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DIARY FOR NOVEMBER.

1. Saturday ... Articles, &c., to be left with Secretary of Law Society.
2. SUNDAY... . *20th Sunday after Trinity*
4. Tuesday ..... Chancery Exam Term, Goderich and Cornwall, commences.
7. Friday ..... Last day for setting down for hearing, Chancery.
9. SUNDAY... .. *21st Sunday after Trinity.*
10. Monday ..... Last day for notice of hearing, Chancery.
12. Wednesday .. Last day for service of writ County Court.
16. SUNDAY ... *22nd Sunday after Trinity*
17. Monday..... . Mich. Term beg. Chan. Hear. T. com. Recorder's Court sits.
21. Friday ..... Paper Day, Q. B.
22. Saturday..... Paper Day. C. P. Declare for County Court.
23. SUNDAY ..... *23rd Sunday after Trinity.*
24. Monday ..... Paper Day, Q. B.
25. Tuesday ..... Paper Day, C P.
26. Wednesday. . Paper Day, Q. B.
27. Thursday..... Paper Day. C P.
28. Friday .. . ... Mich Term ends. Clerks of Municipal Councils to return No. of res. ratepayers to Rec Genl. Chan. Hearing Term ends.
30. SUNDAY..... *1st Sunday in Advent.* St. Andrew.

IMPORTANT BUSINESS NOTICE.

Persons indebted to the Proprietors of this Journal are requested to remember that all our past due accounts have been placed in the hands of Messrs Patton & Ardagh Attorneys, Barrie, for collection; and that only a prompt remittance to them will save costs.

It is with great reluctance that the Proprietors have adopted this course; but they have been compelled to do so in order to enable them to meet their current expenses which are very heavy.

Now that the usefulness of the Journal is so generally admitted, it would not be unreasonable to expect that the Profession and Officers of the Courts would accord it a liberal support, instead of allowing themselves to be sued for their subscriptions.

The Upper Canada Law Journal.

NOVEMBER, 1862.

SLANDER OF FEMALES.

The law of England is said to be the perfection of reason. In some respects, however, it is defective. In one respect, to which we at present intend to advert, it is barbarous.

It is now held that an imputation, however gross, on an occasion however public, upon the chastity of a modest matron or pure virgin, is not actionable without proof that it has actually produced special temporal damage to her of a material nature.

The law is unmindful of the mental suffering which the foul slander may cause. It is deaf to any appeal on the ground of loss of society or friends. But the moment it is shown that place or power has been lost by reason of the slander, the law is alive to the injury, and ready to award compensation. Nay, if it be shown that the value of a halfpenny is lost in consequence of the slander, the law is on the alert, but dead to everything in the shape of suffering that cannot be weighed in a tradesman's scales, or computed by a clerk in a counting-house.

The law in this respect is behind the age; it has failed to expand with the growth of intelligence.

Words which import a crime known to the laws are actionable *per se*—that is, without evidence of special damage resulting from them; but, no matter how great the turpitude imputed, no matter how aggravating the circumstances, no matter how venomous the motive, if the words spoken fall short of a known crime, the law is powerless unless substantial special damage be alleged and proved.

To say of a woman, no matter how low her moral character, that she is a thief, is the subject of an action; but to say of a woman, no matter how high her position in society, that she is a prostitute, is not actionable, unless it be shown that in consequence of the words so spoken, she lost some pecuniary advantage.

The law does not appear to look upon the wrong done to the woman, except so far as it affects her pocket, or, if married, that of her husband. Even discord between husband and wife, as a consequence of the words spoken, would not seem to be of itself sufficient.

Let us examine some of the decisions which on this subject are to be found in our reports of decided cases.

If the declaration merely allege that the plaintiff was virtuous, modest and chaste, and before and at the time of the slander enjoyed the society of friends, living with them on terms of mutual respect, confidence and intimacy, all of which she lost by reason of a slander on her character, it would not be sufficient; but if, in addition, it allege that her friends, before the speaking of the slander, gratuitously provided her with meat and drink, and after the speaking of the slander refused to do so, it would be sufficient. The law looks only to the substantials. Loss of society of friends, loss of respect of friends, becoming an outcast of society, pointed at with the finge rof scorn at every corner—all is nothing, in the eye of the law, compared with the serious loss of a cup of tea, or a piece of bread, which one has been accustomed gratuitously to receive. (See *Moore* v. *Meagher*, 1 Taunt, 39.)

Indeed the rights of the woman are wholly disregarded. In one case, though she was the real sufferer, and suffered substantial injury, her very existence was ignored. The wife lived apart from her husband. She kept a boarding-house. She had many boarders, and had good credit among tradesmen. The slanderer appeared. He charged her with adultery and prostitution. Her credit forsook her; her boarders left her. She, in consequence, with her husband (who joined for the sake of conformity) brought an action against the slanderer. The action was held not to be maintainable. (*Saville et al* v. *Sweeny*, 4 B. & Ad. 514.)

It would seem that the great effort of the law is to defeat such actions, and allow the wrong-doer to go unwhipt of justice. In a case where the slanderer alleged that he had had connection with the wife of plaintiff, a virtuous woman, in consequence of which she lost the society of her friends, was brought into public scandal, was nearly crazed, became very unwell, was long under medical treatment, to the disgrace and impoverishment of her husband, the action was

held not to be maintainable. Baron Bramwell thus disposed of it:—"The question seems to me to be one of some difficulty, because a wrong is done to the female plaintiff, who becomes ill, and therefore there is damage alleged to be flowing from the wrong; and I think it did in fact so flow. But I am struck with what has been said of the novelty of this declaration—that no such special damage was ever heard of as a ground of action. If it were so, I am at a loss to see why mental suffering should not be so likewise. It is often adverted to in aggravation of damages, as well as pain of body. But if so, all slanderous words would be actionable. Therefore, unless there is a distinction between the suffering of mind and the suffering of body, this special damage does not afford any ground of action. There is certainly no precedent for such an action," &c. (*Allsop* v. *Allsop*, 5 H. & N. 534.)

Here we find an eminent judge admitting a wrong, acknowledging that serious damage flowed from it, and yet powerless to apply a remedy because "no precedent for such an action" could be found.

The whole subject has recently been under discussion in the House of Lords. Great difference of opinion existed among the law lords on some points, but all seemed to agree on the conclusion that the law is unsatisfactory.

The facts were as follows:—Lynch, a step-brother of Mrs. Knight, imputing to Mrs. Knight, among other things, gross levity, and asserted that she had been all but seduced by another man before marriage. Mr. Knight, acting on this imputation, sent Mrs. Knight home to her father. Mrs. Knight (joining her husband as co-plaintiff for conformity) brought an action against Lynch, alleging the loss of the society of her husband as special damage. The action was brought in Ireland. After much argument, seven out of the nine judges decided in favor of the action, and the remaining two against it.

On appeal to the House of Lords, the judgment of the Irish judges was reversed, and the action held not to be maintainable.

Lord Campbell (Lord Cranworth inclining to the same opinion) held, that where a person imputes to a married woman adultery, which he pretends to know and asserts as a fact, and the husband, reasonably believing the charge to be true, dismisses her, the wife is entitled to maintain an action (joining her husband for conformity) against the slanderer for the special damage caused to her by the loss of the comfort and support of her husband.

Lord Wensleydale (Lord Brougham inclining to the same opinion) held, that a married woman cannot maintain an action for being deprived of the society of her husband through the slander of another upon her character, though the husband deserts her in consequence.

Lord Wensleydale held, though no action lay, that the desertion of the husband was properly laid as special damage; for to make words actionable by reason of special damage, the consequence must be such as—taking human nature as it is, with its infirmities, and having regard to the relationship of the parties concerned—might fairly and reasonably have been anticipated to follow from the speaking of the words, and need not be such as would reasonably follow. (*Lynch* v. *Knight*, 5 L. T. N. S. 291.)

So long as this state of the law continues, it is a mockery to boast that under our law there is no wrong without a remedy. Wrongs of the most malignant type may be inflicted with impunity. Reform is seriously needed. We trust that Lord Brougham will soon be induced to add one more to the many law reforms for which we are indebted to him. It is distressing to know that our law, which is said to be the perfection of reason, is really an outrage upon reason. It holds out indemnity to every foul-mouthed slanderer disposed to malign all that is near and dear to us.

APPEALS FROM COUNTY COURTS.

It is the practice of some county court judges to decide all cases before them without stating the reasons upon which their decisions proceed. We have more than once drawn attention to the fact, and expressed a doubt whether or not such a course would be upheld on appeals to the superior courts of common law.

Recently we find that the matter has been under the consideration of the Court of Common Pleas, and that the Chief Justice of that court, in delivering judgment in *Ockerman* v. *Blacklock*, used the following language:—

"I cannot help observing that in this and every other appeal entered during this term from this county court (Hastings), and there have been several, the learned judge has certified the formal proceedings, pleadings and evidence in the cause, with a copy of the notes taken by him of the arguments of counsel before him in term; but he has not given us the benefit of knowing what he said or delivered as his judgment, or whether in fact he said any thing more than that the rule was discharged, or that he gave judgment in favor of plaintiff or defendant, as the case might be. He does not communicate the reasons which influenced his conclusion, nor the authorities or principles on which he acted.

"The statute regulating these appeals requires the judge to certify the pleadings in the cause, and all motions, rules or orders made, granted or refused therein, together with his own charge, judgment or decision thereon, and when there has been a trial, the evidence and all objections and exceptions thereto.

"It may be that, construing the statute according to its very letter, it is enough in relation to a rule *nisi* that has been

granted to return a copy of the rule disposing of it, but if this be so, which I do not assume, I think the true spirit of the act would be more certainly complied with by certifying a copy (if it were written) or a statement (if it were verbal) of the charge to the jury, or the judgment or decision of the learned judge. The words used, "his own charge, judgment or decision," seem to import more than a mere setting forth, as in this case, that the "judge afterwards duly gave his decision and judgment on the same rule, which was that the same should be discharged."

"It is so well established and time-honoured a practice for judges to give the reasons for their decisions, that in common understanding when we speak of the judgment or decision of any judge sitting in term, we refer to the report of what he said, when the court disposed of the matter before it, though technically speaking the *judgment* is the disposal of the matter by the court, and not the opinion of each particular judge. It may be well argued, that this is what the legislature intended.

"The superior courts have not as yet been called upon to decide this question, for the almost universal practice of the learned judges of the county courts has prevented its arising. They have in general shewn a praiseworthy anxiety to explain fully the grounds of their judgments, and I have very often derived much help from the learning and ability their judgments have displayed."

It is to be hoped that after this expression of opinion, the county court judges, one and all, will show a determination to render unnecessary the decision of the question raised. Many judges have, as mentioned by the Chief Justice, "shewn a praiseworthy anxiety to explain fully the grounds of their judgments." The few who have hitherto failed to do so, no doubt will hereafter be too glad to do what is expected of them, without waiting for a formal adjudication on the question whether or not the law is compulsory.

The judges of the superior courts evince a strong desire to support the decisions of county court judges whenever impeached. The least county court judges can do is to assist the judges of the superior courts in the discharge of a duty important in its nature and important in its results.

SELECTIONS.

ON THE LIABILITY OF MASTER TO SERVANT IN CASES OF ACCIDENT*

The Bill on this subject which was introduced this session by Mr. Ayrton and rejected by the House of Commons, purported to extend the liability of the master certainly to two cases where at present he is not liable, namely, (1) where the accident is caused to the servant by default of tackle or machinery, though the master is not proved to have been guilty of any personal negligence; (2) where the accident is caused by the default of a fellow-servant; and perhaps to a third case, (3) where the accident is caused to the servant by the negligence of the master in not furnishing proper machinery, the servant having undertaken or continued the work with knowledge thereof. These three cases were dealt with by the first section of the Bill in these terms: "Whenever any workman or servant shall be injured in consequence of his master, or any other person employed by his master, not doing any act or providing any thing which may be requisite or proper, or doing any act or providing any thing which may be improper, in or for carrying on the undertaking, work, or business in or about which such workman or servant shall be employed by or on account of his master, then such workman or servant shall be entitled to recover from his master damages for such injury by an action at law; provided always, such injury shall not have been suffered in consequence of any wilful act or omission of a fellow-workman or fellow-servant, for which such fellow-workman or fellow-servant is punishable as a criminal offence; and provided also, such action shall be commenced within twelve calendar months after such injury shall have occurred."

The second section extends Lord Campbell's Act to the cases described in the preceding section.

The existing law is fairly open to inquiry, because it is comparatively new. The case which is always cited as the first and leading case, *Priestley* v. *Fowler*, (3 M. & W., p. 1,) dates only in 1837. The general principles of the law relating to accidents are old enough and well established; but for several reasons the application of them to cases involving the relation of master and servant, has not, until recent times, fallen under the consideration of our Courts of law. 1st, Changes in circumstances. The general introduction of machinery has necessarily multiplied accidents, and serious accidents; thus in 1861, in factories alone, and from machinery alone, notwithstanding our special statutory precautions and our inspectors to enforce them, there were about 4,000 accidents. (Report, October, 1861.) Again, the construction of great works by "division of labour" has brought prominently forward new relations between employer, contractor, sub contractor, and the servants of all these. 2ndly, Changes in the law. The old quasi-religious law of Deodand, whereby the chattel or part of a chattel causing the death of a man was forfeited to the Crown or the lord of the franchise, was abolished in 1846 (9 & 10 Vic. c. 62); and in the same year was passed Lord Campbell's Act, (9 & 10 Vic. c. 93,) which gave for the first time a remedy to the families of persons killed by negligence. The Factory Regulation Act 1844, (7 & 8 Vic. c. 15,) and other statutes of the like kind, gave fresh rights or defined and confirmed old ones; and 3dly, the institution of County Courts, and the general cheapening of legal procedure, have rendered the means of redress far more available than formerly to the working classes.

The subject is accordingly novel, and hitherto has been brought piecemeal only before the Courts, as this or that case with its own peculiar circumstances might chance to demand consideration. The whole matter, therefore, deserves and requires discussion.

I will begin by stating shortly the general objects of a law purporting to regulate the liability of masters towards servants in cases of accident occurring in the course of the employment. The first object should be—To prevent accidents. The law should make it the interest of every person to be careful in his work, careful of himself, careful of others;—the master careful in selecting his servants, in superintending them, in choosing right methods of work, in providing sound machinery; the servant careful not only of his master's property, but also of his own life and of his fellow-servant's. For in truth it is very difficult to make men careful: the risk of injury appears so distant, so doubtful, and the very thought of it is so unpleasant; whereas the thought, trouble, and it may be expense to avoid the risk, are certain and immediate. Sheffield workmen, it is notorious, even resent improvements that render their work less dangerous, lest wages should fall; and many

* This paper was contributed by Mr Vernon Lushington, to the Jurisprudence Department of the Social Science Association.

out of mere indolence, some out of mere bravado, will not avail themselves of precautionary means actually provided. Employers again do not like accidents; accidents do them no good, and they have humanity enough to be sorry for those who suffer; yet how few, from want of consideration or from mean economy, will voluntarily take the pains or incur the expense to maintain due arrangements for the safety of their workmen! The necessity of our Factory Acts, Colliery Acts, and other statutes of the kind, too surely shows this. Against all such selfishness of employers, and unmanly recklessness of workmen, a law making persons responsible for injury occasioned by their negligence to others, and excluding them from compensation for injury caused to themselves by their own negligence, is a valuable protection.

The second object should be,—To furnish rules whereby, when injury actually occurs, justice may be done between the parties. This appears rather a vague matter, but is a very real one, and in the present day of special importance. Our population being industrial, and every day more and more so, the social relation, including the legal relation, of master and servant, needs in all respects to be clearly on a right basis,—to appear just in the sight of men. In particular, accidents, involving, as they do, grievous personal loss and pain, rouse a sense of wrong, which co-operates with other causes to work dissension between class and class, and sometimes even leads to acts of lawless revenge. The recent murder in Manchester may illustrate this. The retributive law in cases of accident should be just; by being just, I mean founded on a fair consideration of the capital facts which mark the relation of master and servant, and the consequence of accidents arising in the course of the employment,—fair equitable consideration. This position is not denied, it is freely admitted, and the law purports to be based upon a construction of the contract of service, which it is to be remembered is, so far as express terms go, silent as to liability. But if the law has in any respect gone wrong, it will be from misapprehending or insufficiently appreciating some of these characteristic facts.

The principal of these facts seem to be as follows:—

1. The master and servant are engaged in a common work for the benefit of both. There is a virtual partnership between them. No one, least of all a lawyer, when he remembers the duty of the master to take reasonable care of his servant, can say the contract is for money wages and nothing else.

2. The servant works with his hands for wages, is a poor man, generally of imperfect education, and belongs to a class traditionally improvident. The master is a person of more or less capital, employs many servants, keeps accounts, and in the course of his business is accustomed to make pecuniary calculations based on complex contingencies.

3. The choice of servants, the selection of machinery and materials, the determination of the method of work, is with the master and the master only. Practically, and with few exceptions, this is absolutely so.

4. The master and servant are equally aware of the dangers incident to the employment: I say equally, for though the servant may be practically more familiar with some dangers, there are others which the employer may well understand better; and of all he must be presumed in law to know adequately.

5. When an accident to a workman occurs, it may be accompanied or not by damage to the master's property, sometimes very great damage; but in all such cases the workman suffers with his body, literally with his flesh and blood, perhaps with his life. In a great number of instances the prospects of himself and his family are ruined. On the other hand, the master may lose heavily through the negligence of a servant without the servant suffering any injury; and in all such cases the master has practically no redress. Railway accidents and collisions at sea, involving thousands of pounds, are commonly of this kind. This is true, but not in my opinion very material. Such facts, which lie at the root of the subject, ought to be fairly weighed in framing the law, or estimating it when framed; and I ask you to bear them in mind now in approaching the consideration of the rules of the English law which regulate the liability of masters to servants in cases of accident.

These rules are not statutory rules, but are the ancient Common Law rules concerning negligence, modified by the Judges from the sense of what their contract of service requires. By "negligence," the law means the want of common and reasonable care: the want of due care, all the circumstances of the case considered. Every person is bound to use common and reasonable care, but what is to be deemed such care varies with circumstances. One kind of care is expected from an expert, another from a layman; one kind of care from a master, another from a servant; one kind of care from a person under contract, another from a stranger; what is negligence in a grown-up person will not be negligence in a child, and so on. In legal proceedings this question of negligence is generally a question of mixed law and fact, determinable upon the evidence by the jury after instruction by the Judge. As a general rule, in all cases of accident, including those between master and servant, the jury have to say, upon a consideration of all the circumstances, whether there has been, by either party or both, a want of common and reasonable care, contributing to cause the accident.

The rules of law then relating to accidents sustained by servants in the course of their employment, are:—

Rule I.—*For injury by pure accident the servant has no remedy.* This is in accordance with the ordinary rule of law. Nobody has been guilty of negligence, nobody is to blame; and ill-luck has to be borne where it falls. The rule may be just, and it may be necessary, but no exception is made in consequence of the relation between the parties. The rule discards or overbears any consideration of the virtual partnership subsisting between employer and employed; and the practical result is, that in many cases the workman is maimed or killed in the service of his master, and without any compensation to himself or his family. It is true that in some instances, as in the late Hartley Colliery accident, or in the common case of shipwreck, the employer may have at generous expense adopted every measure to prevent accidents, and may himself be a heavy loser by the casualty; but in the majority of cases the suffering is chiefly on the side of the man. This may be remembered when we come to consider the more doubtful cases. It should be noticed that this class of accidents, purely inevitable accidents, though largely incident to a few callings, as for instance seafaring, is not otherwise extensive; most accidents are the result of carelessness somewhere.

Rule II.—*For injury caused by the master's personal negligence the servant may recover compensation, if he has not contributed to the injury by any negligence on his own part.* This again is the ordinary rule as between strangers, no less and no more.

The master is accordingly bound towards his servant to take reasonable care in providing sound machinery, reasonable care in selecting competent fellow-workmen, and reasonable care in arranging methods of work; and for any accident caused by his default in any of these respects, and without fault of the plaintiff, he is liable. But the burden of strict proof of the master's default is upon the plaintiff, which in itself enables many masters to escape liability for accidents undoubtedly caused by their negligence; and this not only by obtaining verdicts in actions brought, but in deterring injured servants from suing.

Again, without personal negligence on the part of the master there is no liability. The law gives the servant no warranty from the master that the tackle shall be reasonably sufficient, though the master provides the tackle and the servant's life depends upon it; no warranty that the fellow-workmen shall be competent, no warranty that the mode of work prescribed shall be safe from unnecessary risk. The tackle may be rotten,

the ship unseaworthy, the system of work unnecessarily dangerous, but the servant has no remedy against the master for injury so caused unless the master has himself been guilty of a want of reasonable care, guilty of negligence. Hence a variety of accidents whereby the servant suffers and without redress. I do not now speak of inevitable accidents, which I have already dealt with, nor of accidents caused by fellow-workmen, which I shall deal with presently, but I now confine myself to those caused by the negligence of persons who have provided improper materials by contract with the master. The law holds that the servant has no remedy against the contractor because he is a stranger to the contract; (*Winterbottom* v. *Wright*, 10 M. & W., 109;) a position I accept, but have no space to examine critically; and no remedy against the master, because the master has not been personally guilty of negligence; in effect no remedy at all. Is not this hard law? And what of the maxim, *Ubi jus, ibi remedium*, no wrong without a remedy?

Now this might be different. The law might imply from the contract of service a warranty from the master that the tackle and machinery should be sufficient for the ordinary work to be done. In so doing the law would do nothing very unprecedented. To the contract of marine insurance the law annexes an implied warranty that the ships shall be seaworthy. So the Common Law has for centuries implied a large obligation on the part of the innkeeper to his guest, and on the part of the common carrier to his bailor, so far as property is concerned. It makes them insurers against all accidents save the "act of God and the Queen's enemies;" and as it appears to me, for the reason that the innkeeper in the one case, and the carrier in the other, have practically the charge of affairs; just as in the case of master and servant, the master provides the tackle, and has superintendence of the work. It is true that the liability of the common carrier is generally avoided by a special contract, (allowed by the law,) and that it has not been extended in its full strictness, though very nearly it has, to the contract of common carriers with passengers. (Hodges on Railways, p. 619.) But why should it not be so extended? and why should not a rule of law, which has done so much for the security of property, be applied to insure the safety of the lives of workmen? Such a rule would enforce personal care on the part of masters, and would not encourage carelessness on the part of workmen; nor would it operate unfairly: for the master, who has as good a head for calculating as any innkeeper or common carrier, could estimate such contingent liabilities in making his wages, bargains, and other contracts, far better than the workman now calculates them. The master, moreover, would have his remedy over against the defaulting contractor, the author of all the mischief. It was said in Parliament the other day, when this matter was discussed: Will you require of the master more than reasonable care? Certainly not, I answer. But will you make the master liable, except for want of reasonable care? Certainly, yes, I answer; he should be liable for the want of reasonable care on the part of the contractor whom he has employed. The only difficulty is a purely practical one, how to express the limits of the warranty in due terms. For the tribunals having refused to declare a warranty to be implied by law, it must be given, if at all, expressly by statute. The first section of Mr. Ayrton's Bill, though capable of improvement, seems to me to define fairly enough the liability of masters in this respect.

