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THE ENQUETE SYSTEM.

We have been informed that the use of stenography for the purpose of taking evidence in the Courts has not in every instance proved satisfactory to those who have resorted to it. The inconveniences to which our attention has been directed, and which have reference particularly to Montreal, consist chiefly in the difficulty of checking errors in the notes taken by the stenographers. As counsel cannot at the time read or supervise what is taken down, mistakes, it is said, may occur in the notes and may pass undetected until too late for rectification. Apart from inaccuracies which may occur in the original notes, there may also be mistakes in the transcription, and the original notes are not filed, and even if accessible, would not be legible to other short-hand writers. It is also remarked that writers are of varying degrees of accuracy, and some are far from prompt in extending their notes for use in the case.

If the system of stenography has not done all that its enthusiastic admirers anticipated, there is no occasion for surprise, for we are inclined to think that the expectations entertained at the outset were in some respects unreasonable. Stenography is simply rapid writing, and its use does not preclude errors arising from imperfectly hearing what is said, or misconceptions proceeding from imperfect acquaintance with the subject. In some of the discussions which preceded the introduction of stenography, it seemed to be supposed that because evidence could be taken down rapidly in short hand, therefore the words of the witness must necessarily be exactly photographed. But a moment's reflection is sufficient to show that entire accuracy cannot be guaranteed. The senses are imperfect, and a word or two may be incorrectly heard, whereby the meaning of the witness is misunderstood. How often, in the course of a trial, are counsel at war as to what a witness has actually said, and this within a few moments after the words have been uttered! It is no inconsiderable merit of stenography that in such cases a reference to the short-hand notes is generally accepted as final.

The question is not whether stenography is absolutely perfect, but whether it is not an improvement upon the old time system. It will be admitted, we think, by all, that in certain classes of cases it is a vast benefit to have the aid of a stenographer, and few would willingly forego the advantage. That there are some imperfections in the system of stenography is quite true. There are imperfections in almost all human contrivances. But just as printing is a vast improvement over the old system of multiplying copies by hand, and printer's errors are few compared with the blunders which will be found in almost all written documents, so short hand in the Courts has proved of immense advantage. It must not be forgotten, too, that witnesses have an opportunity to correct their testimony when the notes are read over to them, and it is not to be assumed that a witness, especially if hostile, will permit a material deviation from what he said to pass unnoticed.

The whole subject is one of great practical importance, and on another occasion we may return to it. In the meantime it would be useful if those who have had large experience both under the old and new systems, would state the results of their observation, and point out wherein they conceive the present practice is defective.

A case involving a novel point of law was decided by the County Court of San Joaquin county on the 4th ult. A jury in a civil case while out deliberating was taken by the sheriff to a restaurant to eat. As the county had refused to pay for feeding juries in civil cases, the sheriff told the restaurant keeper to collect from the jurors. Of this, however, the jurors had no knowledge. One of the jurors refused to pay for his meal, and was sued by the restaurant keeper. No express promise to pay was proved. The court held that, under the circumstances of the case, the law would not imply a promise on the part of the defendant to pay for what he ate, and gave judgment in his favor.

REPORTS AND NOTES OF CASES.

COURT OF QUEEN'S BENCH.

Montreal, June 22, 1878.

Present:—DORION, C. J., MONK, RAMSAY, TESSIER, and CROSS, JJ.

CUVILLIER et al., Appellants; and SYMES et al., Respondents.

Donation entre Vifs—Survenance d'Enfans—Revocation.

An unmarried lady whose estate was equal to about a million dollars, made donations to relatives amounting to $100,000, of which the interest was paid regularly until some years after her marriage. The donations were made before the coming into force of the Code of Lower Canada. One of the donations, of $10,000, was in question in the cause. *Held*, Chief Justice Dorion and Mr. Justice Cross dissenting, that the donation was not revoked by the donor's marriage and the birth of children.

The question was whether a certain donation of $10,000, being one among several amounting in all to $100,000, made by the respondent to a relative before her marriage to the Marquis of Bassano, was revoked by her marriage and the birth of children, issue of the marriage. The Court below held that the donations were revoked, and dismissed the action brought against the Marquis de Bassano for overdue instalments of interest on the donation of $10,000 which was particularly in question in the present suit.

DORION, C. J., dissenting, considered the judgment right and that it should be confirmed. Miss Symes had made these donations, amounting to about one-tenth of her fortune, several years before her marriage in 1872, and the interest was paid until 1876, when she refused to continue the payments any longer, the ground being that the donations had been revoked by her marriage, and the birth of two children. According to the French law, if a donor gave the whole of his property or *aliquam partem*, the donation was liable to be revoked if he married subsequently. There was a variety of opinion among the authors on the subject, but the rule seemed to be that if the donor had given such a portion of his fortune as he would not have given if he had contemplated marriage and having children, the donation would be revoked by his marriage. But a trifling gift would not be revoked. Here the donations must all be considered together, and it seemed improbable that if Miss Symes had contemplated the possibility of having children, she would have given so large a sum as $100,000 to her relatives. There was no apparent motive for the act, for these relatives were not in need. At the time of her marriage, there was a clause put in the draft of marriage contract, proposing to ratify the donations, but the English solicitor, into whose hands the draft came, considered such a donation so extraordinary that he struck it out. This indicated the view of a professional man accustomed to deal with business of this kind. His Honor considered that the ordinance of 1731, which made such donations revocable by marriage, if not actually in force in Lower Canada, might be considered as adopting the jurisprudence which previously existed, or as deciding between conflicting jurisprudence. It was said that there was a ratification of the donation, by the respondent continuing to pay the interest after her marriage. But she had no knowledge of the law, and her husband was a foreigner who was unacquainted with it. And moreover, the donation being absolutely revoked and null, could not be ratified. Upon the whole, the Chief Justice considered that the action was properly dismissed.

