

Div. Cl.]

HANNON V. CHERRY—RECENT ENGLISH PRACTICE CASES.

guest was *not owner*, he will have no lien upon them : *Broadwood v. Granara*, 10 Ex. 423. Having once obtained a right of lien it remains as long as the goods remain, and the person who bought them retains the character of a guest. Continuance of possession of the goods is absolutely necessary to enable the holder of the goods to exercise his right of lien : *Ryall v. Roth*, 1 Atk. 165. The general principle appears to be that if an inn-keeper allows a traveller to leave goods at his inn, and the traveller never becomes a *guest*, the innkeeper is answerable for the loss or damage to the goods, and consequently will have no lien upon them, for in the case of goods the right of retainer exists only in consideration of the obligations due to the guest ; but it would be otherwise as to animals or chattels, which may be improved by keeping, for then the general principle of the law of lien prevails, and the innkeeper can retain a horse for its keep even though the person who has brought it to the inn has not lodged it there himself : *Allan v. Smith*, 12 C. B. N. S. 638. The mere leaving the horse constitutes the person who leaves it "a guest," and thus the landlord becoming responsible has also his security. In the present case there is no doubt, however, that the thief became a guest, for he lodged all night with the defendant, and the horse was kept in the stable.

But another principle of the peculiar nature of an inn-keeper's lien is that the property detained cannot be sold unless by the consent, express or implied, of the owner, either to reimburse the inn-keeper for the original bill, or to cover the expenses incurred in keeping it : *Thames Iron W. Co. v. Patent Derrick Co.*, 1 Johns & W. 97. A lien is a *mere right of detention* for the debt due, and the property cannot be parted with or sold without a waiver of lien : *Jones v. Pearl*, Strange 556 ; *Ex parte Shunk*, 1 Atk. 234 ; *Kruger v. Wilcox*, Amb. 252 ; *Wilkins v. Carmichael*, Dougl. 101 ; *Sweet v. Ryan*, 1 East. 4 ; *McCoubie v. Davies*, 7 East 5.

In the present case, in view of the authorities, I must hold that the sale of the horse in question determined the lien, and rendered the defendant liable to the plaintiff, the true owner, for the value of the animal. And the lien being ended there can be no claim for the keep of the horse against the plaintiff.

It is unfortunate for this defendant that the

Ontario Act, passed in 1882, had not been on the Statute book some years sooner. That Act, 45 Vict. cap. 16, Ont. enables an inn-keeper, (providing certain formalities are observed), to sell a horse or other animal should his claim in respect of them be unpaid for the space of *two weeks*—a salutary provision, and conferring a power which it is somewhat surprising to find the legislature have been so tardy in extending to our numerous publicans.

As to the damages, under all the circumstances of the case, I think they should be the price realized by the defendant at his last sale of the animal, when he sold it as his own property, viz. \$50. The defendant appears to have acted in good faith though in ignorance of the law. Verdict for plaintiff, \$50.

RECENT ENGLISH PRACTICE CASES.

MCGOWAN ET AL. V. MIDDLETON.

Imp. O. 19, r. 3 ; O. 23, r. 1—Ont. rr. 127, 170.
Pleading—Discontinuance of action—Counter-claim.

By discontinuing an action after a counter-claim has been delivered, a plaintiff cannot put an end to it so as to prevent the defendant from enforcing against him the causes of action contained in the counter-claim.

Vannasseur v. Kraff, L. R. 15 Ch. D. 474, overruled.

[C. A., L. R., 11 Q. B. D. 464.

Per BRETT, M. R.—I think that a counter-claim is not a cross-action ; it cannot be deemed an action, it not being commenced by writ of summons. But a counter-claim must be treated as if it were a proceeding in a cross action. . . The fundamental idea of the framers of these statutes [the Judicature Acts] is to be found in the Judicature Act, 1873, sec. 24, sub-s. 7 (Ont. Jud. Act. sec. 16, sub-s. 8.) . . The plaintiff's action being discontinued, that which is only a defence to it drops with it ; but anything beyond a defence, anything in the nature of a claim against the plaintiff, must be treated separately and cannot be discontinued. . . The plaintiff has a right to plead to it (the counter-claim) anything which would be a defence to a cross-action ; the old doctrine of defence in pleading is gone, and the plaintiff may plead by way of defence to the counter-claim the facts averred in the claim which he has discontinued ; but he must do that within a limited time, and if he