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## DIARY FOR DECEMBER.

1. Friday N. T. Day Q. B. Clerk of every Mun. ex. Co. to [ret. number of res. rate-payers to R.G.
2. Satur. Michaelmas Term ends.
3. SUN. .. 1*st Sunday in Advent.*
4. Mon. .. Last day for notice of trial for County Courts.
8. Friday *Con. B. V. Mary.*
9. Satur.. Last day of service of York and Peel.
10. SUN... *2nd Sunday in Advent.*
12. Tues... Qr. Sess. and Co. Ct. sittings in each County.
14. Thurs. Last day for Coll. to ret. roll to Chamb or Treas.
17. SUN... *3rd Sunday in Advent.*
18. Mon. .. Recorder's Court sits. Nomination of Mayors.
19. Tues... Declare for York and Peel.
21. Thurs. *St. Thomas.*
24. SUN... *4th Sunday in Advent.*
25. Mon. .. Christmas Day.
26. Tues... *St. Stephen.* [York and Peel.
27. Wed. .. *St. John Evang.* Last day for notice of trial for
28. Thurs. *Innocents.* Sitt. Court of Error and Appeal com
30. Satur.. Last day on which remain. half G. S. F. payable.
31. SUN... 1*st Sunday after Christmas.* End of Mun. year

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*Owing to the very large demand for the* Law Journal *and* Local Courts' Gazette, *subscribers not desiring to take both publications are particularly requested at once to return the back numbers of that one for which they do not wish to subscribe.*

THE

# Upper Canada Law Journal.

DECEMBER, 1865.

## COMMON CARRIERS.

The necessity for some legislative enactment on this subject, as connected with the too common practice, to which common carriers, particularly railway companies, are addicted, of exempting themselves from liability by imposing special and unreasonable conditions, has lately been again discussed in the court of Queen's Bench.

Whilst admitting that some of the principal reasons, in which originated the strict rule of law as to the liability of common carriers, have passed away with the change of customs and means of transit and traffic that have taken place of late years, it cannot, on the other hand, be denied that it is going to the other extreme to allow public companies to bind the travelling and trading community by all sorts of unreasonable and unfair conditions—conditions not only unreasonable in themselves, but, generally speaking, practically unknown to any but the managers or servants of the company imposing them.

These conditions are, generally, kept in the background; they are often printed in small type in some inconspicuous place in a way-bill, bill of lading or receipt, or whatever the document may happen to be called. Even if the forwarder *is* aware of them, he is not generally in a position to help himself, and must submit to them or else give up business altogether, as there is probably only the one means of transit. In fact, he is, under such circumstances, the victim of a monopoly.

Our attention has been drawn to this subject by the late cases of *Hamilton* v. *The Grand Trunk Railway Co.* 23 U. C. Q. B. 600, and *Bates* v. *The Great Western Railway Co.* 24 U. C. Q. B. 544 (also published in another place in this *Journal*.) In the former case the company received certain plate glass to be carried for the plaintiff, who signed a paper, partly written and partly printed, requesting them to receive it upon the conditions endorsed, which were that the company would not be responsible for damage done to any glass, &c., and the defendants gave a receipt for the glass with the same conditions upon it. The evidence shewed that the damage sued for arose from the gross negligence and improper conduct of the defendants' servants. The court yielded to the authority of decided cases, and held that such a delivery and acceptance formed a special contract, which was valid at common law and exempted the defendants from liability. But the Chief Justice, in giving judgment, intimated that, if it had not been for the weight of authority, he would have decided that such special contracts are a violation of the principles of the common law, which imposed and enforced duties on common carriers for the protection of the public; but though he could not shake off the impression that they are contrary to the public policy so frequently enunciated and so much lauded in the older cases, he was obliged to hold that they are binding.

In the latter case, the declaration stated that the defendants, being common carriers by their railway, received from the plaintiff certain cattle to be carried from Ingersoll to Toronto; and the breach of duty alleged was, that they negligently and improperly detained the cattle at Ingersoll, and kept them in an open and exposed place, owing to which two of them died on the journey, and that, by the unreasonable delay in the carriage and delivery of the others, the plaintiff lost a market, &c.

To this the defendants pleaded a special contract—that the plaintiff undertook all risk of loss, injury or damage in loading, unloading, conveyance and otherwise, arising from the negligence, default or misconduct, criminal or otherwise, on the part of defendants; and that they did not undertake to forward the animals by any particular train, neither were they responsible for the delivery of the animals within any certain time, or for any particular market.

On demurrer, it was held that the plea was good; that the parties could lawfully enter into such a contract; that having done so, their rights and liabilities must be ascertained by the terms of it, and not by the common law.

In both these cases the court alluded to, and deplored the present state of the law, and suggested the propriety of legislative redress as the only means of putting the public upon a fair footing with companies who are *not*, in reality, owing to the present system of special conditions, "common carriers," in the sense that a lawyer would use the words. The defect in the law, which we are now complaining of, was also experienced in England; and Baron Parke, in *Carr* v. *The Lancashire and Yorkshire Railway Co.*, 7 Ex. 708, suggested the same remedy, when he said that it was not a matter for the interference of the courts, "but must be left to the legislature, who may, if they please, put a stop to this mode, which the carriers have adopted, of limiting their liability."

And now as to what statutory alteration should be made in the law. We are not at a loss for a guide in this, for we have the English statute, 17 & 18 Vic., cap. 31, sec. 7, which, with such modifications as the requirements of business in this country or the experience of mercantile men might suggest, would, we think, in a great measure remedy the evils complained of. The enactment is to the following effect:—

That every company (confined in England to railway and canal companies) shall be liable for all loss or injury to any animal or thing in the receiving, forwarding or delivery of them, occasioned by the neglect or default of such company, notwithstanding any notice or conditions made or given by such company contrary thereto; every such notice or condition being declared null and void. Provided that such company may make any conditions in the premises, which shall be adjudged, by the court or judge before whom any question affecting the matter is tried, to be just and reasonable.

The section makes further provision, limiting the *amount* of the liability of the company in certain cases, unless the value is declared to them and an extra payment made. Proof of the value is on the person claiming compensation, and no special contract shall be binding unless signed by the person delivering the goods for carriage.

The facts of the case of *Allday* v. *The Great Western Railway Co.*, 11 Jur. N.S. 12, referred to by the Chief Justice in *Bates* v. *The Great Western Railway Co.*, as exemplifying the benefit of the English act, were as follows: the plaintiff delivered cattle to the defendants to be carried to B station, and at the same time signed a ticket, containing certain conditions, whereby the company claimed immunity "from any consequence arising from over-carriage, detention or delay in, or in relation to the conveying of the said animals, however caused." The cattle were over-carried, and suffered in consequence. The court held that the deterioration of the cattle was an "injury" within the statute already referred to, and that the condition attempted to be imposed was an unreasonable one.

We may mention that the American Courts take a somewhat more liberal and equitable view of the law on this subject. Our readers will find in the *Repertory* a late American case bearing on it.

The courts have done their duty in pointing out the defects in the law. The mode of remedying the evil is hinted at in the cases in our own courts, and is now brought more prominently before the public. It remains, therefore, for the Legislature to pass such a measure as may be necessary to protect the business public, without, at the same time, imposing any unnecessary restriction on the working of what ought to be, and generally are, great public conveniences.

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## WRITS AGAINST GOODS AND LANDS.

The case of *The Ontario Bank* v. *Kerby et al.*, in the Common Pleas, the report of which will be found in another place, and *The Ontario Bank* v. *Muirhead*, 24 U. C. Q. B.

563, following *Oswald* v. *Rykert*, 22 U. C. Q. B. 363, are practical examples of the inconvenient and unfair working of the law, respecting writs of execution both against lands and against goods. It is remarked upon by the learned judge who delivered the judgment of the court, in the case in the Common Pleas, who, whilst pointing out the evils of the present system, suggested that "It would, perhaps, have been a more convenient method of proceeding on executions to have had the one writ against goods and chattels, and lands and tenements, with a direction to the sheriff to levy upon the goods and chattels, as in *elegits*, in the first place; and if there were no goods, or upon these being exhausted, to levy upon the lands, but not to sell them for twelve months after the seizure."

The subject has already received some attention from our Legislators. Mr. M. C. Cameron last session, introduced a bill which among other things proposes, after repealing section 252 of the C. L. P. Act, to enact that "goods and chattels, and lands and tenements, may be included in the same writ of execution; provided always, that the Sheriff shall not expose any lands or tenements for sale, within less than twelve months from the day on which the writ is delivered to him, nor until the goods and chattels of the execution debtor shall have been first disposed of and exhausted." Some such provision as either of these, which are substantially the same, seems desirable, and we hope that at the close of next session we may find that the necessary amendment in the law has been made.

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## LAW SOCIETY—MICHAELMAS TERM 1865.

We are glad to see that the number of persons willing to sacrifice themselves for the good of their country, by becoming lawyers, has somewhat fallen off this term.

