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CONTRIBUTORY NEGLIGENCE.

ON whom does the *onus* of proving the existence, or absence of, contributory negligence lie?

"There are two things for him (the plaintiff) to establish, one is affirmative, and the other negative. It is for the plaintiff to shew that the accident which happened to him was caused by a negligent act of the defendants, or of those for whose negligent acts the defendants are liable, and that that accident was produced as between him and the defendants solely by the defendants' negligence in this sense, that he himself was not guilty of any negligence which contributed to the accident; because even though the defendants were guilty of negligence which contributed to the accident, yet if the plaintiff also was guilty of negligence which contributed to the accident, so that the accident was the result of the joint negligence of the plaintiff and of the defendants, then the plaintiff cannot recover; it being understood that, if the defendants' servants could by reasonable care have avoided injuring the plaintiff, although he was negligent, then the negligence ol the plaintiff would not contribute to the accident." *Per Brett. M. R., in Davey v. London and South Western Ry. Co. 12 Q. B. Div. 70 (1883).*

This language is clear enough, and it is the holding of the Court of Appeal in England. Is it law?

Although the point was not directly in issue in *Dublin, Wicklow and Wexford Ry. Co. v. Slattery, 3 App. Ca. 1155 (1878)*, the opinions of several eminent judges may be found there. Lord Hatherly said: "It appears that the course in Ireland is to raise such a case by a plea, but the form in which it is raised can make no difference in the substance of the case. Whether introduced under the plea of 'not guilty,' or by a special plea, such a defence must be proved *by the party asserting it*." Lord Penzance said: "I entirely fail to see how the shifting of the *onus* or burthen of proof in the course of the trial can alter the issue itself, *which is an affirmative, and not a negative one*. . . . . Whether the plaintiff gives any evidence or not, the affirmative of the issue in question is none the less ultimately upon *the defendant*, and he must satisfy the jury, and not the judge, that the evidence has established it." Lord Blackburn said: "If in the present case no evidence at all had been given to shew that there was neglect of duty in the deceased occasioning the accident, no doubt it must have been taken that there was no such neglect of duty. So far the *onus* was at the beginning of the trial on the *defendants*." Lord Coleridge agrees that "there are two things for him (the plaintiff) to establish," but his catalogue is not the same as that of the Master of the Rolls in the Davey case:—"There must be evidence of negligence on the part of the defendants, and also that the negligence in fact caused the injury complained of. . . . . The plaintiff fails, if he fails to shew that the defendants caused the wrong, and he does so fail, if he shews that he caused it, or that the deceased caused it himself. . . . . The . . . . plaintiff may fail . . . . to prove his cause of action, by proving his own negligence, as well as by not proving the negligence of the defendant. It is, therefore, I think the duty of the judge to withdraw the case from the jury if by the plaintiff's own evidence, at the end of the plaintiff's case, or by the unanswered and undisputed evidence on both sides, at the end of the whole case, it is proved, either that there was no negligence of the defendants which caused the injury, or that there was negligence of the plaintiff which did."

Let us put the holdings of the Master of the Rolls and the Chief Justice together for comparison.

The plaintiff is bound to prove—

As per the Master of the Rolls:

1. That the accident was caused by a negligent act of the defendants.

2. And that he himself was not guilty of any negligence which contributed to the accident.

As per the Chief Justice:

1. That there was negligence on the part of the defendant.

2. And that the negligence in fact caused the injury.

The Chief Justice therefore divides the first requirement of the Master of the Rolls into two, and omits the second.

In many cases the distinction is unimportant; for it being admitted that the plaintiff must show that the accident was caused by the defendant's negligence, it lies upon him to detail all the circumstances of the accident, and in doing so he necessarily describes his own actions. In other words, usually a plaintiff cannot prove that the defendant's negligence *caused* the accident—was the effective cause of it—which he must do, without, at the same time, showing his own carefulness.

This is a different thing, however, from saying that in all cases the plaintiff must prove the propriety of his own conduct. He is not bound to prove affirmatively, for instance, that he looked up and down the railway track to see if the train which ran over him was coming (though if he did not this would constitute contributory negligence); for if such were the law, and the man, instead of being wounded, were killed, his executors could, in all probability, never prove their case. See *Peart v. Grand Trunk Ry. Co. 10 Ont. App. R. 191.*

We submit, therefore, that the opinion of the Chief Justice is correet.

