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JUDICIAL OVERWORK.

Never before were complaints of judicial prostration from the effects of overwork so universal. In the U. S. Senate, a few days ago, in the course of a discussion on a bill to provide an additional Circuit Judge, Senator Davis stated some facts illustrating the immense pressure on the Federal Judges. At the April term of the Circuit Court in New York, 444 jury cases were set down for hearing; on the Equity Calendar there were 116 cases. There were also 59 appeals in Admiralty, and 40 motions noticed. In Chicago, the accumulation of arrears was still more formidable. There were 3,500 cases on the docket other than bankruptcy cases, which, with Admiralty business, engage all the time of the District Court at that place.

To the increasing pressure upon the Judges is ascribed the large mortality in their ranks. The *Albany Law Journal*, in noticing the decease of Judge Allen, of the New York Court of Appeals, which occurred on the day following the death of Judge Dorion, of Montreal, remarks that of the seven Judges who formed the Court at its re-organization, under the amended judiciary article of the constitution, three have been removed by death—Judges Peckham, Grover, and Allen. Judge Johnson, who was appointed to fill a vacant place upon the bench, and who performed judicial duties for nearly a year, had also died. "None of these," remarks our contemporary, "were what could be called old men, not one of them having passed the constitutional limit of age for the judicial office. There is no doubt that the physical constitution of every one of these Judges was broken down by overwork in the performance of official duties, and that, except in the case of Judge Peckham, their deaths resulted from this cause." In England and Canada, the results of overwork on the bench have been equally apparent. Is the present generation less able to stand pressure, or is the accumulation of case law, and the frequent change of statutes, in conjunction with overweighted rolls, becoming too heavy a burden upon those called to administer the law? One thing at least is clear, that the judicial office is very far from being a sinecure, and instead of being eagerly grasped at, or accepted as a matter of course when tendered, should be undertaken only after the most serious consideration, and with a due regard to the sacrifices involved in the faithful and conscientious discharge of its duties.

TRADE MARKS.

A decision given recently by the Chancery Division in England, in the case of *Siegert* v. *Findlater*, goes very far in protecting manufacturers in the enjoyment of the marks by which their goods are usually known. In 1830, the plaintiff manufactured certain bitters at Angostura, a town in Venezuela, and he called the article "Aromatic Bitters." It was not till 1876 that he adopted the name "Angostura Bitters." In 1863 these bitters had been introduced into England, and obtained the popular name of "Angostura" Bitters, which they always retained. The defendant was also a manufacturer of bitters. He commenced to manufacture them at Upata, about 200 miles from Angostura, in 1860. In 1870 he removed to Ciudad Bolivar (formerly called Angostura.) About the year 1874 the plaintiff brought an action in Trinidad to restrain defendant from using the word "Aromatic" to describe his bitters, which was successful. The defendant then adopted the name "Angostura," and on the 16th August, 1874, registered that name at Stationers' Hall. The plaintiff now brought this action to restrain defendant from using the name "Angostura," and from using bottles and wrappers resembling those used by him. The Court held that, as the bitters made by the plaintiff were known in the market as "Angostura" bitters, and as the bitters made by the defendant were not identical with those of the plaintiff, the defendant must be restrained from using the name "Angostura" in such a way as to induce the public to believe that they were purchasing the plaintiff's bitters. Thus not only the name first selected was protected, but that which appears to have been given by the public.

PARDONS.

Two points in connection with the granting of pardons and commutations of the death penalty have recently come before Courts in different States of the Union. In one case, the matter of *Victor*, the convict had been sentenced to death, but the sentence was commuted to imprisonment for life. Subsequently the criminal claimed his discharge, on the ground that he had never accepted or acquiesced in the commutation, and therefore, he was held in custody illegally. The Court decided against this novel pretension, and the Supreme Court of Iowa affirmed the decision, holding that the commutation is presumed to be for the culprit's benefit, and is valid without any action on his part.

In the other case, *Arthur* v. *Craig*, which came before the Supreme Court of Iowa, in April, the question was whether a condition may be annexed to a pardon. In this instance, a person convicted of larceny from a building in the night time, and sentenced to ten years' imprisonment, received a pardon containing these conditions: that the prisoner should, during the remainder of his term of sentence, refrain from the use of intoxicating liquors as a beverage; should exert himself for the support of his mother and sister, and should not be convicted of a violation of any criminal law of the State. In case he violated any of these conditions he was to be liable to summary arrest upon the warrant of the governor at the time, whose judgment was to be conclusive as to the sufficiency of the proof of the violation of the first and second conditions, and was to be confined in the penitentiary for the remainder of the term of his sentence. The prisoner formally accepted the pardon and its conditions, and was set at liberty. He violated the condition against the use of intoxicating liquors, and was arrested upon a warrant by the governor and returned to the penitentiary. Upon proceedings by *habeas corpus* the court held the re-arrest and return to the penitentiary were valid and proper. The *Albany Law Journal* remarks: "Whether an executive can impose conditions in pardons has been doubted. 1 Whart. Cr. Law, §591 d. But it is now considered as settled that such conditions may be made. This is eminently the case where the offender, after having been released upon condition that he leave the country, refuses to go or surreptitiously returns. *Flood's Case*, 8 W. & S. 197; *State* v. *Smith*, 1 Barley 283; *People* v. *Potter*, 1 Park. Cr. 47; *State* v. *Chancellor*, 1 Strobh. 347; *State* v. *Fuller*, 1 McCord, 178; *Roberts* v. *State*, 14 Mo. 138."

