagley, Esq.*