

In *Arthur v. The Commissioners of Sewers in Yorkshire*, (8 Mod. 331) the court uses this language: "It is true where a man is chosen into an office or place, by virtue whereof he has a temporal right, and is deprived thereof by an inferior jurisdiction, who proceed in a summary way, in such case he is entitled to a *certiorari ex debito justitiae*, because he has no other remedy, being bound by the judgment of the inferior judicature."

With regard to Mr. Hughes' reason for not proceeding to adjudge upon the summons by reason of his relationship to Mr. Horton, we can scarcely be expected to compel him by mandamus to do that which I have shewn a judge in England declined to do, and which has also occurred more than once in this province. Anciently a judge could not try a civil or criminal case in the county in which he was born or inhabited, so jealously guarded was the administration of justice, but that was remedied by statute.

Rule discharged.

VANEVERY ET AL. V. THE BUFFALO AND LAKE HURON RAILWAY COMPANY.

Agreement—Construction—Liabilities for moneys received by purser, and for goods supplied to steamer.

Defendants entered into an agreement to advance money to the plaintiffs to enable them to procure a steamer which was to run in connection with defendants' railway, and guaranteed them against loss up to a specified sum. The earnings of the vessel were to be shared as provided for; and it was agreed that defendants should name and pay a person to act as purser, and keep an accurate account of the receipts and expenditure. He was to be subject to their authority, but to mess with the captain at the plaintiffs' expense.

Held, that the defendants were not liable to account to the plaintiffs for moneys received by him and not paid over.

The plaintiffs also claimed for goods supplied to another steamer, but it was shewn that this vessel was chartered to one W., who ran her on his own account, of which the plaintiffs had notice. *Held*, that they could not recover.

Assumpsit on the common counts. Pleas, never indebted, payment, and set-off.

At the trial, at Goderich, before Draper, C. J., after the plaintiffs had closed their case and the defendants had examined a witness, the plaintiffs agreed to take a non-suit, with leave to move the court to enter a verdict for them for the three first items of their account, No. 1, for \$39.85c., No. 2, for \$11.37c., and No. 3, for \$28, amounting together to \$79.22c.; and that the affidavits of J. K. Gooding and J. L. McCormick might be read by the court, in order to decide as a jury would decide on the evidence therein contained whether the plaintiffs were entitled to such verdict, and to add to that the further sum of \$193.64c., if the evidence on the judge's notes would sustain such verdict, and the plaintiffs were in law entitled to recover; defendants to be at liberty to file the charter party of the steamer *Troy*.

J. Wilson, Q. C., obtained a rule calling on the defendants to shew cause why the nonsuit entered should not be set aside, and a verdict entered for the plaintiff for \$79.22c., and \$193.64c., or for either or both sums, or any part of either, pursuant to leave reserved at the trial, if the court should be of opinion that the plaintiffs were entitled to recover on the evidence, and on affidavits to be filed of one Gooding on the part of the plaintiffs, and an affidavit to be filed by the defendants if they should choose to do so.

E. B. Wood, for the defendants, shewed cause against the plaintiff's rule, and filed, pursuant to leave reserved, the charter party of the steamer *Troy*, which had been run in connection with the defendants' railway, for supplies for which steamer part of the plaintiff's cause of action against defendants was, the boat being owned by them.

During Easter Term, J. Wilson, Q. C., supported the rule.

Though leave was reserved to the plaintiffs to file affidavits from Gooding and McCormick none were filed, and the plaintiffs' right to recover rested on the evidence received at the trial, which is fully stated in the judgments.

McLELL, J.—It appears that in the year 1859, the defendants being anxious to have a steamboat communication opened from Goderich to East Saginaw, in the state of Michigan, so that it might be in connection with their railway, and establish a route for the transport of goods and passengers from Buffalo to Saginaw, entered into an agreement with the plaintiffs to induce them to purchase a boat to be run by them on the proposed route, with

certain stipulations as to the part to be performed by each for the mutual advantage of both parties. The defendants agreed to advance \$5000 to the plaintiffs to enable them to procure a sufficient boat to be placed on the communication, and mutual stipulations were entered into as to the amount to be charged for freight and passengers, and for the payment by one to the other of a portion of the moneys received according to the services rendered by either. For the purpose of keeping an accurate account of the expenses of the boat, and of the moneys received on board of her, it was agreed that the defendants might name a person to act as purser on board, and to be entitled to mess on board with the captain; his wages, however, to be borne by the defendants. He was to be subject to the authority of the defendants, but to do the usual duties of a purser on board.

Under that agreement, bearing date 29th of June, 1859, the plaintiffs procured and placed upon the route the steamer *Kaloolah*, and one J. L. McCormick was placed on board as purser by the defendants, for the purpose of keeping the accounts of the boat and doing any other duty otherwise usually devolving on a person in that situation. The three first items in the plaintiffs' account, for which leave was reserved to the plaintiffs to move to have a verdict entered, were for moneys alleged to have been received by McCormick while he was purser on board of the boat and not paid over to the plaintiffs, and the only evidence of the receipt of such moneys consisted of receipts signed by McCormick.

The defendants objected that they were not liable for any moneys received by McCormick; that though they nominated him as purser, and paid his wages on board of the boat, he was only placed there as a person in whom they had confidence to keep the accounts and to discharge the general duties of purser for the plaintiffs, so that at proper periods there might be no difficulty in settling the accounts according to the stipulations of the agreement as to the running of the boat.

There was a further objection, that McCormick had nothing whatever to do as purser in receiving freights or other moneys elsewhere than on the boat, and that the moneys for which the receipts were given appeared to have been received from a Mr. Gooding, the agent of the steamer at Saginaw, for the purpose of being transmitted to the plaintiffs, except to the amount of \$11.37 freight on goods sent by railway and steamer from Buffalo to Saginaw, of which amount \$5.25 was freight on the railway.

The through manifest of railway and steamer charges, amounting to \$11.37, receipted by McCormick on the 12th of October, 1859, was produced, and the witness, Jonathan Black, the plaintiffs' book-keeper, proved the signature of McCormick to the receipt, and also to a receipt on a similar manifest dated 5th of October, 1859, the freight on which amounted to \$39.85. He produced the ledger kept by McCormick as purser on board of the boat. By that the two first items, \$39.85, and \$11.37, appeared to be entered as due to the *Kaloolah*, and in another entry McCormick charged the plaintiffs with \$28 as paid to them on account of freight. The receipt the witness says purposes to represent the \$28 to be money received from Gooding on account of produce shipped by the plaintiffs to Gooding on consignment. The two first items are charged to Gooding in the ledger as unpaid.

On cross-examination the witness Black stated that he was employed at the wharf at Goderich, and Gooding on the American side. If goods were consigned to Gooding he had to collect the freights: Gooding acted as agent for the steamer at Saginaw. The first item was for freight on goods consigned to Copland & Co., at Saginaw, the second item was for freight under similar circumstances, \$11.37, but the witness never knew of McCormick collecting freights at Saginaw except in these two instances.

There was nothing to show any liability on the part of the defendants for moneys received by McCormick in his capacity of purser of the plaintiffs' boat. He was not there as the servant of the defendants exclusively, though they paid him and he was placed there at their instance. He was performing a duty for the plaintiffs in fact, and all that was required of him by the defendants was an accurate account of moneys received and expended by the boat, as the defendants had by their agreement covenanted to guarantee the plaintiffs against loss by their enterprise in running the boat. If it had been intended that the defendants were to be responsible for McCormick, there would no doubt have been some