Eighteen gentlemen presented themselves for examination for call to the Bar, of whom the following passed:

T. Boyle, Madden; P. M. Campbell, Toronto; M. Caldwell, London; M. O'Driscoll, Pembroke; E. H. Duggan, Toronto; D. Freeman, Hamilton; C. E. Hamilton, St. Catharines; A. Hoskin, Toronto; J. F. McDonald, Toronto; W. A. Reeve, Napanee; Jas. Robb, Hamilton; R. T. M. Walkem, Kingston; S. White, Windsor.

The papers of Messrs. Reeve and Walkem, particularly the former, were considered so satisfactory that they were not called upon for the oral examination.

Of twenty three students who went up for examination for admission as attorneys, only the following obtained certificates:

Jas. Austin, Toronto; G. A. Consitt, Perth; W. M. Cochrane, Hamilton; P. M. Campbell, Toronto; G. O. Freeman, Hamilton; Alex. Goforth, Welland; James H. Mills, Hamilton; E. G. Malloch, Perth; M. J. Macnamara, Kingston; T. K. Morgan, Barrie; A. Parsons, Ottawa; R. T. M. Walkem, Kingston.

Mr. Walkem also distinguished himself in this examination, obtaining we believe, within 15 marks of the total number he could receive in the three papers. He and Mr. Malloch, whose papers were also very good, received the compliment of being passed without oral examination.

The Law Society scholarship examinations being concluded, were awarded as follows:

The first year to Mr. Charles Moss, who obtained 276 marks out of a maximum of 312, the number necessary to obtain a scholarship being 206. Next to Mr. Moss was Mr. Kerr of Perth, who obtained 254 marks and Mr. Arnoldi, who received 242. Another student competed for this scholarship, but did not come up to 206. The Treasurer, in awarding this scholarship, highly complimented Mr. Kerr and Mr. Arnoldi on their proficiency.

No scholarships were awarded for the second or fourth years, the candidates not having reached the qualifying standard.

The scholarship for the third year, was awarded to Mr. Thomas S. Kennedy B. A., Trin. Col., Toronto. The maximum number was 350, the number necessaay to be rated 233. Of the 350, Mr. Kennedy obtained 292, and Mr. Bell, the only other gentleman who came up to the standard, out of seven in all, who went up for examination, received 233. Mr. Kennedy was only in his first year as a student, but, in consequence of his B. A. degree, he could not compete for the second or third year scholarships; the result of the examination was therefore the more creditable to him.

It is thought that arrangements may shortly be made for a course of lectures on medical jurisprudence, by some competent person. The Benchers have agreed to give the room &c.,

if a sufficient class can be made up to defray the expenses of the lecturer.

We may mention for the information of several amongst the students, that we have spoken to those in authority, as to publishing the examination questions, as also the number of marks obtained by the different candidates for call and admission; but it is not thought advisable or judicious, for various sufficient reasons, to publish them.

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Mr. Justice Crompton, who was lately compelled, from ill health, to resign his seat in the Court of Queen's Bench in England, has since died, aged 68. Mr. Lush, Q.C., has been appointed to fill the vacancy. The appointment is said to be an admirable one, having been made, as it ought to have been, solely on account of the high legal attainments of the learned gentleman.

## SELECTIONS.

### THE CASE OF CONSTANCE KENT AND THE PLEA OF GUILTY.

(From the *Law Magazine and Law Review.*)

The case of Constance Kent, in any view of it, is without parallel in the history of crime. In any view of it—whether of her innocence or of her guilt—it belongs to the history of crime, and in either view, whether she was or was not the criminal, it is a case, not only extraordinary, but utterly without parallel. The more closely it is scrutinised, the more it will appear that the secret of that crime is still is veiled in the darkest mystery; and the case not only extraordinary, but remarkably illustrative of the incurable vice and uselessness of our whole system of criminal procedure. From the first stage to the last, it is downright absurdity, but more especially in the first steps; for, of course, in the detection of crime, especially crime of any mystery and atrocity, time is everything; and it is of the very essence of criminal procedure, that the first steps should be swift, prompt, and keenly intelligent. It is not too much to say, and it has been said on this very subject by able writers, that if intelligent and obvious means were at once employed, hardly any murder could escape detection. In this case, for instance, had the inmates of that house, on the morning of the discovery of the deed, been separated, and separately examined, while, in the meantime, without the delay of an hour, while the inmates were being thus occupied, the premises had been carefully searched, and all this had been done under the guidance of some person acute, intelligent, educated, and acquainted with the manifold motives of human nature, and the artifices and mysteries of crime, there can be no doubt that the mystery would have speedily been solved. As it was, however, what with a blundering coroner, and ignorant policemen, and stupid "detectives," and, above all, delay, the opportunity was lost for discovery, and the case has been left for ever a mystery. We say for ever, for though shallow-minded persons, when Constance made her admission of guilt (not confession, for confession in the proper sense she never made) said the mystery was cleared up, we shall have no difficulty in showing that, on the contrary, it has only left the mystery deeper and darker than ever; and all that is capable of being made clear is that the person who has thus asserted that she did the deed, did not do it. And in this last stage of the case, as in the first, the imperfection of our system of procedure is painfully made manifest; in nothing more than this—the blind confidence with which the so-called confession was received, and the entire absence in our law of any provision for an investigation—either on the part of the magistrates who received it, or of the court which gave effect to it—into its truth and reality. It is strange that it has occurred to no one to compare it with the undoubted facts of the case, and the sworn evidence of witnesses, in order to test its truth. It is unfortunate that the court could not do so at the trial, upon a plea of guilty; and though the magistrates took evidence as to the circumstances of the case, which, as we shall show, are utterly inconsistent with the statement of guilt, they, in the course of their duty, could only commit the girl for trial as she had chosen to say she did it. The learned judge at the trial expressed a wish that the case should be gone into with a view to test the confession, and see if it had been made from any other motive than a consciousness of guilt; which of itself implied his impression that it might be so, and that the confession might possibly be false.

Persons who are not acquainted with the history of criminal trials may fancy that the confession of a crime is certain to be true, but lawyers know that confessions are often, for some reason or other, untrue. And this even in capital cases, especially where, as in this instance, there is abundant reason to believe that the party making the admission of guilt knew that there was no danger of the capital penalty being inflicted. Persons commit suicide daily, and confession, if death ensue, is but a form and mode of suicide. And if the sacrifice is made in despair on one side, under the pressure of intolerable misery, and from the most powerful motives of affection on the other hand, with a view to save those who have been involved in ruin by some terrible event in which the world has implicated an entire family, the idea of such a sacrifice—under the combined force of the most powerful motives that can influence human nature

—is infinitely more probable than that such a deed should have been done by such a person, and admitted in such a manner; that is, admitted without being confessed. The learned judge himself, with his usual and characteristic accuracy of expression, denoted the distinction. There was no confession, which would be unaccountable if the girl were guilty; for guilt seeks to unburden itself, and enters into detail, and in this instance there were the strongest moral reasons for doing so, in order to clear others who had been suspected and accused. But there was a marked absence of disclosure and detail, a studied adherence to the strictest reticence, an abstinence—evidently designed—from all circumstantial statement of facts which might test the truth of the confession. If the confession were false, this is not easily explainable, but would be precisely what we should expect. A person who had not done the deed could not declare the details, and would avoid attempting to do so, lest the attempt should betray the falsehood. And there never was a case in which details and circumstances were more necessary to clear others who had been suspected, and who had been made the subject of several previous inquiries. How strange that it should not have occurred to others—it evidently had occurred to the learned judge—to bring the confession to the test of a careful comparison with the undoubted facts of the sworn evidence in the case. Let us recall the history of the case, and trace out its broader features.

On Friday, June 30, 1860, the body of the murdered child was found in a privy, with its throat cut from ear to ear, and with a deep stab half through its chest. It is most important in such a case to look closely at what is called the "real" evidence in the case—those circumstances of the *corpus delicti* itself, which cannot deceive. Now in the present case the evidence of this kind was clear, strong, and conclusive as to the weapon used. The surgeon stated that there was a stab which was made by a long pointed knife, such as a dagger or a carving-knife. He came, he said, to that conclusion from the way in which the clothes were cut, "which nothing but a direct point would do." And he added that it would require great force to inflict such a wound. The wound, he said, must have been made stab by a dagger or pointed knife, and formed a made by a long and strong pointed instrument. Besides this, the throat was cut from ear to ear, which of course could have been done by a knife with a point, but the stab, the surgeon was sure, must have been done by such a weapon.

Besides this, the surgeon said that there were strong symptoms of suffocation. There was, he said, a blackened appearance round the mouth, as if something had been pressed tightly against it. It struck him, he said, that there had been strong pressure against the mouth before death; "the tongue, too, was protruded." The appearance, he said, indicated that there had been pressure upon the mouth for a considerable time; to such an extent as to cause the tongue to protrude, and blacken the mouth; and cause suffocation, if not death. The severing of the arteries would have caused the blood to spirt up in a jet, unless death had already taken place. The stab, he was sure, would require a long sharp-pointed instrument, and could not have been caused but by a sharp point. The stab had, he said, penetrated half through the chest.