Under what circumstances contributory negligence is a good defence has been discussed in *Siner v. G. W. Ry. L. R. 4 Ex. 119* (largely overruled), *Robson v. North Eastern Ry. Co.*, 2 *Q. B. Div. 85; Rose v. North Eastern Ry. 2 Ex. Div.; Jackson v. The Metropolitan Ry. Co. L. R. 3 App. Ca. 197, Haldane v. Great Western Ry. Co. 30 U. C. 97; Jones v. Grand Trunk Ry. Co., 45 U. C. 198; Edgar v. Northern Ry. Co. 4 Ont. R. 201; Bliss v Boeckh, 8 Ont. R. 451;* and in the cases above noted.

THE LAW REPORTS.

UNDER the present regulations of the Law Society the Editor of the LAW REPORTS is restricted to 32 pages per month. The consequence is that the reporting is falling very much in arrear, and that the profession is deprived of the advantage of a prompt perusal of many valuable judgments. We would recommend the Law Society to remove all limitation—to require that all cases worth reporting should be reported, and reported without delay.

That the delay may be the less prejudicial we give below a synopsis of the points determined during the last Term. The reports, unless some new arrangement be made, cannot be published for three months to come.

PARENTEAU v. HARRIS. *Husband and wife.—Execution.—Purchaser for value without notice.* A husband and wife owned adjoining farms. That of the wife was worked entirely by the husband; his horses and implements being used for the purpose, and the wife in no way interfered, or took part, in it. The seed grain had been paid for partly by the husband and partly by the wife. A man employed at

the threshing said he threshed for the husband—"I was to be paid by the one who employed me." Other threshers were paid by the husband's labor. *Held*, that the grain was the property of the husband.

Upon the evidence it was held that a purchaser of the grain had notice of the existence of an execution, and took, therefore, subject to it.

JONES v. HENDERSON. *Company.—Powers of Manager.—Prima facie* it is not within the power of a manager of a company engaged in the manufacture of farming implements to pledge the goods or assets of the company to a creditor of the company.

MILLER v. HENRY (C. L.) *Order to examine party residing abroad.* (1) A party to an action resident abroad may be ordered to attend and be examined upon the pleadings. (2) It is in the discretion of the judge whether to make the order *ex parte* or upon summons. (3) A copy of the order must be served upon the opposite attorney, otherwise attendance cannot be enforced. Service upon a firm of attorneys resident abroad having no instructions to receive service is not sufficient.

YOUNG v. SHORT. *Invalid chattel mortgage.—Possession after fi. fas. but before seizure.* After a defective chattel mortgage bad been made to the plaintiff, the defendant placed an execution against the mortgagor in the sheriff's hands. Before actual seizure the mortgagee took possession. *Held*, that he was not a person who had acquired "the title to such goods .... *bona fide*, and for valuable consideration" without notice of the writ, within 19 & 20 Vic. c. 97.

The Act 46 & 47 Vic. c, 30 is not retrospective.

SHARPE v. MCBURNIE. *Counter-claim.—"Breaking."* A claim not arising and matured before the issue of the writ cannot be set up by way of set-off or counter-claim. Such a plea should show that the claim asserted had so matured, (Overruling Taylor, J.) Dubuc, J., *diss.*

"Breaking" land in a contract does not include back-setting.

ANLY v. HOLY TRINITY CHURCH. *Mechanic's Lien Act.—Sub-contractor.—Equitable assignment by contractor.* Until a lien under the Act has been acquired by a sub-contractor, the contractor may give an equitable assignment of the contract price. In such case the sub-contractor can recover nothing from the owner of the land.

BRAUN v. HUGHES. *Sale of land.—Rescission by one of several joint purchasers.* Five persons, of whom the plaintiff was one, jointly purchased land from the defendants. On a bill to set aside the purchase upon the ground of fraud, *Held*, that the sale could not be rescinded in part, and that the plaintiff's only remedy was by deceit.

The court refused to allow the plaintiff to procure a conveyance from the other purchasers, and thus rescind the whole sale; such other purchasers not being parties to the suit.

RANKIN v. MCKENZIE. *Joint covenant.—Liability of executors of deceased covenantor.* "The mortgagors do hereby for themselves, their heirs, executors and administrators, covenant, promise and agree, to and with the said mortgagee, his heirs and assigns, in manner following, that is to say, that the said mortgagors, their heirs, executors, administrators, or some or one of them, shall and will, well and truly pay or cause to be paid," &c., is a joint covenant.

The cases in which joint covenants will be held to be joint and several discussed.

RE BANNERMAN. *Real Property Act of 1885."—Probate.* Before executors can apply for registration as owners of the defendant's land they must prove the will in Surrogate Court.