CROSS, J., also dissenting, concurred with the Chief Justice.

RAMSAY, J., rendering the judgment of the majority, remarked that no such question could ever arise again. A very few months after this occurred the law was entirely changed, (C. C. art. 812), and donations are no longer subject to revocation by the birth of children to the donor. On the general principles of law which governed the case, he thought the Court was unanimous; the whole difference was as to the application of the law to the particular circumstances of the case before the Court. There was evidence that the respondent considered the donation a small one in view of her wealth. Circumstances which transpired subsequently could not be taken into consideration. The authorities, in his Honor's opinion, did not bear out the view that a donation of so inconsiderable a part of the donor's fortune was annulled by the birth of children.

TESSIER, J., concurring, considered that the donation of $10,000, which was alone in question in the present case, must be considered

separately, and without reference to the others. The rule of Roman law relied upon, be held, was not in force in the Parlement de Paris.

MONK, J., concurred in the judgment of the majority for this reason. This was precisely one of those donations which, supposing the law revoking donations to be in force, would not have been set aside in France under the circumstances of the case, the donation constituting but a small portion of the lady's wealth, and her motives in making it being easily understood.

Judgment reversed.

E. Barnard, for Appellants.

Bethune & Bethune, for Respondents.

BULMER et al., appellants, and DUFRESNE et al., respondents.

Substitution—Sale of sand by the Grévé.

The *grévés de substitution* sold to the appellants all the sand they could take from the property for five years. *Held*, that the sale was illegal, and that the purchaser might be sued by the substitute for the value of the sand so taken. (21 L. C. J. p. 98.)

The action had been brought by the substitutes to a succession against the appellants to whom the *grévés de substitution* had sold all the sand they could take from the property for five years. The judgment had condemned the appellants to pay about $800.

CROSS, J., dissenting, thought the judgment should be reversed.

RAMSAY, J., also dissenting, held in the first place that no such action was known to the law either of this country or of England. No trace of such a proceeding could be found in the books. On the merits there was no evidence to show the quantity of earth taken at all, except the admission of Bulmer, and the amount awarded was exorbitant.

DORION, C. J., said that Dufresne, the *grévé*, long after the registration of the substitution, sold this sand to Bulmer, who must be taken to have knowledge of the substitution. The sale was beyond the powers of the *grévé*, as the removal of the sand might destroy the value of the property altogether. Bulmer, by removing the sand, stood in the same position as any one who caused damage to his neighbor—he was bound to repair the damage. He might not have had actual knowledge of the substitution, but it had been published and he was bound to know it. The action resembled the action of trover in England. The judgment was correct in principle, but the amount must be modified to the extent of two-eighths, and the costs would be awarded in the same proportion.

H. W. Austin for appellants.

Geoffrion & Co. for respondents.

DISPUTED QUESTIONS OF CRIMINAL LAW.

(*Continued from page* 298.)

II. "Obscene" Indictments.—The ruling of the English Court of Appeal in R. v. Bradlaugh, 38 L. T. (N. S.) 118, will shake a practice which, in the American courts, has been heretofore unquestioned. The defendants, Charles Bradlaugh and Annie Besant, who argued their case in person, and with remarkable shrewdness and force, were convicted in the Court of Queen's Bench on an indictment which charged that they, "unlawfully and wickedly devising, contriving, and intending, as much as in them lay, to vitiate and corrupt the morals as well of youth as of divers other subjects of the queen, and to incite and encourage the said subjects to indecent, obscene, unnatural, and immoral practices, and to bring them to a state of wickedness, lewdness, and debauchery, unlawfully, &c., did, print, publish, sell and utter a certain indecent, lewd, filthy, and obscene libel, to wit, a certain indecent, lewd, filthy, bawdy, and obscene book called 'Fruits of Philosophy,' thereby contaminating, etc." The jury found that the book was calculated to deprave public morals, but exonerated the defendant from all corrupt motive in publishing it.

A motion in arrest of judgment was made, on the ground that the libel ought to have been set out. The motion was overruled by the court, consisting at that time of Cockburn, C. J., and Mellor, J. The case was argued in error in January, 1878, before Bramwell, Brett, and Cotton, L. JJ., who unanimously concurred in reversing the decision of the Queen's Bench. Bramwell, L. J., who leads off, begins by announcing the general rule that an indictment, if it give simply a conclusion of law, is bad, but that it must set out the facts necessary to constitute the offence in the concrete. The

reasons for this rule he recapitulates, saying that, while there may no longer be much force in those which rest on the defendant's right to know the charge against him, and on the importance of an exact specification so as to relieve him from a second trial for the same offence, the third reason remains substantial, this reason being a defendant's right to have the question of his guilt determined on the record by a court of error. Wherever the court has to determine on the legal quality of words, he proceeds to argue the words must be set out. In civil pleading this must be the case; *a fortiori* in criminal. He cites R. v. Curl, 2 Stra. 789, 17 How. St. Tr. 154, as a case for obscene libel in which the words were set out, and R. v. Sparling, 1 Stra. 498, where it was held to be a fatal objection to an indictment for cursing, that the "curses" were not spread on the record. Chitty's Precedents, he admits, contain a form omitting the words of an alleged obscene libel (2 Chitty's Cr. Law, 45) ,"but," he remarks, "a solitary precedent in a text-book is of but little weight; you must have a mass of precedents before they can be used as authority." "The other authorities consist altogether of American cases. Now, cases decided by the American courts are not, strictly speaking, authority at all; they are only guides, though frequently most valuable guides; they contain the opinions of able men, well versed in our law, and, therefore, will always have great weight attached to them in our courts, but they are not authority by which we are in any way bound. But, even if they were binding on us, they do not assist the case of the prosecution in any way, but make quite in the opposite direction. For instance, the case of The Commonwealth v. Tarbox, 55 Mass. 66, has been relied on; but in that case there was an allegation in the indictment that the libel was so obscene it could not be put on the record, and it is clear that it was considered that, but for such an allegation, the words must have been set out. And the other American cases go no further to help the prosecution, but, as far as they go, equally aid the defendant's case. It is true that it is suggested in this case that, although there is no such specific allegation in the indictment, yet that one is implied in the epithets, "lewd, filthy, bawdy, and obscene," applied to the libel; but, as such epithets are employed in every indictment, they can imply nothing of the sort."