REPORTS AND NOTES OF CASES.

COURT OF QUEEN'S BENCH.

Quebec, June 1, 1878.

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

MARQUIS v. VAN COURTLANDT.

Appeal—Saisie-Arrêt—Costs.

Motion to reject an appeal on account of *acquiescement*. The appellant was condemned by the Court below to pay a certain debt, he not having made his declaration as *tiers saisi* in time. In fact he was domiciled in another district, and had there made his declaration, that he owed nothing, within the proper delay. He then moved the Court in Arthabaska to revise this judgment, and to allow him to make his declaration anew. The Court granted the appellant's petition, but condemned him to all costs. He moved for leave to appeal, but in the meantime so far conformed himself to the amended order as to make the new declaration. Respondent maintained that this was an *acquiescement*.

The Court held that it was not, and the motion to reject the appeal was dismissed with costs.

Quebec, June 4, 1878.

Present:—MONK, RAMSAY, TESSIER, CROSS, JJ.

HARDY v. SCOTT.

Appeal—Alteration of Judgment.

This was an action for rent due and to fall due. It seems that the judgment went for the rent due, but owing to some inadvertence, judgment was entered up according to the conclusions of the declaration. Execution was taken out on the judgment as entered, and this appeal was instituted.

Seeing the error, the *Greffier*, it seems, (though the affidavit does not make the point clear) entered up the proper judgment on another page, supposing himself authorized so to do by

Art. 474 C. C. P. The appellant moved for a *certiorari* to bring up the first judgment.

The Court granted the motion, remarking that the appellant certainly had a grievance. The judgment from which he appealed had been changed without his knowledge, and the Court should be in a position to give him a remedy. It was also intimated that Art. 474 C. C. P. would not cover an alteration of this kind after proceedings had been taken on the judgment.

PERRON v. BELISLE.

Appeal—Interlocutory Judgment.

Action for price of sale. The defendant pleaded by preliminary exception that there were two mortgages enregistered on the property, and asked suspension of the proceedings till this *trouble* was removed. The plaintiff produced two receipts *sous seing privé* and the Court dismissed the exception, except as to costs, which plaintiff was condemned to pay to defendant.

From this judgment the defendant moved for leave to appeal.

The Court thought that the matter might be rectified on the final judgment, and the case being for a very small amount, the Court in its discretion refused leave to appeal, but without costs.

LAROCHELLE v. REID.

Appeal—Default to file Reasons.

Motion to reject appeal, the reason of appeal not having been filed till the day before the opening of the term.

The Court granted the motion. The strict right of respondent was to have appeal rejected unless appellant could show some ground for mitigating the severity of the rule. No such ground had been shown in this case. It was an appeal purely for delay. Appellant, an insolvent, was condemned to answer interrogatories. He could suffer no great damage from complying with such an order. Motion granted.

SUPERIOR COURT.

Montreal, May 31, 1878.

JOHNSON, J.

THE ONTARIO BANK v. LIONAIS et al.; LIONAIS, opposant, and PAPINEAU, contesting.

Will—Clause exempting from Seizure—Debt of Succession.

The party contesting the opposition got two judgments against the two defendants, one of them being testamentary executor of his deceased wife, and the executions issued in satisfaction of these judgments were noted as oppositions *afin de conserver*, a previous writ having issued.

JOHNSON, J. The opposant pretends that the property seized is incapable of being taken in execution, in virtue of a provision in his mother's will, and this pretension is contested, because the judgment being against the defendant in his quality of executor and administrator to his wife's succession, and the debt being a debt due by the succession, the provision in the will cannot extend to exclude it. It is proved, as a matter of fact, that the judgment was rendered for money advanced to pay the debts of the testatrix herself. It is, therefore, obvious that she had no power to prevent the property of her succession from being liable for her debts. When her children get it, and their creditors want to sell it, it will be time enough to set up the exemption from seizure under the will.

Opposition dismissed.

Jetté & Co., for plaintiff and contestant.

LA COMPAGNIE DU CHEMIN DE FER DE MONTREAL, OTTAWA & OCCIDENTAL v. BOURGOUIN et al., and ATTY. GEN., Opposant.

Railway—Execution—Appeal—Opposition founded on title.

The plaintiff's action was dismissed, and the defendants' attornies took a writ of execution for their costs. The Crown filed an opposition which rested upon two grounds: 1st, that the judgment had been appealed from and was therefore not executory; and secondly, that the property seized belonged to the opposant. The first ground was answered by the defendants, who contested this opposition, by an exception in the nature of a dilatory exception, setting up that the appeal was only taken eight months after the judgment, and four after the execution, and that, therefore, the opposition can only be made subject to the payment of costs resulting from the delay and negligence of the party in taking the appeal.

JOHNSON, J. The fact of the appeal either as

a ground of the opposition, or of dilatory exception to it is equally fallacious. The appellant might urge the pendency of an appeal; but the opposants have no interest whatever in doing so; and on the other hand, the defendants might reproach the plaintiffs with delay in taking their appeal; but that is nothing to the opposants. At most, however, this would resolve itself into a question of costs, for even if the opposants had exposed themselves to pay costs by their own negligence, they would not be prevented from exercising a right of property, if they have one. The question of property, as a matter of fact is admitted:—that is to say the transfer of the 16th of November is admitted as a fact, without admitting the legal consequences of it.