RE IRISH. *"Real Property Act of 1885."—Unpatented lands.* (1) By section 28 lands "when alienated" by the Crown, "shall be subject to the provisions of this Act." The word "alienated" means completely alienated—that is

by patent. (2) Lands unalienated, by patent, on the 1st July, 1885, remain under the old law until brought under the provisions of the Act. (3) Lands brought under the Act become chattels real for the purpose of devolution at death, but are lands in other respects, and are not exigible under *fi. fa.* goods. (4) A person entitled to a patent for a homestead, or pre-emption, having received a certificate of recommendation for patent, countersigned by the Commissioner of Dominion Lands, may bring such lands under the operation of the "Real Property Act, 1885." *Taylor, J., diss.* (5) After application under the Act no deeds can be registered in the county registry offices. (6) Conveyances of lands, patented after the 1st July, 1885, in the statutory short form may be treated as substantially in conformity with the forms given in the Act.

CANADA P. L. & S. CO. v. THE MERCHANTS BANK. *Fixtures.* Articles not otherwise attached to the land than by their own weight are not to be considered as part of the land, unless the circumstances are such as to show that they were intended to be part of the land, the *onus* of shewing that they were so intended lying on those who assert that they have ceased to be chattels.

A machine complete in itself, unattached to the realty, but receiving motive power by a belt or pipe from some other machine does not lose its character as a chattel merely because it is used in a building, where a manufacture for which the machine was adapted, is carried on.

PLUMMER WAGGON CO. v. WILSON *Law Stamps.* A jury notice was filed without the usual $12 in stamps being affixed. *Held*, regular, as the Act relating to stamps is *ultra vires.*

THE BRADLAUGH CASES.

MR. BRADLAUGH has the Court of Appeal against him again. *Attorney-General v. Bradlaugh, 14 Q. B. Div. 667.* It was against him before in *Clarke v Bradlaugh, 7 Q. B. Div. 38*, but the House of Lords reversed the decision, and Mr. B. will probably endeavour to procure the House to repeat the operation.

How simple a thing it is to start a long course of difficult and expensive litigation. After Mr. B.'s election for Northampton in the spring of 1880, upon entering the House of Commons, he claimed to be allowed to take an affirmation instead of the usual oath. Afterwards he expressed his willingness to take the oath, and it was referred to a select committee to consider whether the House had any right to prevent him so doing. Various other proceedings were taken and ultimately he was expelled and a new writ issued. If he had taken the oath in the first place there would have been no difficulty, but claiming the right to affirm, and then abandoning it, brought in its train all that followed—a small enough cause for so much effect.

After his re-election, while the House was in session, Mr. B., accompanied by two members, approached the table. Mr. Speaker rose and called "Order, order;" but Mr. B., directly he reached the table, proceeded to read the oath from a paper which he held in his hand, kissed a New Testament which he had brought with him, subscribed the paper, and left it upon the table, together with the certificate of his return. On the same day he took part in three divisions in the House; and, this being done, the question whether he had forfeited the penalties prescribed by the statute for sitting and voting without having taken and subscribed the oath, was in fair shape for trial in the courts.

Upon a subsequent occasion Mr. B. again voted in a division of the House, and upon the same day a writ was issued against him by one Clarke, claiming the penalties. The old point, as to the division of a day, was at once suggested; and the statement of claim was demurred to upon the ground that, as a writ is supposed to issue at the earliest moment of the day of its date, it had issued before the offences complained of. Mr. B. failed in his demurrer, *7 Q. B. Div. 151;* and in the Court of Appeal he fared no better, *8 Q. B. Div. 63.*

Clarke only survived this difficulty to meet one more serious. It was said that "when a penalty is created by statute, and nothing is said as to who may recover it, and it is not created for the benefit of a party grieved, and the offence is not against an individual, it belongs to the Crown, and the Crown alone can maintain a suit for it." Mr. Justice Matthew thought that this proposition was unsound, and the Court of Appeal agreed with him (*7 Q. B. Div. 38*), but the House of Lords reversed the decision (*8 App. Ca. 354*) and this terminated the action in Mr. B.'s favor.

It only established, however, that the Attorney-General, and not a common informer, must be plaintiff, and an information was forthwith filed. In this the real points in controversy were tried at bar in the Queen's Bench Division, when a verdict was entered against the defendant. The stability of that verdict has been upheld by the Court of Appeal.

The principal question decided is as to the religious belie necessary to the taking of an oath. The Master of the Rolls disposes of it by citing the old decision in *Omichund v. Baker, 1 Atk. 21*, where Miles, C. J., said, "I am of opinion that such infidels as believe in a God, and that He will punish them if they swear falsely, may and ought to be admitted as witnesses in this, though a Christian country. And on the other hand, I am clearly of opinion that such infidels (if any such there be) who either do not believe in a God, or if they do, do not think that He will either reward

or punish them in this world or the next, cannot be witnesses in any case, nor under any circumstances." The jury had found that Mr. B. had no belief in a Supreme Being, and was a person upon whose conscience an oath, as an oath, had no binding force. And it was, therefore, held that although he "may have taken something which binds him according to his own feelings . . . that is not what the Act of Parliament requires. It requires an oath; and he has not taken an oath."