The judgment of the court below he thus disposes of:

"The lord chief justice gives three reasons for his decision. The first reason is the great inconvenience that might arise from such a rule. He gives an instance of "what would be the monstrous inconvenience of setting out *in extenso* the whole of a publication which may consist of two or three volumes." With great deference to his lordship's opinion, it seems to me equal inconvenience might arise from making such an exception to the general rule of law; for when is a libel to be considered too long to be set out? Is one of ten volumes too long, or two, or one; or one of one hundred pages? Where is the line to be drawn? And it has not been suggested that defamatory libel need not be set out; and yet it may be of any length. And however long a libel is, it is admitted that it must be set out, or, on demurrer at any rate, the indictment will be bad. Then his lordship says the objection ought to have been taken on demurrer. That might be so if the Legislature had said so, but it has not, and it is not the law of the land. The law says, convenient or inconvenient, he may take the objection at any time before or after verdict. His last ground is that it is *communis nocumentum*, and, therefore, after verdict need not have been set out; but I am not aware of any such exception being known to the law. Now, in the judgment delivered by Mellor, J., I find he says, "If it be essential to set forth the terms in which the libel was published, the point may still be taken upon error." I am glad to find those words, and glad also to see that the lord chief justice himself says that he leaves the ultimate decision of this matter to the court of error." I am glad to find those expressions, because they show that they did not consider they had concluded the whole question, but that it was deserving of being more fully discussed here. The result is that there are a number of authorities unimpeached and binding upon us, and, no good reason having been given us why we ought not to do so, we must act upon them. According to the law as contained in them, this indictment is wholly defective, and not merely imperfect, the words "to wit," with what follows them, not supplying the defect in any way, being mere words of identification. Therefore, without expressing any opinion on the merits, which it is not for us to do, and which we could

not do, being wholly in ignorance on the matter, we come to the decision on the dry point of law, that judgment ought to have been arrested, and the judgment of the Queen's Bench Division must be reversed."

Brett, L. J., who follows, argues at large to the effect that, wherever words are the gist of an offence, they must be set out in the indictment. Of the older cases he gives the following interesting analysis:

"In Zenobio v. Axtell, 6 Term Rep. 162, the libel was in French, but the indictment after saying that it was published in the French language, went on to say that it was "to the purport and effect following, in the English language—that is to say," and then followed a translation of the libel in English. It was held, on motion in arrest of judgment, that such a declaration was defective, Lord Kenyon remarking that "the plaintiff should have set out the original words and then have translated them." In Wright v. Clements, 3 Barn. & Ald. 503, the declaration alleged that the defendant published certain libellous matters of and concerning the plaintiff, "in substance, as follows: that is to say," and then set out the very words of the libel. On motion in arrest of judgment it was argued that from some such a preface to the setting out the libel, it must be concluded that the actual libel published was not set out *verbatim*, but in substance only; and the court allowed the objection, saying the libel ought to have been introduced by some such words as to the "tenor and effect following," which would have imported that the very libel itself had been set out; and judgment was accordingly arrested. Cook v. Cox, 3 Mau. & Sel. 110, is to the same effect. These cases were decided in 1814 and 1820, and, therefore, after Fox's Libel Act, 32 Geo. III., ch. 60, passed in 1792, which is a sufficient answer to the argument founded on that act. But it is quite clear that no alteration was, or was intended to be, made in the law in this respect by that act. This appears both from the principle of that enactment and also from express provision contained in it. After that act it was still left for the judge to say whether the words used could possibly be a libel, and, therefore, since before he can decide that question he must have the libel before him, the necessity for setting out the libel was not removed. But the act contains an express provision to the same effect. By section 4 it is provided: "That, in case the jury shall find the defendant or defendants guilty, it shall and may be lawful for the said defendant or defendants to move in arrest of judgment, on such ground and in such manner as by law he or they might have done before the passing of this act; anything herein contained to the contrary notwithstanding." The last case that I shall refer to is a very remarkable one. In Rex v. Wilkes, 4 Burr. 2527, the defendant is indicted for having published an obscene and impious libel, "to the purport and effect following, to wit;" and then followed the libel. Before the trial the attorney-general, Sir Fletcher Norton, applied to Lord Mansfield, at chambers, to amend the indictment by striking out the above words, and substituting for them the words "to the tenor and effect following, to wit;" which his lordship, after hearing the other side against it, did. Now, here it is worthy to notice that although the actual libel was fully set out, yet the highest law officer of the crown thought it inexpedient and unsafe to go on without substituting technical prefatory words, which were always held to signify that the actual words of the libel followed them, for other words which had not the same technical significance. So, taking a review of all these cases, we find in them a strong body of authority derived from every kind of crime which consists in words, to the effect that in all such crimes the pleadings must set out the words themselves which constitute the offence. Now, what are the cases which are said to be to the contrary effect? In Dugdale v. The Queen, Dear. & P. 64, the indictment was for keeping in his possession indecent prints, and in a second count for obtaining and procuring indecent prints, in both cases with an intent to publish them. In neither case were the prints set out in the indictment, but it was not necessary, on such a charge, that they should be set out. The offence was complete, though the defendant should never have looked at them, and therefore it was not necessary to the validity of such an indictment that they should appear on the face of it. This case is, therefore, distinguishable on that ground but I think it would have been enough to say that there is a difference, in this respect, between indecent prints and pictures, and an offence consisting of words. Sedley's Case, 1 Keb. 620, Fortes. 99, is also distinguishable on the same