The contestation rests mainly on the argument that the Provincial Statute 39 Victoria, c. 2, is *ultra vires*, because this railway has ceased to be a provincial railway, and has become a Canadian railway under federal legislation. Thence it is concluded that the sale made to the Crown is null, and that the property seized belongs in reality to the plaintiffs, though nominally and apparently to the Crown, and that consequently the defendants can bring it to sale to pay the plaintiff's debts.

Now all the cars and locomotives as well as the greater part of the land seized never belonged to the plaintiffs at all; but were bought and paid for with public money through the Railway Commissioners.

There remain, however, some lands which the plaintiffs themselves had bought before the 16th of November, and as to these last, the question might be raised whether the transfer of that date is legal or not. But it strikes me very forcibly that the contestation does not raise the point in any way that could be effectual, even if it is well founded; for I see that though the fact of the transfer is admitted, and the deed itself must therefore subsist until it is set aside, there is no conclusion that it be declared null, but simply that the opposition be dismissed. This was not noticed at the argument; but I must say it appears to me very seriously to affect the contestation of the opposition, for it is difficult to see how this deed, whatever it may be, is to be allowed to stand while at the same time the opposition founded upon it is to be dismissed. But it may further be noticed that whether the Stat. 39 V., c. 2, is to have the effect claimed for it or not, is a question quite independent of the right of the plaintiffs to sell lands no longer useful to them for the objects of their incorporation. The Quebec Railway Act of 1869, sec. 7, sub-sec. 2, gives them the power to purchase and to alienate. This company had been incorporated to build a railway. It became incapable of achieving its object. By the deed of November, 1875, this is declared to be the reason of the transfer to the Province, which then undertook the work. The Act 39 V., c. 2, no doubt recognised the necessity of federal legislation to carry out the work; and indeed it appeared to me in this very case, and I said so in giving judgment dismissing the action, that the plaintiffs were in no position to question whether this work was a Provincial or a Canadian railway, they themselves having asked for the federal legislation that changed their name; but the question whether it is to be considered either the one or the other has nothing to do with the right of the stockholders to sell to the Crown, which would be the same in either case. I have already quoted the specific power given by the Quebec Statute of 1869, and that given by the Federal Railway Act, 1868, is in precisely the same words. I am therefore of opinion to maintain this opposition, on the ground of the right of property being in the Crown.

The contestation was made also to some extent to rest on the contention that the opposants were in reality only using the plaintiffs' name. That might be the case, however, without enabling the defendants to sell the opposants' property under this execution, unless the judgment was executory against them, which it is not; but only against the plaintiffs.

De Bellefeuille & Turgeon for opposant.

Doutre & Co. for defendants.

McMahon v. Lassiseraye, and Lassiseraye et al., Opposants.

Seizure—Usufructuary.

This was a case of contested opposition, the the contestation being about effects claimed by the opposant as *legataire en usufruit* of her deceased husband, and tutrix to their children.

Johnson, J. These oppositions are contested by the plaintiff on the ground of the things

seized belonging to the defendant personally being purchased with her own money. The proof of this however has failed. The piano is the result of two or three exchanges—and on the last occasion some money was paid to make up the difference. I have no doubt the contestations are not maintainable. Even if she paid her own money to make up the price of the last piano, that would make her part owner individually, and therefore under this seizure her share could not be sold. Oppositions in both cases maintained, and contestations dismissed with costs, on the ground that the property seized is that of her children, of which she has only the usufruct.

Duhamel & Co. for opposant.

DUCHARME v. ETIENNE.

Obligation by Wife — Community—Renunciation.

JOHNSON, J. This action is brought by the plaintiff—or rather is now directed by the plaintiff's two sisters (he himself being dead)—against the defendant as tutor to the minor child, issue of the marriage of the late Gilbert Brunet and Eulalie Jobin, who, after her first husband's death, married Roch Thibault. She herself died in May, 1878, leaving by her will her two children universal legatees. One of them, however, had died before her; and it is against the tutor of the surviving child of the first marriage that the present action is brought.

The first thing alleged is the execution by Eulalie Jobin and her second husband of two obligations, the first in September, 1875, and the second in September, 1876. The first obligation was for the sum of $1200, payable to the plaintiff by the obligors jointly and severally, in five years, with interest at eight per cent., payable half yearly; and the second was for $200, between the same parties, payable on the plaintiff's order, with interest at the same rate, and in the same manner; and a lot of land belonging to the wife was mortgaged for both these amounts, and the mortgages duly registered. It is then alleged that the consideration of these two obligations was a debt due by the wife, and the real estate mortgaged was hers *en propre*, and that the surviving child, or her tutor for her, have taken possession of everything under the will; and the conclusions are that the tutor *es qualité* be condemned to pay $208, the interest due under the two obligations.

The defendant pleads that he never accepted as tutor the community between the minor's mother and Roch Thibault, but on the contrary expressly renounced it on the advice of a *conseil de famille*. That the money mentioned in the two obligations did not go to pay the wife's debts. That when she married Thibault, the property in question was already mortgaged for $950, and, by the marriage contract, the husband offered to pay $200 of it; and as to the balance, he undertook to pay one-half, viz.: $375. Thus her succession would only benefit to that amount, and he offers the interest on it, calculated from the date of the obligations, some $60, with costs as in an action of that amount. The defendant further says that the present action is instigated by Roch Thibault, who hopes to escape thereby from his personal liability. The plaintiff answers, first, by saying that this contract of marriage was never registered, and that whatever it may mean, as between the parties to it, it means nothing as regards him; and that even if Thibault had undertaken with his wife to pay her debt, that would not discharge her towards her creditor, but merely oblige him to re-imburse her.