Rule III.—*Whatever the negligence of the master the workman cannot recover, if by his own negligence he has contributed to cause the accident.*

A similar rule obtains universally in Common Law in all cases of negligence. Its equity is not altogether obvious, but it is well ratified by experience. Hard cases continually occur in which the fault is on both sides, the suffering on one side only; and the first suggestion of equity is that compensation might be allowed upon a consideration of the proportion of blame attributable to either party. But practical difficulties stand in the way of such an arrangement: for when A and B are both in fault, who can say how much blame is due to A, how much to B? The only Court in which any apportionment of damages prevails, is the Admiralty Court, where, by what is said to be the old maritime law, if both ships are to blame for a collision, the damages are divided; but it is needless to dwell on this. The Common Law rule has long been settled that a plaintiff contributing, by negligence on his part, to his own injury, is without remedy, and rests upon the ground of public policy;—that a severe rule of this kind admonishes every man to be careful of his own safety. The rule is therefore perhaps beyond attack; but as between master and servant, it operates peculiarly unfortunately, for it induces the master to be careless, and often causes the servant to suffer for the joint default of himself and his master, when the master is far the more to blame of the two. This will be apparent when I state that entering or continuing upon work with knowledge of danger caused by the negligence of the master, is generally considered as conclusively showing contributory negligence on the part of the workman, so as to bar his remedy. This was the main point decided in *Priestley* v. *Fowler*. How it operates in practice let the two following cases speak.

Dynen v. *Leach*, (26 L. J., Exch. 221.) "The defendant was a sugar refiner, in Liverpool, and had employed the deceased as a labourer. It was part of the deceased's duty to fill the sugar moulds, and hoist them up to higher floors in the warehouse by means of machinery. The usual mode of attaching the moulds to the machine was by placing them in a sort of net-bag, which effectually prevented any accident. This was the mode adopted by the defendant, until, from motives of economy, he substituted a kind of clip, which laid hold of the rim of the mould. The deceased, on the occasion in question, had himself filled the mould, and fastened it to the clip, but when it was raised, the clip by some jerk slipped off the mould, which fell on his head and killed him. On these facts the wife of the labourer was not entitled to recover."

Senior v. *Ward*. (28 L. J., Q. B. 139.) "After the passing of 18 & 19 Vic. c. 108, special rules were framed and approved of for the regulation of a coal-mine of which the defendant was the proprietor and manager. By one of these rules, for the direction of enginemen and banksmen, every morning, before any one descended the shaft, the cage by which they were let down was to be twice run slowly up and down, loaded, in order to test the sufficiency of the rope and tackling; this rule had been habitually neglected for many weeks, to the defendant's knowledge. One night, the rope by which the cage was suspended, being before in good repair, was (as it was afterwards discovered) injured by an accidental fire in the mine. The next morning A, who was a miner employed by the defendant in the colliery, and other miners, who all knew of the rule for testing the rope, and of its being habitually violated, presented themselves at the pit to be let down to work, and there not having been any previous testing of the rope, &c., according to the rule, were told by the banksman that they had better examine the rope before they went down. They, however, got immediately into the cage, and the rope breaking as they descended, they were all killed. An action having been brought by A's representative against the defendant: held that the action was not maintainable, for that the deceased's own negligence had materially contributed to the accident." In this case a widow lost three sons.

No one can deny that in these and the like cases the chief blame is with the master, while the cruel loss is upon the workman. The fault of the man is acquiescence in his master's wrong: and common experience tells us that, except in extraordinary cases, he is practically obliged to acquiesce, to choose between acquiescing or giving up his employment. The Judges have felt this, and in a recent case have held that continuing to work with a knowledge of the danger does not

necessarily amount in law to want of reasonable care, but is, with the other facts tending to shew negligence, to be left to the jury. (*Holmes* v. *Clark*, 10 W. R. 405.) The facts of that case were as follows:—When the plaintiff entered into the service of the defendant, who was owner of a cotton-mill, certain machinery, which was required by statute to be fenced, was fenced. After he had been some months in the service, the fencing by some accident or by decay was out of repair, and the machinery was unprotected. The plaintiff complained of it more than once, and it was promised that it should be replaced or restored. Before it was replaced, and whilst the plaintiff in the course of his duty was oiling the machinery, he was caught by the machinery and lost his arm. Upon these facts the Court of Exchequer, and afterwards the Court of Exchequer Chamber, held the plaintiff entitled to recover. The decision rendered substantial equity, no one can doubt; and it rests, I think, securely upon the principle, that nothing can bar a plaintiff of his right against a wrongdoer but a want of reasonable care on his own part contributing to the accident, which the jury are to be judges of upon a consideration of all the circumstances. But in result it effects a considerable change in the law. Cases which would have been stopped by the Judge, may now go to the jury, who naturally are disposed to find for the plaintiff. But even as construed by the light of this case, this rule necessarily operates with severity upon workmen, and enables masters to be guilty of the greatest carelessness with impunity.

The section of Mr. Ayrton's Bill, it must be remarked, does not notice this rule of law: and perhaps the intention was to enforce the master's liability, notwithstanding the servant's acquiescing in the danger caused by the negligence of the master or others employed by him. If so, I think it is going too far; as there might be instances in which the servant voluntarily, for his own convenience and perhaps for additional reward, accepts the dangerous machinery. The rule given by *Holmes* v. *Clark* appears to hit the right middle course; and might be imported into the statute by inserting amongst the provisoes there mentioned one to this effect: "Provided the workman or servant has not, by want of reasonable care on his part, contributed to occasion the injury."

Rule IV.—The last rule, and one to which I would ask especial attention, is, that *A workman cannot recover against the master for injury occasioned by the negligence of a fellow-workman.* This rule, which governs perhaps the most numerous class of accidents befalling workmen, dates from 1850, from the case of *Hutchinson* v. *The York, Newcastle, and Berwick Railway Company*, (5 Ex. 343,) and takes away from the servant the right which he would possess if a stranger, of suing the master of the person whose negligence occasions the accident. It is therefore a novelty. It is now, however, firmly established as the law both of Scotland and England by a decision of the House of Lords overruling a contrary opinion of Lord Justice Clerk, and Lord Cockburn; (*Barton Hill Coal Company* v. *Reid*; 3 Mac Queen, 266;) it is also the law in America (*Farwell* v. *The Boston and Worcester Railway Corporation*, 4 Metcalfe, 49.) The Judges say: the servant enters the employment with a knowledge of the risks incident to it, among which are the risks arising from the negligence of fellow-servants; he therefore takes such risks upon himself.

In order to estimate the force of this reason, it is necessary to consider the ordinary rule called *Respondant Superior*, which makes the master responsible for the wrongful act of his servant. Now it must be taken for granted that the master is not personally guilty of any negligence, that he has taken due care in the selection of the servant, and is altogether innocent of blame; and perhaps it is not very clear at first on what ground a person so innocent is made to answer for the fault of another. It does not become clear until you give due weight to the other facts of the case, namely, that the master for his own profit set the servant on to work; that the person who suffers injury is wholly innocent of blame, and that his remedy against the actual wrongdoer is practically no remedy at all. This last consideration is important, for as before said, "*Ubi jus ibi remedium*," no wrong without a remedy. The law finding the remedy against the actual wrong-doer is valueless, casts about if possible to find a solvent person whom it may not inequitably fix with the responsibility, and finds him in the person next to the wrong-doer, the master who is profiting by the work. It is, I think, for the converse of this reason, that the master has been held not liable for the act of one who is not strictly his servant, as an "independent contractor" whom he has employed. There is not the same necessity to make him liable; he chooses the contractor indeed, he pays the contractor, he profits by the contractor's work, but then the contractor is considered able to answer for his own mischief, and for the mischief occasioned by any of his servants. The case is simply not within the policy of the rule, they would say. In this conclusion, however, I do not agree. For it is too much to say that the contractor or sub-contractor is always a sufficient man; often he is not; and often it is difficult to determine, before all the evidence is given, where the negligence lies. I see no reason why the original employer should not in all cases be liable, with a remedy over against the person actually in fault, or the master of such persons. Such a rule would be simple, easy in practice, and just. But at any rate it is agreed on all hands that a master is liable to a stranger for the act of his servant. Then why not liable to one of his own servants? Is it that the stranger does not share in the performance of the work, that the servant does? that the stranger does not share in the resulting profits of the work, and that the servant does? But by hypothesis, the suffering servant's share in the work is inconsiderable; and it is assuming the whole question to say that he takes his wages as a consideration for the risks he has to run. Why should the existence of a contract with the master diminish the obligation otherwise resting upon him? Why should the servant who renders good service to the master be worse off than the stranger who renders none? Contracts generally impose liabilities, not remove them. The leading case of *Coggs* v. *Bernard* (1 Smith, Leading Cases) shews that even a gratuitous bailee is bound to take ordinary care of the thing bailed, by his servants as well as by himself; and further, that the passing of a consideration for the bailment only adds to the obligation. So in the ordinary contract of carriage, the Common law as we have seen not only binds the carrier to take reasonable care, but makes him an insurer. Above all, in the ordinary case of the servant suing the master for personal negligence, the contract does not stand in the way.

Then if it is not the mere existence of a contract, nor the share in the work done; ought the entering into the service with the knowledge that risks may arise from the negligence of the fellow-servants, to bar the remedy against the master? Let us examine this. If entering upon the employment with such knowledge amounted to a want of reasonable care, I could understand why it should bar the remedy: but it clearly does not; there is nothing tortious or negligent in entering the employment with such knowledge; such knowledge is simply inevitable. If, again, it be said that the knowledge of the risk operates as an implied waiver on the part of the servant of all right to recover for injury occasioned by risks so known, as a consenting to his own wrong;—I answer, analogy is all the other way. The bailee knows the dangers his goods run in transit, the railway passenger knows the danger of his journey when he takes his ticket; yet their remedies under the contract suffer not thereby. Even a stranger has some knowledge, at least must be presumed to have, of the dangers that may befall him on the highway, as from negligent driving and the like. But most of all, in the common case of the servant suing the master for personal negligence, there is antecedent knowledge of the risk, with full right of action in the event of the risk

happening. On this point we have the following strange observations from the Court of Queen's Bench, when invited to compare the two cases.

"Though the chance of injury from the negligence of fellow-servants may be supposed to enter into the calculation of a servant on undertaking the service, it would be too much to say, that the risk of danger from the negligence of a master when engaged with him in their common work enters in like manner into his speculation. From a master, he is entitled to expect the care and attention which the superior position, and presumable sense of duty, of the latter ought to command." (*Ashworth* v. *Stanwix*, 30 L. J., Q. B. 185.)

The simple answer seems to be, that a servant *has* a right to expect equally both of master and fellow-servant reasonable care, though care of different degrees; and he enters on the service with a knowledge of this right, but no less with a knowledge that both master and fellow-servant are mortal men, and either may fail in their duty.

If I am right in this reasoning, the rule which deprives a servant of remedy against his master for injury by a fellow-servant, is not founded in strict law on the fact of a contract subsisting between the parties, nor on the fact of entering the employment with knowledge of the risks, but must rest, if at all, upon considerations of public policy . on an opinion, that on the whole, in such cases, it is better that the servant should take the risk on himself. I submit that this opinion is erroneous, for the following reasons, which are simply a recapitulation of the positions with which I began this paper, the statement of the general purposes of the law, and the facts characteristic of the relation of master and servant.

1. The workman is a poor man, dependent for his daily bread upon his bodily exertions. If there is any person to whom the law should strive to give a remedy for innocent suffering, he is that person. And we have seen that, in many cases, the law in other respects deals hardly by him.

2. A rule making the master liable would stimulate him to take every care in selecting servants, and in superintending the work. The existing law exonerates a master simply because he is rich and delegates his office to a subordinate. Servants also would be induced by a change in the law to take greater care of their fellows, in order to avoid incurring the displeasure of the master. The statutory rule requiring factory machinery to be fenced, which in effect makes the master often responsible for the negligence of one of his servants towards others, has been found to work well in this respect.

3. The rule suggested is not open to the objection that it would be unfair upon the master, for the master, in fixing his rate of wages and his prices, may take into account contingent losses arising from accidents caused by workman to workm.. , as he now takes into account all other losses.

4. The rule suggested would help to bind master and men into a closer and more friendly partnership. The compulsion of law to take every measure for the safety of workmen would not only induce habits of carefulness, but would co-operate with other influences to promote habits of kindly consideration from the master, which in turn would bring better service from the workman, and in all ways improve their mutual position.

These are leading reasons for the change proposed. But to these I would add the following objections to the existing law. The existing law has introduced a qualification upon the leading principle that a person is answerable for the tortious acts of his servants; which in itself is an evil, unless necessary. It has further introduced subtle questions, of which the case of *Holmes* v. *Clarke* and other cases, (*Abraham* v. *Reynolds*, 3 H. & N. 143; *Barton Hill Road Company* v. *Reid*, 3 Mac Queen, 266; *Barton Hill Road Company* v. *M'Guire*, ib 300,) promise an ample harvest, as to who are and who are not fellow-servants within the meaning of the rule. And it has already committed this contradiction, that although the contractor and his servants are not the servants of the original employer, (*Reedie* v. *London and North Western Railway*, 4 Ex. 244,) as against a stranger, yet the servants of contractor and sub-contractor are held fellow-servants with one another and the servants of the employer, (*Wiggett* v. *Fox*, 11 Ex. 837.) Not only equity therefore and public policy, but simplicity and consistency of legal doctrine are in favour of the change.

With these remarks I commend Mr. Ayrton's Bill to the approval of the Association. I do not wish to exaggerate its importance. Compared with other matters affecting the working classes it is not important; but it belongs to an important class. Statutory interference with trade should not be applied without much consideration, but modern experience, as of our Factory Acts, Colliery Acts, Merchant Shipping Acts, shews clearly that positive enactments may be required to secure justice to working men from their employers, and may work most beneficially to all parties.—*Law Magazine.*

CASE LAW.

The most rigid Conservative who ever anathematized reform in Church and State would scarcely venture to maintain that our present materials for legal research are perfect, or that the study of the law is free from many an awkward hitch and serious inconvenience. Apart from the perplexity caused by the confused state of our statute book, an evil which we have alluded to before, and shall no doubt have occasion to discuss again, there exists a difficulty of equal magnitude in the vast number of reported cases from which the lawyer has to seek out such points as arise from time to time in the course of professional practice. We have heard that the study of the Sanscrit language was held by the native pundits of the Indian peninsula to be a task involving the labour of a lifetime; that its recondite grammar was spread out into volumes sufficient to furnish the shelves of a moderate library; and that great was the scandal when English, French, and German authors gathered the disjointed fragments together, and ruthlessly compressed them into the limits of an octavo volume. There was some excuse for the feeling of indignation thus excited, for Sanscrit was an obsolete language existing only in the traditions of the learned, and its study had no bearing on the practical interests of society, or the daily pursuits of life. This cannot be said of law; yet in the brightest days of our civilization we have allowed that science to be oppressed with the same incubus which in the case of a mere *dilettante* study our linguists have laboured successfully to remove. It is to the last few years that we owe that vast "plague of reports," which threatens to reduce legal study from a science to a mere mechanism, and to place the decisions of our courts on a level with the casuistical lucubrations of mediæval philosophers. Apart from the selections of cases contained in legal periodicals, there are no less than 1100 volumes of *authorized* reports, of which only 150 existed a century ago. It were well if we could look upon these figures as an ultimate limit; but it is only too evident that in a few years the number will be doubled; as fresh cases are accumulating at the rate of 2250 per annum, adding yearly to the legal library no less than twenty-seven or thirty volumes.

The disastrous result of such an oppressive increase of reported decisions may be readily anticipated; indeed, it is amply foreshadowed by the facts of our daily experience. The time of a lawyer is far too much taken up with the search for particular points, sometimes of the most minute description. He dares not relax from this semi-mechanical labor, lest, when he thinks he has grasped a , inciple, it should suddenly be torn from his grasp by a "case in point" which the

court may deem it necessary to follow. We grieve that it should be said of our modern lawyer that he is always ferreting out trifles, that he founds his arguments on petty distinctions and casts off general principles as practically useless, that he throws each train of thought off his mind in sheer weariness as soon as his point is elicited, and seldom acquires a general grasp of the subject, that he is rather like a local pilot who studies the headlands of one particular coast than an experienced navigator who knows the front and profile of every sea-board. But as time goes on matters will become worse and worse; the courts will become more and more case-ridden, and the minute shades of distinction will be infinitesimally subdivided; the reports will be multiplied in increasing ratio by the very action of the system which their present inordinate bulk is introducing and fostering; and the trained practitioner will at last be almost as much at a loss to find the point he requires as an embryo student who is turned loose for the first time to seek his coveted nugget amid the chaotic masses of a legal library. It is time that lawyers should lay their heads together to find the best means of obviating so inconvenient a result; for the public opinion of England though long enduring, is a formidable assailant when thoroughly aroused, and if reform does not originate with the profession itself, hostility will sooner or later act with chilling effect from without.

There are many objections to codification, which we need not here detail at length, since they are, at any rate among lawyers, pretty generally recognized and understood. We may remark, however, that the results of the experiment as tried in France, are by no means encouraging, as the mass of commentaries, decrees, modifications and explanations, grafted on the Code Napoleon, bids fair to render it one of the most cumbrous systems of legislature in existence. We should look, too, with distrust on any attempt to paralyse the discretion of our really excellent judges, or any sweeping measure of reform which would cast away for ever the accumulated wisdom of ages. There are no such obstacles, however, to digesting the reports and weeding out all useless and obsolete matter; and there could be little difficulty in making regulations with a view to curb their luxuriance for the future. It is the opinion of an able writer in the papers of the Juridical Society,* that a mixed committee of twenty men could accomplish the work of digesting the reports in less than eight years, and could give to the world in a hundred volumes such a compendium as every practical lawyer endeavours to form in shadowy outline by his own unassisted study. The digest, when once made, should alone be admitted for purposes of citation, and it should be continued by responsible officers appointed to keep an authentic record of all important decisions.

We entertain some doubt whether the digest could be prepared in so short a time or confined within so limited a compass as the writer in question anticipates. We cannot forget that White and Tudor's Leading Cases, a work which is in fact a digest of cases on certain outlying points of equity, forms two volumes of a much larger bulk than that of ordinary reports; and whether any reporters, official or non-official, would record the cases with the brevity which is attained in the very useful work in question. We cannot, however, feel insensible to the imperative necessity of confining our legal lore within a reasonable compass. The paper above alluded to is perhaps a little too sanguine, but it is useful as advocating the only feasible method of escaping from a difficulty, and as offering many practical and useful suggestions as to the means by which so desirable a measure of reform may be carried out. (See Warren's Law Studies, pp. 844-846, 2d ed.) —*From the Solicitor's Journal and Reporter.*

* Vol. ii. paper xxix. By George Sweet, Esq.

UPPER CANADA REPORTS.

COMMON PLEAS.

(*Reported by* E. C. Jones, Esq, *Barrister-at-Law, Reporter to the Court*)

CORPORATION OF CHATHAM v. MCCREA ET AL.

Bond—Surety—Notice of default of principal.

W McC and R S W (the defendants) enter into a bond conditioned that one McK shall pay to the plaintiffs certain rent in equal monthly payments, with a proviso "that the said municipality (the plaintiffs) shall on default being made by the said C McK in the payment of the said amount monthly, give notice thereof to the said obligors." Upon an action brought for non payment and breach of the bond, it appeared the payments were to be made on the last day of each month, beginning with the last of January, 1861

The first payment was made the 1st of February, the next the 8th of March, the third the 19th of April the fourth the 14th of June, and some irregular amounts between that day and the 15th of November were paid

The first notice given was on the 15th of August, 1861, the second on the 28th of September, and the last on the 28th of December, 1861.

Held, that the proviso for notice was to be considered as a condition precedent to the plaintiffs' right to call upon the defendants as sureties, and that notice of default not having been given within a reasonable time, the defendants were relieved. The question of reasonable notice is one for a jury, but the undisputed facts leaving no doubt what the decision of a jury should be the court ordered a nonsuit to be entered.

Declaration on a bond made by defendants to plaintiffs, in a penalty of £600, subject to a condition, after reciting that one Charles McKeugh had purchased the fees arising from the market in the town of Chatham, for the rent or sum of $1360, payable in 12 equal monthly instalments, as set forth in the indenture of lease granted to the said McKeugh, and that defendants had agreed to become sureties for him, that the said McKeugh should pay to the treasurer of the plaintiffs the said rent or sum, at the times and in the manner mentioned in the lease, and should perform, keep, &c., all the duties, rules and regulations, and other things required of him as market clerk to the said corporation for the year 1861, and following the said condition there was a proviso that the said municipality should, on default by McKeugh in the payment of the said amount monthly, give notice thereof to the defendants.

Breach, that McKeugh did not pay, and there remained due by him the sum of $600. Second breach, that McKeugh did not perform, &c., the duties, rules and regulations and other things required of him as market clerk.

Averment, that all conditions were fulfiled, and all things happened to entitle plaintiffs to recover.

Pleas.—1st. That although the said McKeugh made default in the payment of the first and of several subsequent instalments, contrary to his covenants, yet the plaintiffs did not give any notice whatever of such default to the defendants.

2nd. That McKeugh did perform, &c., all the duties, rules and regulations, and other things required of him as such market clerk of defendants.

The plaintiffs took issue on these pleas.

The case was tried in April, 1862, at Chatham, before *Hagarty*, J. The bond was put in, and it appeared that after the condition that if McKeugh should pay, &c, the obligation should be "null and void, otherwise to be and remain in full force and effect," the following words were added by interlineation: "provided always, that the said municipality shall on default being made by the said Charles McKeugh in the payment of the said amount monthly, give notice thereof to the said obligors." The plaintiffs only proceeded on the first breach, viz., non-payment by McKeugh.

The lease was also put in, by which the plaintiffs in consideration of $1360, to be paid as rent by McKeugh to the treasurer of plaintiffs, demised to him for a year, ending the last Saturday in December, 1861, the fees arising from the public market in the town of Chatham. And McKeugh covenanted to pay the rent in twelve equal monthly instalments, the first to be paid on the last day of January, 1861, and each of the other instalments to be paid on the last day of every succeeding month. There were other covenants not material to be noticed, and at the end a proviso that in default of due payment and fulfilment of the other covenants the plaintiffs might enter upon, possess, and enjoy the said market fees notwithstanding the lease.

By a statement rendered by the treasurer of the plaintiffs, it

appeared that the monthly payment for January was not made until the 1st of February, 1861; that for February was made on the 8th of March; that for March on the 19th of April. The next payment for April was not made until the 14th of June. No payment was then made until the 2nd of August, between which day and the 15th of November, 1861, there was paid, including both days, the gross sum of $340, making a total of seven months' rent, amounting to $793 32.

A notice was given to each of the defendants, dated the 10th of August, 1861, by the town clerk of the plaintiffs, that McKeugh was a considerable sum in arrears in his "payments of the rent of the market fees." This was the first notice given. Subsequent notices were given respectively dated the 28th of September and the 28th of December, 1861, by the last of which an arrearage of $566 88 was claimed. Another letter claiming $552 48, and threatening legal proceedings against defendants as McKeugh's sureties, was written to them on the 24th of January, 1862. At the end of July, 1861, the sum of $340 was due, over and above all payments made. On the 2nd of August a payment of $50 was made, so that on the 10th of August McKeugh was $290 in arrear.