ground —that it was not a case of libel at all, but of indecent exposure. In Regina v. Goldsmith, 28 L. T. (N. S.) 881, Law Rep. 2 C. C. 74, the prisoner was indicted for unlawfully receiving goods knowing them to have been obtained by false pretences, he did not get them himself by false pretences. Now, on such a charge, it was necessary to prove that the prisoner knew what false pretence had been used in getting the goods, therefore it was not necessary to set out the actual false pretences in the indictment: just as, in an indictment for receiving goods knowing them to have been stolen, it is not necessary to show how or by whom they were stolen, since that offence can be committed by a man who is ignorant of the exact circumstances of the theft. Heyman v. The Queen was a case of conspiracy fraudulently to remove goods, in contemplation of bankruptcy, and, as in Regina v. Aspinall, which was also a case of conspiracy, the offence was held complete directly the agreement was come to; so that—after verdict, at least—an indictment which alleged such an agreement, but omitted other particulars, was good. In those cases the crime did not consist in words, but in an agreement for a particular purpose."

Cotton, L. J., in concurring makes the following comments on the American cases:

"But do these American cases even justify such an omission as there is here? We should not be bound by them if they did, but they do not. They lay down a rule that, where there is an allegation that the libel is too bad to put on the record, it may be omitted; and it is enough to say that there is no such allegation here. But do the English courts recognize that rule? They do not. Our courts do not allow libels to be perpetuated and disseminated under a pretence of judicial necessity; but that is as far as they go. Where it is relevant and necessary, there is no rule which allows matter to be omitted merely because it is impure or libellous. A court ought not to consider its records defiled by any matter which a defendant has a substantial interest in demanding to be placed on them If it is desirable that there should be an exception in any such case, the Legislature must make it, as it has made exceptions in other cases."

It is to be observed, as is noticed by Bramwell, J., that the American authorities excuse the non-setting forth of the libel on the grounds of obscenity, which allegation was omitted in R. v. Bradlaugh. It will not do to say that this excuse is surplusage. An indictment which excuses the non-setting of a document on the ground of its loss, or of its destruction by the defendant, is good, though without such an excuse the indictment would be defective. The excuse, therefore, is essential. But, when such an excuse is made, the American cases present an almost unbroken line of authority to the effect that the obscene document need not be copied. The Commonwealth v. Holmes, 17 Mass. 335; The State v. Brown, 1 Williams (Vt), 619; and The People v. Girardin, 1 Mann. (Mich.) 90, are direct to this effect. The Commonwealth v. Tarbox, 1 Cush. 66, reaffirms the principle of The Commonwealth v. Holmes, but holds that to paste the alleged obscene matter to the indictment is a defective mode of pleading. On the other hand, the State v. Hanson, 23 Texas, 234, an indictment for publishing an obscene document, without giving the words, was held bad. In this case, however, there was no excuse offered, as in The Commonwealth v. Holmes, for not setting out the libel. The Commonwealth v. Sharpless, 2 Serg. & R., was the case of an indecent picture, and the Supreme Court held that it was not necessary that the picture should be copied on the indictment. The reason, however, is the same as that given to The Commonwealth v. Holmes—that the court must preserve the "chastity" of its records, and not permit them to be used to perpetuate obscenities.

If an obscene publication were to be considered as exclusively a libel, it would be difficult to resist the conclusion that, as a libel, when indicted as such, it should be spread on the record, supposing that no legitimate excuse be given for the non-setting out. But there is much force in the position that an obscene publication is not so much a libel as an offence against public decency, and, if it be the latter, the particularity required in setting forth libels is not necessary. If a mob, for instance, should gather about a religious assembly, disturbing its worship by profane and indecent language, it would not be necessary, it may well be argued, that those profane and indecent words should be set out. Nor is this the only illustration to which we may appeal. An indictment against a

common scold need not set forth the words the "scold" was accustomed to use. United States v. Royall, 3 Cranch, 618; The Commonwealth v. Pray, 13 Pick. 362; James v. The Commonwealth, 12 Serg. & R. 220; and see to same effect 6 Mod. 311; 9 Stra. 1246; 2 Keb. 409. To such an indictment we can readily conceive the same objections to be made as were made against the indictment in Bradlaugh's case. "How do we, the Court of Appeals, know that the words the scold used were really scolding? Is it not possible that, while the jury may have thought they were, we might have thought differently? Is not language of gentle self-assertion on the part of women often called scolding? To convict under such an indictment violates the important rule that, when an offence consists in the use of words, those words should be spread out on the record." Yet convictions on indictments of this class have been numerous, both in England and the United States.

In a late North Carolina case the defendant was indicted for disturbing a place of public worship, by singing persistently a hymn to music out of tune. Could it be rightly maintained that the notes of such a tune should be given in the indictment, so that it could be sung before the Court of Error in order to satisfy them of the indecorum?

A common "barrator," to take another illustration, can be indicted without setting forth the particulars of which the barratry consists. The State v. Dowers, 45 N. H. 543; The Commonwealth v. Davis, 11 Pick. 432; see to same effect 6 Mod. 311; 2 Hale, 182; Chitty's Cr. Law, 230. Yet here, also, a court of error might complain, as did the judges in Bradlaugh's case, that they were asked to pass sentence on an indictment which gave only a conclusion of law, and did not state the facts on which this conclusion rested.

