THE

MANITOBA LAW JOURNAL.

VOL. II. SEPTEMBER, 1885. No. 9.

LARCENY.

The Cabman's Case.

THE case of *Regina v. Ashwell* has given rise to much discussion and difference of opinion in England. When the case first came before the Court for Crown Cases Reserved it was thus noticed by *The St. James' Gazette*:—

"If a sovereign is given to a cabman by his fare, both parties believing it to be a shilling, and an hour later the cabman discovers the mistake and keeps the sovereign, has he stolen it? The argument of this question before the Court for Crown Cases Reserved last week afforded excellent entertainment to a professional audience. The difficulty is, that to 'take and carry away *animo furandi*' is an essential part of the common-law definition of larceny, and that in this case the cabman did not form a felonious intention about the sovereign when he took it and carried it away, because he then believed it to be a shilling. On behalf of the Crown it was argued that either he took it when he knew it was a sovereign, or the felonious intention which he subsequently formed relates back to the time when he took it. Before the argument had gone far it was apparent that the five judges who were hearing the case were not agreed, and while Lord Coleridge had no doubt that the

sovereign was stolen, Mr. Justice Stephen was equally positive that it was not. Mr. Justice Cave further complicated matters by throwing out a suggestion that the cabman might have committed the statutory offence called larceny by a bailee. In the result the Lord Chief Justice announced that the Bench was so seriously divided in opinion that there must be a further argument before the full court—that is the whole Queen's Bench Division."

Accordingly a re-argument took place before the thirteen judges, when the majority were of opinion that the conviction was right.

A somewhat similar case is *Reg. v. Macdonald*, in which the question was whether a minor, who had purported to enter into a contract for the hiring and purchase of furniture, and who had sold it before he paid all the instalments, could be convicted of larceny. In this case also a majority of the judges confirmed the conviction.

The Law Journal (*Eng.*) sides with the minority, and it seems to have much authority in favor of its contention.

Roscoe's definition of larceny, as modified by a suggestion of Sir James Stephen, and in this form adopted by Mr. Harris, is as follows:—"The wilfully wrongful taking possession of the goods of another with intent to deprive the owner of his property in them." This definition will be of no further service, for it is quite clear that there did not exist any wrongful intent—nor indeed any wrongful taking.

But for the statute relating to bailees, it was believed that there was no case in which a person having wrongfully converted to his own use that which he had come into possession of innocently could be convicted of larceny. *Harris, 212.* It was thought that there must exist the *animo furandi* at the time of taking.

For example, where A went to a shop and said that C wanted some shawls to look at. The shopkeeper gave the shawls to A, and A converted them to his own use. This is larceny if the design of so converting was present when

the possession was obtained; but it was thought not to be larceny if such design was conceived subsequently to the rightfully obtaining possession. *R. v. Savage, 5 C. & P. 143.* "Though the person thus obtaining possession afterwards fraudulently appropriated the goods to his own use, he would not be guilty of larceny at common law." *Harris 211.*

But we will allow *The Law Journal* to speak for itself:—

"In regard to the question raised in *Regina v. Macdonald*, we sympathise with the dissentient judges. At common law there could be no larceny without a trespass. A statute says that a bailee who fraudulently converts to his own use goods bailed to him may be convicted of larceny. An infant fraudulently converts to his own use goods of which, if he had not been an infant, he would be bailee. Is he guilty of larceny? The answer seems to be in the negative. There is no dilemma. He is not guilty at common law, because he has committed no trespass, and he is not guilty by statute, because he is not a bailee. His proper legal description is that of licensee, and if it had been decided that a licensee who does something inconsistent with the license becomes a trespasser and, if a fraudulent intent be added, a thief, the decision would have been intelligible. But the various *reductiones ad absurdum* put several times by the judges do not help to a conclusion. They would help if the law of larceny were based on reason, but it is not. It had its origin in days when most crimes were crimes of violence, and it has been toned down by the judges in days when it was a hanging matter. The suggestions made by the learned judges in the course of the argument were valuable to the Legislature, but did not elucidate the question in hand. Some positions of law, however, seem to have been assumed without warrant. It appears to have been supposed that if a chattel is lent to an infant, and he sells it, there would be no remedy unless he was guilty of larceny. He would, however, be guilty of a conversion, upon which he could be sued. The assemblage of a dozen judges to decide a point of criminal law greatly

imperils its proper decision. They are apt to treat the matter from the point of view of common sense and convenience rather than law, and support one another in so doing. They become less a forum than an assembly of gentlemen settling among themselves what is right and wrong."