If this reasoning be permitted it will have a far-reaching effect. Is will be observed that the point of the decision is this :—Admit for the purposes of argument, that a member of Parliament, observing all the proper formalities, has assumed to take the usual oath, and no one has for months questioned his right to vote, he may, nevertheless, be sued for the penalties and be mulcted if it can be shown that his religious belief was defective. The decision is well calculated to add a new terror to indulgence in political life. There are, probably, a good many members of the British House of Commons who could not successfully defend themselves in such an action. It involves this also, that a witness in any case may take an oath, swear falsely, and escape conviction for perjury if he can show that his belief was not up to the legal standard.

If this were the only point in the case we should expect to see it reversed in the House of Lords. On the other ground, however, that the rules of the House did not permit the taking of the oath in the manner adopted, the decision may probably be upheld. It would be clearly insufficient for a member to stand up in his place, while other business was proceeding, and after mumbling some words to say that he had taken the oath. And in the present case the proceedings were equally informal.

SECOND ACTION FOR NEW DAMAGE.

IT is plain law that for one cause, there can be but one action; but, although that statement seems to want nothing in clearness, difficulty often arises in its application.

In case of an assault there can be but one recovery of damage, although in after years a disease, theretofore unsuspected, is developed from the injuries. Here there is a well defined cause of action settled by a judgment; and no further damages can be sought.

The question seems, however, not always to be so easy fo solution. A recent case in England, *Mitchell v. Darnley Main Colliery Co., 52 L. T. N. S. 675*, illustrates the difficulty upon which learned judges have differed.

The owner of a mine by excavation causes a subsidence of the soil which is owned by another; damage for the subsidence is recovered and paid; and subsequently a further subsidence takes place. In such case can a new action be brought for the new damage? The mine-owner has done no new act. The second subsidence seems to be a development of the damage at first done, just as the disease in the assault case. But although it appears at first sight to be strictly analogous, it in reality is not so.

Let us take another case by way of illustration. Let us suppose that a drain is constructed which has the effect of improperly throwing water upon an adjoining owner. It is plain that for the mere construction of the drain no action will lie. A man has a right to build as many drains upon his own property as he likes, provided he does not permit them to become a nuisance to his neighbours. After the first flood an action is brought and damages recovered and paid. During the next year a similar flood occurs. And now the question arises,—Can a second action be brought? The answer seems to be sufficiently easy. Of course it can.

And yet the defendant has done no new act. He has, however, omitted to do something. The second flooding is the result of *not removing* the drain. And for every subsequent flood a new action can be brought.

To return to *Mitchell v. Darnley Main Colliery Co.* Is it analogous to the assault case, in which the new damage, the disease, cannot be sued for, or to the drain case in which it can? Undoubtedly, we think, to the latter. No action could be brought for the mere excavation. The mine-owner could excavate as much as he liked, provided he did no damage to the owner of the soil. Until a subsidence took place there could be no action at all, for no damage had accrued, and the mine-owner might at any time put in supports and prevent the happening of any damage at all. After a subsidence an action may be brought for the *subsidence*, not for the *excavation*. In this action it would be just as impossible to recover for an anticipated further subsidence, which might be prevented by the defendant shoring up the soil, as in the drain case to recover for subsequent years of floods, which might also be prevented by the removal of the drain. And so it has at last been decided, but not without overruling. *Lamb v. Walker, 3 Q. B. Div. 389;* and *Nicklin v. Williams, 10 Ex. 259.*

INTEREST REIPUBLICÆ UT SIT FINIS LITIUM.

ANOTHER well-worn belief—another legal axiom—has been thrown open to discussion. If A. sues B. and, after a hard-fought contest, succeeds, can B. in a subsequent action avoid estoppel by pleading that the judgment was obtained by perjury or fraud?