But these are not the only cases in which courts of error have been obliged to sustain indictments resting on summaries of documents or acts, instead of on documents or acts themselves. The loss of a document, or its retention by the opposing party, as we have just observed, has been frequently held to be a sufficient excuse for the omission to set it out. Yet in such case the Court of Error has to accept the finding of the jury as to the character of the document, and are precluded from having recourse to the document to determine its legal character.

We must, therefore, conclude that the law does not require a document which is the basis of a prosecution to be set out in the indictment, when there is sufficient reason given in the indictment to excuse the omission. The question is, what is a sufficient reason?

It is plain that loss or possession by the defendant is such a reason.

Whether the excessive obscenity of the document is a reason is discussed at large, as we have just seen, by the judges of the Court of Appeals, and, although they have put their decision on the ground that there is no excuse for the omission given in the indictment in the case before them, yet their reasoning is clear to the effect that, no matter how obscene the litigated document may be, on the record it should be spread. This, then, is the issue between the English and the American Courts. As to this issue it is necessary only to remark that obscenity, like noxious sounds and smells, is a matter peculiarly for the determination of a jury. When there has been a finding by the jury, with the approval of the judge trying the case, it is no more necessary for the Court of Errors to have the obscenity reproduced before them than it is necessary that the noxious sounds and smells should be reproduced. And if a common scold's words, or if the words of a person disturbing a religious meeting, need not be set out, why need the words incident to the obscene nuisance, found to be such by a jury?

AGENCY—LIABILITY OF AGENT TO THIRD PARTIES—IN TORT.

For many years it has been the practice of the Legislature to exempt the private means of commissioners from liability, either by incorporating them or enabling them to sue and be sued in the name of a clerk, and restricting the execution to the property which they hold as commissioners.

"I can well understand," said Baron Bramwell, in Ruck v. Williams, 3 H. & N., 308, "if a person undertakes the office or duty of a commissioner, and there are no means of indemnifying against the consequences of a slip, it is reasonable to hold that he should not be responsible for it. I can also understand that if

one of several commissioners does something not within the scope of his authority, the commissioners as a body are not liable; but when commissioners, who are a *quasi*-corporate body, are not affected (*i. e.* personally) by the result of an action, inasmuch as they are authorized by act of Parliament to raise a fund for payment of damages, on what principle is it that if an individual member of the public suffers from an act *bona fide* but erroneously done, he is not to be compensated? It seems to me inconsistent with actual justice, and not warranted by any principle of law."

Chief Justice Best pointed out in Hall *v.* Smith, 2 Bing., 156, that it is harsh and impolitic to cast on individuals gratuitously a public duty, and make them responsible out of their private means for the non-fulfilment of it. But for many years it has been the practice of the Legislature to exempt the private means of commissioners from liability. The basis of the above reasoning therefore fails, and *debile fundamentum fallit opus:* per Blackburn, J., in Mersey Docks etc., *v.* Gibbs, *sup.*

The case of the Postmaster-General is like that of all other public officers, such as the Lords Commissioners of the Treasury, the Commissioners of the Customs and excise, the Auditors of the Exchequer, who are not liable for any negligence or misconduct of the inferior officers in their several departments: per Lord Mansfield in Whitfield *v.* Lord Le Despencer, Cowp., 754.

The reason assigned by Lord Holt (12 Mod., 489) for holding a principal liable for the acts of his deputy is that, as he, as principal, has power to put him in, so he has power to put him out. In general merchant ships the captains have a power of hiring their sailors, and so far are considered as independent of their owners; and the reason given by Molloy (b. 2, c. 13, s. 13) why the master of a ship is held responsible for the acts of the mariners within the scope of their authority, is that they are of his own choosing, and he may reimburse himself any injury they may have committed out of their wages. But the master is not liable for the wilful act of one of the crew: Bowcher *v.* Nordstrom, Taunt, 568.

There is no analogy between the case of a captain of a ship of war and that of a master of a ship. The former has no power of appointing the officers or crew on board; and is compellable to enter upon the performance of the duties upon the ship to which he is appointed. Hence he is not answerable for damage done by his vessel running down another vessel, the damage having been done during the watch of the lieutenant, and when the captain was not upon deck, nor called by his duty to be there: Nicholson *v.* Mouncey and Symes, 15 East, 384.

In all cases deputies are answerable for their own personal misfeasances; hence, a deputy postmaster is liable for non-delivery of letters gratis in a country post town: Rowning *v.* Goodchild, 2 W. Bl., 909.

Lane *v.* Cotton, 1 Ld. Raym., 646; Whitfield *v.* Lord Le Despencer, 2 Cowp., 754, the cases of the Postmaster General; and Nicholson *v.* Mouncey, 15 East, 384, the case of the captain of the man-of-war, are authorities that when a person is a public officer in the sense that he is a servant of the government, and as such has the management of some branch of the government business, he is not responsible for any negligence or default of those in the same employment as himself. But these cases were decided upon the ground that the government was the principal, and the defendant merely a servant. All that is decided by this class of cases is that the liability of a servant of the public is no greater than that of the servant of any principal, though the recourse against the principal, the public, cannot be by an action. The principle is the same as that on which the surveyor of the highways is not responsible to a person sustaining injury from the parish ways being out of repair, though no action can be brought against his principals, the inhabitants of the parish: per Blackburn, J., in the Mersey Docks and Harbor Board *v.* Gibbs, 35 L. J., 225, Ex.

As to an action on the case lying against the party really offending, there can be no doubt of it; for whoever does an act by which another person receives an injury is liable in an action for the injury sustained. If the man who receives a penny to carry letters to the post office, loses any of them, he is answerable; so is the sorter in the business of his department. So is the postmaster for any fault of his own: per Lord Mansfield, Whitfield *v.* Lord Le Despencer, Cowp., 754.—*W. Evans*, in *London Law Times.*

CURRENT EVENTS.

