

"sold," but an allegation that the defendant "sold and carried away the same, and converted and disposed thereof to his own use," nor was a claim made for double the value of the goods distrained and sold, within the terms of the statute.

Held, reversing the decision of FERGUSON, J., that the action was the ordinary action for conversion, and that the value, and not the double value, of the goods distrained should be recovered; but, according to the finding that no rent was due, it was proper to make a liberal assessment of the damages.

Held, also, reversing the decision of FERGUSON, J., that a wrongdoer taking goods out of the possession of another is not at liberty to set up the *jus tertii*, but the person out of whose possession the goods are taken may show the *jus tertii*, and in such case the wrongdoer may take advantage of its being so shown; and the plaintiff, having shown a chattel mortgage subsisting upon a portion of the goods distrained, could not be allowed to recover the value of the mortgaged goods from the defendant without protecting the latter against another action at the suit of the mortgagee.

Held, also, per FERGUSON, J., that the plaintiff was not entitled to recover from the defendant the amount received by him from the sale of the plaintiff's goods in addition to the value of the goods; nor was the defendant obliged to deduct the amount so received by him from the rent which afterwards fell due.

Howe v. Lee, 5 C.B. 754, followed.

Judgment being given in favour of the plaintiff upon his claim, and in favour of the defendant upon his counterclaim,

Held, reversing the decision of FERGUSON, J., that the amounts should be set off.

McConnell for the plaintiff.

N. McDonald and Tremear for the defendant.

Divl Court.]

[June 21.]

STEWART v. SCULTHORP.

Bailment—Delivery of seed on contract to plant—Property not passing—Condition—Warranty—Damages to land from impurity of seed—Remoteness—Performance of contract—Estoppel—Slander—Words not imputing crime—Privilege—Actual malice.

The defendant gave the plaintiff two bushels of variegated sweet peas to be planted by the plaintiff in his own land, and the produce to be cultivated, harvested, threshed, and delivered to the defendant, for the reward to the plaintiff of \$2 per bushel. This contract was performed on both sides, but the peas turned out to be only partly variegated sweet peas, and partly vetches.

The defendant delivered the seeds as and for variegated sweet peas, honestly believing them to be such, and the plaintiff so received them, and neither knew that there were vetch seeds among them, nor at the time did either of them know vetch seeds from variegated sweet peas.

In an action for damages for the injury sustained by the plaintiff by reason of the peas turning out to be partly vetches,

Held, that if the transaction had been a sale of the peas, it would have been