There was proof offered and made under reserve of objection that the consideration of the obligations was a debt due by the wife, and I think the proof is clear on that head, and ought to be allowed, particularly with the basis afforded by the confession of the defendant, and the original obligation by the wife during widowhood to the Trust and Loan Company. The renunciation to the second community made by the Tutor cannot affect the antecedent liabilities of the wife, and though the second husband may be liable to the minor for $200, her succession is liable to the plaintiff for the rest. Judgment for plaintiff.

Loranger & Co. for plaintiff.

Duhamel & Co. for defendant.

In the Southwark, England, County Court on the 28th of March last, in the case of *Poice* v. *Jacob*, it was held that a London carman is not a common carrier, but is liable to loss or injury of property transported by him, caused by the criminal act of a stranger, occurring through his criminal negligence as bailee.

PRIVITY IN NEGLIGENCE.

The Court of Appeals in *Robinson* v. *New York Central & Hudson River Railroad Co.*, 66 N. Y. 11, manifested an unusual degree of timidity or rather caution in regard to the question of imputed negligence. The facts of that case were that the plaintiff—a woman—was invited to ride by one Conlon in his carriage and accepted the invitation. Conlon was a fit and proper person to manage a horse; but through the alleged negligence of the defendants' servants, its train was run against the carriage, and plaintiff was injured. The defendants alleged that the negligence of Conlon contributed to the injury, and that this negligence was imputable to the plaintiff, but the court below charged that even if Conlon was negligent the plaintiff would not be responsible therefor, and this ruling was sustained by the Court of Appeals. The opinion of the court ends thus: "It is not intended by this decision to establish a rule which will embrace cases not within the facts developed in this case, as construed by the court and found by the jury."

The English decisions are undoubtedly in favor of privity in negligence. The point was first raised in *Thorogood* v. *Bryan*, 8 C. B. 115, which was an action under Lord Campbell's act. The deceased, wishing to alight from an omnibus in which he was a passenger, got out while it was in motion, and without waiting for it to draw up to the curb; and, in doing so, he was knocked down and fatally injured by an omnibus belonging to the defendant. Williams, J., who tried the cause, told the jury that if they were of opinion that want of care on the part of the driver of the omnibus in which the deceased was travelling, or on the part of the deceased himself, had been conducive to the injury, their verdict must be for the defendant. A rule for a new trial on the ground of misdirection having been obtained, was, after consideration, discharged by the court, Coltman, J., observing: "The negligence that is relied on as an excuse is not the personal negligence of the party injured, but the negligence of the driver of the omnibus in which he was a passenger. But it appears to me that, having trusted the party by selecting a particular conveyance, the plaintiff has so far identified himself with the owner and her servants, that if any injury results from their negligence he must be considered a party to it." To the same effect Maule, J., says: "On the part of the plaintiff, it is suggested that a passenger in a public conveyance has no control over the driver. But I think that cannot with propriety be said. He selects the conveyance. He enters into a contract with the owner, whom, by his servant, the driver, he employs to drive him. If he is dissatisfied with the mode of conveyance, he is not obliged to avail himself of it."

A like decision was come to in the case of *Bridge* v. *The Grand Junction Railway Company*, 3 M. & W. 244, where it was held in a case of a collision between two trains, that the plaintiff must show the accident to be due exclusively to the defendant's negligence, and that joint negligence of the defendant, with other persons having charge of the train in which the plaintiff was travelling, was not sufficient.

In *The Milan*, Lush. Adm. 388, Dr. Lushington said he would not be bound by and did not approve of *Thorogood* v. *Bryan*, and in the note to *Ashby* v. *White*, 1 Smith's L. C. (6th Eng. Ed.) 266, that case was sharply criticised. See, also, S. C., 7th Am. Ed. at p. 481. And consult *Rigby* v. *Hewitt*, 5 Exch. 240, and *Greenland* v. *Chaplin*, id. 243.

The question was again directly involved in *Child* v. *Hearn*, 22 W. R. 864; L. R., 9 Ex. 176. The facts of that case were as follows: The plaintiff, a plate-layer, in the employment of a railway company, was returning from work along their line upon a trolly, when some pigs belonging to the defendant escaped from his field, which adjoined the railway, and running on to the line in front of the trolly, upset it, thereby causing the injury to the plaintiff, for which he sought to recover damages from the defendant. A verdict was entered for the plaintiff, which the court afterward set aside, holding that the company had not maintained a sufficient fence under 8 Vict., c. 20, s. 68, and that the plaintiff could not recover, since he was identified with the company whose line he was using for their purposes. Bramwell, B., in his judgment, observed: "The plaintiff was a servant of the owner of property which was unfenced through the owner's default. It is manifest, as I have before said, that if the pigs

got on to that unfenced property through its owner's default, the owner could not maintain an action; and, if so, it is impossible to say that a third person using the property through the license of the owner, and on his behalf, can. The servant can be in no better position than the master when he is using the master's property for the master's purposes. Therefore, without saying anything as to the decision in *Thorogood* v. *Bryan*, it is sufficient to say that the defendant's pigs escaped through the negligence of the plaintiff's employer, and that, having met with the accident through his employer's negligence, the plaintiff can maintain no action against the defendant."