It was agreed defendants should have leave to move to enter a nonsuit on the objection that no sufficient notice of default was given. There was no contest as to the foregoing facts, and it was left to the Court to apply the law thereto, and the plaintiffs had a verdict for the full amount claimed.

In Easter term *A. McNabb* obtained a rule *nisi* to set aside the verdict and enter a nonsuit; or to reduce the verdict to such sum as the court should determine, according to the leave reserved.

In the following term *Eccles, Q. C.*, and *Atkinson* shewed cause. *McNabb* supported his rule.

DRAPER, C. J.—I do not perceive that any leave was reserved to move to reduce the verdict.

Taking the proviso as attached to and connected with the words immediately preceding it, namely, that the obligation should be "null and void, otherwise to remain in full force and effect," the fair meaning is, that if McKeugh makes default, the bond is to be in full force and effect, provided the plaintiffs shall, on default being made in payment of the stipulated amount monthly, give notice thereof to the obligors.

The defendants have contended that though this is not a formal agreement on the part of the plaintiffs to give notice, it is a condition introduced for their, the obligors, protection, and that non-payment by McKeugh of any monthly instalment does not alone forfeit the bond, unless the plaintiffs give notice of such non-payment, and that the want of such notice, on the day when the first or any subsequent monthly payment fell due, discharged them (the obligors) altogether, because the defendants as sureties would have had a right to insist that the plaintiffs should immediately enter upon and receive the market tolls as soon as McKeugh made default, and that they were deprived of the opportunity of claiming this remedy for their own protection by reason of their not receiving due notice of the default.

I think this proviso does operate to make notice of the default a condition precedent to the plaintiffs' right to call upon the sureties, and the only questions are, what is the proper construction of the proviso, does it require the notice of any default in any monthly payment to be given immediately such default takes place; and does this omission to give proper notice of default in paying any one instalment discharge the defendants as to all the residue thereafter to accrue due?

This proviso does not fix the time within which notice is to be given, nor is there any rule of law absolutely determining it. If given within a reasonable time, it would, I apprehend, be enough, for I do not think the defendants would be discharged by the fact that, default being made in payment on the last day of January, notice was not given to the defendants on the following day. It would, I apprehend, be a question for a jury, if the circumstances were such as fairly to raise the question. But here it appears to me the undisputed facts leave no room to doubt what ought to be the conclusion of a jury upon them. McKeugh was in default in making no payment on the 30th of April, and did not pay the sum then due until the 14th of June following. Of this default no notice was given. He was again in default on the 31st of May, the 30th June, and the 31st of July, making no payment until the 2nd of August, and then he only paid $50, not half the sum which was due on the 31st of May, and the first notice which was given was dated the 10th of August, and was served soon after, the precise day not being proved. I think no jury would decide this to be a notice within reasonable time; and that they ought to be told that the delay was, from the very character of the transaction, against the spirit of the proviso, and that upon these admitted facts the proper conclusion is, that no sufficient notice was given.

Then as to the effect of want of such notice. It (the notice) is a condition precedent to the plaintiffs' right to recover, and the general averment in the declaration that all conditions were fulfilled, and all things happened to entitle plaintiffs to recover, include this condition. The plea puts the giving notice expressly in issue, and the burden of proof is on the plaintiff.

In my opinion they failed to sustain their averment, and therefore failed to make out the case stated in the declaration, and as a consequence the rule for entering a nonsuit should be made absolute.

Per cur.—Rule absolute.

IN RE GRANT AND THE CITY OF TORONTO.

By-law—Esplanade—Debentures.

The statute 16 Vic., ch. 219 authorises the issuing by the city of Toronto of $120,000 of debentures for esplanade purposes. A by-law having been passed on the 7th of May 1860, entitled "To provide for the issue of additional debentures for $54,000 for esplanade purposes" upon an application to quash the by-law on the ground that on its face it did not shew any authority in law for raising the sum,

Held, that inasmuch as the by-law in its recital referred to the statute, which was a public act, it could not be said that it shewed no authority for raising the sum, and a *primâ facie* case of an excess of authority in the amount authorised by statute in not being proved the court in its discretion refused a rule.

Hallinan applied for a rule *nisi* to quash by-law No. 318, of the City of Toronto, passed 7th of May, 1860, and entitled, "To provide for the issue of additional debentures for $54,000 for esplanade purposes." objecting that the by-law did not shew on the face of it any authority in law for raising the sum, nor that the sum is less than, or equal to, the amount which the corporation is entitled to raise for esplanade purposes. It appeared among other things, that debentures for the whole sum of $54,080 had been issued under the by-law.

The recital in the by-law sets out part of the statute 16 Vic., ch. 219, the second section of which authorises the corporation to pass a by-law to raise a loan for such an amount, not exceeding $120,000, as may be necessary for the purpose of constructing the esplanade, and to issue debentures for the purpose of redeeming the same and paying the interest, in any by-law to be passed authorising the said loan $150,000, or any part thereof, and the issuing of debentures, to impose a special rate, &c.

DRAPER, C. J.—This act being expressly referred to, and being a public act, it cannot be said the by-laws shews no authority for raising the sum; and as the act shews the sum which may be raised to be $120,000, and as the by-law only provides for raising "a further sum of $54,000," it certainly does not appear on the face of the by-law that the authority has been exceeded by reason of any previous sums that may have been raised, amounting, together with the $54,000, to more than $120,000. If such be the fact, it should be plainly asserted, and made a ground for this application.

In the exercise of the discretionary power given by the Municipal Act, ch. 54, Consol. Stat. U. C., we should require a clear *primâ facie* case to induce us to grant even a rule *nisi* to quash a by-law passed more than two years ago, and fully acted upon; besides which for all that appears, this by-law may possibly have been specially promulgated, (it does not appear it has not been,) and then an application to quash it must be made within six months after the promulgation.

We think there should be no rule.

Per cur.—Rule refused.

FORD ET AL. V. JONES

Ejectment—Mortgage—Possession—Right of, till default in proviso of mortgage—Heirs at law—Their right to bring ejectment—Executors.

One D B O F being the owner of certain land mortgaged it in fee to the T & L Co., with a proviso or condition that until default he should remain in possession

Upon his death (the plaintiffs) his heirs at law, during the currency of the mortgage, brought ejectment to recover possession from a tenant, no default having been made in the mortgage.

Held, that the proviso for remaining in possession until default made, would entitle the mortgagor to bring ejectment, but that the right of action descended to the executors and not to the heirs at law, therefore the defendant was entitled to recover.

The plaintiffs claimed title as heirs at law of David B. Ogden Ford, late of the town of Brockville, in the county of Leeds, Esquire, deceased, who claimed by deed from the Trust and Loan Company of Upper Canada.

The defendant, besides denying the title of plaintiffs, claimed title in himself by deed from Jones.

On the trial proof of no default having been made in the mortgage was given.

The defendant's counsel objected that the fee of the land being in the Trust and Loan Company, the plaintiffs could not maintain the action.

A verdict was taken for the plaintiffs subject to the opinion of the court.

The case was argued on points reserved, by *Anderson* for the plaintiffs, citing Com. Dig. Estate,

Richards, Q. C., for defendant, cited *The Canada Company* v. *Weir*, 7 U. C. C. P. 341; *Robertson* v. *Bannerman*, 17 U. C. Q B 508; *Doe Lyster* v. *Goldwin*, 2 Q. B. 144; *Mallock* v. *McEwan*, 9 U. C. C. P. 467 Williams on Ex. 554.

DRAPER, C. J.—The material facts appear to be that D. B. O. Ford made a mortgage in fee of the premises, to recover possession whereof this ejectment is brought, to the Trust and Loan Company: that the mortgage contained a proviso that the mortgagor might retain possession until default; and there has been no default; that the mortgagor has since died, and this ejectment is brought by his heirs at law, claiming that the proviso for the mortgagor remaining in possession enures for their benefit and gives them a right to recover.

The case of *Wilkinson* v. *Hall*, 3 Bing. N. C. 508, has been frequently acted upon by our courts, and it in effect decides that Ford, the ancestor, had by virtue of the proviso that he should retain possession until default, acquired from the Trust and Loan Co., to whom he had conveyed the fee by way of mortgage, a term for as long as he had time given him to redeem by payment of the mortgage money, unless he made default in any intermediate payment of interest.

It was a chattel interest—not one of freehold—that he thus acquired, limited in point of duration till the day of payment of the principal money arrived, subject to forfeiture by non-payment of any stipulated installments or of interest; but as a chattel interest it could not on his death vest in his heirs at law, who are the claimants in this action. The fee did not descend to them, though the right to redeem it did, and by law the term vested in the executors of their ancestor.

The *postea* must therefore be delivered to the defendant.

Per Cur.—*Postea* to defendant

ELECTION CASES.

Reported by ROBERT A. HARRISON, *Esq., Barrister-at-Law.*

THE QUEEN ON THE RELATION OF ARMOR V. COSTE.

Con. Stat. U. C. cap. 54, s. 73—Municipal Council—Disqualification to be member.

On 27th June 1861, a By-law was passed by the County Council of Essex appropriating $2,543 for the improvement of certain Roads and Bridges in the County, amongst others "on the Town line, between Colchester, Malden and Anderdon the sum of $600, and that Messrs. Coste (the defendant) and Cunningham be commissioners to expend the same," and that "the several commissioners hereby appointed to superintend the letting of any work to be done as aforesaid, shall receive three per cent. upon all contracts entered into by them, under the provisions of this By law." On 1st December, 1861, the defendant received all the money he was entitled to in respect of his services under the By law

Held 1. That proof of the mere fact of defendant being a Road Commissioner to expend moneys raised in and for 1861, did not necessarily imply that he was an "officer" of the corporation within the meaning of Con. Stat. U. C. cap. 54, sec. 73, so as to make him ineligible to be elected in 1862, unless clearly shown that his duties continued.

2 That any contract which the corporation made with him to compensate him for services rendered as a Road Commissioner in 1861, having been fully performed by the payment of his commission in 1861, he was not at the time of his election in 1862 "a person having by himself or his partner an interest in any contract with or on behalf of the corporation" within the meaning of the same statute.

Quære—If a person enter into a Joint Stock Road Company, in which company a Township Municipality has taken Stock, is such person thereby disqualified to be a member of the Township Council

Where defendant while denying any interest in the contract with the Road Company, admitted that he was employed as a salaried agent for the contractor, costs were refused to him

The relator objected that Coste were not eligible to be elected Township Councillor of the Township of Malden and Reeve of the said Township, on the grounds:

1st. That he was a person having by himself or partner an interest in a contract, with, or on behalf of the Corporation of the said Township of Malden.

2nd. That he was disqualified from being elected by reason of his being a road commmissioner of the corporation of the county of Essex, and a person receiving an allowance from the said corporation other than as a Deputy Reeve or Warden of the said corporation.

Boyd for relator. *Prince* for defendant.

The facts sufficiently appear in the judgment of the learned judge before whom the matter was argued.

RICHARDS, J.—I shall dispose of the second ground first.

On the 27th June, 1861, a By-law was passed by the County Council of the County of Essex, of which defendant was then a member, to appropriate $2,543 for the improvement of certain roads and bridges in the County. The By-law provided where the money should be expended, naming the several roads and commissioners amongst the others as follows:—"On the Town line between Colchester, Malden and Anderdon the sum of $600, and that Messrs. Coste (the defendant) and Cunningham be Commissioners to expend the same." The by-law then proceeded to enact "that the whole of the above work so to be done and performed as aforesaid shall be given out by contract, by public competition, by the said parties duly appointed to superintend the same, on or before the first day of September next, and should any one or more of the above mentioned parties fail to be present at the time appointed for the letting of such work, then any one member of such commissioners present may proceed to the letting of the same;" and "that all contracts entered into for the performance of any work to be done under the provisions of this By-law, shall be signed by the Commissioners letting the same on behalf of the corporation, and all sums due for such work shall be paid by the County Treasurer upon a certificate being produced, signed by the Commissioner or Commissioners letting the same of the work having been performed according to the contract," and "that the several commissioners hereby appointed to superintend the letting of any work to be done as aforesaid, shall receive three per cent. upon all contracts entered into by them under the provisions of this By-law."

By the terms of this By-law, the contracts were to be let by the commissioners on or before the 1st of September 1861, and from the nature of the work it is possible that all would be completed within the year. At all events the defendant seems to have received on the 12th of December 1861, all the money he was entitled to in respect of his services under the By-law, so that he would have no contract with or demand against the corporation in respect to such services at the time he was chosen Reeve.

His being a Road Commissioner to expend moneys raised in and for 1861, does not necessarily imply that he would be an officer of the corporation within the meaning of the statute so as to make him ineligible to be elected in 1862, unless it is clearly shown that his duties continued.

I therefore think as to this ground that the relators case fails, defendant not being shown to be an officer of the corporation when elected and any contract the corporation may have made with him to compensate him for his services rendered as such commissioner in 1861, having been fully performed by the payment of his commission under the By-law on the 12th December 1861.

The first ground taken by relator is supported by his endeavouring to show the following facts, that there was established a joint stock company called the Amherstburg, Malden and Talbot Plank and Gravel Road Company, in which company, during last year, the Township of Malden took stock to the amount of six

thousand dollars, and that by virtue of his office of Reeve and of the said stock, defendant sits and votes in the company as a director thereof, that the company during the last year entered into a contract with Michael Seberville for the construction of seven miles of the said Road, and that defendant is interested as a partner or otherwise in the contract entered into by Seberville and the Road Company.

I have read all the affidavits filed on both sides in reference to the matter, and am not satisfied that Coste is a partner with or interested in the contract of the road company, so as to disqualify him from being elected Reeve of the Township. I do not at present decide that entering into a contract with a road company disqualifies a person from being elected Reeve or Councillor of a Township when such Township has taken stock with road company.

I can see many reasons why the taking of such a contract should work a disqualification, and am not prepared to say that it would not be carrying out the spirit of the statute, to hold that it did come within the act, and that such a contractor could not be elected Reeve even if he could be a councillor for the Township, so holding perhaps much the largest portion of the stock of the Road Company. But as in this case I do not feel justified in coming to the conclusion that defendant was a contractor or interested in the contract in a sense to disqualify him, it is not necessary to decide the question how far such a contract if it had been entered into would have worked a disqualification.

I must therefore decide in favour of the defendant on this ground.

The only remaining question is the costs. Defendant whilst denying any interest in the contract of Seberville admits that he is employed as his agent, that he receives from him $400 and his expenses as such agent, and is actually engaged in this work. Whilst he is acting thus as the agent of the contractors he is by virtue of his office of Reeve of the Townships a director of the Road Company, as such director it is his duty to see that Seberville performs his contract, and does justice to the Company, though the strict enforcement of such contract might cause Seberville pecuniary loss. On the other hand as Seberville's servant and agent it is his interest and perhaps he may consider it his duty to do the work in such manner as may be most profitable for his employer, in which case the interest he is bound to protect as Reeve, and director may suffer.

I do not think any man ought to place himself in such an equivocal position, and it is not unreasonable that such a matter for the public interests should be enquired into.

Looking at the defendants own conduct and position as set up by himself, I am not disposed to give him any costs.

I shall therefore decide in favour of the defendant without costs to either party.

Reg. ex rel McMullen v. DeLisle.

Consol. Stat. U. C., cap. 54, s 73—Municipal Councils—Disqualifications—Relator.

Where defendant had been appointed a commissioner for the expenditure of Municipal funds upon the roads of the municipality in which he resided and the by-law appointing him fixed a certain commission to be paid to him for his services as such commissioner, and it was shewn that some portion of his commission remained unpaid at the time of his election as a member of the Municipal Council, he was held to be disqualified as being a person having an interest in a contract with the corporation.

It is not desirable that the clerks of Municipal Councils having the custody of papers of the corporation should be relators in *quo warranto* cases to unseat members of the councils to which they are clerks.

In this case in order to discountenance such a practice, costs were refused to relator, Clerk of the County Council to which defendant had been elected a member, although the application to unseat defendant was successful.

Relator objected to defendant holding the office of Deputy Reeve of the Town of Amherstburg on the following grounds:

1st.—That the corporation of Amherstburg is not entitled to a Deputy Reeve, the said town not having the names of 500 resident freeholders and householders on its last revised assessment roll.

2nd.—That defendant was disqualified from being elected Deputy Reeve because he was a road commissioner of the corporation of the County of Essex, and a person receiving an allowance from the said corporation other than as Deputy Reeve or Warden of the said corporation, and as such disqualified to be elected a member of the council of the corporation of the county.

The relator it appeared was Clerk of the County Council of the County of Essex, and as such officer, had the custody of a certified copy of the assessment roll of the Town of Amherstburgh.

In his affidavit he gave a synopsis of the names on the roll, and the result he arrived at was, that there were not the names of 500 resident freeholders and householders on the last revised assessment roll of the town. He then stated that defendant was, by a by-law of the corporation of the county, passed on the twenty-seventh of June, 1861, appointed road commissioner to superintend the expenditure of monies to be expended upon certain roads and bridges in the said county, and by the same by-law it was provided, that, as such commissioner, defendant should receive an allowance from the corporation of Essex of 3 per cent. upon all contracts entered into by the said defendant as such commissioner, which said amount so due as aforesaid, was still due and owing, as he was informed and believed, from the county corporation to defendant.

The affidavits were very conflicting.

Boyd for relator; *Prince* for defendant.

Richards, J.—As to the first ground of objection, if the case turned upon it, I should require further information, the affidavits filed on either side being so conflicting; but as I shall dispose of the matter on the other ground, I shall not delay my decision merely to ascertain who is right as to the number of resident freeholders and householders whose names are on the assessment roll of 1861 for the township of Amherstburgh.

I have already made an abstract in the matter of costs of the party of the by-law passed in 1861, appointing persons to expend money on different wards in the county. The extracts there made will all apply to this case except the one naming the commissioner, and that part which relates to defendant's appointment as commissioner is as follows, viz.: "On the town line between Malden and Anderdon leading into the town of Amherstburgh the sum of $410, and that Messrs. Kolfage, DeLisle (the defendant) and Cunningham, be commissioners to expend the same."

It appears from the papers filed that the amount due defendant under the by-law for his services as such commissioner had not been paid to him at the time of his election as deputy reeve. Mr. Kolfage, the reeve of Amherstburgh, stated that he was present on the 27th June of last year when the by-law to levy a tax in the county of Essex for the improvement of certain roads and bridges in the aforesaid county of Essex was passed, and that he remembers on the occasion of the passing of the by-law he asked the question of relator, who was at the time solicitor and clerk of the said municipal council, whether, as they were acting in their capacity of reeves in superintending the appropriation of monies for county or town line roads, and on letting out the contracts for the same, they could, according to law, be granted under a by-law any allowance for the expenses they would necessarily incur in fulfilling their prescribed duties, and that the said McMullen answered that they were acting in their capacity of reeves, but that as such an allowance could be made to them under the by-law.

The answer set up by defendant to the second objection is, that he was, whilst acting as commissioner under the by-law, acting in his capacity as reeve, and that any compensation awarded to him under the by-law, was in such capacity as reeve: that the statute does not work a disqualification when the allowance is to the person receiving it as reeve, deputy reeve, &c.

I am not prepared to give my assent to the proposition advanced in favour of the defendant. In that view large sums of money might be raised for the purpose of making alleged improvements, to be expended by the members of the municipal council, who would get a per centage on it, and who might vote for the raising of the money to make money out of their commission on the expenditure. The reason of the rule which excludes any one having a contract with the municipality from being elected a reeve or councillor, usually extends to prevent the councillors from increasing their own emoluments. The exceptions as to reeves and deputy reeves receiving an allowance from the corporation undoubtedly means the $1 50 per diem, which the council may allow them for their attendance in council. It is not desirable that reeves or councillors should be mixing themselves up with the contracts given out on behalf of the corporations, whose interest they are by law expected to look after. It is not desirable that they should

be induced to vote for the raising of moneys to be expended under their own supervision, in the hope of being able to make some petty per centage out of such expenditure, and thereby indirectly receive a profit out of their office which the law does not contemplate.

In the case before me, however, it is sufficient to say, that the by-law appoints this defendant, with other gentlemen, commissioners to expend money, by letting out a contract for certain work, and gives him a per centage for so doing. He is not in the by-law mentioned as the deputy reeve of Amherstburgh, nor is it stated that the per centage is as an allowance to him in that capacity. The by-law simply declares the commissioners . . . "shall receive three per cent. upon all contracts entered into by them." Now, under the By-law, they received an allowance for their services as commissioners, which disqualified them from being elected whilst the matter was pending and the allowance unpaid. This defendant has never been paid his commission, and was at the time of his election in the position of a person receiving an allowance from the corporation, or of an individual having a demand against the corporation for services he had rendered, and for which he had not been paid, and under the decided cases disqualified from being elected as deputy reeve.

I am of opinion, therefore, defendant's election as deputy reeve must be set aside.

When the writ in this matter was applied for I intimated my opinion that the clerk of the council was not the proper person to move to set aside the election of a member of the body of which he was the servant; that often the original documents required to be referred to would be in his care and custody, and that the opposite party would, to a certain extent, be placed at his mercy, for the procurement of copies, &c., and that it was not desirable in my opinion, that whilst the clerk, and having the custody of the papers of the corporation, he should be a relator.

I further intimated at the time, that I should probably, if called upon to decide the case, refuse costs to the relator, with a view of discountenancing the practice of persons in his position becoming relators in these proceedings. It further appears from the papers filed, that at the time of the passing of the by-law under which defendant acted, that relator was clerk and solicitor to the municipal council, and expressed his opinion at the passing of the by-law, that the reeve or deputy reeve could properly receive the commission allowed them under it.

Under these circumstances I do not think it would be proper to allow the relator his costs. He seems to me to have placed himself in a false position in this matter; 1st, by becoming a relator when he was clerk of the county council, and 2ndly, in instituting proceedings against parties who acted in good faith in accordance with the opinion he had himself given as the legal adviser of the corporation.

The writ will go to remove the defendant from the office of deputy reeve of the town of Amherstburgh, but without costs to either party.

CHANCERY.

(Reported by ALEX. GRANT, *Esq., Barrister-at-Law, Reporter to the Court.)*

MONTREAL BANK v. BAKER.

Mortgage—Execution of deed in blank—Absconding debtor.

A debtor being about to leave this province for the purpose of raising funds to discharge his liabilities, signed and sealed a printed form of mortgage upon certain lands, without, however, having inserted either the name of himself or the mortgagee therein, which was also in like manner executed by the wife of the mortgagor, and by him locked up in his desk. From Halifax he wrote to his agent here instructing him to fill up the blanks as he should find necessary, which was accordingly done, and handed over to the mortgagee. *Held*, that this was a sufficient execution of the mortgage, and that the same was a valid charge upon the property embraced in the instructment.

When it is necessary for the purpose of settling the priority of incumbrancers to enquire whether a party who had been sued was or not an absconding debtor within the meaning of the act, this court will do so, and that too although the defendant in the action may not have taken any steps to set aside the attachment issued at law.