In this connection it may be noticed that if there be the *animo furandi* at the time of acquiring possession, the fact that the owner willingly hands over the chattel to the accused is no defence if the transfer has been brought about by some deception. A good example of this kind of larceny was recently decided in the Supreme Court of Michigan, in *People v. Shaw*, where the facts were as follows :—

S. introduced himself to B. as a traveler for a tea-dealing firm in Cincinnati, and told him that one of the means used for getting custom in a new place was offering purchasers a chance, by drawing cards, to get fifty pounds free, in addition to the purchase, if they drew the winning card. In order to carry out the scheme, he wanted B. to accompany him, and showed him how to draw the lucky card, by a little dot on the back. While they were practicing, and B. succeeded each time in drawing the card, J., a confederate of S., came up, appearing to be a stranger, and inquired what they were doing, and S. told him he would show him, and gave him the same explanation as to the mode of selling tea, but did not tell him about the marked cards. S., after some talk, said that B. could draw the fifty-pound card. J. offered to bet $100 that he could not, and held out to S. what seemed to be a roll of bills. S. said he had not the money, but had a $300 check. J. said he did not want the check ; he wanted the money. S. asked B. if he had it. B. said he had not $100, but had $80. B., at S.'s request, handed him the $80, and S. whispered to him to draw the marked card. He drew it, and it was a blank, and S. at once handed the money to J. *Held*, larceny.

THE ROMANCE OF LAW.

The Swinfen Case.

SOME thirty years ago there dwelt in Staffordshire an old country gentleman named Sam Swinfen, the possessor of an estate valued at between 60,000*l.* and 70,000*l.* He had inherited his property somewhat unexpectedly, and for many years he and his wife passed a secluded life in two rooms of the old mansion; on her death in 1848, however, he invited his only son, H. I. Swinfen, to take up his abode with him. This the younger man did, bringing with him his wife, with whom he had contracted a romantic marriage against his father's approval. The old sore was healed, and a complete reconciliation took place. The son set about improving the estate with marked success, and all went well till the latter's sudden death in 1854. The father was now eighty years of age, and in a state of physical, and as it was then thought, mental paralysis. In fact, friends of the family, writing in the widow's behalf, in answer to letters of condolence, stated that 'old Mr. Swinfen was happily spared the shock, being incapable of understanding the loss he had sustained.'

The old gentleman, in fact, was not insane. He knew that in default of a will the estate would pass to the heir-at-law and representative of his predecessor, Captain Swinfen, of the 6th Dragoon Guards, and after due consideration he gave instructions for and executed a will, whereby he devised the whole property to the widow. The will was made on July 7, 1854, and on the 26th of the same month the testator died.

Thereupon Captain Swinfen cast about for means of upsetting the testament, and invoked to his aid the old familiar friend of lawyers—'mental incapacity.' He filed a bill in Chancery, and by consent an issue *devisavit vel non* was sent down for trial, and came on for hearing before Cresswell, J., and a special jury at Stafford Assizes on Saturday,

March 15, 1856. For the widow, plaintiff, on the issue, Sir F. Thesiger, afterwards Lord Chancellor Chelmsford, was specially retained to lead, and on the other side appeared the famous Chief Justice Cockburn, then Attorney-General.