This decision has recently been followed by the same court in the case of *Armstrong* v. *The Lancashire and Yorkshire Railway Company*, 23 W. R. 295; L. R., 10 Ex. 47. The plaintiff, who was in the employ of the London and North-Western Railway Company, sued the defendants, over whose line the North-Western have running powers, for compensation for an injury he had sustained from a collision between some of the defendant's trucks and a North-Western train in which he was travelling. It appeared that the North-Western train being late, the station-master at one of the defendant's stations ordered the trucks in question to be shunted, the signal being put at "danger" while this was being done. Notwithstanding this, the driver of the North-Western train came on, and the collision ensued by which the plaintiff was injured. The jury found that there was negligence in the defendants in shunting at a time when the North-Western train was overdue, and in the driver of the latter in disregarding the signals, and it must be assumed that it was on the part of the defendant's negligence proximately contributing to the accident. A verdict was thereupon entered for the defendants, which the court refused to disturb.

BRAMWELL, B., said: "I am of opinion that this rule must be discharged. It is impossible, I think, to distinguish the present case from *Thorogood* v. *Bryan*, except in one particular, and that is in the defendants' favor. It must not be supposed, so far as my individual opinion is of any value, that I am at all dissatisfied with the decision in *Thorogood* v. *Bryan*. It has been admitted by Mr. Pope that, if his contention is right, the owner of a bale of goods, which was being carried by the defendants, and had been damaged by an accident similar to the one from which the plaintiff has received injury, would be entitled to have an action. The learned counsel was also constrained to admit that if a carriage had been let to hire and injured by the joint negligence of its driver and the driver of another carriage which came into collision with it, the owner of the hired carriage could maintain an action for compensation for such damage. These, I confess, seem to me to be startling propositions. But there is another difficulty. If the present action is maintainable against the defendants, it is upon the ground that they were joint wrong-doers with the London and North-Western Railway Company? If so, there is this difficulty, that one of the wrong-doers is so through contract, and the other by tort. Can there be a joint liability with regard to the negligence or breach of duty toward the plaintiff, and no joint liability as to the contract under which he was being carried? Would another action be maintainable against the London and North-Western Railway Company? Suppose that the plaintiff had merely been an ordinary passenger, could he maintain one action for breach of contract against the London and North-Western Railway Company which carried him, and also another action against the defendants, through whose negligence the coal wagons which caused the accident were left on the line of railway? These are questions worthy of consideration; and in this particular case there is, I think, good reason for holding that the rule in *Thorogood* v. *Bryan* should apply, however unreasonable it may at first sight appear to be. The plaintiff cannot bring an action against the London and North-Western Railway Company, because he was their servant; and yet it is said that he may maintain an action against another company, the defendants, who only contributed to, and certainly were not the proximate cause of the mischief. It would follow from that, therefore, that the servants of a railway company, may in case of a collision sue what I may call the opposing company, but that they cannot sue the company who were the proximate cause of the injury suffered by them. Surely a most preposterous consequence. I am, however,

prepared to decide the present case on the authority of *Thorogood* v. *Bryan*, which, though it may have been questioned and impeached, has never been overruled, and has since been acted on. But, as I have already said, I think this case is distinguishable from that case, and in a point that is favorable to the defendants, and that the latter are entitled to avail themselves of it upon this rule, notwithstanding that there is no cross rule. Certain points were put by the learned judge to the jury, and he reserved leave to the plaintiff to enter a verdict on the ground that, if the findings of the jury were supported by the evidence, and these findings showed the plaintiff to be entitled to the verdict, then it should be entered for him. Now, in assenting to leave to move to enter a verdict against him, the learned counsel for a defendant does not consent to have the matter decided against him and the rule made absolute without regard to the verdict of the jury. He must be taken to adopt the proceedings only so far as they are supported by the evidence. The question whether there was any evidence of negligence in the defendants was left open. The point may be put thus: The defendants, doubtless, were guilty of negligence, but it was negligence the consequence of which the other railway company might have avoided by the use of reasonable care; and it is clear to my mind that the defendants might have maintained an action against the London and North-Western Railway Company to recover compensation for the damage sustained by their coal wagons by reason of the collision, for which the case of *Davies* v. *Mann*, *ubi sup.*, is an authority; and if that be so, it would be highly unreasonable that the plaintiff should have this action against the defendants."

POLLOCK, B., said: "I also think that this rule should be discharged. It is sufficient to say that I think the case not distinguishable from *Thorogood* v. *Bryan*, and is governed by that decision. I must not be taken as in any way expressing dissatisfaction with the decision in that case. The only difficulty I have had in applying it has been in consequence of the use of the word 'identified' in the judgment of the court there. If the court are to be taken as meaning by that word that the plaintiff, by his own proper conduct, as by the selection of the omnibus in which he was riding, so acted as to constitute the driver his agent, the proposition would, I think, be an unsustainable one. But I do not understand the word to be used in that sense. I take the court to mean by it that, under the circumstances of the case, the plaintiff, for the purpose of the action, must be taken to be in the same position as the owner of the omnibus or his driver. The case of *Waite* v. *The North-Eastern Railway Company*, E. B. & E. 719, is an illustration of this, where the child, as far as regards contributory negligence, was 'identified' with its grandmother, in whose charge it was, although it could not be said that the child exercised any volition in the selection of its grandmother for its companion. If, then, the rule laid down by Parke, B., in *Bridge* v. *The Grand Junction Railway Company*, 3 M. & W. 244, that 'although there may have been negligence on the part of the plaintiff, yet, unless he might by the exercise of ordinary care, have avoided the consequence of the defendants' negligence, he is entitled to recover; if, by ordinary care, he might have avoided it, he is the author of his own wrong,' be adhered to, it seems to me that no hardship follows, inasmuch as the plaintiff is only in the same position as the donkey in the case of *Davies* v. *Mann*, 10 M. & W. 546, and, notwithstanding the carelessness of the driver of the train he was travelling by, he would be entitled to recover against the defendants, supposing that their negligence was of a similar character to that of the defendant in *Davies* v. *Mann*. It may be said, why should he not have a right of action against both companies? The answer to that question is that a man may have an action against two tort-feasors for any act causing the injury; but there is no hardship in saying that, if two independent persons are in a position somewhat hostile to each other, then the right to maintain a separate action against one may be an answer to an action against the other, for the plaintiff must show that the negligence of the one whom he sues was the proximate cause of the accident. Therefore, I think that the defendants are entitled to our judgment."