This was a suit of foreclosure brought by the Bank of Montreal upon two mortgages against William Baker, the mortgagor, and Joseph Shuter, The Commercial Bank of Canada, Thomas Rigney and James Brown, the younger, who were made parties as incumbrancers, Shuter ranking prior to the plaintiffs as to one of their mortgages, and in respect of which they submitted to redeem him.

The bill further stated, that the defendants The Commercial Bank claimed priority over such second mortgage, bearing date the 25th May, 1857, by virtue of a judgment recovered against Baker, and duly registered; such judgment having been recovered in a suit wherein proceedings had been commenced by writ of attachment, and which was sued out prior to the registration of such second mortgage of the plaintiffs; but which the plaintiffs submitted the Commercial Bank could not properly claim, Baker never having been in fact an absconding debtor, or liable to such process.

All the defendants answered the bill. The Commercial Bank alleging that Baker was at the time of suing out their attachment an absconding debtor, and that such attachment never had been superseded or abandoned; and that the mortgage of the 25th May, 1857, was never in fact executed by Baker, and that the same did not operate as a lien on the lands embraced therein.

The cause having been put at issue, evidence was taken therein before the court at great length, the material points of which, so far as the questions decided are concerned, appear in the judgment.

Strong, for the plaintiffs.

Roaf, for the Commercial Bank.

A. Crooks and *Blake*, for the defendants Rigney and Brown.

For the plaintiffs, it was contended, that the execution of the mortgage in blank by signing the name and affixing the seal of the mortgagor thereto was sufficient, although the name of the mortgagee did not appear therein; and that the agent of the mortgagor having subsequently filled in the names and delivered the deed to the plaintiffs, under the written authority of the mortgagor, was a good delivery thereof, although such authority was not under seal. The interest of Baker at the time was only an equitable estate, and as such did not require a sealed intrument to charge it. An equity of redemption may be charged without seal. It may be admitted that to pass a legal estate by the grantor's attorney a seal is necessary to the instrument constituting the attorney. *Hudson* v. *Revett*, 5 Bing. 366; *West* v. *Stewart*, 14 M. & W. 47; *Hibblewhite* v. *McMorine*, 6 M. & W. 215; and Broom's Legal Maxims, 145-6, were referred to.

The proceeding to sue out an attachment with knowledge of the facts, was a most improper use of the provisions of the act of parliament. Baker, in the eye of the law, never was an absconding debtor: it is shewn that he left openly, with the knowledge of the community in which he resided, for the purpose of visiting Montreal, Boston, or any other place in which he might consider it probable that he would succeed in raising funds to discharge his liabilities.

Counsel for Rigney and Brown insisted upon the same objections as were raised by the plaintiffs as to the invalidity of the proceedings under the attachment, which they also contended had been abandoned by the attaching creditors, Baker having been permitted to assume control of his property after his return, and to continue his business in the same way as he had previously done.

For the Commercial Bank, it was contended, that the mortgage to the plaintiffs never was a valid subsisting charge at law; as a conveyance it was wholly void at law, and being void at law, would be void also in equity. No agreement is alleged or proved to execute a mortgage or create a charge by deposit of title deeds, or in fact do otherwise than was done. The delivery, if any such took place, was before the blanks were filled up, and the registration of the mortgage was effected upon the affidavit of a witness, who swore to the delivery by Baker himself: this alone is sufficient to shew that the plaintiffs relied alone upon the delivery by Baker; and McNider, agent of the plaintiffs, says he accepted the mortgage before the blanks were filled up.

So far as the question respecting the validity of the attachment is concerned, the only point for consideration is, whether there was fraud in the suing out of the writ as against other creditors; nothing turns upon the ground of the regularity or irregularity of that proceeding. Baker never having adopted any steps for setting aside that writ, this court will not now enquire into the fact whether the debtor was an absconding debtor or not.

Exp. *Hoover*, 1 Mer. 7; *Shepnerd* v *Titley*, 2 Atk. 348; Chitty's Archbold's Practice, 688; Shepherd's Touchstone, 313; *Amer* v. *Best*, 1 Vermont Rep. 303, were also cited.

SPRAGGE, V. C.—The principal question in this case is, whether the instrument which the plaintiffs claim to be a mortgage, and which bears date the 25th of May, 1857, was ever, and if ever, at what time, duly executed. The question is one of priority between the Montreal Bank, and the Commercial Bank, and the defendants Rigney and Brown.

The instrument in question, without the names of any party in the body of it, but with a space left for their insertion, was signed and sealed by the mortgagor Baker, and his wife, on the day of its date, and in that state attested by a subscribing witness. On the outside the words, "mortgage with dower" are printed; below this the word, "to," and underneath it in pencil, in the handwriting of Baker, are the words, "Bank of Montreal." The instrument was not then delivered, but in the state I have described was retained by Baker, and locked up in his desk. This was done on the eve of his departure for Montreal, and perhaps to Halifax, with a view to obtaining money to relieve his embarassments. At the latter place he wrote a letter of instructions, which is produced to a Mr. Lavis. A mortgage with similar blanks executed in the same way, and intended for the Commercial Bank, was also left by Baker in his desk.

In his letter to Lavis he informs him of the execution of these instruments, and instructs him to procure them, and fill up the blanks, as he should find it necessary; and to deliver them respectively to the agents of the banks at Belleville, delivering the one in question first to the agent of the Montreal Bank. The one intended for the Commercial Bank was offered to the agent, and refused, on the ground that it was invalid by reason of the blanks. The one offered to the Montreal Bank was accepted by its agent, McNider. It was delivered first, while in the state in which it was left, and again after the blanks had been filled up.

It is incontrovertible, I think, that the instrument in the state in which it was left by Baker was void; and that as first delivered to McNider, it was void. The question is, whether the filling up of the blanks, and subsequent delivery, gave it validity.

If the only thing remaining to be done had been the delivery of the instrument, it would be clear, I think, that delivery being a matter in *pais*, was authorised by a letter from Halifax, and was validly done. I think it is also clear, as a matter of fact, that the filling up of the blanks was in accordance with the instructions contained in that letter. The question is, whether Lavis, as agent appointed by parol, could complete the execution of this imperfect instrument by any authority less than under seal.

If a re-execution of the instrument by Baker himself, supposing him present, and not acting by attorney, had been necessary after the blanks were filled up, it would follow that Lavis had no authority to complete its execution. A formal re-execution by signing and sealing, or its equivalent, acknowledging signature and seal, would not be necessary, I apprehend, but a filling up of the blanks in the *presence* of the grantor merely, would suffice under the authority of *Hudson* v. *Revett*, 5 Bing 368, even as read by the court in *Hibblewhite* v. *McMorine*, 6 M & W. 215. But it is a question whether in *Hudson* v. *Revett* the court held the presence of the grantor necessary; their language does not attach importance to that circumstance.

The deed in question in that case was a conveyance to trustees for the benefit of creditors; the sums due to them respectively being inserted in the deed; a blank was left for a very large amount due to one of the principal creditors, which it was agreed should be ascertained by the production of vouchers; the deed was executed with this blank, which it was agreed should be filled up when the vouchers were produced. The next day the vouchers were produced by the grantor, and the blank filled up, probably in his presence, with the smaller amount, which only he alleged was due.

The omission in that deed was certainly not of so startling a character as in the case in question, nevertheless the court held that it was quite impossible that the deed could have any operation while the blank remained in it. It was therefore void, and more than void it could not be.

Then how did the court get over the difficulty that the deed was inoperative and void as first executed, and became a valid deed without any re-execution? As I understand the case, in this way, that there was not a perfect execution of the deed on the first day; and that the delivery at that time was in the nature of an escrow, though not technically as an escrow, the delivery being to the grantee himself; that taking it, that there was a delivery of the deed as a deed, it was only a delivery upon condition that something was afterwards done, and that then, and not till then, it became a perfect deed.

No stress was laid upon the circumstance that the blank was filled up in the presence of the grantor, nor was that circumstance material in the view which the court took of the case. It would indeed be only evidence of assent, which itself is matter in *pais*, and could be done as well by an agent authorised by parol, as by the grantor in person; suppose, for instance, the grantor had given a power of attorney not under seal, to attend and have the blanks filled up with such a sum, and then to deliver the deed to the grantee, that would be a valid perfecting of the deed within the reasons of the decision; and even if the presence of the grantor had been relied upon.

Hudson v. *Revett* does not stand alone The old case of *Zouch* v. *Claye*, 2 Lev. 35, is thus shortly stated in *Levinz*: "In debt upon an obligation, the case was thus: A. and B. delivered the bond to C., and after, and by the consent of all parties, the name and addition of D. was interlined, and D. also sealed the obligation, and delivered it; and if the obligation by this alteration was made void against A. & B. or not, was the question? But by Hale, and the whole court, adjudged that it was not, and that it is the obligation of all three.

In the still earlier case of *Markham* v. *Gonarstor*, Cro. Eliz. 626, it was at first held that the blank space left in the bond, afterwards filled up with the assent of the obligors, avoided the instrument; but this was subsequently reversed; Moor. Rep. pl. 547, and even when first heard, this distinction was taken by Popham, J., that if it had been appointed by the obligor before the ensealing and delivering thereof that it should be afterwards filled up, it might then, peradventure, have been good enough, and it should not have made the deed to be void; but being after, it shall avoid the deed—this distinction proceeding, I apprehend, upon the ground upon which *Hudson* and *Revett* was decided.

Zouch v. *Claye* was recognised as authority in *Watson* v. *Booth*, 5 M. & S. 223, where a bond to the sheriff was executed by four obligors, with a space left for the name of a fifth. In that state it was left in the hands of an agent of the obligors who had executed it, by whom the name of a fifth obligor was inserted in the blank space, and the additional obligor executed the bond, and it was delivered to the sheriff. It was held that before the insertion of the additional name, the holding of the bond by the obligor's agent, was in the nature of an escrow, and the addition having been made with the assent of the agent, was the same as if made with the assent of the obligors themselves, and so within the case of *Zouch* v. *Claye*; and the bond was held valid.

Hibblewhite v. *McMorine* is one of several cases in which it has been held that an assignment of shares in incorporated companies, which assignments are required by statute to be under the seal of the transferer, and therefore deeds, are void if the name of the transferee be left blank. That was the only point decided, though the language of Lord Wensleydale, by whom the judgment of the court was delivered, militates against such acts as were done in the case before me, by an agent not appointed under seal, being sufficient to make a valid deed. In regard to *Hudson* v. *Revett*, he observes: "A blank in a material part was filled up; but having been done in the *presence* of the party, and ratified by him, it was held that it was evidence of re-delivery."

Lord Wensleydale may have thought that the circumstance he adverts to was the proper ground upon which to place the decision; but according to the report of the case it was not placed upon that ground by the learned judges by whom it was decided. The circumstance of the blanks being filled up in the *presence* of the grantor, is not even alluded to by the judges, and it is not clear that the fact was so. Serjeant Wilde, who argued against the validity of the deed, said, that the deed was always out of the grantor's possession after the first execution; and the counsel who sustained the deed put the case both ways, whether the blanks were filled up in the grantor's presence or not. The learned judges

I take it, must have thought the circumstance either immaterial or not established.

Hudson v. *Revett* was again referred to, *in the Court of Exchequer*, in *West* v. *Steward* (14 M. & W. 47), when Baron Alderson's comment upon it was: "There the court considered it to have been executed originally as an escrow, and not absolutely executed until the blank was filled up."

The doctrine established by *Hudson* v. *Revett*, and *Markham* v. *Gonastor*, and *Zouch* v. *Claye*, I think is, that a deed containing blanks, executed by the grantor, although void at the time, may be perfected and rendered valid by the filling up of those blanks, with the assent of the grantor, or by insertion made in pursuance of directions given at the time of its execution; and *Watson* v. *Booth* establishes further, that such assent may be by agent appointed not under seal. The ground upon which I understand this to proceed I have already explained.

To apply it to this case: the deed, in its imperfect state, was placed by the grantor in the hands of his agent Lavis; not to deliver it immediately, but to hold it for a certain purpose, and then to deliver it; it was then in the hands of Lavis as an escrow. It matters not, according to the cases, whether the purpose for which it was to be held before delivery was something collateral to the deed, or something to be inserted in the instrument itself; Lavis held it for the purpose for which it was placed in his hands; caused that to be done in relation to it which he was instructed to have done, and delivered it. It may be that there was no good reason why the blanks should not have been filled up by Baker himself; but there can be no doubt how they were to be filled up. The names of the executing parties and the pencil endorsement clearly indicated that; in addition to which was the letter of instructions.

I cannot, in principle, distinguish this case from those to which I have referred. *Watson* v. *Booth* resembles it in its circumstances as well as in principle. It can make no difference. I think, that the delivery to Lavis, as an escrow, was not contemporaneous with the signing and sealing.

But it is objected that the deed was actually delivered by Lavis to the bank agent before the blanks were filled up; and that the deed having been registered upon the evidence of Gould, who only witnessed the execution by Baker himself, the bank must have rested upon that delivery. I do not think the registration upon Gould's affidavit can preclude the bank from insisting upon any delivery other than in his presence. Assuming that Lavis delivered the deed, and that McNider for the bank accepted it before the blanks were filled up. I think the bank may still insist upon a delivery by Lavis after the blanks were filled up; for the rule against a second delivery only applies when the first delivery is inoperative, as put by Perkins (sec. 154): "It is to be known that a deed cannot have and take effect at *every delivery* as a deed; for if the first delivery take effect, the second delivery is void." And so in *Hudson* v. *Revett*, Serjeant Wilde did not contend that there *could* be no second delivery, but that as a matter of fact there was no re-delivery; and Best, C. J., held that there was no perfect delivery by the grantor, because the deed itself was inoperative by reason of the blank that was in it. So here the first delivery could not take effect for the like reason; and the second delivery, which was proved, was a good delivery.

Of course I do not mean to say that there has been any good execution of the deed by Baker's wife. But I have come to the conclusion, after some hesitation, that the cases warrant me in holding, that there has been a perfect execution by Baker and his wife.

Something is said in the evidence, of the mortgage to the Montreal Bank being in the possession of Lavis on the evening of the 18th of June, the blanks having been filled up; but I am satisfied from the evidence that it had at that time been a second time delivered by Lavis; and if in his possession afterwards, it could not affect the completeness and validity of the deed.

Evidence has been given as to the exact time at which the mortgage was carried to the registry office for registration, and at which the attachment issued by the Commercial Bank, and under which that bank claims priority, was lodged in the sheriff's office. I incline to think that the mortgage was first in the registry office: but if not, I do not see how the attachment can prevail against it; if it was at that time perfectly executed, an unregistered deed is good against an attachment, unless there is some statutory provision on the subject which I have not seen.

In the view which I take of this case, it is unnecessary to consider some other points raised, at least so far as the plaintiffs' priority is concerned; but as between the Commercial Bank and Rigney and Brown, it is necessary to determine as to the validity of the attachment issued by the bank on the 19th of June; Baker's mortgage to Rigney and Brown having been given on the 17th of October, and registered the same day, and the judgment of the Commercial Bank upon their attachment having been recovered on the 7th June following.

Mr. Roaf contends that the only point open is, whether, in suing out the attachment, there was fraud on the part of those by whom it was sued out, as against other creditors; and that this court will not examine whether as a matter of fact Baker was an absconding debtor or not. If this be correct, that fact cannot be ascertained in any court as between those claiming priority in virtue of it, and other incumbrancers. The Commercial Bank, and Rigney and Brown are both brought into this court as incumbrancers. The bank's judgment is subsequent to the firm's mortgage, but the bank claims priority by reason of the attachment. Is it not open to Rigney and Brown to displace that claim, by shewing that the supposed fact upon which it is based had no existence. It would not be impeaching the regularity of proceedings in another court, but removing the grounds of an assumed priority. The fact is inquirable at law between the attaching creditor and the debtor, for one purpose, the question of costs; as to the debtor, the priority of creditors is nothing; and the writ of attachment is a summons as well; but he is allowed an inquiry for a purpose material to himself; and the inquiry then is, not whether circumstances as they appeared to the creditor, and those who made the further affidavit, were not such as might lead reasonable men to believe that the debtor was an absconding debtor, but whether in fact he was an absconding debtor or not. If as a fact he was not, no attachment ought to have been sued out, and the attaching creditor obtained his priority without right: and in a question of priority only inquirable into in this court, it would be anomalous, I think, if the fact could not be shewn, and shewn by those who have no other opportunity of shewing it. If it were not so, other creditors better informed as to the fact, not to say more careful and scrupulous in their proceedings, would be postponed; because they cannot place themselves in the same position as the attaching creditors, without taking the like proceedings, and upon the like affidavits; and this they could not do with a good conscience, and the result would be that a priority would be gained by the *error* of the attaching creditor: a priority which it is against good conscience that he should retain.

As to the facts necessary to constitute a debtor an absconding debtor—the 43rd and 44th sections of the Common Law Procedure Act are not quite consistent. By the former, the debtor must depart from Upper Canada with intent to defraud his creditors, but by the latter section, attachments may issue upon its being shewn that he has departed with intent to defraud the plaintiff of his just dues, or to avoid being arrested or served with process: in the Consolidated Statutes the same discrepancy is continued.

I have carefully read the evidence, and am convinced that Baker did not leave Upper Canada either to defraud his creditors or the Commercial Bank, or to avoid being arrested or served with process: but in good faith in order to procure moneys to pay his creditors, and among those the Commercial Bank.

I will refer to some of the prominent circumstances that lead to this conclusion. His leaving the mortgages in the Montreal and Commercial Banks, to be handed to them for their security, in the event of his failing to procure money on this side of the Atlantic; and which I have no doubt he *intended* to be valid and effectual, as in my judgment this one was, and the other would have been, if accepted. His directions to Mr. Collis, his Montreal agent, to apply the proceeds of consignments to meet the notes accruing due. His efforts at Montreal, Quebec, and Halifax, and in England, to raise money to pay his debts. His leaving not by stealth, but openly, and with the true object declared. His making provision for the conduct of his business during a tempo-

rary absence, with a view of resuming it upon his return, and its actual *resumption and continuance* as before, after his return.

If it were necessary to determine that the attachment was sued out upon affidavits made without sufficient reason for believing Baker to be an absconding debtor, and in the face of facts known to the bank agent, which ought to have led to a different conclusion, I think I should have been prepared so to determine. The bank agent had been to Stirling on the 15th or 16th, and had seen Lavis, and the state in which Baker had left his business, and had been offered the mortgage before he made the affidavit for the attachment. Indeed it would appear that the immediate motive for taking out the attachment was not so much to secure the estate of the debtor for the bank and other creditors, as thereby to obtain priority over the Montreal Bank. What took place on the evening of the 18th is evidence of this; when the bank agent and bank solicitor pressed it upon Lavis to keep the mortgage to the Montreal Bank in his hands till at least ten o'clock the following day, their object being in the meantime to lodge an attachment, with a view to obtaining priority. Upon the question of priority, therefore, between the Commercial Bank and Rigney and Brown, my opinion is, that the latter in respect of their mortgage are entitled to priority.

COMMON LAW CHAMBERS.

(*Reported by* ROBERT A. HARRISON, Esq., *Barrister-at-Law*)

THE QUEEN v. THE TRUSTEES OF SCHOOL SECTION NUMBER TWENTY-SEVEN, IN THE TOWNSHIP OF TYENDINAGA, IN THE COUNTY OF HASTINGS.

Peremptory mandamus—Necessity for return—Attachment for contempt—Practice.

No attachment will lie for not making a return to a peremptory mandamus; it should be for not obeying the writ.

Such an attachment must be tested in term, on the same day as the rule on which it issues.

The rule nisi called upon the trustees of school section number twenty-seven in the township of Tyendinaga, in the county of Hastings, to show cause why an attachment should not issue against them. On an affidavit of service of this rule on A., B. and C., stating them to be trustees of said section, a rule absolute was granted following it in form, and thereupon an attachment issued against A., B., and C., *held* bad, as not warranted by the rules.

[July 29th, 1862.]

In this case a writ of peremptory mandamus issued on the 5th of July, 1861, returnable on the first day of Trinity Term then next, directed to the trustees of school section number twenty-seven, in the township of Tyendinaga, in the county of Hastings, commanding them to levy and collect from the freeholders and householders of the section a sum of money sufficient for the satisfaction of two judgments recovered against them by one John Waterhouse, and recited in the writ.

A former application for attachment had been made for not returning the writ of *mandamus nisi* issued in the same matter, which is reported in 20 U. C. Q. B. 528.

No return having been made, on the 27th of November, 1861, during Michaelmas Term, *Sisson* obtained a rule *nisi*, entitled "The Queen against The Trustees of School Section number twenty-seven, in the township of Tyendinaga, in the county of Hastings," and calling upon "the trustees of school section above mentioned," to shew cause why an attachment should not issue against them for contempt in not making a return to the writ.

This rule was personally served on William Cross, James Glass, and Robert Gillespie, and in Hilary Term, 1862, on the 5th of February, *C. Robinson* moved it absolute, on an affidavit of service stating that on the 21st of January, 1862, the defendant did "personally serve William Cross and James Glass, both of them trustees of school section number twenty-seven in the township of Tyendinaga, in the county of Hastings, and that on the 22nd of January, 1862, he did also "personally serve Robert Gillespie, another of the trustees of school section number twenty-seven, in the township of Tyendinaga, in the county of Hastings," with a true copy; and that the original rule was at the same time shewn to each of them.

On the 15th of February, during the same term, the following consent was given, endorsed on the copy of the rule *nisi*:

HILARY TERM.

I hereby consent that the attachment on the mandamus issue upon the expiration of two months after the present term, the trustees paying the moneys collected upon the rate bill to M. Crombie, Esq., counsel for Waterhouse.

WM. PONTON,
Counsel for Trustees.

Thereupon on the same day a rule absolute was granted, entitled "The Queen against The Trustees of School Section number twenty-seven in the township of Tyendinaga, in the county of Hastings," and ordering "that a writ of attachment be issued forthwith against the trustees of school section number twenty-seven in the township of Tyendinaga for contempt in not making a return to the peremptory writ of mandamus issued in this cause."

On the first day of May following a writ of attachment issued, tested on that day, and commanding the sheriff "that he attach James Glass, Robert Gillespie, and William Cross, the trustees of school section number twenty-seven, in the township of Tyendinaga, in the county of Hastings, so that you may have them before our justices of our Court of Queen's Bench, at Toronto, on Friday the 30th day of May instant, being in the term of Easter, to answer to us for certain trespasses and contempts by them lately done and committed in our said court, and have you then and there this writ."

Upon this attachment the said William Cross was arrested on the 26th of May, and committed to the gaol of the county of Hastings, where he had remained up to the time of this application.

On the 22nd of July following, *M. C. Cameron* obtained a summons calling on her Majesty the Queen, and John Waterhouse, his attorney or agent, to shew cause why the writ of attachment, the arrest of the said William Cross thereunder, and all subsequent proceedings, should not be set aside for irregularity, with costs, and the said William Cross discharged from custody, on the following grounds, among others: 1. That the said writ was not warranted by the rule under which it was granted, the said rule authorising an attachment against the corporation styled: "The trustees of school section number twenty-seven, in the township of Tyendinaga, in the county of Hastings," and not against individuals by name, and on an attachment against the corporation no arrest of an individual could be made.