INDIA.

A Singular Criminal Case.—A criminal case has recently come before the courts of India which is exciting great interest in that country by reason of the position of the parties implicated. The Rajah of Poorree, who is the hereditary guardian of the temple of Juggernaut, and the secular head of the Hindoo religion in Oressa, and who is worshipped by vast numbers of people as the visible incarnation of Vishnu, became possessed with the idea that a Hindoo ascetic of great sanctity who enjoyed a special reputation for curing diseases was attempting to perform some work of incantation against him. He therefore induced the ascetic to visit his private apartments, and, with the aid of his servants, put him to the torture and then cast him out into the street. The injured man was found by the police, but died from his injuries within a few days. The Rajah was arrested, tried for murder, convicted and sentenced to transportation for life. An appeal was taken, but it is probable that the conviction will be sustained.

ENGLAND.

Contract to stifle a prosecution.—In *Davis* v. *London & Provinc. Marine Insurance Co.*, 38 L. T. Rep. (N. S.) 468, decided on the 2nd of March last by the Chancery Division of the English High Court of Justice, one Evans, an insurance agent of defendant having become liable to it for certain sums of money, plaintiff, who was his friend, having been given to understand that defendant could and was about to prosecute him criminally, and that the police had been instructed to arrest him, agreed to and did deposit £2,000 in a bank as an indemnity and security for Evans' liabilities, under the belief that the criminal prosecution would in consequence be abandoned. Before the agreement and deposit were made the defendant was informed by his legal advisers, that the prosecution against Evans could not be maintained, and had withdrawn its instructions to the police to arrest, but plaintiff had not been informed of these facts. The court held that the agreement must be rescinded and the money repaid to plaintiff. The court concludes, that although the contract was bad, whether as one to stifle a prosecution, or as induced by a misrepresentation that a prosecution was to be stifled when no prosecution was intended, plaintiff was not precluded from relief: first, because the money being *in medio*, something must be done with it; second, because illegality, arising from pressure or from an attempt to stifle a prosecution, is not sufficient to make the court stay its hand. The decision is not in conflict with that principle of law which forbids the courts from interfering to save a party who has entered into an illegal contract from the consequences of a failure by the other party to fulfill. In case of an agreement to compound a felony, the plaintiff, seeking to recover back money paid, cannot even claim relief on the ground of pressure. *Sheppard* v. *Dornford*, 1 K. & J. 401; *Sharp* v. *Taylor*, 2 Ph. 801; *Thompson* v. *Thompson*, 7 Ves. 470; *Farmer* v. *Russell*, 1 B. & P. 296. But see *Tennant* v. *Elliott*, 1 B. & P. 3: *Williams* v. *Bayley*, 4 Giff. 638. Such a contract, being one of suretyship, is not one *uberremæ fidei* to be upheld only in the case of there being the fullest disclosure by the intending creditor. But the contract must be based on the full and voluntary agency of the individual who enters into it, and when there is no consideration, as in the case at bar, a very little will do to authorize the court to interfere. Therefore, anything like pressure upon the part of the intended creditor will have a very serious effect on the validity of the contract and still more so where that pressure is the result of maintaining a false impression on the mind of the person impressed. See, also, *Hill* v. *Gray*, 1 Stark. 434; *Carter* v. *Boehm*, 3 Burr, 1905; *Peek* v. *Gurney*, L. R., 6 H. L. 377; *Keates* v. *Cadogan*, 10 C. B. 591; *Turner* v. *Harvey*, Jac. 169. *Pulsford* v. *Richards*, 17 Beav 87; *Rees* v. *Berrington*, 2 Ves. Jun. 540.

Liability of Carriers.—In the case of *Berghum* v. *Great Eastern Ry. Co*, 38 L. T., Rep. (N.S.) 160, decided by the English Court of Appeal on the 14th January last, it is held that the liability of railway companies as common carriers does not apply in the case of luggage over which they have not absolute control. In this case plaintiff went to defendant's station some time before the train started. A porter, by plaintiff's direction, placed his bag in the carriage. Plaintiff went away for a short time, and on his return the bag was gone. He brought

action to recover the value of the bag, and the jury found that neither defendant nor plaintiff had been guilty of negligence. The Court of Appeal held, affirming the decision below, that defendant was not liable as a common carrier, and therefore was entitled to judgment. The general rule has heretofore been supposed to be that a carrier of passengers is liable for baggage the traveller takes into the same carriage with him. "If a man travel in a stage coach" says Chambre, J., in *Robinson* v. *Dunmore*, 2 B. & P. 419, "and take his portmanteau with him, though he has an eye upon the portmanteau, yet the carrier is not absolved from his responsibility but will be liable if the portmanteau be lost." See, also *Le Conteur* v. *Lond. & S. W. Ry.*, L. R., 1 Q. B. 54; *Richard* v. *Lond. & S. W. Ry. Co.*, 7 C. B. 39; *Hannibal, etc., R. R. Co.* v. *Swift*, 12 Wall. 262; *Cohen* v. *Frost*, 2 Duer, 335. But the rule that binds common carriers absolutely to insure the safe delivery of the goods, except against the act of God and the public enemy, whatever may be the negligence of the passenger, has never been applied. *Talley* v. *Great W. Ry. Co.*, L. R., 6 C. P. 44. Here it was shown that the passenger, when changing cars, left his portmanteau unprotected, and the railway company was held not liable for a robbery of the portmanteau. And it has been held that a railway company is not liable for articles carried on the traveller's person, nor for overcoats, canes, and umbrellas, such as he usually has under his exclusive supervision. See *Steamboat Palace* v. *Vanderpoel*, 16 B. Monroe, 302; *Tower* v. *Utica & S. R. R. Co.*, 7 Hill, 47.