It is to be observed of this case, that the plaintiff was the servant of the company in whose train he was travelling, and was therefore precluded from suing them for the injury

which arose from the negligence of their servants.

In this country the prevailing opinion is unquestionably against imputed negligence. Shearman & Redfield on Negligence, § 46; Wharton on Negligence, § 395. In *Chapman* v. *The New Haven Railroad Co.*, 19 N. Y. 341, the Court of Appeals of this State held that a passenger by railroad is not so identified with the proprietors of the train conveying him, or their servants, as to be responsible for negligence on their part, and could recover for personal injuries from a collision through negligence of the defendant, although there was such negligence contributing to the collision on the part of the train conveying him, as would have defeated an action by its owners. And in *Colegrove* v. *N. Y. & N. H. R. R. Co.*, 20 N. Y., 492, it was held that the injured passenger could maintain his action against the proprietors of both, on the ground of their concurring negligence. These cases were followed and approved in *Webster* v. *Hudson River Railroad Co.*, 38 N. Y. 260.

So in *Metcalf* v. *Baker*, 1 Abb. (N. S.) 431, the Superior Court of New York, at General Term, held as in the principal case, that one riding on invitation with the owner of a private vehicle was not chargeable with his negligence contributing to an injury, occasioned by the negligence of the defendant, to the plaintiff; and to the same effect are *Robinson* v. *N. Y. C., etc., R. R. Co.*, 65 Barb. 146; *Sheridan* v. *Brooklyn City R. R. Co.*, 36 N. Y. 39; *Knapp* v. *Dagg*, 18 How. Pr. 165.

But in *Payne* v. *The Chicago, Rock Island & Pacific R. R. Co.*, 39 Iowa, 523, where the plaintiff was injured at a railroad crossing, by a collision between the wagon in which he was riding and defendant's train, the court decided, without discussing the question, that the negligence of the one who was driving defeated plaintiff's right to recover, citing therefor, *Artz* v. *C., R. I. & P. Railway Co.*, 34 Iowa, 153. But the case is like that of *Beck* v. *East River Ferry Co.*, 6 Rob. 82, where the plaintiff and the one guilty of negligence were engaged in a joint enterprise. In the Iowa case, three neighbors, one of whom was plaintiff's intestate, were travelling for a common purpose in a wagon belonging to none of them, but procured for the purpose. They drove by turns. The case was correctly decided, and is not an authority against the doctrine of the principal case.

In *Bennett* v. *The New Jersey Railroad Co.*, 7 Vroom, 225; S. C., 13 Am. Rep. 435, it was held that where a passenger in a horse car is injured by the carelessness of the engineer of a railroad company, in the management of his locomotive, it is no defence to show contributory negligence in the driver of the horse car.

In *Lockhart* v. *Lichtenthaler*, 46 Penn. St. 151, this question was considered at great length. The action was brought to recover damages under a statute by the widow and children of one killed by a collision between a train of cars and oil barrels owned by the defendant, and placed too near the track by his servants. The deceased was a brakeman on a car belonging to a coal company, but which was drawn by a locomotive belonging to the railroad and controlled by its servants. The court held that the deceased was not a servant of the railroad company, but that he "must be considered in the light of a passenger in charge of property being conveyed with himself by the railroad company for his employers," and that if the negligence of the railroad *directly* contributed to the accident, the defendant would not be liable. After a review of the authorities, Thompson, J., who delivered the judgment of the court, said: "If in this case there was no contributory negligence chargeable to those conducting the train, by which the cars in charge of the deceased were with himself being conveyed; in other words, if their negligence did not *directly* contribute to the disaster, although they may have been negligent in a *general sense*, the defendants will be answerable if the act of their servants or agents was the *proximate* cause of it. The negligence on the part of the train which would be a defence must be directly involved in that result; it must by itself, or concurring with the defendants, be the *proximate* cause of the death. For instance, running too rapidly on a road in bad repair, driving instead of drawing the train, would not abstractly be such negligence as would be a defence. To be such, the consequences of these acts, or some of them, must have directly entered into and become active agents in the very disaster itself. This must be the rule of all such cases."

Smith v. *Smith*, 2 Pick. 621, is frequently cited as an authority in support of the rule of *Thorogood* v. *Bryan*, but all that was decided in that case was that one who is injured by an obstruction placed unlawfully in a highway cannot maintain an action for damages if it appears that he did not use ordinary care by which the obstruction might have been avoided. This rule is well established, and is, we take it, not in conflict with the principal case. See *Styles* v. *Geesey*, 71 Penn. St. 439; *Cleveland, Columbus & Cincinnati R. R. Co.* v. *Terry*, 8 Ohio St. 570; *Williams* v. *Mich. Cent. R. R. Co.*, 2 Mich. 259; *Murphy* v. *Deane*, 3 Am. Rep. 390.