2. That the said writ of attachment was issued for an alleged contempt of the court in returning a peremptory writ of mandamus, which is no contempt, as no return is necessary; it is disobedience to the command of the writ that is a contempt, and no disobedience of the command is alleged in said writ or in the rule under which the same was granted.

3. That the said writ of attachment was irregular and void, being tested in vacation and not in term, and does not bear date of the day on which the rule under which the same was issued was granted.

4. That no rule to return the writ of mandamus was granted or served on said Cross.

5. That said Cross was arrested under said attachment on the 26th of May last, and was not produced in court on the return of said writ, nor was any motion on the return of said writ made against him, nor any order or rule of court in respect to him or his alleged contempt, and the said John Waterhouse, the prosecutor, did not move against him or require him to answer interrogatories, nor hath he done any thing in the matter since the arrest of the said William Cross.

C. Robinson shewed cause, citing Tapping on Mandamus, 346, 408, 423, 423, 424; Gude's Cr. Pr. 186; Bull N. P. 201; *Burdett* v. *Sawyer*, 2 U. C. P. R 398; Rule of Court in England, 2 Q. B. H. 1844, referred to in Ch. Arch. Prac., 9th Ed., 1612, not adopted here; C. L P A., sec. 19.

M. C. Cameron, contra, cited *Regina* v. *Ledyard*, 1 Q. B. 619; *Rex* v. *Mayor*, &c., of Rye, 2 Burr. 798; Grant on Corporations, 231; Tapping on Mandamus, 461, Rule 4; Ch. Arch. Prac. 1612, rule 2, 1841.

BURNS, J., held that the rule *nisi* should have called upon the trustees by name, and that the attachment, therefore, although in the proper form, was not warranted by it or by the rule absolute under which it was issued. 2. That the second objection was

entitled to prevail; and 3, that the attachment should not have been tested in term, on the same day on which the rule absolute was granted, but that this defect being amendable would not alone have been fatal.

He made the rule absolute, but without costs, owing to the consent given on the part of the trustees. The other objections were not noticed in the decision.

CURRY ET AL v. TURNER.

Writs against the body, lands and goods at same time—Proceedings in Chancery contemporaneously—Regularity of.

The plaintiffs having obtained a judgment against the defendant, on the 7th June last, issued a *ca. sa.* on the judgment, directed to the sheriff of the county of Oxford. He did not then place it in the sheriff's hands. On the 12th June he issued a *fi. fa.* goods to the sheriff of Oxford, which writ was on the same day returned *nulla bona*. On the 14th June he issued writs of *fi. fa.* against lands to the respective sheriffs of Oxford and Haldimand. On the same day (14th June), he filed a bill in Chancery to charge certain equitable interests of defendant in lands, which could not be directly reached through the writs at law. On the 16th September he for the first time placed his *ca. sa.* in the hands of the sheriff of Oxford, the writs against lands then being in his hands, and the proceedings in Chancery still pending. The *ca. sa.* was not properly styled in the cause, and was not tested in the name of the Chief Justice or other judge of the court from which it issued.

***Held*, that plaintiffs' proceedings violated the spirit of the law in charging defendant in execution on a *ca. sa.* whilst endeavoring to enforce a remedy against his lands through an execution issued since the *ca. sa.*, and since a *fi. fa.* goods returned *nulla bona*. Such being the case, an application to amend the writ of *ca. sa.* was refused, and the writ set aside for irregularity, with costs, defendant undertaking not to bring an action for the arrest.**

***Semble*, the irregularities were amendable, and would on terms have been amended under ordinary circumstances.**

(27th September, 1862.)

Jackson obtained a summons calling upon the plaintiffs in this cause to show cause why the writ of *capias ad satisfaciendum* issued in this cause and placed in the hands of the sheriff of the county of Oxford, should not be set aside for irregularity, with costs, or why the said writ should not be ordered to be withdrawn from the hands of the said sheriff for irregularity, with costs, on the ground **that the said writ was not properly styled in the cause, and that it was not properly tested in the name of the Chief Justice or of** any other judge of the court at the time when issued, and on the ground that the writ was waived and abandoned by the plaintiffs' issuing writs of *fieri facias* against goods and lands in this cause subsequently to the issue of the writ of *ca. sa.*, and that since the issue of the *ca. sa.* plaintiffs filed a bill in Chancery against the lands of defendant, and that the *ca. sa.* was not placed in the hands of the sheriff to whom directed until after the writs against goods and lands had been delivered to the sheriff.

Stevenson shewed cause.

The following cases were cited on the argument:—*Hodgkinson* v. *Whalley*, 2 C. & J. 86; *Dicas* v. *Warne*, 2 Dowl. P. C. 763; *Miller* v. *Parnell*, 6 Taunt. 370; *Andrews* v. *Sanderson*, 1 H. & N. 726; Story's Eq. Jur. sec. 1266; *Billings et al.* v. *Rapelje*, 2 U.C. Prac. 194; Con. Stat. U. C. cap. 22, sec. 252; *Haywood et al* v. *Duff*, 6 L. T. N. S. 433; *Knight* v. *Coleby*, 5 M. & W. 274.

The facts sufficiently appear in the judgment of the learned judge.

RICHARDS, J.—The first objection taken is, that there is a mistake in the style of the cause in the writ of *capias ad satisfaciendum*. This would not be of much consequence, and could be readily amended under ordinary circumstances.

The second—that the writ is tested in the name of Sir J. B. Robinson, who had ceased to be Chief Justice of the Court of Queen's Bench—is clearly an irregularity; and unless the plaintiffs are entitled to amend, the defendant is entitled to be discharged from imprisonment under the writ.

It is contended that the writ is a nullity, on the ground secondly taken, and cannot be amended. If it be necessary for the writ to be tested in the name of the Chief Justice, it is equally necessary that it should bear date on the day on which it is issued; and yet if there was an error in the date, I cannot doubt that it would be amendable.

I do not think that I should, under ordinary circumstances, hesitate to amend the writ on both points, and in this case would do so on payment of costs but for the other facts which appear, and which are taken as grounds for the defendant's discharge.

The facts and dates necessary to be considered are as follows: Judgment was entered on the 7th June, 1862, and a *ca. sa.* issued the same day. On the 12th June a *fi. fa.* against goods was issued, and placed in the hands of the sheriff of the county of Oxford, and returned by him *nulla bona* on the same day. On the same day two *fi. fas.* against lands were issued—the one to the sheriff of Oxford, and the other to the sheriff of the county of Haldimand. On the 14th June the writ against lands was placed in the hands of the sheriff of Haldimand, and on the same day a bill in Chancery was filed to reach defendant's equitable interest in certain lands in Haldimand. The bill recites the judgment in this cause; the execution against goods, and its return of *nulla bona;* the fact that defendant had an equitable interest in certain lands in Haldimand, and that the interest of the defendant in the said lands could not be sold under the execution at law against lands; but the plaintiffs were advised that such interest could be sold to satisfy the said judgment, under the order and by the process of that court (Chancery), and that defendant had no other property or means by which they could recover the monies by their execution at law. They thereupon prayed that the defendant's interest in the land might be sold for the satisfaction of their judgment. On the 18th June the plaintiffs, doubtless with a view of binding defendant's lands and making a notice under the Registry Act, registered a certificate in the registry office of the county of Haldimand, that they were taking proceedings against defendant in Chancery, in which some title or interest in his lands were called in question. On the 16th September plaintiffs placed the *ca. sa.* in the hands of the sheriff of the county of Oxford, the writ against lands to the sheriff of Haldimand being still in the sheriff's hands, in full force and effect, and not returned. The plaintiffs' attorney states that the writ of *fi. fa.* against lands was issued in order to bind the defendant's interest in said lands.

The general doctrine seems to be that plaintiff may issue a *fi. fa.* and *ca. sa.* together, and if nothing be done under the *fi. fa.* he may arrest the defendant on the *ca. sa.* But if anything is done under the *fi. fa.* which may make it necessary for the sheriff to **defend himself under the writ, it must be returned and enrolled, and then a *ca. sa.* cannot be regularly executed until this is** done. Bayley, B., in *Hodgkinson* v. *Whalley*, **states there is** no doubt that a *fi. fa.* and *ca. sa.* may issue **together and be** concurrent, for if nothing is done on either, no award of execution is entered on the roll. But if one is executed, a return of that must be entered before you can enter the award of another execution. Now, if both are executed concurrently the entry on the roll must be that both were awarded and issued on the same day, which would be irregular. It is clear upon principle that two executions cannot be acted upon at the same time. There was the execution against lands acted upon before the *ca. sa.* was placed in the sheriff's hands. The plaintiff says he placed it there to bind defendant's lands, and I believe when parties proceed in equity to enforce satisfaction of legal judgments out of the equitable interest of defendants in lands, they are obliged by the practice of that court to issue and place in the hands of the sheriff executions against lands. This the plaintiffs have done, and though they may not be able to sell the defendant's lands by virtue of the execution, yet the issuing of the writ and placing it in the sheriff's hands is a mode of reaching them through proceedings in another court. If after doing this and further endeavoring to bind the interest of the defendant in the lands by registering the fact of proceeding in Chancery with the County Registrar, a plaintiff were allowed to take a defendant in execution on a *ca. sa.*, it might be urged that such a proceeding could be used as an "engine of oppression," as is mentioned in some of the cases, quite as effectually as if he had, by advertising the lands for sale, done something under the writ against lands towards executing it, and then arrested the defendant under a *ca. sa.*

Under our statute I doubt if an execution against lands could properly issue without some proceeding equivalent to enrolling the return of *nulla bona* on the *fi. fa.* against goods. In practice such writs are not, I believe, issued until the execution against goods is produced and filed, with the return of *nulla bona*, by the proper officer, on it. If, therefore, that writ is to be considered as enrolled, then the *ca. sa.* must be void, because there must be a return of one before there could be an award of the other, accord-

ing to *Hodgkinson* v. *Whalley*, 2 C. & J. 86, and affirmed by *Andrews* v. *Saunderson et al*, 1 H. & N. 726.

On the whole I am of opinion that the plaintiff's proceedings have violated the spirit of the law, in charging the defendant in execution on a *ca. sa.*, whilst they are endeavoring to enforce a remedy against his lands through an execution issued since the *ca sa*, and since a *fi. fa.* against goods was returned *nulla bona*. Such being the case, I shall decline amending the writ, and it must be set aside for irregularity, with costs, defendant undertaking not to bring any action against any party, and the defendant is to be discharged forthwith from the custody of the sheriff of the county of Oxford in this action.

Summons absolute with costs.

COUNTY COURT CASES.

(In the County Court of the United Counties of Frontenac, Lennox & Addington, before His Honor KENNETH MCKENZIE, County Judge.)

SMITH v. SHAW.

Held 1. That the "future owners and occupants," mentioned in the 24th section of the Assessment Act, are persons who become owners or occupants by purchase or otherwise between the making of the assessment and the return of the collector's roll.

2. That "*the persons who ought to pay the taxes*," mentioned in the 96th section of the Act, are persons whose names appear on the collector's roll as owners or occupants, or persons who have become owners and occupants by purchase or otherwise between the time of the making of the assessment and the return of the collector's roll

3. That City and County Councils cannot legally pass a resolution under the 104th section of the act, to continue the levy and collection of unpaid taxes by distress after the return of the collector's roll, and that such roll must be returned at furthest by 1st March in each year.

4. That after the return of the collector's roll, municipalities must sue under the 102nd section of the Act, or proceed against the land

5 That when goods are seized and money paid under protest to release them from seizure, an action will lie.

This action was brought by Sir Henry Smith against the defendant. The declaration contained two counts—one in trespass, the other the common money counts. The defendant pleaded not guilty by statute to the first count, and never indebted by statute to the remainder of the declaration.

The cause was tried at the March (1862) sittings of the court, before Mackenzie, Judge Co. C, when it appeared in evidence that the defendant, as collector of taxes for the city of Kingston, seized a pier glass of the plaintiff's, of the value of $50, on the 29th November, 1861, for arrears of taxes rated against Caroline Smith in the year 1850, in respect of premises owned and occupied by the plaintiff in Victoria Ward since 1851 or 1852 up to the time of the seizure. The plaintiff was obliged to pay to the defendant $36 and 55 cents to release his pier glass. He paid this amount under protest after his property had been seized by the defendant.

It appeared that the premises were occupied by Caroline Smith in 1850, and that the plaintiff had nothing to do with them until 1851 or 1852. The premises were assessed against Caroline Smith for the year 1850, according to the roll produced. The name of the plaintiff did not appear on the roll, in respect of these premises, for 1850. The taxes for 1850 against the premises were rated against Caroline Smith at £9 2s. 8½d., or $36 55c. The plaintiff paid all the taxes rated against the premises since he became their owner.

Caroline Smith was living within the city of Kingston since 1850. There was no evidence to show that the taxes of 1850 were demanded from her, or that a specific demand was made on the plaintiff. One of the witnesses stated that the defendant was appointed by the council of the City of Kingston special collector to collect back taxes. There was no further proof of the defendant's appointment There was no resolution of the Council proved. The collector's roll for 1850 was put in evidence by the defendant, whereon Caroline Smith only stood charged with the taxes of that year. The roll of 1850 was delivered to the defendant by the City Chamberlain.

For the defence, *Agnew* objected that the plaintiff was not in a position to dispute the legality of the seizure, having paid the taxes instead of bringing an action of replevin.

The judge thought that the paper produced showed a seizure of the plaintiff's property by the defendant, which, taken with the fact that the plaintiff paid the money under protest, in his opinion amply supported the declaration

The defendant then justified the seizure under the 24th section of the Upper Canada Assessment Act, and cited the 96th, 102nd, and 104th sections of the same act in support of what he did.

The judge told the jury that, in his opinion, the defence failed on several grounds—That there was no legal proof of a resolution having been passed by the city council of Kingston, under the 104th section of the said act, appointing the defendant a special collector. That he (the defendant) would require, under the 24th section, to shew that the premises were assessed against "the owner" and "the occupant" on the roll of 1850, and that the defendant had no right to seize the property of the plaintiff, whose name did not appear on the roll, and that he had no right under the roll of 1850 to proceed against the plaintiff as a subsequent occupant. *Agnew* objected to the judge's charge generally.

Verdict for the plaintiff for $36 55c.

Agnew, in April term, 1862, obtained a rule *nisi* calling upon the plaintiff to show cause why the judgment should not be arrested, on the ground—1st. That the action cannot be maintained within the meaning of the 2nd Vic., chap. 126; 2nd. That there is a misjoinder of counts; 3rd. That it should be alleged that the act complained of was done maliciously and without probable cause; that it discloses no cause of action, or shows such a trespass as would give a cause of action; 4th That, as to the second count, that such a cause of action is not maintainable against the defendant as a public officer, and that the verdict being general he thought judgment should be arrested. Or why the verdict should not be set aside, and a new trial be had on the ground that, under the circumstances, nominal damages could only be recovered on first count, on the ground of misdirection; that the verdict was contrary to law and evidence, and on the ground of surprise.

In July term, 1862, *Sir Henry Smith* showed cause, and cited *Fraser* v. *Page*, 18 U. C. Q. B. 327; *Robertson* v. *Rapalje*, 4 U. C. Q. B. 291.

Agnew supported the rule.

MACKENZIE, Co. C. Judge.—All the grounds urged in arrest of judgment are inapplicable to that form of proceeding. When a verdict is entered generally on some counts that are good and some that are bad a *venire de novo* should be applied for. All the other grounds pressed in arrest of judgment are founded on an assumption that the defendant has been sued as a public officer. There is nothing in the declaration to show that he has been sued as a public officer. The court cannot arrest judgment but for a matter intrinsic appearing upon the face of the record; besides, the two counts are good in law, and nothing appears on the face of the record to show that they have been improperly joined.

I adhere to my ruling at the trial, as to the plaintiff's cause of action being sustained by evidence. I think that the paper signed by the defendant, and put in evidence at the trial, amply proves that the defendant seized the goods of the plaintiff, and that the plaintiff paid $36 55, under protest, to prevent his goods being sold. That is sufficient to sustain the declaration.

That part of the rule nisi which asks for a new trial on the ground of misdirection, and that the verdict is contrary to law and evidence, opens up the main question involved in the case, namely,—whether the defendant was justified in proceeding to collect taxes rated against Caroline Smith, in 1850, by distress and sale of the goods of the plaintiff, as a subsequent owner and occupant of the premises against which the taxes were assessed, the plaintiff's name not being inserted on the assessment or collector's roll of that year in respect of the same premises. I deferred giving judgment in this case, until the Court of Queen's Bench should pronounce its judgment in the case of *Holcomb* v. *Shaw* That court has pronounced its judgment in that case, and the learned counsel for the defendant, Mr Agnew, has furnished me with a copy of it. I have perused the learned and elaborate judgments delivered by the judges, with great interest and attention. That case decides the present case. The facts upon which the judgment in that case was pronounced, are similar to the facts of the present case. The defendant in that case is the defendant in this case. He was sued in that case for doing what he did in this case. Replevin was brought against him for seizing the property of the plaintiff The defendant, as collector of taxes for the city of Kingston, avowed the taking of the goods of the plaintiff, to levy by distress and sale of the same, certain taxes rated

against Donald McIntosh, as occupant, and John Counter, as owner of the Kingston Marine Railway property in 1855, and certain other taxes rated against Hooker and Pridham, as occupants, and Alexander Campbell, as owner of the same property in 1859, which taxes remained due and unpaid at the time of the seizure in December, 1861; that the plaintiffs were the occupants at the time of the seizure, and had the goods seized in their possession on the same property. The avowry contained averments that the rolls of 1855 and 1859 were returned, and that the defendant was appointed collector, by resolution, instead of the collectors of 1855 and 1859. The plaintiff demurred to this avowry, on the ground that circumstances mentioned do not constitute a justification in law for taking the plaintiff's goods, in 1861, by way of distress for taxes rated against other parties in 1855, and in 1859. The court gave judgment for the plaintiffs on the demurrer.

McLean, C. J., said:—The defendant does not allege that the plaintiffs were the persons who ought to pay the rates in arrear, but assumes that because they were occupying the premises in the latter part of 1861, and had goods in their store house, they were the persons who ought to pay the taxes assessed and demanded in 1855, by some former collector, as taxes due by McIntosh and Counter. Surely it did not require any great extent of judgment to point out that the rates ought to be paid by the parties who occupied or owned the premises during these years, and that they were the persons legally liable for them. Against them, the collector of 1855, after demanding payment, might at any time, after 14 days, have proceeded by distress, and he might have seized any goods which he could find, belonging either to the occupant or the owner, within the united counties of Frontenac, and Lennox and Addington. But, instead of the remedy against these parties being pursued within a reasonable period, the collection, in one instance, is deferred for six years, and in the other for two years, until the premises are owned and occupied by other parties, and they are attempted to be held liable for the taxes of previous occupants and owners, because they hold the premises. It is, I think, quite plain, that the defendant in the first place had no right to distrain without a demand by himself personally, as collector; and that if he had any right to distrain against any one under his appointment, the plaintiffs were not the persons who ought to pay the rates in arrear." In reference to the 104th section of assessment act, the learned Chief Justice observed: "That section was intended to give to the council power by resolution to authorize the same collector, or any other person in his stead, to continue collections which were being made, but which had not been completed at the time appointed for the return of the collector's roll. But to suppose that it confers upon a council the same power after the lapse of any number of years, seems to me to be most absurd. If that were so, then the 102nd section authorizing taxes which cannot otherwise be recovered, to be recovered with interest and costs as a debt due to the local municipality, and the 107th section, which makes taxes a lien on land, would be superfluous" Mr. Justice Burns makes the following observations on the 24th section of the Assessment Act: "The first matter for consideration is, what is the true meaning of the expression, that the taxes may be recovered from any future owner or occupant; and the expression in the 96th section, the collector shall levy the same with costs by distress of the goods and chattels of the person who ought to pay the same. Are they to be considered with reference to the time during which it may be said the collector's roll is in force for each year's taxes, or are they to be understood, as the defendant contends for in this case, as extending over any length of time? I entertain no doubt what the proper meaning is. By the 49th section the assessors are directed to complete their rolls in every year, between the 1st February and such day, not later than the 1st May, as the council of the municipality appoints. The assessor, of course, sets down in his roll the facts in regard to owners and occupiers, as he finds them at the time he makes the assessment. Between that time and the time the collector should return his roll under 103rd and 104th sections, the property assessed may have changed both ownership and occupancy by sale, devise, or in various other ways, and in such case the new owner or occupant may be the proper person or party to pay that year's taxes." Mr. Justice HAGARTY stated: "I am of opinion that after the formal return of the roll by the Collector, it is not in the power of the council to appoint any person to collect the unpaid taxes by distress and sale. Another course is pointed out by the statute to enforce payment—by the sale of lands."

The above remarks are nearly as applicable to the present case as they are to the case of *Holcomb* v. *Shaw*. The present defendant has assumed, erroneously, that he had a right in 1861 to distrain the goods of the plaintiff, for taxes rated against Caroline Smith in 1850, because the plaintiff owns and occupies in 1861 the premises which were assessed against Caroline Smith 12 years ago And the City Council of Kingston assumed a right to pass a resolution in 1861, under the 104th section of the Act, to authorise the defendant to continue the levy and collection of the taxes rated against Caroline Smith in 1850, when in truth and in fact the roll of that year had been returned 10 or 11 years ago, without any levy whatever, so far as the taxes of Caroline Smith are concerned, being made or commenced. The interpretation of the law given by the Court of Queen's Bench, in *Holcomb* v. *Shaw*, must rule this case. That interpretation sustains the ruling at the trial in this case.

I hold, then, that the present plaintiff was not at the time of the seizure of his goods by the defendant, in November, 1861, "a future owner or occupant," within the meaning of 24th section of the Act; that he was not at that time "the person who ought to pay the taxes," within the meaning of the 96th section; and that the Council of the Municipality of Kingston had no authority in law to pass a resolution, under the 104th section, in 1861, to authorise the defendant to levy taxes rated against Caroline Smith, in 1850, by distress of the goods of the plaintiff; and that the defendant's seizure of his goods in November was illegal. By the 103rd section it is enacted that, "on or before the 14th December in every year, or on such day in the next year, not later than the 1st March, as the Council of the County or City may appoint, every collector shall return his Roll to the Treasurer of the Township or to the City Chamberlain, and shall pay over the amount payable to such Treasurer or Chamberlain;" and by the 104th section it is enacted that the said resolution (that is a resolution authorizing the collector, or any other person in his stead to continue the levy and collection of unpaid taxes) shall not alter or affect the duty of the collector to return his roll." In reading the two sections together as they should be, it will appear that the roll must be returned at furthest by the 1st March in the year after the assessment is made, and that after the return the municipal council has no authority to appoint any one to collect any of the unpaid taxes by means of a distress and sale of goods. Another course is pointed out by the statute to enforce payment after that period by sale of lands under the 107th and the following sections, or by an action of debt in the name of the municipality under the 102nd section. The present plaintiff could not lawfully be treated in November 1862 "a future owner and occupant" in respect of the assessment of 1850 under the 24th section, because his name does not appear on the Assessment Roll of that year, and there is no evidence to shew that he became owner or occupant of the assessed premises before the roll of that year was returned. Neither could he be treated as the person "who ought to pay the taxes" of 1850 under the 96th section, as he is not the person who was taxed on the roll of that year, and did not become "the owner or occupant" of the premises during the currency of the roll of 1850. The taxes could not be lawfully demanded from him as the person taxed under the 74th section by the collector, and they have not been demanded from Caroline Smith so far as we know; consequently the collector could not in law proceed to distrain any goods and chattels under the 96th section. The plaintiff is a stranger to the roll of 1850 as regards the premises assessed against Caroline Smith, and was a stranger to the premises themselves until after the time appointed by law for the return of the roll, and in the absence of proof to the contrary it must be presumed that the roll was returned at the proper time.