Next, as to the time of the act. The surgeon stated that when he saw the body at nine o'clock, he thought death had taken place five hours previously, that is, about four in the morning. Allowing for the circumstance that the body was found in a cool place—the vault of a privy—it is more likely that it was a less time than a longer time than that. But taking it at that, or about that time, say between three and four in the morning, here the evidence of the surgeon received a strong confirmation in that of Mrs. Kent, who swore that "in the dim light of the morning," which would be between three and four, she heard a noise as of the drawing-room window opening; which window was found open.

Then as to the condition and circumstances in which the body was found. It was wrapped in a small blanket which had been upon the bed between the counterpane and sheet; and under it was a small piece of flannel; and under that as much as a square yard of some newspaper. Such were the circumstances under which the body was found; and it is obvious that whoever did the deed would be able to account for the weapon with which it was done—the opening of the window—the use of the flannel and the paper, and all the other surrounding circumstances of the case.

It should be borne in mind further, that it was found in the course of the previous inquiries—though utterly forgotten afterwards—that there was access to the nursery from outside the house, through a little spare room adjoining it, and the low roof of an outhouse to which a man could obtain access merely by getting on a wall. It is an illustration of the extreme stupidity which marks our mode of dealing with such cases, that not only has the fact been entirely forgotten, but the contrary of it has been persistently assumed in all the discussions the case has received, and it has been taken as a fact, therefore, that the actual murderer must have been an inmate of the house. We know that a legal gentleman, who, at the time the case occurred, applied his mind to it, and wrote an elaborate letter to the late Home Secretary, Sir G. C. Lewis, about it, came to a different conclusion; and although, of course, there must have been some one in the house aware of the murder—for no rational theory of motive could be started which would not implicate two persons—it is not necessary to assume that the other person was any party to the murder, or even, in a legal sense, privy to it; for it may have been done by one with

the knowledge but without the assent of the other, who may have stood by, under certain circumstances, a shocked and startled witness of the deed—committed on some sudden impulse, from the danger of an alarm. The assumption, therefore, that the actual murderer must have lived in the house (almost invariably made the basis of any theory of the guilt of Constance) is unfounded; and if it be assumed by hypothesis that the actual murderer was not an inmate, then it is of course almost certain that Constance was not implicated at all; for all theories of her guilt—including her own (which if false in any respect is not reliable at all)—make her the sole culprit. It is remarkable that a man actually confessed the perpetration of the crime, in the very mode now suggested as possible—viz., by having the child handed out of the window to him; and he gave a very correct description of the premises, showing that he knew them; which we allude to, not only as showing that those who knew the premises were aware of the possibility of such a mode of committing the deed—but also as illustrating, by what ensued, the importance of sifting a confession.

That confession was sifted and treated by the magistrates as false, and the man was discharged. Assuming that it was false, as there was one false confession of the crime there might be another—the one, indeed, might have suggested the other—and if the one upon investigation was found to be false, perhaps the other might have been equally found false, if equally sifted. That case shows that magistrates are not obliged to commit persons on their own confession, if upon investigation they have reason to believe it false; and we were not quite satisfied with the committal of Constance Kent without a sufficiently stringent enquiry into the truth of her confession, and especially as to its consistency with the sworn evidence given or taken at inquiries, and the undoubted facts in the case. To these we desire to direct attention, not in the least with the view of showing or suggesting who did the deed (for the time for finding out that has long since passed away) but with the view of testing the truth of the admission made by Constance Kent, and illustrating the infirmity of our law, in not admitting of a proper investigation at the trial of the truth of the plea of guilty. We desire, indeed, to direct particular attention to this, that all the real evidence in the case, especially the appearances of suffocation, point clearly to a deed rather sudden than premeditated and prepared; and we particularly point to this, that the confession of Constance Kent, who declares she carried the child down so carefully and gently as not to wake him, is utterly at variance with these clear proofs of violent suffocation.

Next, as to the circumstances which immediately followed the event, the facts are at once proved, beyond a doubt. The very same morning, the surgeon, with the police superintendent examined the nightgown of Constance Kent, which was on her bed, and observed nothing to attract their attention; the murder was early on Saturday morning, and on the Monday morning the clothes were put in a basket, in a lumber room, to which all in the house had access, until the laundress came, which was at mid-day; turning to the evidence of the housemaid, the night-dress Constance had worn the week before, ending on Saturday, was put into that basket, and a second was in wear, which had been aired for the purpose on the Saturday; and a third was taken into wear on the following Saturday, so that, as the girl only had three, the one worn on the night of the murder must have been either the one put into the basket, or the one just taken into wear.

It is clear that the surgeon and superintendent saw both of them, but they observed nothing particular in either; and on the same day, the Saturday, at four in the afternoon, the wife of a policeman came to examine the night-dresses of the young ladies, and among others that of Constance, and found nothing to lead to suspicion, and the one she saw had been worn a week, so that it was the old one, which the housemaid swore was put into the basket on Monday morning, the basket being put into the lumber-room till the laundress came for it, during which interval the basket was open to everybody in the house. When the laundress came to examine the basket, she found, as she said, that the nightgown was missing, and it has never been discovered what became of it; but it is obvious that it might have been taken by any one in the house, so that its disappearance proved nothing against any one in particular.

Then as to the piece of flannel found under the body, the policeman's wife, on that very day, the day of the murder, examined and testified that it was a chest protector made out of an old flannel garment, and that she tried it on all the servants, and found that it fitted the nurse exactly, though the nursemaid swore that "it did not belong to the house." There was not a single fact which in any way pointed to Constance, and the incidents of the missing nightgown rather pointed to some one else having abstracted it to throw the guilt upon her, because as both her nightgowns, the one just taken into wear, and the one out of wear, had been seen and examined by several persons on the day of the murder, she had no reason to abstract it, and any one else might have done so.

When Constance was accused, at the time, even with all the aid of a detective, not one single fact could be proved against her. The fact of the nightgown being missing, as already shown, came to nothing, or rather, went to point to some one else. The fact of a garment having been found downstairs,* came to less

* "In evidence, police-sergeant James Watts said: 'This in consequence of certain information which I received, I proceeded to the house of Mr. Kent, in June, 1850, and made a search. In the course of the search I found in the fire-hol

than nothing, for it was not proved that it belonged to Constance, or that the blood was not natural, which, indeed, it would appear it was, and this accounts for its never having been seen again after having been shown to a medical man. The fact, indeed, that it was found secreted downstairs, points rather, as does another fact,† not proved in evidence, to the servants.

It is surprising that a person should have supposed for a moment that Constance should have destroyed one bloody garment and secreted another downstairs, in a place where it must have been found. The evidence, indeed, showed that she had not destroyed a nightdress, for the housemaid proved that the one which was missing was the one seen and shown to several persons on the morning of the murder; and the two others were found; and the girl had but three. The detective, whose blundering in the case strongly showed the want of persons of some intellect to undertake such cases, had got an idea into his head, just one of those ideas which ignorant persons take up so readily, and cannot bring to the test of careful and enlarged examination of all the facts. His idea was that the nightdress put into the basket was not the one worn during the bloody deed, but one put into the basket in substitution for it, and withdrawn to put in its place—leaving the absence of a third to be accounted for by a supposed loss by the laundress.

It no doubt would be absurd to suppose that Constance, a sharp, sensible girl, should have put a nightdress which had been bloody, into the basket, or that she should at once raise suspicion against herself by withdrawing one from the basket, the loss of which the laundress was certain to discover and declare—as she did—that very day; and this although several witnesses had seen both dresses and found nothing to observe upon them. Thus she would gratuitously and unnecessarily have exposed herself to a fatal and irremovable suspicion. If her statement is true, the "detective" was wrong altogether; for she says the dress put into the basket was the one worn while she did the bloody deed. On the probable truth of this it is enough to observe that it was too absurd even for the detective to suppose; and no one, surely, can believe that, supposing the nightdress had such traces that she should have felt it necessary to withdraw it and incur the certainty of [illegible] novable suspicion, the persons, male and female, who had examined it on the morning of the murder, would not have observed those traces. For the present, however, it is enough to notice that if the confession is true the detective's theory was wrong; and that the undoubted facts in the case are not to be reconciled with either the one or the other. However, there was one fact which had a fatal effect upon the girl—the nightdress, beyond a doubt, was missing. And that fact ruined her. It was a fact which could not, we think, be explained on any credible theory of her *guilt*. But, on the other hand, it could not be explained on any theory of her *innocence*, except upon this, that some one else, implicated in the crime, and an inmate of the house, had withdrawn the dress from the basket, in order to divert suspicion and throw it on Constance; and it is observable that about a week after the murder, the nurse, being then herself under suspicion and surveillance of the police, remarked upon the fact that the nightdress was missing as certain to lead to a disclosure of the guilty party; and went so far, according to two witnesses, as to state that she herself had seen the dress put into the basket, which she at once denied; but they, on their oath, asserted that she had said so, and it was one of the facts given in evidence against her.

