The same view seems to have been taken in a case in the preceding year, (1857) *Hodgkinson* v. *Fernie*, 3 C. B., N. S. 189, where the whole law as to setting aside awards is discussed.

Now this case before me is wholly wanting in materials to bring it within the influence of any of the cases cited. There is no statement of the arbitrator or admission as to his proceedings, or of his views of either law or fact. I am naturally struck on reading the papers, with the apparent difficulty of understanding how in a claim against A P. McDonald, Schram and Ross, the defendants, were entitled to set off the money received by plaintiff on a note to which Schram seems to have been a stranger, and which A. P. McDonald swears was retired by him (McDonald) and Ross, and apparently not with money in which Schram had been interested.

But I strongly suspect both from the language of the affidavits filed, the form of the motion, and the argument addressed to me, that the contest before the arbitrator was chiefly, if not wholly, as to the proceeds of this note being applied by plaintiff to the partnership business in Hamilton in which he was interested, or whether he appropriated the proceeds to his own use, and thus was chargeable therewith, and that very possibly the right of Schram to have the benefit of this set off may not have been denied, or at all events attention called thereto. On the other hand it may have been fully in question and there may have been strong reasons undisclosed in this motion for allowing it as a set off.

The utter obscurity of this point is a strong illustration of the danger of setting aside an award on such meagre materials as have been laid before me.

I think I should be far outstepping all decided cases and introducing new practice if I acceded to this motion.

It is shewn that a suit is pending in Chancery to settle the partnership accounts between plaintiff, A. P. McDonald and Ross. If so there can be little danger of plaintiff having to pay the note in question more than once. The fact of his application of the proceeds seems to have been fairly in issue, and I see no reason to question its having been fairly decided.

Per Cur.—Rule discharged with costs.

DIVISION COURT CASE.

(In the First Division Court of the United Counties of York and Peel, before GEORGE DUGGAN, Esq., Recorder for the City of Toronto.)

BROWN ET AL. v. MUCKLE.

Carriers—Wharfingers—Contract—Negligence—Cross action, when necessary.

It is an established rule of English law, that negligence or breach of duty cannot be set up as a defence in actions for the recovery of freight, where the defendant has derived a partial benefit under the contract, but defendant obliged to bring a cross-action for damages in respect of such negligence or breach of duty.

Such rule must be taken to prevail in division courts, notwithstanding the provision of the Division Courts Act enabling the judge to decide according to equity and good conscience.

A different rule prevails in several States of the neighboring republic, and is highly convenient as calculated to prevent multiplicity of suits.

The defendant caused to be delivered to the master of Captain Perry's steamer the "Bowmanville," at Quebec, where the steamer was then lying, property of her's, a cask of china and crockeryware, value at least of £10; also a quantity of household furniture, value not shown; which he there received, to be carried for the defendant to Toronto, at a charge of $30, as shown by an informal bill of lading produced at the trial by Captain Perry; although by another bill of lading, produced by plaintiffs, not signed by or on behalf of the captain, carriers, or others interested, $35 was charged as the freight. The sum of $35 was advanced by plaintiffs, as wharfingers at Toronto, to Captain Perry, on a supposed receipt of the goods for which it was incurred.

The plaintiffs held the goods, subject to this and two other charges, viz., $5 for wharfage and storage, and $2 50 for harbor dues.

The defendant, on application at Toronto to plaintiffs for her property, was refused delivery, unless all the above charges were first paid.

Subsequently plaintiffs delivered the goods, upon the undertaking of a friend of defendant that plaintiffs' claim should be paid.

The defendant, on receiving her furniture, found a portion of it damaged and broken, to the extent of $20.

Plaintiffs delivered to defendant a cask, as for that containing her china and crockery, but it was found to contain moccasins, and not to be defendant's cask, and was returned to plaintiffs, who disclaimed all knowledge of defendant's cask, and all liability in respect of it, and denied that it came into their hands.

The defendant refused to pay the above charges, unless her missing property (exceeding in value the amount of freight) was first restored, and her losses for injury to furniture allowed her on account.

Plaintiffs thereupon brought this suit, to recover for freight $35, wharfage $5, and harbor dues $2 50, in all $42 50, besides interest.

Defendant paid into court $7 50, covering plaintiffs' claim for wharfage and harbor dues; and urged that this being a court not of strict law, but of equity and good conscience, the plaintiffs, who voluntarily advanced their money to Perry, cannot be held to be in a better position to claim for the freight, which is the only claim now in dispute, than Perry himself would be had the advance not been made, and were he the plaintiff instead of Brown & Co.; that it would be unjust to permit plaintiffs to recover anything for freight on the contract for the safe carriage and delivery of the defendant's property, whilst the defendant, under this identical contract, has a legal and just claim against Perry exceeding that for which this action is now brought, the payment into court being the full amount of the plaintiffs' charges on the goods distinct from the charge which they voluntarily took the risk of by assuming the carrier's place in relation to them, in so far, at all events, as the freight of them was concerned. The defendant was willing to forego all excess of claim beyond sufficient to meet the charge for freight.

Defendant urged also that the voluntary advance for this freight made by plaintiffs to Perry, cannot give them a right of action against the defendant, but that admitting plaintiffs right to sue defendant, still defendant is entitled to set up her loss and damage growing out of the contract with Perry, against the claim for freight growing out of the contract and payable only in respect of the goods in question.

DUGGAN, R.—I have examined the various cases cited on both sides, and such others as I could find bearing upon this case, disposed if upon authority or precedent in law or equity I could do so to give effect in this action to defendant's just claims under the contract out of which arises the demand for freight, and avoid the necessity of another suit.

By the agreement between the plaintiffs and defendant for the delivery of the goods, and the defendant's acceptance of a portion thereof, I think she is liable to plaintiffs in this action to the extent to which she would have been liable to the carrier, Perry, for freight, had the latter made the delivery in question to the defendant direct, without the intervention of any other party. I find, however, that Perry omitted to carry defendant's cask, and earned no freight in respect thereof.

I consider it an established and inflexible rule of law, that negligence, or breach of duty or of contract, cannot be set up as a defence in actions for the recovery of freight of goods, or for the recovery of an attorneys bill of costs, where the defendant has derived a partial benefit by carriage and delivery of the goods, or had derived a partial benefit from the services charged in the bill of costs, but in these cases the defendant is invariably obliged to resort to an action for redress.

I find this distinctly stated by Bacon Park, in the case of *Mondell* v. *Steel*, 8. M. & W. 858, in which I was referred by the defendant on the doctrine of set off, and reduction of plaintiffs' demand, by setting up his laches in relation to the subject, or the contract out of which his action arises.

The law is so expressed, without doubt or qualification, in modern standard text books. I refer to the recent edition of Abbot, on shipping, and the able and learned work of Mr. Machlaclan, on the same subject, just issued from the English press.

I am unable to find that courts of equity have acted on a different rule where relief has been there sought in cases like the present. The rights and liabilities of the parties in such cases,