According to the broad and sound principles of law laid down by the Court of Queen's Bench in the case of *Holcomb* v. *Shaw*, the present rule must be discharged. It becomes, therefore, unnecessary to consider the other points discussed upon the argument.

Rule discharged.

QUARTER SESSIONS CASES.

[In the Quarter Sessions of Frontenac, Lennox and Addington.]

IN THE MATTER OF THE APPEAL BETWEEN CATHARINE HENNESY, APPELLANT, AND THOMAS OSSIER, RESPONDENT.

Conviction—Form of name—Informant.

Held. that the name of the informant or complainant must in some form or other appear on the face of a conviction.

The appellant was convicted on the 4th August 1862 by M. P. Guess, Esq., under the 254th and following sections of the Upper Canada Municipal Institutions Act, for selling spirituous or malt liquors on Sunday. The appellant appealed to the last Quarter Sessions for Frontenac, Lennox and Addington. The conviction returned to the Sessions did not show who the the complainant or informer was. The adjudicating part of it was in the following words: "Catharine Hennesy is convicted before me, for that she being the keeper of a place where, by the laws of Upper Canada, liquors are or may be sold by retail, did by herself, her servants or agents within 21 days next before the said 4th August, 1862, between the hours of seven of the clock on Saturday night and eight of the clock on Monday morning thereafter, sell spirituous or malt liquors, or permit spirituous or malt liquors to be there drunk, contrary to the statute.

At the hearing of the appeal, *O'Reilly* for the appellant, took several exceptions to the conviction.

1st. That the name of the complainant or informer was not stated in the conviction:

2nd That the offence was laid in too broad and uncertain terms;

3rd. That no day was stated when offence was committed.

B. M. Britton for the conviction.

MACKENZIE, Chairman Q. S—In Dickinson's Quarter Sessions, 876, it is laid down as law that "the informer's name should appear in all cases, that the party may know his accuser."

In the case of *King* v. *Smith*, 5 M. & S, 133, this was held absolutely necessary in all cases where any part of the penalty was given to the informer by statute, he being then, as an interested informer, incompetent as a witness.

It is stated in Paley on convictions, 59: "The name of the informer should be stated in all cases. It is indispensable in those cases where any part of the penalty is given by statute to the informer, in order that the conviction may appear to be founded upon other evidence than that of the informer himself, who is, in such cases, incompetent to give evidence. And in cases where the penalty is given by the statute to the owner of the property injured, by way of compensation, it has been held, ought to appear by some means on the face of the conviction."—

The 257th section of the statute under which the appellant has been convicted, directs that one half of the penalty imposed by the justice, shall be paid to the informant or complainant, and the other half to the Treasurer of the Municipality, where the place referred to is situated. In the general act respecting summary convictions and orders, a complainant or informant is contemplated as the prosecutor in summary proceedings. And the Upper Canada Act respecting appeals in cases of summary convictions, cap. 114 of the Con. Stat. U. C., gives the right of appeal to complainants as well as defendants; and the Quarter Sessions in determining the matter of appeal, may order either party to pay costs. And the form of the oath given in the statute to be administered to the jury who are to try the matter of appeal, shows that there must be two parties to a conviction made under the summary jurisdiction by a Justice of the Peace. The form of the oath given, is as follows: "You do solemnly swear that you will well and truly try the matter of complaint of C. D. against E. F., and a true verdict give according to the evidence." And by the 4th section of the act lastly referred to, it is enacted that "any appellant may abandon his appeal by giving the opposite party notice in writing, six days before the sessions appealed to."

In the face of these authorities and enactments, it is difficult to hold the present conviction valid. The name of an informant or complainant is not mentioned from the beginning to the end of the conviction. And from all that appears on the face of the conviction, there may not have been a complainant or informant at all. I think that the name of the informant or complainant should appear in some form or other on the face of the conviction.

I think the present conviction is bad in law, by reason of the name of the informant not appearing on the face of it.

It must therefore be quashed.

Conviction quashed with costs.

LOWER CANADA REPORTS.

MCDOUGALL V. ALLAN ET AL.

Merchant Shipping Act—Liability of owners for Loss of Passengers, Jewellery, &c.

Held:—In an action against the owners of a sea-going ship for the loss of jewellery forming part of the luggage of a passenger, a plea, (based upon the 503rd clause of the Merchant Shipping Act) alleging that the articles lost were "Gold, Silver, Diamonds, &c, &c.", that the loss happened without the privity or fault of the owner, and by reason of robbery, embezzlement, &c, and that the passenger not having inserted in a Bill of Lading or otherwise disclose in writing the true nature and value of such articles, &c, the owners were not liable for the loss, will not be dismissed upon demurrer.

(30th December, 1862.)

PER CURIAM.—The action is brought by a passenger in one of defendants' vessels from Glasgow to Montreal, loss and non-delivery on arrival, of part of her luggage, consisting of jewellery, watches, &c., to the value of £120. The declaration is in the common form of actions against common carriers in such cases. The defendants by their plea admit their quality of common carriers, that the plaintiff was such passenger with her luggage, but they allege their ignorance of the happening of the loss of the articles referred to, which consisted of gold, silver, diamonds, watches, jewels or precious stones, that the loss was without their actual privity or fault, and by reason of robbery, embezzlement, making away with or secreting the articles lost, and that when plaintiff put her luggage on board the vessel she omitted to insert in a bill of lading, or otherwise to declare in writing to the owners or master of the vessel, the true nature and value of those articles. The essential grounds of the plea rest upon the provisions of the Merchant Shipping Act of 1854, and to this plea the plaintiff has demurred, urging their common law liabilities as carriers, and denying the applicability, in defendant's favour, of the limitation of responsibility under that Act as regards her, a passenger with her luggage, amongst which were the lost articles which she had a right to have with her, and were covered by her fare, and which the defendants were bound to deliver to her at Montreal. The hearing is upon the demurrer.

The clauses of the Merchant Shipping Act of 1854, having reference to this case, and to the limitation of ship-owner's responsibility are as follows: "503. No owner of any sea going ship or share therein, shall be liable to make good any loss or damage that may happen without his actual fault or privity, of or to any of the following things, that is to say,

1. Of or to any goods, merchandise, or other things taken in or put on board any such ship, by reason of any fire happening on board such ship.

2. Of or to any gold, silver, diamonds, watches, jewels or precious stones, taken in or put on board any ship, by reason of any robbery, embezzlement, making away with or secreting thereof, unless the owner or shipper thereof has at the time of shipping the same inserted in his bill of lading, or otherwise disclosed in writing to the master or owner of such ship, the true value of such articles "to any extent whatever."

Before proceeding further it may be proper to observe that the Act relieves the ship-owner alone, not the master: that the relief extends in the most general terms, namely, to any extent whatever: that it applies to every loss or damage that may happen, without the owner's actual privity or fault, to either *goods*, *merchandise*, or *other things* generally, or to the special effects *gold*, *silver*, &c.: that it applies generally to all of them in both categories, when the loss or damage occurs by fire on board of the carrying vessel, and that it applies to the *gold*, *silver*, &c., particularly, when the loss happens by robbery, &c., unless the owner or shipper of the goods put on board, shall have made the owner or master aware of their nature and value, by an act in writing at the time of the shipment. The first sub-section affords general relief against loss or damage by fire to goods and things generally, and must necessarily include a passenger's luggage, changing in this particular the common law responsibility, which made the carrier liable for the loss of goods by fire, though the fire was not

occasioned by any actual negligence of the carrier, and did not arise upon his premises, the carrier being considered as an insurer, and liable for all losses and in all events, except by the act of God, and the Queen's enemies. Chitty, Carriers, p. 39.

The second sub-section affords relief against loss by robbery, &c., to things within the descriptive enumeration, unless the limitation be neutralized and destroyed by the owner or shipper making the written declaration in the bill of lading or otherwise, at the time of the shipping of the articles. In this case there was no declaration, and therefore the Statute would of course have its operation of relief for loss occasioned by robbery, &c. The general enumeration of gold, silver, jewels, &c., covers special articles of the general description. This statutory designation or enumeration would appear to have been made as a particular protection, because the effects enumerated being of great value in small bulk, the facility to rob and make away with them is far greater than of goods of less value but greater bulk. This protection against loss by robbery, &c., was not accorded to the carrier by the common law. On the contrary, he was liable for all such losses upon grounds of public policy, because such a mode of loss might by consent and combination be carried on in such a manner that no proof could be had of it. Chitty, Carriers, p. 41.

Moreover the want of actual privity or fault by the ship-owners in the loss, is of itself made a general limitation of responsibility under the Statute. No ship-owner shall be liable to make good any loss or damage that may happen without his actual privity or consent, to any extent whatever, instead of their previous liability to the extent of the value of the ship and freight.

The plaintiff rested her demurrer upon the common law altogether, irrespective of the Shipping Act, namely, upon the carrier's responsibility to safely carry such luggage of passengers as was usual for them to travel with, whether that luggage was of necessity or for convenience, or of mere personal adornment, and what is deemed to be included in the passage fare; she objects against the application of the Shipping Act to her case, that by its terms and intendment it was confined to merchandize, and to owners and shippers of merchandize on freight, and she supported her pretension by reference to reported cases, and by analogy, to the British Carriers' Act, 1 Vic., cap. 86, whose terms and provisions were to some extent similar to those of the Shipping Act.

It may be observed *in limine* that the analogy attempted to be derived from the Carriers' Act does not hold. It is not in force in this province, whilst the Shipping Act is; several of the provisions of both Acts are exorbitant of, and opposed to, the common law responsibility of the carrier. The Carriers' Act applies to carriers by land, the other to carriers by sea. Their intents are not in common. The object of the former was two-fold, 1st, to apprize the receiver of the goods of the nature of the article delivered to him in order that he might give it a proportionate degree of attention and care. This in principle applies also to the Shipping Act. And 2nd, to give the carrier an increased compensation, fixed by the carrier in his tariff of rates, for the additional risk and danger incurred by him. This is not the Shipping Act. Both acts contain some common provisions, chiefly the requirement of the notice of the nature and value of the effects shipped or delivered to be carried, and the *onus* imposed upon the deliverer and shipper to give that notice. They differ in several essentials. 1st. The great extent of the enumerated particular articles in the Carriers' Act; the few articles specified in the Shipping Act. 2nd. The former addresses itself to effects contained in any parcel or package to be carried for hire, or to accompany the person of the passenger in any public conveyance; the latter only refers to particular effects taken or put on board of the sea-going vessel by their owner or shipper. 3rd. The former requires the carrier to affix in his receiving office a notice of the increased rate of charge to be paid to him, and also requires him to give a receipt in writing for the goods delivered to him; the latter act requires none of these. 4th. The former gives no protection against the loss of effects by the felonious acts of the carriers' servants; the latter does protect the owner, not the master, against such loss so happening without his actual privity or fault. 5th. The mere oral declaration of notice by the deliverer to the carrier of the nature and value of the effects will satisfy the former Act in this particular, but the latter Act requires the insertion to be in the bill of lading, or in some other written declaration, given to the ship-owner or master, by the owner or shipper. 6th. The Carriers' Act limits the responsibility for loss to £10; the Shipping Act relieves *to any extent whatever*. The difference between the Acts is so very marked that an argument upon their analogy cannot apply, nor could it be made to rest upon reported cases resting mainly on the Carriers' Act. The plaintiff's pretension that the Shipping Act is a merchandize or freight Act is founded upon this, that it is merely a consolidation of the 26 Geo. III., ch. 86, and of the subsequent enactments *in pari materia*, which it is said were of that description, and did not excuse or relieve the ship-owner from his common law responsibility for the loss of passengers' luggage. This necessarily involves the chief point of the demurrer. Chitty says, p. 282, that so soon as a person has become a passenger, the carrier is bound to receive with him in the absence of any contract or custom to the contrary, a reasonable quantity of personal luggage or baggage, and that with respect to such luggage the duties or responsibilities of a common carrier attach to him, and that the luggage is to be carried without extra charge, the carrying of it being accessory to the principal contract to carry the passengers. This liability for loss is restricted to the *personal* luggage of a passenger; under this term Parke, B, "comprises clothing and every thing required for the passenger's personal convenience, and *perhaps even a* small present had he such with him, or *a book* on the journey *might be also* included in that term." Pollock, Ch. B, says, the charter of the G. W. R. Co. specifies *articles of clothing*, which ought to include all things necessary to the toilet, and Chitty, p. 286, remarks, "it would appear reasonable that *all articles which it is usual for a person to travel*, whether they be articles of necessity, convenience, or amusement, should be included in the term luggage, and *perhaps* a reasonable sum of money for the purposes of travelling."

Formerly the received doctrine was that carriers by land or water were not liable for the baggage of passengers, unless a distinct price was paid. It was placed on the ground that the carrier is liable only in respect to his reward, and that the compensation should be in proportion to his risk. But now by common usuage sanctioned by the Courts, a reasonable amount of luggage is deemed to be included in the fare of a passenger. The Courts will however not allow this custom to be abused, and under pretence of baggage permit articles to be included not within the scope of the terms or intents of the law. They will not permit the carrier to be defrauded of his just compensation, nor subjected to unknown hazard. Hence when a trunk containing valuable merchandize was taken on board of a steamboat and deposited with baggage, and lost, it was held that the carrier was not liable." "The ordinary baggage trunk of the traveller, containing the *usual general conveniences belonging to him as a traveller*, fall within the customary form, and to be stowed away in the place where such articles are mostly deposited. Otherwise the carrier is doubly wronged; 1st, he is deprived of his just reward for carrying goods, and 2nd, he is prevented from exercising proper precaution against the dangers to which the property may be exposed. Thus the carrier is exempt when the baggage consists of an ordinary travelling trunk in which there is a large sum of money, such money is not considered as included under the term baggage. But money taken *bonâ fide* for travelling expenses and personal use, may properly be regarded as forming part of a traveller's baggage, but to such reasonable amount only as a prudent man might deem necessary and proper for such purposes." Upon the whole it may be gathered that the luggage of the passenger must be reasonable luggage, that is, "usual conveniences belonging to a traveller," "which it is usual for him to travel with," and "which are contained in the ordinary traveller's trunk." Tested by these limitations what is the statement of the loss specified in the plaintiff's declaration? "Certain articles of personal adornment and jewellery to her belonging, to wit: one gold necklace, one coral necklace, one silver thistle pin, one pair of cut coral bracelets, one thick gold chain, one soft gold chain, one jet shawl pin and chain, one jet necklace, one brilliant and emerald shawl-pin in form of a wreath, one coral pin, one pure yellow stone, one large brilliant cross, gold back, the centre stone being out, one large enamelled mourning ring with engraving of the date of the death of Wm. Whiteman,

one gold ring blue stones opened with hand, one ring set in pearls, two plain gold rings, one locket with portrait in military costume, on the back a tombstone inlaid in pearls, one large oval brooch, three shades of light hair set in pearls, five small gold lockets, one large gold band bracelet with stones turquoise." This is the list of articles which the declaration owns "to have *belonged to the plaintiff, and part of which were family jewels, and therefore highly prized by her as such, apart from its intrinsic value; the whole of the value of* £120," "and which amongst other goods and effects were contained in a certain large trunk, the said trunk part of her baggage." This description and enumeration by no means appear to be of "the usual general conveniences of a traveller," or "what is usual for him to travel with and are usually contained in the ordinary traveller's trunk," or "articles of clothing which include all things necessary to the toilet," or "clothing and every thing required for the passenger's personal convenience." They are very much more than these, and do not seem to fall within that description of luggage protected by the common law responsibility of the carrier as passenger's luggage. But if they were actually luggage to be carried with her, the question remains, does the Shipping Act relieve the ship-owner in such case as this?

It is conformable to the principle of the common law that responsibility of a carrier may under it be abridged by the special terms of the acceptance of the goods. Exemptions which leave the common law rule in force as to all besides, and it being the business of the carrier to bring his case distinctly within them, they are to be strictly interpreted. If the goods are lost or damaged whilst in the control of the master, the *onus probandi* is upon him to prove that the loss was occasioned by some cause for which the law will excuse him; *prima facie* the obligation of safety is upon him. The common law is thus well put by Molloy, B., "The master is answerable if any of the goods are lost or purloined, or sustain any damage, hurt or loss, whether in the haven or just before or upon the seas when she is on her voyage." See Plander's notes. "If there be any exception to this responsibility at sea, it proceeds from the special provisions in the charter party or bill of lading, and not from any suspension of the rule; such exemption is strong evidence of the acknowledged law which rendered them necessary. In short it must be regarded as a settled point in English law that the masters and owners of vessels are liable in port and at sea, and abroad, to the whole extent of inland carriers, except so far as they are exempt by the exemption in the contract, charter party, or bill of lading, or *by statute*." Both the modern and ancient writers admit the possible abridgment of the common law responsibility of carriers by sea and land, either in contracts implied or understood between the parties, or by the operation of Statute laws. The common carrier has two distinct liabilities, the one for losses by accidents or mistakes where he is liable as an insurer, the other by default or negligence where he is answerable as an ordinary bailee: he may restrict his liabilities as insurer, and protect himself against misfortune, but by the public policy of the common law he cannot do so for negligence. The carrier's restriction by express or special contract rests upon the common law, and is productive of no evil consequences. So if the Statute makes the restriction, that is the contract between them; there is no implication or inference in this act which is specific and certain as a contract, there can be no controversy between the parties. It is manifest that the Shipping Act has intervened betwixt the ship-owner and the common law, and has to a certain extent made a restrictive contract in his favour. What is the construction to be put upon its provisions? There are but very few reported cases upon this Act, but the language is so precise and at the same time so general, that difficulty of construction need not arise. No owner of a sea-going ship shall be liable to any extent whatever, for loss or damage that may happen without his actual privity or fault, or to any of the following things, gold, silver, diamonds, watches, jewels, or precious stones, taken on board. The object of the Act, observes Lord Ch. B. Abinger, in *Gillis* v. *Potter*, 10 M. & W., 72, was to impose upon the shipper the *onus* of giving notice to the ship-owner of the nature of the goods intrusted to him to carry, and Alderson, B., "there can be no doubt that under this Statute parties are required to state in their bill of lading, &c., the true nature and value of the goods which they carry, provided these consist of gold, silver, watches, jewels, &c.," and further Martin, B., remarked, "otherwise we should put a most refined and artificial construction on very plain words." "What the Legislature pointed out there was, that the ship-owner was to have full notice of what was the value that the other party put upon this property. By the Carriers' Act the carrier is to be made acquainted with the estimated value of the article, in order that he may, by charging the increased rate, protect himself. At all events the Statute requires the party to state the nature and value &c., it is impossible but that we ought to give every statute, as far as we can, a construction consistent with the obvious sense of its language. The Legislature has pointed out two things to be stated, &c." It has been already observed that the Carriers' Act restricted the responsibility without notice to £10 of value; the Shipping Act gives the full relief from *any extent whatever*. The preamble the limiting responsibility section employs the general words, "the following things." By the first clause of the section, the owner's limitation of responsibility is given for goods, merchandize, or other things lost by fire on board. This is as general as possible, and passenger's luggage is not excepted. By the 2nd clause of the section, the same limitation of responsibility is extended to him for particular effects, set out in terms as general, gold, watches, jewels, &c. Effects of these descriptions are *goods*, *merchandize*, and *things*, as well as articles of personal use, and yet there is no exception in favour of passengers losing them. The limitation is strengthened by the requirement upon the *owner* or *shipper* to insert the nature and value not alone in the bill of lading, a purely mercantile document, but in some written declaration made by the owner or shipper. The effect of the statement in the bill of lading or in the written declaration is to deprive the ship-owner of the excuse or relief from responsibility, to keep the effects safely at all events; the failure or omission of the passenger to make the statement on the other hand, presumes him to have taken the risk upon himself so far as the ship-owner is concerned. As remarked above, by the common law, *prima facie*, the obligation of safety is upon the carrier, but, where the Statute gives him the exemption, the common law to that extent is controlled and done away. Upon full consideration of this matter, the demurrer cannot be sustained and must be rejected; the case rests upon facts the proof of which may or may not support the declaration. The plea cannot be rejected as bad in law.

Demurrer dismissed.

Torrance & Morris, for plaintiff.

Rose & Ritchie, for defendants.

VICE ADMIRALTY COURT.

(Before the Hon. H. Black, C. B., J., Vice Admiralty Court.)

The "James McKenzie."

Rule of Navigation with regard to steam vessels approaching each other on different courses.

A steamer going up the St. Lawrence at night, on a voyage from Quebec to Montreal, saw the light of another steamer coming down the river, distant about two miles: and when at the distance of rather more than half a mile took a diagonal course across the river in order to gain the south channel, starboarding her helm, and then putting it hard to starboard. The steamer coming down having ported her helm on seeing the other, a collision ensued.

Held, That the vessels were meeting each other within the meaning of the act regulating the navigating of the Waters of Canada, (22 Vict. c. 19), and the steamer going up the river was solely to blame for the collision in not having ported her helm.

(31th August, 1862.)

This was a cause of damage brought by Pierre Plante, the owner of the steamer *Fashion* against the steamer *James McKenzie*, to obtain compensation for a loss arising from a collision between these two vessels in the river St. Lawrence, about three quarters of a mile above Lavaltrie island.

The following was the judgment of the court.

On the 27th June, 1861, the steamer *Foshion*,, of 200 tons burthen, and about forty-five horse power, owned by and in charge of Pierre Plante, the promoter, as master, left Montreal at about nine o'clock in the evening, without cargo, and drawing about five or six feet water; having on board Joseph Paquin, a L anch pilot for and above the harbour of Quebec, as pilot, and having the lights by law in the position which the act requires. In the pros-

ecution of her voyage to Quebec she passed down the north channel, between the Verchères islands and the north shore as far as the eastern end of those islands. She then took the main channel and the proper course for that purpose. At this point the north channel and the south channel, or that on the south side of the Verchères islands, merge into one, and they together form one channel of about three quarters of a mile in width for vessels such as those concerned in the present case. At the same time, the *James McKenzie*, a steamer of about 400 tons, and about one hundred and twenty horse power, and having in tow a barge, partly loaded, so as to draw between nine and ten feet water, was proceeding on her voyage from Quebec to Montreal; having a pilot on board, and proper lights in the position required by law, on board the steamer and her tow. It was then between eleven o'clock and midnight, the night was cloudy, but the lights of vessels could be easily distinguished, according to the statements in the pleadings and evidence, at the distance of from one to two miles. The *James McKenzie* intending to take the south channel shaped her course accordingly for it, the *Fashion* keeping towards the south. In this position the vessels saw each other. The people of the *James McKenzie* say they saw the *Fashion* at the distance of about two miles, and that when the distance between the vessels was rather more than half a mile, the *Fashion* appearing to them to be proceeding in a direct course down the river, the *James McKenzie* took a diagonal course across the river in order to gain the south channel, which is said to be safer and better, starboarding her helm for that purpose. The *Fashion*, on seeing the *James McKenzie*, ported her helm, in order to pass the *James McKenzie* on the port side, and to the right hand of the middle of the channel, as the law requires in such cases; and as she approached the *James McKenzie*, the *Fashion* put her helm hard-a-port in order more effectually to avoid her. The *James McKenzie* on the other hand kept her helm to starboard, and afterwards put it hard-a-starboard. Both vessels appear to have stopped their engines, but too late. The *James McKenzie* struck the *Fashion* on the port side about forty feet from the stem, doing her great damage, and sinking her in about four fathoms of water.