This shows that it might have occurred to any inmate who was conscious of guilt or suspicion, to seek to throw the suspicion off in in this way. Such a course has been known to be taken by a person suspected, though not guilty; and, once taken, of course could never be acknowledged; for, on the other hand, it would be deemed, in all likelihood, a fatal proof of guilt. So that the mere fact that the dress was missing proved nothing against the person to whom it belonged, as others in the house had the opportunity of removing it, and on the other hand, of course that person must always remain open to suspicion, unless its removal was brought home to any one else. The act of abstracting the dress, whoever did it, was secret, and no one would be likely to confess what it would be probably fatal to acknowledge. An attempt was made, on the hearing of the case against the nurse, to con-

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in the scullery a chemise wrapped up in a thick brown paper I took it into the stable in the yard to examine it, and while so employed, police superintendent Foley came, and I showed it to him. There was blood on it. Mr. Foley took it away, and said he would show it to a medical gentleman. I have not seen it since. The blood was on the lower part of the chemise. There was a good bit of blood about it. The blood was on both the fore and hinder part. I do not think that there was any blood on the garment about the shoulder part. The marks of blood and smears nearly covered the lower part of the dress. They were both before and behind. I found the chemise on the Saturday afternoon about four o'clock.' By Mr. Rodway: 'I don't know, of my own knowledge, whether the chemise was ever shown to a medical man. I have never seen it since.'"

† "There is one fact which has never yet come to light, from first to last, in this case. It will be remembered that the man-servant and boys swore that when they cleaned the knives and forks in the pantry on the morning of the murder, June 30, all the knives were there, and not one was missing. Shortly after the discovery of the murder, the local police, in scrutinising the locality of the pantry, happened to take particular notice of the knife-cleaning machine. They applied a turnscrew to the screws, and found them easily yield, opened the machine, examined the inside, and a white-handled poultry knife, with spots as of blood clearly visible upon the blade, was discovered hidden there. This circumstance, like that of the stained piece of linen found in the boiler flue—whether important or unimportant we do not say—was kept strictly secret, and it was only by a stratagem that the writer contrived to get an acknowledgment that such a knife, with such stains as described upon the blade, had been found in the knife-cleaning machine. This knife, when last seen, which was about four years ago, was in the possession of the police. Who knows, if this had been produced at the time, what aid it might have rendered as a link in the chain of evidence in the elucidation of the mystery?"—*Western Daily Press.*

nect with the incident in this way, that two witnesses swore, as already stated, that she had herself seen the dress put in the basket, and that being taxed with this she denied it; but that was all that could be proved about it, and the one fact, beyond a doubt, which was fatal to Constance Kent, remained unexplained; viz., that it was *missing*.

(*To be continued.*)

## LAW v. EQUITY.

(*Continued from page* 234.)

A digest of our law is, at the present day, earnestly longed for, so that we need not discuss the degree of its utility. A digest, in the modern sense, implies a consolidation of the whole law into a single mass, and, consequently, an abolition of the technical distinction between law and equity. An amalgamation of these systems, however, neither follows necessarily upon, nor requires a digest or consolidation of the law. All the powers and jurisdiction of the equity judges could be, by a single clause in a statute, transferred to the courts of common law, and be there administered either by means of a distinct procedure of their own, or by the introduction of totally new forms of procedure, which should endeavour to embrace both systems, without the necessity of any previous codification or arrangement.

The infusion of equitable principles into our common law system, attempted by the Common Law Procedure Act, 1854, is very incomplete, and has, besides, worked very unsatisfactorily. Be it remarked that the existing common law procedure is totally unfitted for the purposes of what may be distinguished as administrative equity, and that, in the matter of remedial or auxiliary equity, which, under the Act of 1864 might have been exercised in the shape of injunctions and discovery, the courts at Westminster have refused to grant relief, unless where the right sought to be enforced is established in a manner which would satisfy a Court of Equity *at the Hearing*. There is not, we think, a single case decided under the Common Law Procedure Acts where a party has succeeded in enforcing a right, unless the circumstances proved would in equity, have been a sufficient foundation for a perpetual injunction. The *judicial* discretion of a court of equity has consequently been wholly left out of the Common Law Procedure Acts.

Even prior to the passing of these Acts, however, courts of law enjoyed a certain degree of equitable power, not, indeed, for enforcing rights, so much as for preventing the commission of wrongs. The common law *jurisdiction* in cases of fraud, for instance, appears to us to be entirely co-extensive and co-equal with the like power of the Court of Chancery, though from an early slavery to the trammels of pleading, the actual course of the courts was more restricted and technical. Some writers on equity jurisprudence, indeed have asserted the contrary, and considered that the jurisdiction as well as the remedy to be had in courts of law in cases of fraud is less extensive than in the analogous domain of chancery. These writers have indeed apparently on their side the powerful authority of Vice-Chancellor Kindersley, who, in *Stewart* v. *The Great Western Railway Company*, 13 W. R. 886, expressed himself in favour of the view that the equitable jurisdiction is the more extensive. But this case, though at first sight well adapted to raise that question, did not really decide anything on this point. A tradesman and his wife were passengers by an excursion train, which, owing to alleged negligence by the company's servants, met with an accident, whereby the plaintiffs received serious injury, and were obliged to call in a Mr. Woodward, a surgeon, and medical officers of the company. The plaintiff, when asked by Mr. Woodward what compensation he would require from the company, demanded only £50. Mr. Woodward, who, it appears, was in the company's interest, recommended him to accept £15, and the medical officers of the company earnestly urged him to do so, adding that he would be well immediately, while Mr. Woodward affirmed (contrary to the fact), that the plaintiff's wife's leg was not broken. The plaintiff said that he was in no hurry to settle with the defendants, but finally accepted £15, and gave a receipt for that sum as compensation in full for all damages. He subsequently, however, brought an action against the company for £1,700, to which they pleaded "not guilty" and set up the receipt. The plaintiff then filed a bill alleging fraud, and seeking a declaration that the payment was not under the circumstances a full compensation. An injunction was also sought to restrain the defendants from setting up the receipt. The Vice-Chancellor overruled a general demurrer to the bill for want of equity, being of opinion that the fraud alleged by the bill was such that a court of a law could not take cognizance thereof.

"It would be very difficult," his Honour observed, "to give a definition of what constitutes legal or equitable fraud, but I am of opinion that the facts which are alleged, if proved, are not such as to constitute that sort of fraud which a court of law would take cognizance of." That a definition of fraud in general is very hard to be given we admit, but there appears to be no greater difficulty in defining legal than there is in defining equitable fraud. The difficulty, such as it is, is common to both law and equity, and results from the fact that *moral* fraud must be proved to establish a case in either court. In *Cornfoot* v. *Fowke*, 6 M. & W. 358, for instance, the owner of a house, who knew of a defect in it, employed an agent for sale, who was ignorant of the defect. The purchaser sued as for a fraudulent *scienter* and concealment, but the

court held that as the moral fraud of the owner, and the legal fraud of the agent, did not concur in the same person, no case of fraud could be proved against either. The ruling in this, although it underwent some vicissitudes, is, we believe, still law.

His Honour indeed seems to think that intentional moral fraud on the part of the defendants is not necessary to establish a case of fraud in equity. "It is perfectly clear," he continues, "that a body corporate or the directors can know nothing more about such a fraud as this than any stranger, and, therefore, it would be impossible to prove the fraud committed by the company. The fraud taken cognizance of by a court of equity is made up of all the circumstances of the case, the position of the parties, that they have been imposed upon, have been *inopes consilii*, and, being in a state of bodily, were, consequently, in a state of mental, weakness." All these circumstances, however, are undoubtedly such as would go to establish a fraud at law. The distinction is not one inherent in the jurisdiction, but in the nature of the proof required. Vice-Chancellor Wood laid down, in *Benham* v. *Keane*, that to take advantage knowingly of the fraud of another was to be a *particeps criminis*, at least to the extent of being prevented from taking any advantage of that fraud; and this is the true equitable principle which the courts of law, not from defect of jurisdiction to determine it, but from their nature of this procedure, refuse to recognise.

