

Div. Ct.]

HUNTER V. SAUNDERS.

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cases of indemnity, where one man employs another to do acts not unlawful in themselves.

In *Adamson v. Jarvis*, 4 Bing. 66, Best, C.J., said that the rule that wrong doers cannot have redress or contribution against each other is to be confined to cases where the person seeking redress must be presumed to have known that he was doing an unlawful act.

In *Betts v. Gibbons*, 2 Adol. & E. 76, Lord Denman, in commenting on the cases, particularly the two above quoted, says that the cases would appear to go this far "that where one party induces another to do an act which is not legally supportable, and yet is not clearly a breach of law, the party so inducing shall be answerable to the other for the consequences." Taunton, J., in the same case, says:—"The principle laid down in *Merryweather v. Nixan* is too plain to be mistaken. The law will not imply an indemnity between wrong doers. But the case is altered when the matter is indifferent in itself, and when it turns upon circumstances whether the act is wrong or not." The case of *Wooley v. Batte*, 2 C. & P. 417, was an action by one proprietor against a co-proprietor for contribution, the plaintiff having had to pay damages caused by the negligence of a servant of the proprietors, but that was evidently a case of partnership. The same may be said of *Pearson v. Skelton*, 1 M. & W. 504. A ground alleged in these cases too, was that the wrong doers in these cases were *tort feorsors* only by inference of law. In the latter case a non-suit was sustained because the question of liability involved the taking of partnership accounts, and was therefore a case for equity.

It has been expressly held that where the tort amounts to a crime there is no contribution: *Shackel v. Rosier*, 2 Bing. N. C. 648; *Colburn v. Patmore*, 1 C. M. & R. 73.

In *Power v. Hoey*, 19 W. R. 916, the question of the liability of wrong doers is fully discussed, and the learned Irish Vice-Chancellor states that the principle that there is no right of indemnity between wrong doers is confined to cases where the fraudulent or illegal transaction is itself the basis of the claim, but that the rule does not apply where the transaction, though leading to that which is the basis of the claim, is separable from it.

The only case which has been cited or which I have been able to find where perhaps the doctrine laid down seems to favor the plaintiffs contention is an American case—*Armstrong Co. v. Clarion Co.*, 66 Penn. St. 218. There two counties were jointly responsible for maintaining in repair a bridge over a stream running between the counties. It was allowed to get into a state of disrepair, and a traveller was injured. He sued and recovered damages against Armstrong County. This county brought an action against Clarion County to enforce contribution to the extent of one-half the damages which it had been compelled to pay. The court, after reviewing the English cases, held that in the case before them the plaintiffs could recover.

In the present case the omission of duty subjected the justices to a penalty of \$80. True it may be that it was as much the duty of one as the other to make the proper return of the conviction, indeed it required the signatures of all the justices; but all failed to make a return, and therefore all became liable to the penalty. It appears to me that all being in fault, and having incurred the consequence of a joint default—the responsibility for a statutory penalty—they were joint *tort feorsors*. Nor can the case be brought within the doctrine of the cases of doing an act not unlawful in itself, for here the omission to perform the duty was expressly contrary to the statute, and therefore unlawful, and unlawful to the knowledge of each of the justices. The American case above cited is, in my opinion, not in point. There there was no statutory penalty. There was a liability to the injured party for pecuniary damages. Again I do not think the case entirely reconcilable with the English authorities, and even if the doctrine laid down could be supported I think the present case distinguishable. Here the plaintiff knowingly omitted to perform a duty imposed by statute. Morally as between himself and his associate justices it was his personal neglect that caused all the difficulty. The defendant and the others were not at all absolved from their responsibility by reason of this fact, but certainly his own neglect raises no equity in favor of the plaintiff.

The penalty imposed by the Summary Conviction Act is in the nature of a statutory fine, and although the failure to return the conviction does not amount in law strictly to a crime, it is an offence which is somewhat akin in its con-