The two vessels were undoubtedly meeting each other within the meaning of the act regulating the navigation of Canadian Waters, (22 Vict. c. 19), and that act expressly says, "Whenever any vessel, whether a steam or sailing vessel, proceeding in one direction, meets another vessel, whether a steam or sailing vessel, proceeding in another direction, so that if both vessels were to continue their respective courses they would pass so near as to involve any risk of a collision, the helms of both vessels shall be put to port so as to pass on the port side of each other; and this rule shall be obeyed by all steam vessels, and by all sailing vessels —whether on the port or starboard tack, and whether close-hauled or not—unless the circumstances of the case are such as to render a departure from the rule necessary in order to avoid immediate danger, and subject also to the proviso that due regard shall be had to the dangers of navigation, and as regards sailing vessels on the starboard tack close-hauled, to the keeping such vessel under command." (Sec. 8.) And that, "Every steam vessel, when navigating any narrow channel, shall, whenever it is safe and practicable, keep to that side of the fair-way or mid-channel which lies on the starboard side of such steam vessel." (Sec. 9.) And also that, "If any damage to person or property arises from the non-observance by any vessel of any of the foregoing rules such damage shall be deemed to have been occasioned by the wilful default of the person in charge of the deck of such vessel at the time, unless the contrary be proved, or it be shewn to the satisfaction of the court, that the circumstances of the case made a departure from the rule necessary, and the owner of the vessel in all civil proceedings, and the master or person in charge, in all proceedings, civil or criminal, shall be subject to the legal consequences of such default." (Sec. 13.)

The *Fashion* obeyed the law by porting her helm, and taking the proper side of the channel; and if the *James McKenzie* had done the same, the collision would have been avoided. By her own statement the *James McKenzie* was crossing the course of the *Fashion*, which vessel was where she had a right to be; and though it is probable the *James McKenzie* believed she could pass safely by taking the course she adopted, yet as this course was not required by law, she adopted it at her peril, and is responsible for the damage which resulted from its adoption. There was no absolute necessity even for her taking the south channel at all, there being water enough in the north; or, she might have stopped until the *Fashion* had got into such a position that there could have been no possible risk of collision, by the *James McKenzie's* crossing her course in order to take the south channel: but she did not choose to do so, and preferred taking the risk which led to the collision. She did this without necessity, for there was nothing whatever in the circumstances to render a departure from the rule necessary in order to avoid immediate danger. I must therefore pronounce for the damage, and refer the amount to the registrar and merchants for their report. (The *Duke of Sussex*, 1 W. Rob. 274. The *Sylph*, 2 Spinks. Ecc. and Adm., Rep. 75.)

Jones and Hearn, for *Fashion*.
Lafleur, Counsel.
Holt and Irvine, for *James McKenzie*.

ENGLISH REPORTS.

BETTS v. MENZIES.

(*Reported by* JAMES PATERSON, Esq., *of the Middle Temple, Barrister-at-Law.*)

(From the *Law Times*)

Patent—Novelty—Prior specification without particulars—First patent impracticable—Construction of specifications—Question of law.

The construction of two specifications, alleged to be on the same subject, is not a pure question of law. Even if there be identity of language in the specifications, yet, if there be terms of art in one and also terms of art in the other, it is impossible to predicate with certainty that they describe the same identical external object, unless it is ascertained that the terms of art used in the one have precisely the same signification and denote the same external objects at the date of the one specification as they do at the date of the other. Therefore evidence is required on these points.

An antecedent specification ought not to be held to be an anticipation of a subsequent discovery, unless it is ascertained that the former disclosed a practicable mode of producing the result which is the effect of the subsequent discovery. Thus a notion that tin and lead might, by means of pressure, be so combined as to form a new and useful material, without giving information how to attain that object, is no ground for invalidating a subsequent patent giving that information.

(June 5, 1862)

This was appeal from a judgment of the Ex. Ch., affirming a judgment of the Q. B.

The action was brought by the app. Betts for the infringement of a patent granted to the plt. on the 13th Jan. 1849, for a new manufacture of capsules, and of a material to be employed therein, and for other purposes. The deft. pleaded that the plt. was not the true inventor; that it was not a new manufacture; that Her Majesty did not make such a grant; that there was no enrolled specification; and lastly, not guilty.

The cause came on to be tried before Erle, C. J., when it appeared that a specification of Thomas Dobbs was enrolled on the 12th Sept. 1804. The plt. had, on the 30th Nov. 1848, made his discovery, and immediately applied for a patent, but it was not granted till the 13th Jan. 1849, that in the interval between the application and the grant of the patent, the plt. had manufactured a number of capsules according to the said invention, but the same were not intended to be sold or delivered to the public, nor were they sold and delivered till after the patent was granted.

The specification of Thomas Dobbs, dated 1804, claimed the invention of "a new article of trade, which I denominate Albion metal, and which I apply to the making of cisterns, linings for cisterns, covering and gutters for buildings, boilers, vats, coffin furniture, worms for distillers, and such other things as require to be made of a flexible, a wholesome, or a cheap metallic substance." The material part of the specification was as follows:—

"Now know ye, that in compliance with the said proviso, I, the said Thomas Dobbs, do hereby declare that my said invention consists in plating, coating, or uniting lead with tin, and also the various alloys or mixtures, as the case may require, which, when done, I denominate Albion metal, and which I apply to the manufacturing of cisterns, linings for cisterns, covering and gutters for buildings, boilers, vats and linings, coffin furniture, worms for distillers, and such other things as require to be made of a flexible, a wholesome, or a cheap metallic substance."

"The operation of coating or plating lead with tin, or coating or plating alloyed lead with tin, or with alloyed tin, to make Albion metal, I perform by various methods, as hereafter described; that is to say, I take a plate or ingot of lead, or alloyed lead, and a plate of tin, or alloyed tin, of equal or unequal thicknesses, and laying them together, their surfaces being clean, pass them between the rolls of a flatting or rolling mill with what is technically called a hard pinch, so as to make the metals cohere. If after the first passage of the plates or pieces of metal between the rolls, the plates or pieces do not sufficiently cohere, I pass them a second or third time, or more, between the rolls, until a sufficient degree of cohesion is produced.

"N.B.—It will be useful, if not necessary, to have the rolls and the metals hot when the cohesion of the metals is to be effected by their passage between the rolls, especially when the alloyed pieces or plates are used. When lead or alloyed lead is required to be coated or plated on both sides with tin or alloyed tin, I apply a plate of tin or alloyed tin on each side the plate or piece of lead, or alloyed lead, and pass them between the rolls of a mill under the circumstances aforementioned; or the same may be effected by taking a plate which is already coated or covered on one side with tin, or alloyed tin, which I double with the lead side inwards, and pass it through the rolls, as before described, to obtain the proper degree of cohesion. I also make Albion metal by the following method: I cast a plate or ingot of lead, or alloyed lead, and as soon as it is set or congealed, I cast tin or alloyed tin upon it, or under, or on all sides of it, which will cohere with the piece of metal first cast, and the Albion metal thus prepared may be wrought or flattened, by the usual means of rolling, hammering, or pressing."

The material parts of the plt.'s specification, dated in 1849, were as follows:—"The new manufacture of a material to be employed in the manufacture of capsules and for other purposes, consists in combining lead with tin, by covering the lead with tin over one or both surfaces of the lead, and reducing the two metals in their conjoined state into thin sheets, of a thickness suitable for the purposes to which they are to be applied. And, for the purpose of so preparing lead by covering the same with tin, as aforesaid, I first cast the molten lead in an ingot mould of cast-iron, or other suitable material, and constructed in the usual manner of ingot moulds for metal, and of suitable internal dimensions for producing ingots of lead which (for the manufacture of the material for capsules) may be between four and five inches wide by about three quarters of an inch thick, and about thirty inches in length, with a few inches at one end of each ingot gradually reduced in thickness in the manner of a wedge. I also cast tin either in similar ingots, of the same or nearly the same dimensions as the aforesaid ingots of lead, or the tin may be cast into long thin strips of nearly the same width as the aforesaid ingots of lead, and between one-quarter and one-sixteenth of an inch in thickness and several feet in length. And, having thus obtained the lead and the tin in suitable states for beginning the rolling, or laminating, each of the two metals separately, between a pair or pairs of revolving cylindrical flatting rollers, of the construction usually employed for rolling or laminating ductile metals, I pass and repass the lead, one or more times, through or between such rollers; that is to say, rolling and re-rolling the ingot of lead as many times as may be requisite for reducing the lead to about one-fourth of an inch in thickness, and thereby the ingot of lead will become greatly elongated. And in like manner I roll and re-roll the tin as many times as (according to its original thickness when cast as aforesaid) may be requisite for reducing it to about one-twentieth part of the the thickness to which the lead is reduced by rolling as aforesaid, whatever that thickness may be. The lead and the tin having been thus reduced to their proper relative thicknesses, and their widths being nearly alike, and even surfaces of each of the two metals having been obtained by the aforesaid rolling, then, in case it is intended to cover both sides of the lead with tin, I extend a long strip of the thin tin (so reduced to relative thickness as aforesaid) flatways upon a smooth table, and lay a shorter strip of the lead (so reduced to relative thickness as aforesaid) very evenly upon the extended tin, with one end of the said strip of lead conforming with one end of the said long of strip of tin, and then I fold back the tin over the other end of the lead (being that end thereof which still retains some of that wedge-like form of the original casting of the ingot of lead already mentioned) and, consequently, the tin when so folded will apply to both surfaces of the lead; I then cut off the long strip of folded tin to correspond with the length of the lead, and I smooth down the tin with any convenient wooden rubber, or otherwise, so as to take out all wrinkles in the tin, and bring it very evenly into superficial contact with the lead, and with the two bordered edges of the strip of tin, conforming everywhere with the two bordered edges of the lead, so as to insure that the tin shall cover the lead as completely as can be done; I then take up the lead and tin together from off the said table, and present the folded end of the tin to a pair of revolving flatting rollers, which are set so as to subject the two metals to a very considerable pressure, and that pressure, at the same time that it reduces the thickness and elongates the two metals, will also cause their surfaces to adhere together, and then I repass the conjoined metal again and again between the said rollers for further reduction and elongation, and at every succeeding time of so repassing the adhesion of the two metals will become more complete, and when the strip of conjoined metals is thus become elongated to a considerable length, I find it is convenient, for further repetitions of the rolling, to gather up the said strip (as fast as it comes out from between the said pair of flatting rollers) into a spiral coil, by means of a roller which is suitably disposed behind that pair of rollers, and is turned round by an endless strap motion, so as that the said roller will wind and coil up the strip around it into such a coil; and then that roller, with the said coil thereon, can be removed to the front of another pair of flatting rollers, which by their motion will draw off and unwind the strip from its said spiral coil as fast as the conjoined metal passes through between the said flatting rollers, which rollers should be made of hard cast iron, in the manner of what are called chilled rolls, and highly polished, in order to give a very smooth surface to the tin of the conjoined metals by the rolling or flattening action of the said pair of flatting rollers. And note, I provide a small cistern of water beneath the said roller which has the said coil around it, so that when the same is removed to the front of the pair of flatting rollers, as aforesaid, the lower part of such coil will be immersed in the said water, in order that the conjoined metal may become wetted on its surfaces before it enters between the said pair of flatting rollers; and such wetting tends to prevent the tin on the surface of the conjoined metal from adhering to the rollers, as it might otherwise do occasionally. And I repeat such rolling of the strip of conjoined metals between the same or another like pair of chilled and highly polished flatting rolls, two, three, or more times, as may be requisite for reducing the said strip of conjoined metals to the required thinness. . . . . And the mode of proceeding, when only one side of the lead is to be covered with tin, is the same in all respects as hereinbefore described, except as to applying the tin to only one side instead of both sides of the lead at the time when a thin strip of tin is applied to a thicker strip of lead, as hereinbefore described, but that strip of tin should be folded back a short distance over that end of the lead which has the wedge-like form, and the folded end of the tin should be presented between the pair of revolving flatting rollers when the lead and tin together are to be subjected for a first time to the pressure of those rollers, and make the two metals adhere together, as already explained, for the said folded end of the tin around the wedge-like end of the lead will insure that the two metals will enter properly together between the rollers. And my said new material being made in plates or sheets of adequate thickness and size, may be employed for other purposes for which thin sheet lead or tinned iron or sheet zinc or sheet tin have been commonly employed, such, for instance, as lining cisterns or wine coolers, which are to contain water, and for lining boxes, chests, or cases for packing or safe keeping of articles which require to be kept dry or protected from insects; or on a still larger scale for lining larger water cisterns, and other purposes, in substitution for the thicker sheet lead used by plumbers. In most such cases it will be sufficient to have one side only of the lead covered with tin. And the perfection of my said new material will depend in a great measure upon the soundness of the casting of the tin in the ingots to avoid specks of sand or dirt flaws or honeycomb hollows in the ingots; and the same, in some

degree, of the lead, for as the conjoined metals are to be very much extended in the operations of laminating, and the tin on the surface or surfaces will be reduced extremely thin by those operations, any minute defects in the soundness of the castings will become extended, so as to cause visible blemishes in the tin surfaces of the conjoined metals; hence the casting of the ingots should be conducted with every care and precaution commonly practised for obtaining soundness; and the same of the laminating operations, and, in particular, care should be taken to avoid dirt getting between the tin and the lead when they are pressed together, for the first time between the pair of flatting rollers, for obtaining the first adhesion of the two metals; also, any air which cannot make its escape from between them will remain imprisoned, so as to form blisters, which will render the adhesion imperfect at the places of such blisters. To avoid blisters, the tin should be carefully smoothed down upon the lead, as already mentioned, without leaving wrinkles containing air, of which portions may get imprisoned; and the surfaces of the said pair of rollers, between which the lead and the tin are passed together for the first time as aforesaid, should move with a slower motion than is suitable for the other pair or pairs of rollers between which the subsequent lamination of the conjoined metals is to be performed, after their adhesion has been produced by repeated operation of the first mentioned pair of rollers, the slower motion of which will better allow the air to make its escape from between the lead and the tin. The fragments of my new material left unworked into capsules, or otherwise beneficially employed, are carefully reserved for melting down along with lead for casting future ingots, which will thereby acquire a very small proportion of tin, but not enough to make any material difference from pure lead. I am aware that it has been proposed to cover lead with tin, by applying the tin, when in a state of fusion, to the lead, when adequately heated, so that the adhesion of the two metals would be produced by agency of heat with complete fusion of the tin; but the adhesion of the two metals in my new material is produced by agency of mechanical pressure. And I wish it to be understood that I do not claim the exclusive use of the several processes hereinbefore described or referred to of casting, cutting and rolling, except when the same are employed for the purposes of my said invention; and I hereby declare that I claim as the invention intended to be secured by the said letters patent, firstly, the manufactures of the new material, lead combined with tin, on one or both of its surfaces, by rolling or other mechanical pressure, as herein described; secondly, the manufacture of capsules of the new materials of lead and tin, combined by mechanical pressure, as herein described."

A great deal of evidence was given as to Dobbs' specification, and its alleged worthlessness.

It was contended, on behalf of the defts., that a verdict should be entered for defts. on the issues respectively, that the plt. was not the true and first inventor, and that the alleged invention was not a new manufacture, on the following grounds:—1. That the plt. had manufactured large quantities of capsules for sale before the date of the patent, and that the invention was not a new manufacture at the time of the grant. 2. That plt.'s invention as claimed, or some material part of it, was included in the specification of the said Thomas Dobbs' patent granted in 1801. 3. That if the proportions of the metals to be employed are material, the plt.'s specification was defective and ambiguous in not pointing out the proportions of tin and lead to be employed when the combined metal was to be used for other purposes than capsules, and in leaving it uncertain what proportions were to be used in such cases. 4. That the plt 's specification is ambiguous and uncertain in not distinguishing between what was new and what was old, and especially in reference to the said invention of Thomas Dobbs of 1804.

The learned judge overruled the said objections, but gave the defts. leave to move to enter a verdict for them on these grounds

The jury found a verdict for the plt. on all the issues joined.

In Easter Term, 1859, the defendant's counsel applied for and obtained a rule *nisi* to set aside the verdict and enter a verdict for the defts on the four grounds above stated; and the same came on for argument on the 28th and 30th May; and after hearing the arguments on both sides the court ruled against the defts.' objection on the first point, but made the rule absolute to enter a verdict for the defts. on the issues raised by the first and second pleas, and gave judgment for the defts.

On appeal to the Ex. Ch. the court was divided, but the majority affirmed the judgment. Pollock, C. B., Martin, Channell, Bramwell, BB., and Keating, J., were the majority, and Williams and Willes, JJ. the minority.

The plt. now appealed to the House of Lords, and four of the judges attended the argument.

Macaulay, Q. C., Grove, Q. C. and *Udall*, for the plt. Betts, contended that the judge was right in leaving the case to the jury the evidence. The question whether the plt.'s patent was made void for want of novelty by the publication of Dobbs' specification, was a question partly of law and partly of fact, and therefore the court was not competent to decide the question without admitted facts. Before such questions could be decided the technical terms used by Dobbs must be explained, and what were the nature and properties of the metals in their different states as used by him, so as to see whether they correspond to the operations performed by the plt. It cannot be that the question whether Dobbs' specification invalidates the plt.'s patent is one of pure law, independent of evidence; otherwise a patent taken out on mere conjecture by one who never performed and never could perform the operation he indicates, would yet invalidate a patent afterwards taken out by one who actually succeeded in the operation. The specification of Dobbs could therefore never invalidate the plt.'s patent, unless it were proved or admitted that Dobbs' was a practicable patent; and whether it was practicable was a question for the jury. It was impossible to ascertain the meaning of Dobbs' patent without evidence: (*Bush* v. *Fox*, 5 H. of L. Cas. 707; *Muntz* v. *Foster*, 2 Web. P. C. 93; *Betts* v. *Menzies*, 8 E. & B. 923; *Thomas* v. *Foxwell*, 5 Jur. N. S. 37.)

Mellor, Q. C. and *Hindmarch, Q. C.*, for the resps., contended that the construction of Dobbs specification was for the court, and the plain construction showed that the plt.'s patent was not new. Besides, the plt.'s patent was ambiguous and uncertain, in not pointing out the proportions of tin and lead to be employed in the operation: (*Holmes* v. *North-Western Railway Company*, 12 C. B. 831; 2 H. & N. 81; *Booth* v. *Kennard*, 2 E. & B. 956.)

At the conclusion of the arguments, the House put the following question to the learned judges—Can the court pronounce Betts' patent to be void, simply on the comparison of the two specifications without evidence to prove identity of invention, and also without evidence that Dobbs' specification disclosed a practicable mode of producing the result, or some part of the result, described in Betts' patent? There was another question which was not material. The learned judges answered the question in the negative.

The LORD CHANCELLOR.—My Lords, in this appeal the app., who was the plt. below, brought an action against the resps. for an infringement of his patent. The date of that patent was the 13th Jan. 1849. One of the issues raised in the action was the alleged want of novelty in the invention of the plt. The jury found a verdict for the plt. on all the issues. The defts. had leave reserved to them to enter a verdict for themselves on the issues founded on the first and second pleas. The second plea was, that the plt 's invention, or a material part of it, was included in the specification of a patent granted to one Thomas Dobbs in the year 1804. The Court of Q.B were of opinion that, on the second plea, the rule ought to be made absolute. The plt. appealed to the Court of Ex. Ch., where, by a majority of the judges, the judgment of the Q. B. was affirmed. From that judgment so affirmed, the present appeal is brought to your Lordship's house. My Lords, the question was very learnedly and ably argued before your Lordships, assisted by several of the learned judges, and your Lordships thought fit to put to them two questions. Upon a reconsideration of those questions, I think it will appear that probably the first becomes immaterial to be considered, supposing the second question was answered in the negative. All the judges have concurred, for reasons which I think must be extremely satisfactory to your Lordships, in answering the second question in the negative. There does not appear to have been quite the same unanimity of opinion with regard to the answer to be given to the first question; but, in reality, the second question being

answered in the negative, the first question can hardly be said to arise My Lords, the second question was this: "Can the court pronounce Betts' patent to be void simply on the comparison of the two specifications without evidence to prove identity of invention, and also without evidence that Dobbs specification disclosed a practicable mode of producing the result, or some part of the result, described in Betts' patent?" The answer of the learned judges involves, therefore, two conlusions which are extremely material to the patent law. One is this, that even if there be identity of language in two specifications, remembering that those specifications describe external objects, even if the language be *verbatim* the same, yet if there be terms of art found in the one specification, and also terms of art found in the other specification, it is impossible to predicate of the two with certainty that they describe the same identical external object, unless you ascertain that the terms of art used in the one have precisely the same signification and denote the same external objects at the date of the one specification as they do at the date of the other. And, my Lords, this is obvious; for if we take two specifications dated as the present are, one in the year 1804 and the other in the year 1849, even if the terms employed in the one were identical with the terms employed in the other, supposing that each of them contains a term of art—we will assume it to be a denomination of some engine, some instrument, some drug, or some chemical compound—it might well be that the thing denoted by that name in 1804 is altogether different from the thing denoted by that name in 1849. If it were necessary to enter into such a subject I could give numerous examples, say, from chemistry, of things that were denoted by one name in 1804, and which have retained the same denomination, but which by improved process of chemical manufactures are at present perfectly different in their results, their qualities and their effects from the things denoted by the same names forty or fifty years ago. It is perfectly clear therefore, that if you compare two specifications, even if the language be the same, you cannot arrive at a certainty that they denote the same external object and the same external process, unless you enter into an inquiry, and ascertain as a fact that the things signified by the nouns substantive contained in the one specification are precisely the same as the things signified by the same nouns substantive contained in the other. In all cases, therefore, where the two documents profess to describe an external thing, the identity of signification between the two documents containing the same description must belong to the province of evidence, and not to the province of construction. My Lords, I pass on to the next conclusion, which is involved in the answer of the learned judges to your Lordships' question, and that conclusion I think is also of great importance to the law of patents, because it results from that opinion that an antecedent specification ought not to be held to be an anticipation of a subsequent discovery, unless you have ascertained that the antecedent specification discloses a practicable mode of producing the result which is the effect of the subsequent discovery. My Lords, here we attain at length to a certain undoubted and useful rule. For the law laid down with regard to the interpretation of an antecedent specification is equally applicable to the construction to be put upon publications or treatises previously given to the world, and which are frequently brought forward for the purpose of showing that the invention has been anticipated. The effect of this opinion I take to be this, if your Lordships shall affirm it, that a barren general description probably containing some suggested information, or involving some speculative theory, cannot be considered as anticipating, and as therefore avoiding for want of novelty, a subsequent specification or invention which involves a practical truth, which is productive of beneficial results, unless you ascertain that the antecedent publication involves the same amount of practical and useful information. Now, my Lords, it will be evident, upon a comparison of these two specifications, that the one was a mere general suggestion, while the other is a specific, definite, practical invention. It is possible that a suggestion such as that contained in the one may lead to the discovery of the invention contained in the other. But it is the latter alone which really does add to the amount of useful knowledge; it is the latter alone which by its practical operation confers a benefit upon mankind within the meaning of the patent law. In the present case there was not only no evidence to show that that which was continued in Dobb's specification was capable of practical operation, but in reality that conclusion was negatived by the verdict of the jury. Therefore, my Lords, concurring as I entirely do in the conclusions which have been arrived at by the judges in answer to the second question, it results as a necessary consequence that the decision of the Court of Q. B., and of the Court of Ex. Ch. ought to be reversed, and that the rule *nisi*, made absolute by the Court of Q. B., ought to be discharged. My Lords, I move your Lordships, therefore, to embody these conclusions in your present order.