The Vice-Chancellor was, under any circumstances, bound to overrule the demurrer, because the right of the plaintiff to choose his tribunal, where the jurisdiction is concurrent, has not been interfered with by the late Acts: *Evans* v. *Bremridge*, 2 K. & J. 174. We respectfully dissent, however, from his Honour's opinion, that the jurisdiction of a court of law would be inadequate to reach cases of fraud merely on account of their degree of complexity. The general impression, however, certainly is that a court of law can only take cognizance of a fraud if it be clear; just as it can grant relief on an "equity" under the Common Law Procedure Acts, only if it be indisputable. If we are right in this, it follows that it is unnecessary, and would be futile, by statute to confer upon courts of law an unlimited jurisdiction in cases of fraud, because, as we contend, they enjoy already such power, and are only prevented from exercising it by the fact that they have no procedure fitted for the purpose. To propose to alter their procedure is to re-establish courts of equity under common law judges, nothing more; and may be possibly productive of no greater harm than the loss of the advantage arising from division of labour.

The idea of allowing a plaintiff to *originate* a suit at law upon grounds now cognizable only by a Court of Equity, aimed at by Lord Campbell's Law and Equity Bill of 1860, arose simply from a misconcepti n of the object of conferring equitable jurisdiction on common law courts. On this point we beg to refer our readers to the remarks made upon that bill at the time.* A thorough fusion of law and equity is, doubtless, the necessary result of present tendencies and past legislation, but it is mere confusion to suppose that this implies a simple transfer of all litigation to the common law courts at present in existence.

The consequences of this simplification of the law, if carried out fairly, as we think it ought to be, will in our opinion, be more beneficial than otherwise to the profession.

Let it be an understood thing that every plaintiff who *commences* his proceedings in the right court, be it Queen's Bench, Chancery, Probate, or what not, will be able, no matter what new matter may arise in the course of the proceedings, to have his claim finally adjudicated upon in and by that court, and all that can rationally be desired in the way of fusion will have been accomplished. A hundred years ago the Courts might have done this of their own mere motion, at the expense, at most, of a legal fiction or two; *now* a statute is essential for the purpose, but if it would only be general enough and avoid that pernicious meddling and muddling in details so characteristic of modern English legislation, a very short Act might set at rest this somewhat vexed question.—*Solicitors' Journal.*

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## THE QUAKER AND THE JUDGE.

Upon the jury entering the box at the late Liverpool assizes one morning, one of the number, who gave his name as Josiah Carson, and was a member of the Society of Friends, kept on his hat. Mr. Baron Bramwell, observing it, requested him to uncover. The juryman—"Conscience compels me to keep it on." The Judge.—"Conscience no more compels you to keep your hat on than it does your shoes. You must have respect for others. I will fine you £10 if you don't take off your hat." The juryman—"It is a reverence for the Almighty which compels me to keep it on." The Judge.—"Don't be nonsensical. Your reason is discreditable to common sense." The juryman still refusing to uncover, the Judge said,—"I warn you that I will fine you £10 if you do not take off your hat." The juryman.—"I cannot do so" The Judge.—"Then I fine you £10, and leave the box. Any person with such nonsense in his head is not fit to sit upon a jury." The juryman having left the court, the Judge said—"I shall call upon him again to-morrow, and if he still persist in his nonsense I shall fine him again."—*Express.*

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The Yelverton marriage case is likely to come before the public again on the meeting of Parliament—an appeal to the House of Lords having been duly lodged on behalf of Miss L. against the judgment of the Court of Session.

* 4 Sol. Jour. 657.

# UPPER CANADA REPORTS.

## QUEEN'S BENCH.

(*Reported by* C. Robinson, Esq., Q.C., *Reporter to the Court.*)

### Gustavus Dundas v. John Johnston and John Wilson.

*Ejectment—Title by possession—Possession of part only—Effect of—Competency of witness—New trial refused.*

Remarks upon the possession necessary to obtain a title as against the true owner, and the effect of such possession when extending only to part of a lot.

It must depend upon the circumstances of each case whether the jury may not, as against the legal title, properly infer possession of the whole land covered by such title, though the occupation by open acts of ownership, such as clearing, fencing and cultivating, has been limited to a portion; and *held*, that in this case there was evidence legally sufficient to warrant such inference.

*Semble*, that a "squatter" will acquire title as against the real owner only to the part he has actually occupied, or at least over which he has exercised continuous and open notorious acts of ownership, and not mere desultory acts of trespass, in respect of which the true owner could not maintain ejectment against the trespasser as the person in possession.

A. being sued in ejectment, suffered judgment by default for want of appearance, and B. was admitted to defend as landlord. *Held*, that A. was not a competent witness, but that, as the verdict was warranted by the other testimony, his reception was no ground for interference.

[Q. B., T. T., 1865.]

Ejectment for the east half of lot number ten, in the tenth concession of North Monaghan. The writ was addressed only to the defendant Johnston. Wilson was admitted to defend as landlord by a judge's order, and appeared for the whole. Johnston entered no appearance, "whereupon the said Gustavus Dundas ought to recover against him."

The trial took place at Peterborough, in May last, before Adam Wilson, J.

It appeared that a patent from the Crown, dated the 28th of November, 1833, issued, granting the premises in fee to the plaintiff. He also proved the execution of a deed, dated the 1st of February, 1860, from himself to one Edward Chamberlain, of the premises, for an expressed consideration of £150. A witness swore that about forty years ago, the plaintiff, who represented himself to be a discharged soldier, offered to sell him his right to 100 acres of land, and that the witness accepted the offer, and let the plaintiff have a heifer for it, and got a writing from the plaintiff, which, in moving house many years ago, he lost. He said the meaning of the writing was to secure the witness a right to the land which the plaintiff was entitled to get from the Government. The plaintiff also gave him the location ticket for the 100 acres, being No. 10, in the 10th concession of Monaghan, now North Monaghan. About two years afterwards defendant Wilson bought this right from the witness. The location was subject to settlement duties, and Wilson performed them. The Crown patent was taken out, and the witness believed that Wilson brought it to him to keep until he (Wilson) should pay the witness what he had agreed to pay. He made the payment, and the witness gave up the patent to Wilson.

It was proved that Wilson had a house on the 100 acres adjoining these premises, and cleared from 20 to 30 acres of the premises, a considerable portion of the 100 acres being drowned land, which apparently could not be cultivated.

About the year 1835 the plaintiff asked another of the witnesses for the defence if he knew the lot on which Wilson was living, and said that he had sold that lot. The evidence shewed that Wilson had by himself or his tenants used the cleared land ever since; the uncleared portion had never been fenced in. Evidence was given that the taxes according to the former Treasurer's books had been paid, and the present Treasurer proved that defendant Wilson had paid them in 1846, or for some years afterwards.

The defendant also called John Johnston as a witness, who was objected to, as being the defendant named in the writ of summons. It was answered that he had not appeared to defend, and that judgment was signed against him. The learned judge received his testimony. The most material statement he made was, that the plaintiff, who lived within two miles of these premises, told him that he owned these hundred acres at one time and had sold them.

The learned judge left to the jury whether the plaintiff had knowledge of Wilson being in possession of this land for a period of twenty years or more before action brought, stating that the possession of a part of the 100 acres might import possession of the whole, depending upon circumstances: that Wilson took possession as a purchaser of the whole, according to the evidence, which also shewed that nearly all of the 100 acres which remained uncleared was swampy and not very fit for profitable cultivation, and that the taxes for the whole had been paid.

Exception was taken to that portion of the charge relative to possession of part affording evidence of possession of the whole. The jury found for the defendant.

In Easter Term *C. S Patterson* obtained a rule, calling on the defendant to shew cause why there should not be a new trial, on the ground of the improper reception of the evidence of Johnston, and for misdirection, in ruling that the evidence of the defendant's possession was sufficient without shewing that such possession was continuous, and in ruling that "there was sufficient evidence of the possession of the wild land which the defendant did not occupy;" and on the law and evidence, the possession on which the defendant relied not having been proved. He cited Tay. Ev. 4th ed. sec. 1662.

*S. Richards*, Q.C., shewed cause during this term, and cited *Doe dem. Lord Teynham* v. *Tyler*, 6 Bing. 561; *Hughes* v. *Hughes*, 15 M. & W. 701; *La Frombois* v. *Jackson*, 8 Cowen, 589; *Calk* v. *Lyn's Heirs*, 1 Marshall, 346; *Jackson dem. Hasbrouck* v *Vermilyea*, 6 Cowen, 678; *Farley* v *Lenox*, 8 Serg. & Rawle, 392; *Hunter* v. *Farr*, 23 U. C. Q. B. 324.

Draper, C. J., delivered the judgment of the court.

The question of title by possession without paper title as against a paper title, often presents peculiar features in this country, and is not always a matter of easy solution. Land is generally divided by the Government surveyors into uniform lots in each township, except where the irregular formation of the ground, owing to lake

or river frontage or other causes, renders this impossible, and then there are broken lots. The grants from the Crown are also very frequently for less than the lots as surveyed, sometimes, as in the present case, for a half lot, sometimes for a quarter lot, and sometimes a certain number of acres, part of a lot, is granted. As a rule these grants are of land in the natural state, not cleared or improved; at least such is generally the assumed condition when the Crown first agrees to dispose of it to individuals. Even where the grants were preceded by mere locations, subject to the performance of settlement duties, it is notorious that these duties were oftentimes not made at all or made in a very perfunctory manner, and no part of the land was in fact either cleared, fenced or settled upon, and notwithstanding the previous condition to perform such duties the grantee had not, in the language of the 3rd section of Con. Stat. U. C. ch. 88, "taken actual possession by residing upon or cultivating some portion thereof."