In *Mulliner* v. *Florence*, 38 L. T. Rep. (N. S.) 167, decided by the English Court of Appeal, on the 28th of January last, one Bennet purchased horses and carriages of plaintiff and took them to defendant's inn, where he was entertained, and his horses and carriages kept for a long time. Bennett never paid plaintiff the price of the horses and carriages, and absconded from defendant's inn without paying his bill, and leaving the horses and carriages there. Subsequently, having been takn into custody on a charge of swindling, he re-assigned the horses and carriages to plaintiff, to whom, however, defendant refused to give them up until Bennett's bill was paid. Defendant afterwards sold the horses by public auction, and still retained the carriages. The court held, first, that defendant's lien upon the horses and carriages was a general one for the whole of Bennett's bill, and that Plaintiff, not having tendered the amount of it to defendant was not entitled to maintain his action to recover possession of the carriages or damages for their detention, and second, that the sale by defendant of the horses was a wrongful conversion, for which plaintiff could maintain his action, and that the measure of damages was the value of the horses. The decision as to the lien of an innkeeper, extending to all the the property brought to the inn by the guest for all his expenses, is in accordance with the view taken by Story (Story on Bailm., § 476), who says that the cases do not support the doctrine advanced by some that a horse can be detained only for his own meals. See *Thompson* v. *Lacy*, 3 B. & A. 383; *Sunbolf* v. *Alford*, 3 M. & W. 248; *Proctor* v. *Nicholson*, 7 C. & P. 67; *Jones* v. *Thurloe*, 8 Mod. 172. The innkeeper cannot sell the property of his guest, but only detain it, and a sale is a conversion. *Jones* v. *Peasle*, 1 Stra. 557; *Luckbarow* v. *Mason*, 6 East, 21, note; *Walter* v. *Smith*, 5 B. & A. 439; *Cortelyou* v. *Lansing*, 2 Ca. Cas. 200.

UNITED STATES.

A singular case is on trial in Brooklyn, where a Mrs. Malloy brings suit against St. Peter's Roman Catholic church, of which she is a communicant, for $10,000 damages on account of injuries received by slipping on the icy steps of the church. She argues that as she was bound to attend mass under pain of mortal sin the church was bound to keep its approaches in a safe condition.

MOVABLES ANNEXED TO IMMOVABLES.—In *Gross* v. *Jackson*, 6 Daly, 463, chairs were furnished to a theatre of a pattern that had to be made with special reference to the size, shape, and plan of the auditorium of the theatre in which they were to be placed, and were screwed to the floor, as they could not stand alone. The court held that they formed a part of the building, and that a mechanic's lien could be filed and enforced against the building by the one furnishing them. In *Potter* v. *Cromwell*, 40 N.Y. 287, 297, and *Voorhees* v. *McGinnis*, 48 id. 278, three tests are given whereby the question whether a given article has become by annexation a part of the freehold: 1. To give to articles, personal

in their nature, the character of real estate, the annexation must be of a permanent character. There are exceptions to this rule in those articles which are not themselves annexed, but are deemed to be of the freehold, from their use and character, such as mill stones, statuary and the like. *Capen* v. *Peckham*, 35 Conn. 88; *Teaff* v. *Hewitt*, 1 McCook, 511. 2. A second test but not so certain in its character, is that of adaptability to the freehold. *Voorhis* v *Freeman*, 2 W. & S. 116; *Pyle* v. *Pennock*, id. 390. 3. A third test is that of the intention of the parties at the time of making the annexation. See cases above cited, and *Murdock* v. *Gifford*, 18 N. Y. 28; *Winslow* v. *Merchants' Ins. Co.*, 4 Metc. 306; *Swift* v. *Thompson*, 9 Conn. 63. The English cases go further than the American in the direction of the principles stated. *Walmsely* v. *Milne*, 7 C. B. (N. S.) 115; *Boyd v. Shorrock*, L. R. 5 Eq. 72: *Climie* v. *Wood*, L. R., 3 Exch. 257, and 4 id. 328. See also *Ford* v. *Cobb*, 20 N. Y. 344; *Cresson* v. *Stout*, 17 Johns. 116; *Vanderpoel* v. *Van Allen*, 10 Barb. 157; *Swift* v. *Thompson*, 9 Conn. 63: *Walker* v. *Sherman*, 20 Wend. 636: *Taffe* v. *Warnick*, 3 Blackf. 111; *Tobias* v. *Francis*, 3 Vt. 425; *Gale* v. *Ward*, 14 Mass. 352; *Hutchinson* v. *Kay*, 23 Beav. 413. *In re Dawson*, 16 W. R. 424. Also *Pierce* v. *George* (108 Mass. 78), 11 Am. Rep. 310, and note at page 314, where the various authorities are collated.—*Albany Law Journal.*

Repeal of the Bankrupt Law.—The following is the full text of the bill repealing the bankrupt law, as it finally passed and received the approval of the President:

"*Be it enacted, etc.*, That the bankrupt law, approved March 2nd, 1876, titled 51, Revised Statutes, and an act entitled, 'An act to amend and supplement an act entitled, 'An act to establish a uniform system of bankruptcy throughout the United States, approved March 2nd, 1867, and for other purposes, approved June 22nd, 1874,'" and all acts in amendment or supplementary thereto, or in explanation thereof, be, and the same are hereby, repealed. Provided, however, that such repeal shall in no manner invalidate or affect any case in bankruptcy instituted and pending in any court prior to the day when this act shall have effect, but as to all such pending cases and all future proceedings therein, and in respect of all pains, penalties and forfeitures which shall have been incurred under any of said acts prior to the day when this act takes effect, or which may be thereafter incurred, under any of those provisions of any of said acts, which for the purposes named in this act, are kept in force, and all penal actions and criminal proceedings for a violation of any of said acts, whether then pending or thereafter instituted, and in respect of all rights of debtors and creditors, except the right of commencing original proceedings in bankruptcy, and all rights of, and suits by, or against assignees, under any or all of said acts, in any matter or case which shall have arisen prior to the day when this act takes effect, which shall be on the 1st of September, 1878, or in any matter or case which shall arise after this act takes effect, in respect of any matter of bankruptcy authorized by this act to be proceeded with after said last-named day, the acts hereby repealed shall continue in full force and effect until the same shall be fully disposed of in the same manner as if said acts had not been repealed."