Lord BROUGHAM.—My Lords, in the course of the argument I had and expressed considerable doubts on various parts of the case. Upon the whole, I consider those doubts as answered by the learned opinions of the learned judges, and I agree with my noble and learned friend's proposition.

Lord CRANWORTH.—My Lords, the only question in this case is, whether the plt 's invention was new. The jury found that it was. He is therefore entitled to judgment in his favour, unless, as a matter of law, the jury could not, on the evidence before them, lawfully come to the conclusion at which they arrived; in other words, unless there was evidence before the jury which made it their duty, as a matter of law, to find that the invention was not new. The argument for the resps. was, that the absence of novelty was established conclusively by the production of Dobbs' specification; that in the face of that specification the jury could not find in favour of the plt. And this was the opinion of the Court of Q. B, and afterwards of Ex. Ch. But I agree with the able opinions of the minority of the judges in the Ex. Ch., and of the learned judges, whose assistance we had at the argument of this case, that the judgment below was wrong. It may be true that two specifications may be so entirely identical that the judge may be warranted in telling the jury as a matter of law that they cannot find the second invention to be new, though that was not decided in *Bush* v. *Fox*, for there the jury had found as a matter of fact that the mode of working the two inventions was the same. But here not only are the two specifications not identical, but in the earlier of them there is no trace of that which constitutes the very essence of the plt.'s invention, namely, the relative thickness of the tin and the lead, and the mode of rolling and laminating each metal separately before they are placed together and then made to cohere by being rolled and laminated jointly. Dobbs' specification disclosed no more than his notion that tin and lead by means of pressure be so combined as to form a new and useful material. But it gave no information as to how that object could be attained, and there was evidence to show that Dobbs had never been able, in working according to his specification, to succeed in making the metals unite. There was therefore an essential difference between the two specifications which fully warranted the jury in finding a verdict for the plt as they did. The case has been so fully and ably discussed in the opinions of the learned judges and commented on by my noble and learned friend on the woolsack, that I shall content myself with simply saying that I concur in the motion, that judgment be given for the plt. below who is the app.

Lord WENSLEYDALE.—My Lords, the result of the very full and able opinion delivered by my Lord Chief Baron on the questions propounded by your Lordships, and of the written opinions of the consulted judges, with which we have been supplied, is, that the unanimous judgment of the Court of Q. B. and the judgment of the majority of the Court of Ex. Ch. ought to be reversed. I concur entirely in the propriety of this course. It appears to me, without entering into all the questions which have been discussed at the bar, and on most of which the learned judges have delivered their opinions, that my noble and learned friend who has addressed the House has put the case on a ground which is quite satisfactory, and it appears to me it is perfectly unanswerable. The jury having found that the plt.'s invention was new unless the production of Dobbs' specification without any other evidence conclusively showed that it was not, the patent must be good. Now, I am clearly of opinion that the mere production of Dobbs' patent, in which he makes public his notion that lead and tin might be usefully combined in a new material by mechanical pressure, without any statement or proof how that object could be attained and a practical result secured, is insufficient to show that he had

made prior discovery, and was an inventor. If nothing was set out in the plea but the plt.'s and Dobbs' prior patent and specification, it would, I think, be unquestionably bad. It is not a disclosure of an invention. I agree entirely with Williams and Willes, JJ in their opinion given in this case, in the Court of Ex. Ch., that the mere publication of a notion that a particular article might be made, without any information or means of knowledge communicated to the public, does not preclude a subsequent first inventor of those means from taking out a patent. Very early in the argument it appeared to me that, without some evidence to show that Dobbs' patent is capable of a practical application, and would produce some useful effect, it was inoperative to affect Betts' invention and to render his patent invalid. And it is much to be regretted that this view of the case was not fully discussed at an earlier period. Judgment reversed.

UNITED STATES REPORTS.

NEW YORK SUPREME COURT.

BLOSSOM ET AL. v. CHAMPION ET AL.

The title to property in things moveable can only pass from the owner by his own act and consent, except in cases only where such owner by his voluntary act confers upon the person from whom the *bona fide* vendee derives title, the apparent right of property as owner or agent.

It is not in the power of a common carrier or bailee to change the title to merchandise shipped on board a vessel, or intrusted for storage by the delivery of a bill of lading or storage receipt for such merchandise to some person not the *bona fide* owner thereof or possessed of the apparent right of ownership, or of disposal as agent.

The subsequent purchase of such bill of lading or storage receipt, transferred in good faith for a valuable consideration will confer no title to the merchandise therein mentioned to the purchaser.

The opinion of the court was delivered by

LEONARD, J.—Property in things moveable can only pass from the owner by his own act and consent, except in those cases only where such owner had by his own voluntary consent or act, conferred upon the person from whom the *bona fide* vendee derives title, the apparent right of property as owner, or of desposal as agent. (*Saltus* v. *Everitt*, 20 Wen., 267; *Brewer* v. *Peabody*, 3 Kern., 122.)

A bill of lading does not represent goods or merchandise when shipped on board a vessel, unless it has been delivered to the true owner of the merchandise. It is not in the power of a common carrier or bailee to change the title to merchandise shipped on board of a vessel, or entrusted for storage by the delivery of a bill of lading or storage receipt for such merchandise to some person not the *bona fide* owner thereof, or possessed of the apparent right of ownership, or of disposal as agent. Even the subsequent purchase of such a bill of lading or storage receipt, transferred in good faith for a valuable consideration, will confer no title to the merchandise therein mentioned upon the purchaser. It may create a liability against the vessel and owners, or in the case of a storage receipt, against the bailee to the extent of the damage sustained by the purchaser, but the title to the merchandise is not affected.

There may be cases also wherein the true owner would be estopped from alleging his title against the holder of a bill of lading, by reason of some act or misconduct on his own part.

In the present case the plaintiffs sold their merchandise to be paid for in cash on delivery. They caused it to be shipped on board the vessel of which the defendant, Champion, was master, and took receipt therefor, which they continued to hold at the time this action was commenced. The purchaser had no actual possession, and no *indicia* of ownership.

The lighterman who delivered the merchandise on the defendant's vessel sometimes spoke of it in the hearing of the mate who signed the receipts as the property of the purchaser, but it was not in the presence, nor did it come to the knowledge of the plaintiffs.

The plaintiffs were not wanting in carefulness to fortify themselves with all the usual evidence taken in such cases to establish and preserve their rights as owners

The purchaser never paid for the merchandise so shipped, and had no *indicia* of any kind, to represent posession or ownership by him.

The casual remarks let fall by third parties, or by the purchaser or his agents in the presence of the mate, or of the owners of the vessel gave no authority to them to make delivery of the bill of lading to a party not having the usual evidence upon which bills of lading were customarily delivered.

The evidence was not disputed, although admitted under exception on the part of the defendant as to its validity, that a custom has long prevailed at the port of New York to deliver bills of lading for merchandise shipped for transportation, only to the party holding the receipt of the master or agent of the vessel, which is usually signed and handed to the lighterman or carman at the time of the shipment.

There were some exceptions to this custom, not, however, interfering with its general uniform character. As, for instance, that bills of lading were sometimes delivered without the surrender of the shipping receipt, where the shipper was considered of undoubted responsibility, and guaranteed that the receipt should be produced when called for; also, that bills of lading were sometimes delivered to like persons before the goods were in fact placed on board upon a guarantee that they should be shipped in due season.

In these cases there was a waiver of the strict rights of the vessel and her owners, and a confidence and credit was given which might involve a liability and loss. The uniform character of the custom was not interfered with, but these instances were exceptions arising from agreement and confidence.

The existence of this custom afforded a security to the plaintiffs that they would be able, by retaining the possession of the shipping receipts, to continue the possession of their merchandise until the condition of the sale was complied with by the payment of the price according to the agreement of the vendee, or to use the expressive language of one of the witnesses to hold the receipts in one hand, and receive the check with the other,—the vendor was to hold the shipping receipts till the money was paid, and possession of these was considered sufficient.

It cannot be admitted that the vendors have lost their title because they did not, while the goods were going on board, send word to the master or owners of the vessel that the goods had been sold conditionally upon payment of the price, and that no bill of lading must be delivered to any other party until the goods had been paid for. Such a practice is not customary. The custom which did exist warranted the belief that no such notice was necessary.

It is clear that if the vessel or her agents had adhered to the well-known usage of delivering bills of lading only upon the production and surrender of the shipping receipts, or if they had paused to enquire who was entitled to the bills, that no loss would have occurred.

It is urged, however, that an agreement had been made between the agents of the vessel and the vendee (Woodhull) for the freight of such merchandise by him, and that none of the same kind should be carried for other parties on the ensuing voyage, and that the merchandise in question having been shipped with the sanction of the vendee, and apparently by his direction under such agreement, that the agents of the vessel can not be held to have made a careless or improper delivery of the bills of lading therefor to the vendee, and that the vendors are censurable for suffering the delivery of the merchandise on board in such a manner as to lead to the assumption by the agents that there was no question as to the absolute ownership of the vendee.

It would be quite as reasonable for the vendors to complain that they were not notified of this agreement for freight, as for the agents of the vessel to complain that they had not been informed of the conditional nature of the sale of the merchandise.

It is assumed in the ordinary transactions of commerce that parties are acting honestly and fairly, and it would also be impossible to inform others of agreements apparently affecting only the parties to them. Neither party had any right to expect any such information from the other. The plaintiffs had no knowledge, so far as the evidence shows, of the existence of any such agreement for freight.

However the case might be considered under other circumstances, the want of this knowledge is an answer to the charge of carelessness or want of fairness on the part of the plaintiffs in respect to

the omission to notify the agents of the vessel of the condition of the sale before the delivery of the merchandise on board. Nor does it appear that they were aware that the vendee had anything to say to the agents of the vessel in respect to the shipment.

There is still less reason to censure the plaintiffs for an omission to notify the agents of the vessel that the sale was a conditional one, when it is observed that the defendant delivered bills of lading to the vendee before the merchandise was actually on on board the vessel, and that an advance of $11,000 had been obtained thereon by the vendee from third parties on the same day that they were obtained.

It appears also that the vendee was in insolvent circumstances for some years. This was a circumstance calling for caution by all parties who were dealing with him when he required credit.

It would seem that the agents of the vessel relied exclusively upon their knowledge of the character of the shipper (Woodhull) for integrity and fair dealing, and that they delivered the bills of lading to him in the trust and confidence which they had that he would ship the merchandise as agreed, and surrender the shipping receipt when requested. This confidence was misplaced, and they have suffered loss from that cause, and not for the reason that the plaintiffs did not inform them of the terms upon which the merchandise was agreed to be sold; a notice wholly unusual, and which the defendant could not expect.

It is urged that the custom above mentioned is invalid, among other reasons, because it tends to establish the negotiability of a new and unusual instrument in writing. Some of the witnesses state the custom to be that the bills of lading are delivered to the party who presents the shipping receipts, but the statement more accurately given, I think, by the other witnesses, is that the custom is to give the bills only to the party on the surrender of the receipts. Sometimes the surrender of the receipts is waved where the responsibility of the parties are well known. Such instances are like the present one where confidence or credit is given to some well-known party.

Some of the witnessess state that the bills are given to the person who presents the receipts unless suspicion is awakened.

There can be no conclusion drawn from the whole evidence that the receipts are negotiable, or that the holder of them is entitled to bills, without further question as to the right of the holder. The receipts amount to a strong presumption that the holder is entitled to bills of lading for the merchandise mentioned in the receipt, but the presentation of them does not preclude further inquiry.

On the other hand, if the shipper, or any other person demanding bills, were unable to exhibit and surrender the shipping receipt, it would present a strong case for suspicion, and the owners or agents should make inquiry before delivering the bills.

The custom seems to be uniform, well known, and not unreasonable.

It does not invalidate the custom, because the vessel cannot be compelled to give receipts, or the shipper to take them.

The shipper may still insist that he will ship only by such vessels as will give receipts, and the vessel may also refuse to receive freight unless the shipper will receive receipts, or conform to the custom. It is a custom that tends to the protection of the shipper as well as the shipowner. The safeguard might be increased to shippers and owners by inserting in the receipt a clause declaring that bills of lading shall be required only upon the surrender of the receipts.

There was no error in admitting the evidence of the custom mentioned, or in the submission of the case to the jury, so far as the defendant is concerned.

Evidence of the insolvency of Woodhull was material to ascertain whether credit was given by the plaintiffs to him in respect to the possession of the merchandise, or by the defendant in respect to the delivery of the bills of lading.

This, taken with other evidence in the case, afforded some ground to enable the jury to determine whether the one party or the other had given credit to Woodhull.

In the absence of any new inducement the plaintiffs would not probable abandon the condition for which they had stipulated in making the sale to an insolvent purchaser.

The agents of the vessel had given credit to an insolvent dealer with them to a certain extent, in agreeing to rely upon him to deliver a large amount of merchandise covered by the bill of lading and had bound themselves to give him the exclusive right to ship a particular kind of merchandise for the ensuing voyage. They might have had faith in his personal character for integrity, inducing them to overlook his want of pecuniary responsibility, with slender additional security, but there is no reason to believe, from the evidence, that the plaintiffs had any such faith.

The exception in this respect is not well taken.

The defendant gave evidence of the amount of the freight that would have been earned had the merchandise so put on board been carried to its destination, and the loss and expense arising from the delay of the ship in taking it out, and restoring the cargo which had been displaced in removing the plaintiffs' merchandise.

The Judge was requested at the trial to charge that the defendant Champion was entitled to be allowed for these items, if the jury should find for the plaintiffs upon their claim for the merchandise so shipped. The judge declined so to charge, and the accepted to the ruling.

The voyage has not yet commenced. The ship has not yet broken ground.

The question does not appear to be free from doubt, whether a shipper who has contracted for freight may not remove his shipment under such circumstances without payment of any freight affording only a full indemnity to the vessel for the breach of his contract for freight. The vessel might fill up with cargo on the same or better terms, and sustain little or no damage.

The following cases are adverse to the claim of the vessel: 3 Gray R. 92, Bailey v. Damon; 5 Binn. R. 392, 401, Clewson v. Long.

In the present case there was no contract between the plaintiffs and the vessel or her owners. The plaintiffs were willing, and offered to permit the merchandise to be carried by the vessel for their account on the same terms as it had been received. The defendant, Champion, however, refused to recognize the title of the plaintiffs, or to deliver them bills of lading. The plaintiffs claim of title has been sustained by the jury, under the charge of the court.—The defendant was wrong in denying the plaintiffs' ownership.

The plantiffs were under no obligations to permit their merchandise to leave the port or to remain in the vessel, while their title was denied.

Under such circumstances there can be no legal foundation for demanding freight, damages for breach of any freight contract, or for the delay of the vessel, or the reasonable expenses to which the vessel or her owners were subjected by the plaintiffs, in recovering the possession of their merchandise, unjustly withheld. This exception was not well taken.

The sum of $2,000, part of the advance obtained by Woodhull on the bills of lading delivered to him, was afterwards paid to other parties on general account, and by them paid to the plaintiffs without knowledge of the source from whence it was obtained and has been by the plaintiffs applied on account of other indebtedness.

The refusal of the judge to charge so as to give the defendant Champion the benefit of this payment was correct, and the exception in that respect is not well taken

The defendant has no ground of complaint as to the rulings at the trial or the manner of the submission of the case to the Jury.

In some respects the charge was more favorable to the defence than the Judge was required by law to make.

The judgement should be affirmed with costs.

The result to which we have here arrived is not in harmony with the former decision General Term in this case (reported 28 Barb 217), but the evidence in respect to custom was not then before the Court: and as that is a material and controlling fact in the case as now presented, we do not consider the former conclusion as authority controlling our present views.

D Lord, for the appellant: G Dean, for the respondents.

MONTHLY REPERTORY.

COMMON LAW.

EX. DUKE v. ASHBY. *Jan.* 16.

Ejectment—Landlord and Tenant—Estoppel—Title.

In ejectment by landlord against tenant, on proviso for re-entry in a lease, reciting and "subject to" a former lease to another party, the tenant cannot dispute the landlord's title.

EX. C. YEATMAN v. DEMPSEY.

Contract implied—Agreement to appear at trial without subpœna—Cause of action—Damages.

The plaintiff, with the view (known to the defendant) to obtain a divorce from his wife on the ground of her having been insane at the time of the marriage, employed the defendant, a medical man, to observe her, and also to enquire into her past history and procure evidence of her insanity at the time of the marriage, and to make it available in the suit, and the defendant was to be paid for what he did. The defendant did not appear at the trial, and, his evidence being necessary, the plaintiff was in consequence obliged to withdraw the record.

Held that this was evidence of an undertaking to appear and give evidence at the trial without a subpœna, and also evidence of substantial damage to the plaintiff.

Q. B. WINTER v. WINTER.

Gift of chattel inter vivos—Constructive delivery.

In a gift of a chattel *inter vivos* it is not necessary that there should be any formal delivery of the chattel by the donor to the donee; it is sufficient if the donee takes possesion of the chattel as owner, in pursuance of the gift.

Q. B. MELLOR v. SHAW ET AL.

Master and servant—Injury to servant from personal negligence of master—Joint liability of co-proprietors.

Where a master of a coal mine authorized his workmen to use the shaft while it was in an unsafe condition to his knowledge, and an injury resulted therefrom to one of the workmen, who was using the shaft without knowledge of the danger.

Held that the master was liable for personal negligence.

Held also, that where one of two partners in a coal mine acts as manager, and is guilty of personal negligence, his co-partner is jointly liable for the injury resulting from such negligence.

C. P.

WILTON v THE ROYAL ATLANTIC MAIL STEAM NAVIGATION CO.

Carriers—Luggage—Passenger.

A ticket was taken by an agent for the plaintiff as a passenger by the defendant's ship, from New York in America to the United Kingdom. On the ticket was this condition: "The ship will not be accountable for luggage goods or other description of property, unless bills of lading have been signed therefor; each passenger allowed 20 cubic feet of luggage free, but no jewellery, bullion, &c., will be carried as luggage." No bill of lading was offered to the plaintiff. The ship was lost and with it the plaintiff's luggage on the voyage, by the negligence of the defendant's servant.

Held, that the stipulation for a bill of lading as a condition for the defendant's being accountable was absolute, and that they were not liable for the loss of any part of the plaintiff's luggage. the stipulation for 20 cubic feet of luggage free being an exemption from the charge so far and no farther, leaving the passenger either to get a bill of lading for all for which he intended to make the ship accountable, and at the same time giving him the option of taking luggage under his personal control without a bill of lading, but in that case carrying it at his own risk.

Q B. PATERSON v. HARRIS.

Marine insurance—Policy on a share in an Electric Telegraph Co.—Perils of the sea.

A, previous to the attempt to lay down an electric cable between Ireland and America, had insured his share in the Atlantic Telegraph Co. The policy was in the usual form of marine insurance, with the addition of a special agreement that the insurance "should cover and include the successful working of the cable when laid down," The cable was laid down, but proved inefficient, partly by reason of an injury which it had undergone previous to the shipment, and partly through natural effect of the action of the sea.

Held, that the underwriter was not liable to indemnify A. against the loss resulting from the injurious effects of the ordinary and natural action of the sea-water upon the cable as loss caused by "perils of the sea."

Held also, that although the policy was expressed to be effected on A's "share in the Electric Telegraph Co.," it was in effect on the cable itself; and accordingly that a loss of 370 miles of the cable by the "perils of the sea" came within the policy."

REVIEW.

THE WESTMINSTER REVIEW. New York: Leonard, Scott & Co. We are in receipt of the October number of this valuable quarterly. It is at all times acceptable. The contents of the number before us are:—1. Essays and Reviews. 2. The British Sea Fisheries. 3. Railways: their cost and profits. 4. Gibraltar. 5. The Encyclopœdia Britannica. 6. Idées Napoléoniennes. 7. The Religious Difficulties of India. 8. The Slave Power.—The *first* is a slashing article against the real or supposed bondage of the clergy of the Anglican Church. Freedom of thought and freedom of action are advocated with the usual ability which characterizes the productions of writers who contribute to this Review. The *second* is an interesting article on the British Sea Fisheries. Its aim is to expose "the awful waste of fish life" incident to the present system, and to bring about economy. The *third* exposes the mismanagement of Railways, entailing great losses where considerable profits should be forthcoming. The conclusion at which the writer arrives is, that the leading defect of the present system is the absence of a direct interest on the part of managers in diminishing the expenses and producing profits. The remaining articles are of more or less interest. We have not time to particularize them. One, in praise of the new edition of the Encyclopœdia Britannica, will meet with the approbation of all who possess or have seen that marvellous combination of industry and talent.

GODEY'S LADY BOOK.—The number for December is received. It is enough to say that the number is fully equal, if not superior to any of its predecessors. This magazine must be a treasure to those for whom it is designed.

APPOINTMENTS TO OFFICE, &C.

NOTARIES PUBLIC.

WILLIAM REYNOLDS, of the Town of Guelph, Esquire, to be a Notary Public for Upper Canada.—(Gazetted October 18, 1862.)

FREDERICK THOMAS JONES, of the City of Toronto, Esquire, Attorney-at-Law, to be a Notary Public for Upper Canada.—(Gazetted October 25, 1862.)

CORONERS.

WILLIAM SPRINGER, of the Village of Ingersoll, Esquire, M.D., to be an Associate Coroner for the County of Oxford.—(Gazetted October 18, 1862.)

DAVID KELLY, of the Village of Orillia, Esquire, M.D., to be an Associate Coroner for the County of Simcoe.—(Gazetted October 18, 1862.)

JOHN MACK AULT, of Dereham, Esquire, M.D., to be an Associate Coroner for the County of Oxford.—(Gazetted October 25, 1862.)

TO CORRESPONDENTS.

A SUBSCRIBER.—Your communication omitted, for two reasons. 1. Your real name not sent to us. 2. Question put of no general interest, you must take the advice of counsel upon it.