When therefore a person without any title, or without any real or *bonâ fide* claim of title, (though erroneous) entered upon any such lot, clearing and fencing only a portion thereof. I do not understand upon what principle this wrong doer can be deemed to have taken and to be in possession of the whole of such lot,—for example, of 200 acres, if the lot was originally surveyed to contain that quantity, or of the half or quarter lot, if such had been the division by the original survey; or that his cultivation and fencing of a small part puts him into possession of as much (be it the whole or fractional part of a lot) as the proprietor of the part trespassed upon owns. In cases of what is well understood in the country by the term "Squatters," I have always thought, that as against the real owner they acquire title by twenty years occupation of no more land than they actually have occupied, or at least over which they have exercised continuous and open notorious acts of ownership, and not mere desultory acts of trespass, in respect of which the true owner could not maintain ejectment against the trespasser as the person in possession.

We agree with the learned judge who tried this cause, that it must depend upon the circumstances of each case whether the jury may not, as against the person having the legal title, properly infer the possession of the whole land covered by such title in favour of an actual occupant, though his occupation by open acts of ownership, such as clearing, fencing and cultivating, has been limited to a portion less than the whole. And we think evidence such as was given in this case must be submitted to the jury as legally sufficient to warrant such an inference; and no question upon the evidence, beyond the true character and nature of the possession in point of extent, has been raised.

Upon the question of the competency of the defendant Johnston we are not able to concur in the ruling at the trial. He is tenant in possession of the premises under Wilson, who as landlord is admitted to defend. As such tenant he comes within section 5, of the Evidence Act, (Con. Stat. U. C. ch. 32,) which provides that the previous enactment, that interest shall not disqualify, shall not render competent or authorize or permit "any claimant or tenant of premises sought to be recovered in ejectment" to be called as a witness. His not appearing to defend does not make him the less a tenant of the premises, having a direct interest to prevent a change of possession, and not rendered competent by the act to support that interest by his testimony; but we are of opinion that without his testimony the verdict ought to have been as it was, and we are glad to find in the case of *Doe* v *Tyler*, 6 Bing, 561, which is recognised in *Hughes* v. *Hughes*, 15 M. & W. 701, an authority for upholding the verdict.

We are of opinion this rule should be discharged.

Rule discharged.

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## BATES v. THE GREAT WESTERN RAILWAY CO.

*Common carriers—Special conditions.*

Action against defendants as common carriers for delay in carrying goods.—*Plea*, setting up special conditions, on which the goods were received, exempting defendants from liability. *Held*, good on demurrer.

Remarks as to the necessity and justice of legislative redress in such cases.

[Q. B., T. T., 1865]

The declaration stated that the defendants, being common carriers by their railway, received from the plaintiff certain cattle to be carried from Ingersoll to Toronto; and the breach of duty alleged was that they negligently and improperly detained the cattle at Ingersoll, and kept them in an open and exposed place, owing to which two of them died on the journey, and that by the unreasonable delay in the carriage and delivery of the others the plaintiff lost a market, &c.

*Plea*, that the said oxen and cows in the declaration mentioned were delivered by the plaintiff to and accepted and received by the defendants to be carried and conveyed under a special contract, and subject to the following conditions:—

That the plaintiff undertook all risk of loss, injury, damage and other contingencies in loading, unloading, conveyance and otherwise, whether arising from the negligence, default or misconduct, criminal or otherwise, on the part of defendants or their servants; and that they, the defendants, did not undertake to forward the animals by any particular train, or at any specified hour, neither were the defendants responsible for the delivery of the animals within any certain time, or for any particular market.

And the defendants further say, that the loss and injury sustained by the plaintiff in respect of the said oxen and cows in the declaration metioned, as well by the keeping and retaining of the same at the said Ingersoll station as by the delay in the conveying and delivery thereof, were a loss and injury within the true intent and meaning of the said conditions, and was and is part of the loss or damage so agreed to be borne by the plaintiff as aforesaid, and not any other loss or damage.

The plaintiff took issue on so much of the plea as relates to the said two cattle alleged in the declaration to have died in consequence of the negligence of the defendants. And as to the residue, he demurred, on the ground that the

plea does not answer the breach of duty alleged—namely, unreasonable delay in carrying; and notwithstanding anything in said contract the defendants would be bound to carry within a reasonable time.

*S. Richards*, Q. B., for the demurrer.

*M. C. Cameron*, Q. C., contra, cited *White* v. *The Great Western R. W. Co.*, 2 C. B. N. S. 7; *Latham* v. *Rutley*, 2 B. & C. 20; *Hamilton* v. *Grand Trunk R. W. Co*, 23 U. C. Q. B. 600.

Draper, C. J. delivered the judgment of the court.

In the existing state of our law we are of opinion that the plea demurred to is good. The declaration is framed upon the common law liability of the defendants as common carriers, and the plea sets up that they did not receive the cattle under such liability, but under a special contract which is set out. It is too late to argue that the parties could not lawfully enter into such a contract. Having entered into it their rights and liabilities are to be ascertained by its terms, and not by the common law. We have no such enactment as the 17 & 18 Vic. ch. 31, sec. 8, which submits the question whether the conditions imposed by the Railway Company are reasonable or otherwise to the decision of the court or judge before whom any question relative thereto shall be tried.

This case as well as that of *Hamilton* v. *The Grand Trunk Railway Company* 23 U. C. Q. B. 600 illustrates the necessity and justice of legislative redress. The recent case of *Allday* v. *The Great Western Railway Company* 11 Jur. N. S. 12 shews the value of the English act. The court in that case held that a condition limiting the defendants' responsiblity, very analogous to the present case, was unreasonable, and gave judgment for the plaintiff on the face of it.

But in the absence of any such authority we must decide in the defendants' favour on this demurrer.

Judgment for defendants on demurrer.

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Michael D'Arcy v. Stephen White and James Wilson.

*Ejectment—Judgment by default—Costs.*

An ejectment summons having been served on A. and B., A. only defended, and B. allowed judgment to go by default. The plaintiff obtained a verdict and issued a *hab. fac.* and *fi. fa* for costs against both, whereupon B. moved to set it aside as against himself, or to have his name struck out of the proceedings: but

*Held*, that the plaintiff was right, for, as to the *hab. fac.*, if B. claimed no interest in the land, and was not in possession, he should have applied, on receiving the summons, to have his name struck out: and as to the *fi. fa.* for costs, he was liable, for although if sole defendant he would not have been, yet when there are two persons in possession and one appears, the judgment is suspended till the trial of the issue, if the latter succeeds it enures to the benefit of the other, and if he fails both are liable for the whole costs, (as in an action for damages) of which there can be only one taxation.

[Q. B., T. T., 1865.]

The plaintiff, on the eleventh day of July, 1864, issued an ejectment summons against both the defendants, to recover possession of part of lot number twenty in the fifth concession of the township of North Burgess, specially described. On the 22nd of August, 1864, James White appeared by attorney, and defended for the whole premises, and no appearance was entered or defence made by the defendant Stephen White, and an entry was made on the roll, that the plaintiff ought to recover against him the possession of the said land, but proceedings against him were stayed until the determination of the issue between the plaintiff and James White.

That issue was tried on the 13th of October, 1864, when the jury rendered a verdict for the plaintiff, on which judgment was entered on the 26th of April, 1865, that the plaintiff recover possession of the land in the writ of summons mentioned, and $166 84 for costs of suit.

On the same 26th of April, 1865, the plaintiff issued a writ, reciting that he had lately recovered possession of the premises mentioned in the writ of summons in an action of ejectment, at his suit, against Stephen White and James White, commanding the sheriff to cause the plaintiff to have possession of the said land and premises, with the appurtenances, and further commanding the sheriff of the goods and chattels of the said Stephen and James White that he should cause to be made $166 84, which the plaintiff lately recovered against them for his costs of suit.

And Stephen White obtained a rule calling on the plaintiff to shew cause why the writ of *habere facias possessionem* and *fieri facias* against goods should not be set aside as against him, on the ground that the judgment entered only awarded possession as against him, and that he had not appeared and defended; or why the *fi. fa.* against goods should not be set aside as against Stephen White; or why the judgment should not be set aside as against Stephen White, for directing generally that the plaintiff should recover possession and costs, not saying of whom the costs should be levied, whereas it should have directed that they should be recovered of the defendant James White, the defendant Stephen not having appeared and so not being liable for for costs; and that no proper interlocutory judgment was signed against Stephen; or why the judgment should not be amended, so as to direct definitely against whom execution for costs should be directed; or why Stephen White should not be relieved from being a defendant, and have his name struck out of the proceedings, on the ground that at the commencement of this suit he had no interest in the premises, and was not in possession, and did not appear and defend; or why all proceedings to recover costs under the judgment and writ should not be stayed, on such terms as to costs as the court might direct.