On the first day's hearing the ladies who had written the letters after the son's death were called, and in cross-examination admitted their previous statements as to the old man's incapacity to recognise his loss, he having actually stated to one of them that the person dead was Mrs. Swinfen. Other damaging points also were made against the will, and Thesiger was so impressed that he sent for the widow to his lodgings, and strongly urged her to leave the matter in his hands to settle as best he could. Thesiger led the widow to understand that the defendant offered to settle on her an annuity of 1,000*l.* if she would give up the estate. This, with that courage and pertinacity she showed from beginning to end of the litigation, she absolutely refused. She was ultimately prevailed upon to take the night to think the matter over, but next morning saw no change in her determination, and she telegraphed to Thesiger, 'offer refused.' We may judge then her astonishment when, on arriving at court on Monday morning she was met by her counsel leaving the court room, and cooly informed that he had done the best he could for her, and had settled the matter on the terms originally proposed.'

But if the heir had a verdict the widow had possession, and to possession she clung. From the beginning she had asserted that she would stand or fall by the will, and at this crisis she rose to the occasion like Maria Theresa, and abandoned by all she quietly returned to the hall and awaited events. Speedily possession was demanded and refused. The heir's next step was to take a rule *nisi* for attachment against her. This was quashed on the ground of insufficient proof of disobedience (*Swinfen v. Swinfen, 25 Law J. Rep. C. P. 303*); but the Court, consisting of Cresswell, Williams and Willes, all seemed to agree that the compromise was binding.

Another rule accordingly was taken out (*Swinfen v. Swinfen, 26 Law J. Rep. C. P. 97*), in answer to which Mrs. Swinfen made an affidavit setting out all the facts. Fortunately for her, Crowder, J., happened to be sitting this time, and he held distinctly that the mere relationship of counsel and client did not give a general power to compromise, and that there was no special authority shown, but on the contrary an emphatic repudiation. The other judges held to their previous views, but the practice of the Court being to confirm rules for attachment only when the judges were unanimous, the rule fell through, and the widow escaped as by fire.

The heir, who evidently had more confidence in the verdict already obtained than in the result of a fresh trial, went to Chancery with a supplemental bill for a decree for a specific performance of the compromise (*Swinfen v. Swinfen, 27 Law J. Rep. Ch. 35*). And now a fresh actor appeared upon the scene, in the person of Kennedy, a provincial barrister practising at Birmingham, who had taken up the forlorn widow's cause, and who proved a champion very different from Thesiger. The Master of the Rolls (Romilly), in an able and exhaustive judgment, rejected the compromise, taking the same view as Crowder, that counsel had no power to give estates away at his own discretion. He instanced with approval a case within his own knowledge where a great advocate had in open Court refused to consent to a compromise actually agreed to by his client, on the ground that the client did not understand the sacrifice he was making; and, refusing the specific performance prayed, he ordered a new trial.

This judgment was the first crumb of comfort that had fallen to the widow's lot, but was, of course, far from pleasing to the heir, who appealed only to get an excoriation from the Lord's Justices (*Swinfen v. Swinfen, 27 Law J. Rep. Ch. 69*), Knight Bruce observing that the heir's attempt was only a *pis aller*, and varying the Master of the Roll's decision in the widow's favor so far as to give her costs of the suit.

The new trial accordingly came on at Stafford in March, 1858. The evidence of the letters remained, but a mass of other evidence was put in, all tending to show that the testator's mental faculties, if impaired at all, were not so damaged as to deprive him of testamentary competency. The judge summed up against the widow, but the jury were not influenced by his lordship and returned a verdict establishing the will, a result due principally to the able advocacy and thorough mastery of the case displayed by Kennedy.

The heir was not yet shaken off, however. He went to the Master of the Rolls for a new trial (*Swinfen v. Swinfen, 28 Law J. Rep. Ch. 849*), but far from getting it the Master stated that had the verdict been otherwise he would have sent the case down again. In the course of argument Kennedy went far and wide for instances of physical imbecility combined with mental competency. Many eminent characters in history were referred to, among others the great Marlborough, who, stricken with paralysis, his mouth awry, unable to articulate, was yet competent to make a most important codicil just before his death. Lord Eldon, the famous Chancellor, Sir Herbert Jenner Fust, who suffered from the very disease which affected the testator, and a recent judge (not named) who, though struck with hydrocephale, yet performed his duties with 'transcendent ability' to the very last. The whole report, in fact, is well worth reading by the student of medical jurisprudence.