If A. sues B. for goods sold and delivered, and B. being unable to find his receipt is beaten, it is clear law that he has no remedy, if the time for obtaining a new trial is passed. This was so held in the leading case of *Marriott v. Hampton, 2 Sm. L. C. (8th Ed.) 421.*

Even where there has been no trial in the action, but a writ has been issued, money paid even under protest cannot be recovered. Although in this case the element of fraud may sometimes alter the general rule. *Brown v. McKinally, 1 Esp. 279; Hamlet v. Richardson, 9 Bing. 644; Milnes v. Duncan, 6 B. & C. 679.*

In *Flower v. Lloyd, 10 Ch. Div. 327*, the plaintiff sought to have what he alleged to have been a fraudulent judgment set aside. The plaintiffs had brought an action against the defendants to restrain infringements of a patent process for printing on metal plates. Under an order of the court an expert appointed by the plaintiffs was permitted to inspect the defendants' work, the defendants undertaking to show him the whole process. Upon the evidence thus acquired the plaintiffs were defeated in the action. It was afterwards alleged that the expert had been deceived by the defendants, and an attempt was made upon this ground to impeach the judgment. The proof failed, but the Lord Justice Baggallay said, "Whilst I am fully sensible of the evils and inconveniences which must arise from re-opening what are apparently final judgments between litigant parties, I desire to reserve for myself an opportunity of fully considering

the question, how, having regard to general principles and authority, it will be proper to deal with cases, if and when any such arise, in which it shall be clearly proved that a judgment has been obtained by the fraud of one of the parties, which judgment, but for such fraud, would have been in favor of the other party. I should much regret to feel myself compelled to hold that the court had no power to deprive the successful but fraudulent party of the advantages to be derived from what he had so obtained by fraud." The Lord Justice James, speaking for the Lord Justice Thesiger as well as himself, relies upon the old maxim, the caption of this article: "Where is litigation to end if a judgment obtained in an action fought out adversely between two litigants *sui juris* and at arm's length could be set aside by a fresh action on the ground that perjury had been committed in the first action, or that false answers had been given to interrogations, or a misleading production of documents, or of a machine, or of a process, had been given? There are hundreds of actions tried every year in which the evidence is irreconcilably conflicting, and must be on the one side or other wilfully and corruptly perjured. In this case, if the plaintiffs had sustained on this appeal the judgment in their favor, the present defendants in their turn might bring a fresh action to set that judgment aside on the ground of perjury of the principal witness and subornation of perjury; and so the parties might go on alternately *ad infinitum*. . . . Perjuries, falsehoods, frauds, when detected, must be punished and punished severely; but in their desire to prevent parties litigant from obtaining any benefit from such foul means, the court must not forget the evils which may arise from opening such new sources of litigation, amongst such evils, not the least being that it would be certain to multiply indefinitely the mass of those very perjuries, falsehoods and frauds."

This reasoning seems to us unanswerable, but the doubt having been raised it is not long in being made use of. In *Stewart v. Sutton, 8 Ont. R. 341*, the point came up on demurrer and should, we think, have been settled one way

or another by the judge who heard the argument. He took, however, the extraordinary course of refusing to decide the point, directing the parties to go to trial and see whether the facts as alleged were true, before deciding whether their truth or falsity made any difference in the case.

LAW STAMPS.

OUR court, following the decision of the Privy Council in *Attorney General v. Reed*, has held that the Act relating to law stamps is *ultra vires*. The officials at the court house, however, acting under the direction of the government, refuse to recognize the validity of the decision. In other words, the officers of a court refuse to act upon the law laid down by the same court, confirmed by the Supreme Court and the Privy Council; and the government not only sanctions the proceeding but directs it. The officials excuse themselves on the ground that, if they act as they should, they will be dismissed from office. And the excuse of the government, we suppose, is that they must have revenue. The latter apology would justify burglary. The former is an insult to the government itself.

EDITORIAL NOTES.

Queen's Counsel.

The Hon. C. E. Hamilton, and Mr. N. F, Hagel, have been added to the list of Her Majesty's Counsel. Large numbers in Ontario have also been added; and in many cases are for the first time entitled to say that they are "learned in the law." Many of them have never been seen in court—at all events not since the time, many years ago now, when they agreed to accept the inevitable and sit in their offices; and the great majority never received a brief, unless at their own attorney-hands. No one knew of their ability, as advocates, not even themselves, until Her Majesty declared it.

On the whole, however, we welcome the list and only wish it were larger—that it embraced the whole profession—and then there would probably be an end of the farce. "Whom the gods destroy they first make—numerous." Let them be numerous!

Dialogue between Lawyer and Client.

Who taught me first to litigate,
My neighbour and my brother hate,
And my own rights to overrate?
My lawyer.

Who cleaned my bank account all out,
And brought my solvency in doubt,
Then turned me to the right-about?
My lawyer.

ANSWER.

Who lied to me about his case,
And said we'd have an easy race,
And did it all with solemn face?
My client.

Who took my services for naught,
And did not pay me when he ought,
And boasted what a trick he'd wrought?
My client.

Albany L. J.