In the affidavit filed in this case, it was stated that a seizure of goods of Stephen White had been made under this execution, and that no action for mesne profits had been brought against him. It was also sworn on his behalf that on the 23rd of April, 1864, he executed a quit-claim deed to his son, the other defendant, of the premises mentioned in the writ of summons, the consideration being a debt of £25 due by the father to the son for working on his farm, and five shillings.

Stephen White swore, among other things, that he had never used or occupied any part of the land sued for, except about fifteen acres, which (with other land) he conveyed, on the 23rd of April, to his son James, which conveyance was made in pursuance of an agreement

made between them, that James should come and work with Stephen for a year, which he did, and thereupon Stephen conveyed to him; that the land was poor, and not worth more than a reasonable compensation for James's service. He denied that he was concerned in or privy to the defence. And after the sale to James he swore he did not occupy or use the land in any way, other than for the pasturage of some young cattle for, which he paid James: that he never was notified by the plaintiff of his title to the land: that he attended the trial of this cause merely from curiosity, and not from any interest he had himself in the matter, and as he had not for years been able to work, he lost nothing by his attendance at court.

On the other hand, the plaintiff swore, that after he had purchased these premises he found Stephen White in possession, and applied to him to him to give them up, but he did not do so, but he continued to possess the same till he was put out by the sheriff, but that he pressed the plaintiff to sell him this land: that the defendant James was living with his father, and had no separate dwelling, and was not more than tweny-two or twenty-three years of age: that, notwithstanding the transfer, Stephen White during the summer of 1864 and the spring of 1865, used the land, and pastured his cattle thereon, as he formerly used to do, and removed his cattle therefrom two or three days before the plaintiff was put into possession. And the statement that Stephen was for several years in possession of these premises until ejected was confirmed by another deponent, who also swore that he was satisfied James White had no property.

*Robert A. Harrison* shewed cause, citing *Roots* v. *Farniscott*, 2 U.C.P.R. 239; *Harper* v. *Lowndes*, 15 U. C. Q. B. 430; *Haskins* v. *Cannon et al*, 2 U.C.P.R. 334; *Wilkinson* v. *Kirby*, 15 C.B. 430; *Anstey* v. *Edwards*, 16 C. B. 212; *Hutchinson* v. *Greenwood*, 4 E. & B. 324; *Bleecker* v. *Campbell*, 4 U. C. L. J. 136; Consol. Stat. U. C. ch. 27, secs. 16, 26.

*Kingsmill*, contra, cited Cole on Ejectment, 131; *White* v. *Cochlin*, 2 U.C.P.R. 249; *Mobbs* v. *Vanderbrande*, 9 L. T. Rep. N. S. 761; *Doe dem. Wright* v. *Smith*, 8 Dowl. 517.

Draper, C. J., delivered the judgment of the court.

We think upon Stephen White's own shewing, that he pastured his cattle on this land, on which it does not appear there was any dwelling house or building, the plaintiff had reasonable ground for making him a defendant, as well as the son James. If Stephen had immediately on being served with the ejectment summons made oath that he was not in possession, and claimed no interest in the land at the time of the service, or perhaps at the date of the summons, and this statement was not rebutted, he might have had the service on himself set aside and his name struck out of the writ upon proper terms. But letting judgment go by default, which is the effect of not appearing, must be considered as an admission that he was in possession, for such judgment is a sufficient foundation for a writ to put the plaintiff into possession. He now, among other things, applies for the relief, but I think for this purpose he comes altogether too late. The question is then reduced to his liability to costs.

Although if Stephen had been sole defendant the plaintiff could have had no judgment or execution against him for costs, yet we apprehend that when there are two persons in possession and both are sued, if the plaintiff fails in proving his case against one who defends, he cannot get possession against the other who does not appear to the writ. The judgment of the court is suspended until the issue be tried; and if the defendant who appears is successful, it in effect enures to the benefit of the other. There can only be one taxation of costs where the plaintiff succeeds against all the parties he sues. In an action for damages, if one defendant suffers judgment by default and the other pleads to issue, and the jury find for the plaintiff, there is one entry of judgment for the same costs and damages against both, though the plaintiff's costs must be materially increased by having to go down to trial, which only was made necessary by the act of one defendant.

No authority has been cited which would afford even a pretext for holding that there could be a severance of the taxation of costs in a case like the present, and the analogy of other actions is against such a practice.

The Ejectment Act does not provide for awarding costs when there is only a judgment by default, but where there is a trial it expressly authorizes costs to be recovered; and, as it must be assumed the defendants are jointly in possession, the recovery by verdict against one will, we apprehend, draw with it all the consequences as regards the other.

We think, therefore, this rule should be discharged.

Rule discharged.

## COMMON PLEAS.

(*Reported by* S. J. Vankoughnet, Esq., M.A., *Barrister-at-Law, Reporter to the Court.*)

### The Ontario Bank v. Kerby et al.

*Return of nulla bona to unexecuted fi. fa.—Irregularity—Consent—Concurrent writs against lands and goods—Abandonment of writs against goods—Validity of writs against lands.*

Plaintiffs issued *fi. fas.* goods, and on the same day placed them in the hands of the Sheriffs of different counties. Within three weeks the writs were, at the request of the plaintiffs' attorney, and *with the consent of* H., one of the defendants, returned *nulla bona*, the other defendant, as it was believed having no goods, and the goods of H. being claimed by another in privity with him. On the return of these writs, *fi. fa.* lands and *alias fi. fa.* goods were on the same day issued and placed in the Sheriffs' hands. Subsequently the *alias fi. fas.* goods were withdrawn, the *fi. fas.* lands being left in the Sheriffs' hands.

*Held*, that although the same rule applies in the case of two defendants, as in the case of one, that the goods of both must be exhausted before the lands are resorted to, and each has, therefore, as great an interest in the due execution of a writ against the goods of his co-defendant, as against his own, before the lands are touched: yet, in this case, H. could not, by reason of his consent thereto, complain of the return of *nulla bona* as to him elf; nor could he complain of the same return as to his co-defendant, because the latter had no goods which could apply to the writs; while the latter could not object to the return as to H., because, it was alleged, the goods of H were claimed by another under a title from him, and it was not reasonable that the plaintiffs should contest this claim, particularly as the property appeared to be small, when

there was a probability of realizing their claims by a sale of the lands after the expiration of the usual time.

*Held*, also, sustaining *Oswald* v. *Rykert*, 22 U. C. Q. B. 306, that the issuing of the *fi. fas.* lands and *alias fi. fas.* goods concurrently was objectionable; but that the latter, not having been acted on, could be abandoned, and the *fi. fas.* lands retained.

A return of *nulla bona*, where there are goods, is only an irregularity to be excepted to by the defendant, if the plaintiff is abusing the process of the court by proceeding against the lands before having exhausted the goods.

*Quære*, whether the heir, devisee, or other claimant under a deceased debtor, or any person to be prejudiced thereby, may not justly complain, if a wrongful or collusive return of *nulla bona* be made, while there is a sufficiency of goods, and the debtor's lands be seized to satisfy the debt.

Observations on the inconvenience of the procedure here, by two writs of execution, in order to reach lands, and probable intention of 5 Geo. II. ch. 7, with reference thereto. [C. P., T. T., 29 Vic.]

In Easter Term last, *S. B. Freeman*, Q. C., on behalf of the Bank of British North America and the defendant James Hamilton, the application being made in three suits between the same parties, obtained a rule in the Practice Court, calling on the plaintiff to shew cause in this court, why the respective writs of *fieri facias* against goods, and the respective writs of *fieri facias* against lands in the hands of the Sheriffs of the counties of Wentworth, Grey and Welland, and of the United Counties of Huron and Bruce, in the above suits respectively, should not be set aside on the grounds, as to the writs against lands, that no writs of *fieri facias* against goods had been taken out in the respective suits and delivered to the said Sheriffs, or to the Sheriffs of any other counties, to be executed; or had been in any such Sheriff's hands to be executed and then returned according to law, before the writs against the lands of the defendants had been issued; and, also, as to all of the said writs, that the writs against the goods and lands of the defendants in the said suits respectively had been issued at the same time, and placed in the respective Sheriffs' hands to be executed, and where then being executed concurrently; and, also, on the ground that the return of *nulla bona* to the writs against goods in the above suits had been collusively, illegally, and fraudulently obtained for the purpose of enabling the said plaintiffs to obtain a fraudulent preference and priority over the other creditors; or why some of the said writs should not be set aside on the grounds aforesaid, and on grounds disclosed in affidavits filed.