The writer ventures to think from his limited observation of human nature, that the desire for vengeance is usually stronger with the fair sex than with their *soi-disant* lords and masters. Mrs. Swinfen was no exception to this rule. Flushed with victory she now entered the lists against her late counsel, the august Chancellor himself, and sued Lord Chelmsford for damages for a 'fraudulent' compromise against instructions (*Swinfen v. Chelmsford, 29 Law J. Rep. Ex. 383*). This, however, was a little too much, and the Court unanimously dismissed her suit, and settled by its

decision the powers and responsibilities of counsel. And here, if this were a novel, and not a statement of facts, would come the obvious and happy conclusion—viz. the marriage of the plucky widow to her devoted advocate, and the usual notice in the *Times:* 'St. George's, Hanover Square—Swinfen to Kennedy. No cards.' But unfortunately the affairs of mankind seldom end correctly. Mrs. Swinfen did not become Mrs. Kennedy, but she did become Mrs. Broun, and thereupon followed another great suit—viz. the leading case of *Kennedy v. Broun and Wife, 32 Law J. Rep. C. P. 137.* Kennedy alleged that, having given up his other practice, and devoted himself wholly to the advocacy of the widow's rights, both at the bar and by writings and pamphlets 'designed to render her cause popular,' she had agreed in return to pay him a fee of 20,000*l.* in the event of success, and for this sum he sued. Upon the argument English common lawyers became civilians for the nonce, and went deep into the mysteries of the *lex cincia*, and the old usages of the Roman patrons and advocates. Erle, C. J., presided, and delivered perhaps his finest judgment, settling what in fact had hardly before been seriously doubted, that an English barrister's fee is an *honorarium*, and cannot be made the subject of a legal claim. He was terribly hard on poor Kennedy, but as a specimen of judicial eloquence his deliverance can hardly be surpassed, and we cannot resist the temptation of quoting therefrom the following description of a model advocate: 'We are aware that in the class of advocates, as in every other numerous class, there will be bad men taking the wages of evil and therewith also, for the most part, the early blight that awaits upon the servants of evil. We are aware also that there will be many men of ordinary powers performing ordinary duties without praise or blame; but the advocate entitled to permanent success must unite high powers of intellect with high principles of duty. His faculties and acquirements are tested by a ceaseless competition, proportioned to the prize to be gained—that is, wealth and power and honor without, and active exercise for the best gifts of

mind within. He is trusted with interest and privileges and powers almost to an unlimited degree. His client must trust to him at times for fortune and character and life. The law trusts him with a privilege, in respect of liberty of speech, which is, in practice, bounded only by his own sense of duty, and he may have to speak on subjects concerning the deepest interest of social life, and the innermost feelings of the human soul. . . . . If an advocate with these qualities stands by the client in the time of his utmost need, regardless alike of popular clamour and powerful interest, speaking with a boldness which a sense of duty can alone recommend, we say the service of such an advocate is beyond all price to the client, and such men are the guarantees to communities of their dearest rights, and the words of such men carry a wholesale spirit to all who are influenced by them. Such is the system of advocacy intended by the law; requiring the remuneration to be by gratuity.' And he then proceeds with little difficulty to show, from a long course of precedent, that such an action as the present could not lie.

After this nothing was left for Kennedy but ruin, to which he added disgrace, by certain unsavoury statements made in the bitterness of despair. He was disbarred, and died heartbroken, perhaps the only instance of a lawyer who saved his client and ruined himself.

As for Mrs. Swinfen, she may, for all the writer knows, still be living full of years and honors at Swinfen Hall, but if so, she is the sole survivor of the *dramatis personæ* in the 'Swinfen cases.' Thesiger, Cockburn, Romilly, Knight-Bruce, Erle, and all the other erst famous advocates and judges who figured in this long litigation, have now passed to a world where, it is to be presumed, briefs and special retainers are unknown, and new trials are not allowed.—*Albany Law Journal.*

AMENDMENTS.