In *Puterbaugh* v. *Reasor*, 9 Ohio St. 484, the plaintiff put R. in charge of his team. R. and the defendant engaged in a fight which frightened the team and it ran away, and one horse was killed. The defendant was held not liable because the plaintiff, having placed R. in charge of the team, was responsible for his negligence. Sherman and Redfield cite this case as well as that of *Cleveland, etc.*, v. *Terry*, and *Smith* v. *Smith*, *supra*, as authorities for the rule of *Thorogood* v. *Bryan*, but they are obviously not so as to the question of privity in negligence.—*Albany Law Journal.*

AGENCY—RIGHTS OF AGENT AGAINST THIRD PERSONS IN TORT.

Any special or temporary ownership of goods, with immediate possession, is sufficient to maintain an action for conversion: Legg *v.* Evans, 6 M. & W. 36. An agent having such special property, with immediate possession, may maintain an action against the absolute owner for wrongful conversion, but can only recover damages in respect of his limited interest: Roberts *v.* Wyatt, 2 Taunt. 268. If an agent is not in possession at the time of the conversion, and has to rely upon his right only, he may be called upon to prove a good title, and the defendant will be allowed to rebut his title by showing a *jus tertii*: Leake *v.* Loveday, 4 M. & G. 972; Gadsden *v.* Barrow, 9 Ex. 514. Where the defendant has disturbed the actual possession of the plaintiff, he will not be allowed to set up a *jus tertii*, unless he can justify his act under the authority of the third party: Jeffries *v.* The Southwestern Railway Company, 5 E. & B. 802; 25 L. J. 107 Q. B.

First, as to the cases where the agent has been in possession of the goods or chattels in respect of which he sues:

In Burton *v.* Hughes (2 Bing. 183) the owner of furniture lent it to plaintiff under the terms of a written agreement. The plaintiff placed it in a house occupied by the wife of a bankrupt. The assignees of the bankrupt seized the furniture, and the Court of Common Pleas held that the plaintiff might recover it in trover without producing the agreement. "The case of Sutton *v.* Buck, 2 Taunt. 302, which has been referred to," said Chief Justice Best, "confirms what I had esteemed to be the law upon the subject, namely, that a simple bailee has a sufficient interest to sue in trover." In that case a person whose title was not completed by registry of a regular conveyance sued in trover to recover a ship of which he was possessed. "Suppose a man," observed Chief Justice Mansfield, "gives me a ship, without a regular compliance with the Register Act, and I fit it out at £500 expense, what a doctrine it is that another man may take it from me and I have no remedy." "There is enough property in the plaintiff," remarked Mr. Justice Lawrence, "to enable him to maintain trover against a wrongdoer; and, although it had been urged that the contract is void with respect to the rights of third persons, as well as between the parties, yet so far as regards the possession, it is as good as against all except the vendor himself."

The rule laid down by Mr. Justice Chamber, in the case cited by Chief Justice Best, is that an agister, etc., a carrier, a factor may bring trover. A general bailment will support the action, though the bailment is made only for the benefit of the true owner.

In Rooth *v.* Wilson, 1 B. & Ald., 59, which was an action on the case against the defendant for the not repairing the fences of a close adjoining that of the plaintiff, whereby a horse of the plaintiff fell into the defendant's close and was killed, it was objected that the plaintiff had not such a property in the horse as to entitle him to maintain the action, he being merely a gratuitous bailee. A verdict having been found for the plaintiff, the court discharged a rule for a new trial. "I think," said Mr. Justice Abbott, "that the same possession which would enable the plaintiff to maintain

trespass, would enable him to maintain this action." Mr. Justice Holroyd based the liability of the defendant on the ground that the plaintiff was entitled to the benefit of his field not only for the use of his own cattle, but also for putting in the cattle of others.

Secondly, as to cases where the agent has not been in possession:

In Fowler *v.* Down (1 B. & P., 44), which was decided by the Court of Common Pleas in 1797, Chief Justice Eyre pointed out that it is not true that in cases of special property the claimant must have had possession in order to maintain trover, citing the case of a factor, to whom goods have been consigned, and who has never received them.

In Bryans *v.* Nix (4 M. & W., 775), a corn merchant, T, who had been in the habit of consigning cargoes of corn to the plaintiffs as his factors for sale at Liverpool, obtaining from them acceptances on the faith of such consignments, obtained from the masters of canal boats 604 and 54, receipts signed by them for full cargoes of oats deliverable to the agent of T in Dublin, in care for the plaintiffs. T inclosed the receipts to the plaintiffs, and drew a bill on them against the value of the cargo, which the plaintiffs accepted, on 7th Feb., and paid when due. On 6th Feb., W., an agent of the defendant, who was T's factor for sale in London, pressed T for security for previous advances, and T gave W an order on the Dublin agent to deliver to W, the cargoes of the boats on the arrivals. Only boat 604 was loaded when the receipt was given by the masters, and the acceptances were obtained from the plaintiffs. The loading of 54 was completed on the 9th, and T then sent to W a receipt signed by the master, similar to that sent to the plaintiffs, making the cargo deliverable to W, who took possession of both cargoes. The court held that the property in the cargo of boat 604 vested in the plaintiffs on their acceptance of the bill, and that they were entitled to maintain trover for it; but that they could not maintain trover for the cargo of boat 54, since none of it was on board, or other specifically appropriated to the plaintiffs when the receipt for that boat was given by the master.