Crime in Illinois.—The *Chicago Legal News* of the 22nd inst., says: "George Sherry and Jeremiah Connolly were hung in the jail of this county, on yesterday morning, by Sheriff Kearn, for murdering McConville. Cook county never had so many prisoners in jail charged with taking human life as at the present time. People are becoming exercised over the increase of murders and are demanding that something shall be done to stay the hand of the murderer. It would be well to study the effect of the execution of these two criminals upon the vicious, and see whether it will have a tendency to preven crime."

Collecting Agencies.—The Committee of Clay County Bar publish the following notice respecting the action of the bar, unanimously declining in the future all division of fees with the so-called collecting agencies:

"At a recent meeting of the members of the Clay County Bar, it was decided by unanimous vote to decline in the future all division of fees with the so-called collecting agencies, which, by the aid of extensive advertising and persistent dunning, have for years imposed both upon the business men of the city and the attorneys of the country.

These agencies generally have their origin in the ambition of patriotic but impecunious individuals to serve their country by the publication of catalogues of "reliable attorneys," at the rates of from one to ten dollars per head. It is necessary that these catalogues be annually revised. The revision serves the double purpose of keeping the list "strictly reliable" and of marking the time for payment of annual dues. To be a "reliable attorney," the "only ones recommended," cost annually from one to ten dollars for each "bureau." These "bureaus" have become numerous; and, as a like sum is required to secure a situation with each, being a "reliable attorney," while gratifying to professional pride, is expensive.

Reading circulars from these "reliable bureaus," offering dazzling inducements (for $2.50 and a division of fees) seriously encroaches upon the time of attorneys in actual practice—replies are out of the question. But the enterprising bureau man does not suffer his enterprise to be balked by the neglect of the "reliable attorney" (with $2.50) to give his consent to be catalogued as a member of the bureau. In due time the catalogue is at hand, with the request that it be paid for or returned if not wanted, and the "reliable attorney," who dislikes to be in the position of a recipient of favors without paying charges, remits the "annual dues."

We desire to notify these bureau men who have often so kindly remembered us (for a small fee), that while we are solicitous for their welfare in general and in particular, in the future we shall decline to become "reliable attorneys." We do not desire to divide fees with those who have no part in earning them. We do not desire assistance in the way of procuring collections.

By the way of a return for past favors, if any of these gentlemen desire positions as hotel runners, or insurance agents, or in any other occupation where persistence and cheek are essential qualifications, where their peculiar talents will serve them, and their ambition find free scope, we heartily recommend them."

GENERAL NOTES.

The Court of Appeals of Kentucky, in the case of *Greer* v. *Church et al.*, decided on the 23rd of November, 1877, passes upon the effect of a contract purporting to be for the renting of a piano. The contract, which was in writing and and signed by both parties thereto, set forth that Church & Co. had rented to one Mrs. Martin a piano valued at $550, and that she agreed to pay as rent for the same $400 for the first month; $10 per month for six months thereafter, and $20 per month afterward. Mrs. Martin was entitled to become the purchaser of the piano at $550, and the sums received for rent for the first eleven months were to be allowed toward the purchase-price. It was in evidence that Mrs. Martin purchased the piano, paid on the contract $410 and took possession of the piano, which she subsequently sold to appellant Greer. Church & Co. then replevied it. The court below instructed the jury, at the trial of the replevin action, that if the rent paid by Mrs. Martin on the piano did not amount to $550, the plaintiff should recover. The Court of appeal reversed a judgment for plaintiff, holding that the transaction was a purchase and not a lease, and that no matter whether the parties intended the title to pass or not the law would, in furtherance of public policy and to prevent fraud, treat the title as being where the nature of the transaction required it to be. See, as sustaining a similar doctrine, *Domestic Sewing Machine Co.* v. *Anderson*, 15 Alb. L. J. 64, where the Supreme Court of Minnesota held in the case of a sewing machine which was alleged to be leased and a written contract of leasing produced, that parol evidence was admissable to establish a contract of sale, antecedent to the lease, and that the lease was in consequence void for want of consideration. See, also, note of case upon *Victor Sewing Mach. Co.* v. *Hardue*, 16 Alb. L. J. 442, where a similar agreement, in respect to a sewing machine, was treated as invalid upon other grounds.

An *ex parte* application was made to a police magistrate in open court by certain persons who had been employed by the plaintiff upon a railway, for a summons against the plaintiff under the Masters and Servants Acts, 1867 (30 & 31 Vict., c. 141), on the allegation that he had not paid them their wages, though he had received funds to enable him to do so. The magistrate refused to grant their application, on the ground that the facts as stated by them did not bring the case within his jurisdiction to do so, and afforded no ground for criminal proceedings. The defendants, who were newspaper proprietors, published a fair report of the proceedings before the magistrate, which contained matter defamatory to the plaintiff. *Held*, that the defendants were protected by the privilege which attaches to all fair and impartial reports of judicial proceedings, and that such privilege was not taken away either by the fact that the magistrate decided that he had no jurisdiction, or that the application was made *ex parte*.—*Usill* v. *Hales*.