IN *Cameron v. Perry, 2 Man. L. J. 231*, Mr. Justice Killam is reported to have held, that if, in his opinion, the plaintiff ought to be allowed to amend his declaration, then it must inevitably follow that the defendant should have full liberty to add as many new pleas as he desired to add, and that the judge had no power to prevent him so doing. We think that it is extremely unfortunate if this be the state of the law. It would not be difficult in many cases for a defendant to raise such totally new defences as would effectually defeat the plaintiff—defences of which, until that moment, the plaintiff was entirely ignorant.

But we submit, with great deference, that the plaintiff may be allowed to amend "*upon such terms as to the Court or judge may seem fit*"; and that the terms (besides the question of costs) ought to be, that the defendant should be at liberty to plead what he liked *to the new matter;* but that he should only be allowed to add pleas, which might have originally been pleaded, upon an application being made by him for that purpose—an application that would be dealt with separately from that of the plaintiff. The learned judge's opinion seems to have been based upon the idea that when a new declaration is filed the defendant should be unhampered in drawing his pleas. The fallacy, we venture to suggest, is in treating an amended pleading as a new pleading.

WAIVER OF DAMAGES FOR DELAY.

IF A. agree to sell goods to B. and to ship them by a certain date, will B. by accepting the goods when they arrive be estopped from suing A. for delay in shipment? In *Coristine v. Menzies*, *2 Man. L. R. 84*, it is said that the acceptance would be a waiver of any damages for the delay. We can readily understand that if, after the delay, there be a new bargain between the parties providing for the acceptance of the goods upon certain terms, that in such case the purchaser must be held to have waived all damages, or rather that any possible damages would be held to have been satisfied by the new contract. And in the case mentioned there was a new contract relating to the acceptance of the goods. It is the dictum: "Since having received them, even in the absence of the bargain made to give additional time, I think she has waived any cause of action arising from delay in shipping"—that we desire to call attention to.

Acceptance of goods will not waive a breach of warranty as to the quality of the goods, and it is not very apparent why it should waive the delay. We can find no authority for the proposition, and we cannot help thinking that if an opinion upon the point had been necessary for the decision of the case, the learned judge would have come to a different conclusion.

CORRESPONDENCE.

To the Editor of the Manitoba Law Journal.

SIR:

No publication makes its appearance with greater regularity than the Yearly Amendment to the County Courts Act, and as it feeds upon itself—the enactments of one year necessitating the amendments of the next—there is no immediate prospect of the process stopping.

One Section—the twenty-fifth—of the instalment of 1885 is worth considering. It is as follows: "As between the assignee of a debt or chose in action, and a garnishee, whether the garnishee order shall have been issued before or after judgment, priority of service, or notice, on, or to, the garnishee shall govern the right of the parties, subject to the question of *bona fides*, and such defence and rights otherwise as may now be set up in garnishee proceedings in said County Courts."

The intention may have been good, though it is difficult to see why a perfectly *bona fide* assignment should be defeated by a garnishing order subsequent to it, merely because the garnishee gets prior notice of the order, so long as he has not altered his position; but apart from this the effect of the section is peculiar. Suppose a *bona fide* assignment to be made on the 1st, a Queen's Bench garnishing order to be obtained and served on the 2nd, and a County Court garnishing order on the 3rd, and notice of the assignment to be given the garnishee on the 4th. As matters now stand the assignment being before the Queen's Bench order cuts it out, the Queen's Bench order being before the County Court order cuts it out, and under the section in question the County Court order cuts the assignment out.

Who will get the money? The garnishee seems to occupy the most enviable position.

Would it not be well for County Court legislation to confine itself to its legitimate sphere, the regulation of County Court practice and procedure? Changing principles of law under the pretence of amending the procedure of an inferior court should not be encouraged.

Yours, &c.,

X.

X raises a nice question. The case is this: Of three claimants to money in the hands of K., A. is entitled to priority over B.; B. is entitled to priority over C.; and C. is entitled to priority over A. At first sight it may appear that K. having possession has decidedly the best of it, but cases not less difficult have been presented for decision, and have been decided, as between the claimants. Perhaps some of them may help our correspondent.