"The transaction," said Baron Parke, who delivered the judgment of the court, "is in effect the same as if T. had deposited the goods with a stake-holder who had assented to hold them for the plaintiffs, in order to indemnify them. As evidence of such a transaction, it is wholly immaterial whether the instruments are bills of lading or not; and it might equally be proved through the medium of carriers' or wharfingers' receipts, or any other description of document, or by correspondence alone. If the intention of the parties to pass the property, whether absolute or special, in certain ascertained chattels, is established, and they are placed in the hands of a depository—no matter whether such depository be a common carrier or shipmaster employed by the consignor or a third person—and the chattels are so placed on account of the person who is to have that preperty, and the depository assents, it is enough; and it matters not by what documents this is effected, nor is it material whether the person who is to have that property be a factor or not; for such an agreement may be made with a factor, as well as any other individual." In Anderson *v.* Clark (2 Bing 20) a bill of lading, making the goods deliverable to a factor, was, upon proof from correspondence of the intention to vest the property in the factor as security for the antecedent advances, held to give him a special property the instant the goods were delivered on board, so as to enable him to sue the master of the ship for their non-delivery. When, however, the relation between consignor and consignee is simply that of principal and factor, the latter has no such interest in consignments that have not come into possession as to entitle him *to* maintain trover against the carrier who claims a lien: Kirloch *v.* Craig, 3 T. R. 783.

Lord Ellenborough observed, in Patten *v.* Thompson (5 M. & S. 350), that "if it be taken that the cargo was consigned to the Liverpool house as a security for advances made by them, this may afford a ground for their claim to detain the same until such time as they are indemnified against these advances on the responsibility they had contracted in respect of the cargo. But the case as it now stands seems to me to go further, and that the defendant, in order to succeed in his claim, must make out this position, that whenever a principal consigns goods to his factor for sale, and is at the same time in a course of drawing on the factor upon account, the circumstance of there being mutual

credits between them, does of itself give to the factor a right, not merely to detain such consignments as shall come to his hands, but to anticipate the possession, and to keep it against the unpaid seller. If there had been any specific pledge of this cargo in the course of the transaction, if bills had been accepted by the Liverpool house on the credit of this particular consignment, or if it had been so stipulated, this would have been a different case."

In Evans *v.* Nichol, Scott, N. R. 43, which was decided in 1841, trover was brought for a quantity of alkali and potash, and the defendants pleaded that the plaintiffs were not possessed, of their own property, of the goods mentioned. At the trial, it appeared, that a manufacturer at Newcastle consigned the potash and alkali to E. & Co., their factors in London, specifically to meet a bill drawn upon them, transmitting to them a receipt signed by the mate of the vessel. The receipts acknowledged the goods to have been received for E. & Co. At the time of the shipment the consignor was indebted to the shipowners for freights due on former shipments. He became bankrupt, whereupon the snipowners refused to sign the bills of lading, claiming a general lien. The vessel reached London, and the shipowners sent to their agents there (the defendants) an order for the goods in question, The defendants received the goods, and refused to deliver them to E. & Co., the plaintiffs. An unsuccessful attempt was made to prove a custom to a general lien, and Chief Justice Tindal ruled upon the other question, that the circumstances of the alkali having, at the time of the shipment, been specifically appropriated by the consignor to the bill, vested such a property therein in the plaintiffs as to enable them to maintain trover. A rule *nisi* to enter a non-suit was discharged.

Maule, J, said, "Upon the delivery of the goods to the defendants to be delivered to the plaintiffs, and the defendants' acceptance of them upon those terms, the property vested in the plaintiffs, who had an interest in them, viz., the interest of persons with whom the goods were pledged. And this view of the case is strongly supported by the decision of the Court of Exchequer in Bryans *v.* Nix, 3 M. & W. 15. It is clearly competent to a man to sell goods to another, and to vest in him the property, though the goods are not present. It is admitted that the plaintiff's right to recover would have been indisputable had the relation between Clapham (the consignor) and the plaintiffs been that of vendor and vendees, instead of pawner and pawnees. But the goods having been shipped by Clapham to the order of the plaintiffs upon their acceptance of the £500 bill, and the defendants having received them for the purpose of being delivered to the plaintiffs, and Clapham not having revoked the consignment, it appears to me that the plaintiffs acquired such an interest in the property and right to the possession as to entitle them to maintain trover against the defendants."

The case of Haille *v.* Smith, 1 B. & P. 563, bears a resemblance to Evans *v.* Nicholl. A, of Liverpool, wishing to draw upon the banking house of B in London, agreed, among other securities given, to consign goods to a mercantile house consisting of the same partners as the banking house, though under the firm of B and C. Accordingly he remitted the invoice of a cargo and the bill of lading indorsed in blank to B and C, but the cargo was prevented from leaving Liverpool by an embargo. A then became bankrupt, being considerably indebted to B, and the cargo was delivered to his assignee by the captain. It was held that B and C might maintain for the cargo against the captain.

In Kinloch *v.* Craig, (3 T. Rep. 783), Bruce *v.* Wait, (3 M. & W. 15), and Nichols *v.* Clent (3 Price, 547), there was no documentary or other evidence to prove that the intention of the consignors was to vest the property in the consignee from the moment of delivery to the carrier.—*W. Evans, in London Law Times.*

Mr. H. C. Wethey, barrister-at-law, and reporter to the Court of Queen's Bench, Ontario, died on the 22nd ult. The deceased was called to the bar in Hilary Term, 1871, and succeeded Mr. Christopher Robinson as reporter of the Queen's Bench. As a reporter, Mr. Wethey was accounted most industrious and painstaking, while his amiable qualities gained him the esteem and affection of his professional brethren.