By an English statute an unregistered bill of sale is void as against an execution creditor or assignee in bankruptcy, but not so as against a subsequently registered bill of sale. This being the law the perversity of events produced this difficulty: A. held an unregistered bill of sale; B. a registered bill of sale; and C. was an execution creditor. A., therefore, was entitled to priority over B., B. over C., and C. over A. The question came up upon interpleader, when C. permitted himself to be barred, presuming, we suppose, that B's claim was valid as against him. The way now seemed clear for A. He has only B. to contend with, and by the hypotheses if there were no C., A. is first in order. But it was held otherwise, and the first, as prophesied, turned out to be last. And it was reasoned out in this way: As between A. and C., C. was entitled and if B., succeeding against C., must in his turn give place to A., then, in fact, as between A. and C., A. gets the money. It therefore appears that although at the time of the execution of B's bill of sale he took subject to A's bill, yet the subsequent existence of an execution against the mortgagor reversed the priorities. The case we have been referring to is *Richards v. James*, *L. R. 2 Q. B. 285*.

In a more recent case, *In Re Barrand, Ex parte Cochrane, 3 Ch. Div. 324*, there was an unregistered bill of sale to A., a registered bill to B., and an assignment in bankruptcy to C. Here again is the circle of priorities. The contest was between B. and C. and again B. was victorious. And there was the same result in *Ex parte Leman, in Re Barrand 4 Ch. Div. 23.*

Applying these authorities to our correspondent's case B. "seems to occupy the most enviable position."—[ED. MAN. L. J.]

REVIEWS.

SMITH ON CONTRACTS.—There seems to be no end of editions through which the celebrated lectures of Mr. John William Smith are to pass. We have to hand the seventh American, from the eighth English edition published by T. & J. W. Johnson & Co., 535 Chestnut Street, Philadelphia, carrying with it the notes of Vincent T. Thompson, William Henry Rawle, George Sharswood, and John Douglass Brown, Jr.

To a Canadian lawyer, the book has the same defect apparent in most of our text books—there are no Canadian cases cited. Many passages would be largely elucidated by Ontario and Manitoba precedents. For example, it is said at page 8: "where an instrument is formally sealed and delivered, and there is nothing to qualify the delivery but the keeping the deed in the hands of the executing party, nothing to show that he did not intend it to operate immediately, it is a valid and effectual deed; and delivery to the party who is to take by it, or any other person for his use, is not essential." This is far from clear. By hypothesis the deed is "sealed and delivered," but that being so "delivery

is not essential." The notes, certainly, are of value here, but by how much would they not have been enriched by reference to *Bank of Montreal v. Baker*, 9 *Gr.* 97, and *Bank of Toronto v. Cobourg, Peterborough and Marmora Ry. Co.*, 7 *Ont. R.* 1. Again, when treating of escrows, we miss the well known case of *Oliver v. Mowat*, 34 *U. C. R.* 472, deciding that even registration of an instrument will not change it from an escrow to a deed.

In comparing the notes with the text, we cannot help being struck with the fact that many of the States have broken away from mere maxims and forms, still ruling in England, where a more sensible view requires the introduction of a more sensible rule. For example, in the text, we find it stated (p, 30) that in *West v. Blakeway*, a tenant had covenanted not to remove a greenhouse, and it was held no defence for him against an action for so doing, that he had his landlord's subsequent permission so to do, *that permission not being shown to have been under seal.* In the notes the rule is shown to have been too rigid for American notions of law and justice.

It is just this feature of American books that makes them valuable to the profession in our western Province. Not that we advocate the substitution of American for English precedents. On the contrary, we have the very highest respect for English authority. But we do think that both in England and Ontario, in many lines, the law has, by dint of piling precedent upon ill-fitting precedent, and the application of principles in ill-conceived methods, become crabbed and unreasonable; and that a well-regulated kick over the traces occasionally, in American fashion, will do no harm.

The text of the book now in review has long since passed into the classics of legal literature. Of the present edition, and especially the notes, we may be permitted to say that, with the exception noticed, the work appears to have been excellently done. One does not, of course, look for the fullness of Addison; but we are well content to have continued for us the clearness of Smith.