The rule was obtained on a memorandum, which stated the following facts:

The plaintiffs have five judgments against these defendants, one of the judgments being against one Samuel Overfield jointly with the defendants. Three of the cases were in this court and two in the Queen's Bench. In the memorandum filed, the suits were numbered; Nos. 1 and 2 being the same as Nos. 1 and 2 at the head of this application, Nos. 3 and 4 being Queen's Bench cases, and No. 5 being the same as No. 3 in this application.

The table below will explain the different kinds of writs that were issued, their delivery to or return by the Sheriffs, and the different dates that are material. All of these writs were directed to the Sheriff of Wentworth.

1. C. P.—*fi. fa* goods—dated and received by Sheriff 5th April, 1865—returned *nulla bona* 22nd April, 1865.
1. C. P.—*fi. fa.* lands—dated 22nd and received by Sheriff the 24th of April, 1865.
   *al. fi. fa.* goods—dated 22nd and received by Sheriff the 25th of April, 1866.
2. C. P.—*fi. fa.* goods—dated and received by Sheriff 5th April, 1865—returned *nulla bona* 22nd April, 1865.
   *fi. fa.* lands—dated 22nd and received by Sheriff 24th April, 1865.
   *al. fi. fa.* goods—dated 22nd and received by Sheriff 25th April, 1865.
3. Q. B.—*fi. fa.* goods—dated and received by Sheriff 10th April, 1865—returned *nulla bona* 22nd April, 1865.
   *fi. fa.* lands—dated 22nd and received by Sheriff 24th April, 1865.
   *al. fi. fa.* goods—dated 22nd and received by Sheriff 25th April, 1865.
4. Q. B.—*fi. fa.* goods—dated and received by Sheriff 15th April, 1865—returned *nulla bona* 22nd April, 1865.
   *fi. fa.* lands—dated 22nd and received by Sheriff 24th April, 1865.
   *al. fi. fa* goods—dated 22nd and received by Sheriff 25th April, 1865.
5. C. P.—*fi. fa* goods—dated and received by Sheriff 25th April, 1865—returned by Sheriff *nulla bona* 22nd April, 1865.
   *fi. fa.* lands—dated 22nd and received by Sheriff 24th April, 1865.
   *al. fi. fa.* goods—dated 22nd and received by Sheriff 25th April, 1865.

The same attornies were the attornies for the plaintiffs in each case.

The returns of *nulla bona* were made at the request of the plaintiffs' attornies, and by the consent of James Hamilton, but not with the consent of the other defendant or defendants. When such returns were made James Hamilton had goods liable to seizure in execution in the county of Wentworth, and there was no execution against him excepting in these suits. At this time Kerby had goods in Wentworth under execution or prior writs, which goods were sold on the 18th of May, 1865, and just satisfied such prior writs.

In the third suit in the memorandum, which is in the Queen's Bench, there was, when the above returns were made, a concurrent *fi. fa.* against goods in the hands of the Sheriff of Brant, upon which, on the 10th of May last, he returned, "made $104 90 of the goods of one Muirhead," one of the defendants of that case.

Upon each of the writs of execution against goods, in the cases in this court, there was endorsed a *præcipe*, dated the 22nd April, 1865, for the writs against lands and goods in each case as before mentioned, and for a writ in each case against lands to the Sheriff of Welland, and another to the Sheriff of Huron and Bruce. On the 24th of April, 1865, a writ against lands was, also, issued in each case to the Sheriff of Grey; and all such writs were issued, and, as it is believed, were delivered to the respective Sheriffs, to be executed.

The Sheriff of Wentworth seized, as the property of the defendant Hamilton, certain shares in the stock of the Great Western Railway Company, and in the stock of the Canada Life Assurance Company.

By an indenture, dated the 7th of May, 1865, James Hamilton conveyed to Thomas Paton, General Manager of the Bank of British North America, lands of the said defendant in Wentworth, Welland, Grey, Bruce and Wellington, and also a part of his personal estate by way of mortgage, to secure payment to the said Bank and to the Ontario Bank, the present plaintiffs, ratably and proportionably, according to the debts which he owed to them, the Bank of British North America about $11,100, and the plaintiffs about $11,200.

An affidavit was filed by the plaintiffs' attorney, on the part of the plaintiffs, which stated that shortly after the original writs against goods had been given to the Sheriff, he discovered there was no prospect of the Sheriff making the amount of the executions out of the goods and chattels of the defendants, in consequence of there being then, as he believed, other executions in the Sheriff's hands more than sufficient to cover all the goods of Kerby, and the said Hamilton's personal property, which might have sold for about two or three hundred dollars, being in great part claimed as belonging to his daughter, Mrs. Racey; that therefore the Sheriff was requested to return the writs *nulla bona*. which he did after the consent of Hamilton was given; that he believed the defendants were not possessed of any goods except in Wentworth; that on the 19th of May last he received from Messrs. Freeman & Craigie the latter which was annexed to the affidavit, and on the morning of the 22nd of May he attended at their office, and told Mr. Craigie he was then on his way to the Sheriff's office to withdraw the *alias* writs against goods, in the suits in this court, and on the same day he notified Mr. Craigie of his having done so.

During the present term *Moss* shewed cause.

The law does not compel a plaintiff to wait until the expiry of his writ against goods, when there is a certainty that there will be no goods to answer it, or that there will be goods only to a small value to be applied to it: if this were so, the result would be that subsequent creditors would, by getting a return of no goods, gain the priority, as to the lands, over the earliest creditors: *Doe Spafford* v. *Brown*, 3 O. S. 92.

The plaintiffs had the right, after issuing the concurrent writs against goods and lands, to elect which of them they would continue: they could not both be void.

*Freeman*, Q. C., contra.—The plaintiffs had no right to place the writs against goods in the Sheriff's hands with the mere object of getting a colourable return of no goods made to them, upon which to found the writs against lands: the statute intended that the return of no goods should be a *bonâ fide* one. It may be no injustice to a defendant to have it untruly made, for he may have consented to it; but even when he does consent, the other creditors of the defendant have the right to complain of the proceeding, for it operates to their delay and prejudice; and, if there be two defendants, the consent of one cannot authorize this course to be taken against the defendant who has not consented. *Oswald* v. *Rykert*, 22 U. C. Q. B. 306.

Then the *alias* writs against goods and the writs against lands cannot be running at the same time; and if the plaintiffs withdraw the *alias* writs in time to anticipate this application, that will not avail them, because by so doing they cannot give effect to the writs against lands, which were concurrent; for they were improperly issued, and the subsequent withdrawal of the other writs will not cure the defect: they were both unwarranted when they were issued, and they are each of them unwarranted still. He referred to *Curry* v. *Turner*, 8 U. C. L. J. 296.

A. Wilson, J., delivered the judgment of the court.—

The questions are:

1st. Whether it was allowable to the Sheriff to return the three original writs of *fieri facias* against goods *nulla bona* in so short a time after he got them, at the request of the plaintiffs' attornies, and with the consent of one of the defendants, if the value of the goods of such defendant were very small in proportion to the amount of the debt, and if the property in these goods were believed to be claimed by another in privity with the defendant, and if it were believed the other defendant had no goods which could be applicable to such writs.

2nd. Whether, if such returns be good as against the defendants, the Bank of British North America, as the grantees of the defendant Hamilton's real estate, can impeach the writs against lands which were issued out upon the returns of *nulla bona* before mentioned.

3rd. Whether it was objectionable to sue out the concurrent writs of *fieri facias* against lands and *alias fieri facias* against goods above mentioned; and if so, whether the plaintiffs could elect to abandon the *alias* writs against goods, and retain in full force the writs against lands.

The statement of the first question is, I think, an answer to it. The defendant, who gave consent to the return of *no goods*, cannot complain; nor has either defendant any cause of complaint of the return that was made as to the other. Hamilton cannot complain, because Kerby had no goods in fact which could apply to these writs; and Kerby could not complain, because, it is alleged, the goods which are said to be Hamilton's are stated to be claimed by another under a title derived from Hamilton; and it is not at all reasonable that the plaintiffs should contest this claim, especially if the property be small, as it is represented to be, when there is a probability of getting payment from the lands of Hamilton without this difficulty, simply by delaying till the expiry of the period when by law the lands can be sold: *Dicas* v. *Warne*, 10 Bing. 341; *Knight* v. *Coleby*, 5 M. & W. 274.

From the passing of the Statute of Westminster the 2nd, by which lands first became liable to an execution against the judgment debtor, it has always been held, that under the *elegit* the Sheriff must first take the goods of the defendant before he can deliver the lands; and if the goods be sufficient to satisfy the debt, the lands shall not be extended: 2 Inst. 395: *The King* v. *Hopper*, 3 Pr. 40. And the like rule applies, that the goods of both defendants shall be exhausted, when there are two defendants, before the lands of either are touched.

One defendant has, therefore, an interest in the due execution of the writ against the goods,

of his co-defendant, as well as of himself before his lands shall be seized: he has such an interest, at any rate, if the like rule applies in this country, in enforcing a process against goods and lands, which applies in England; and there seems to be no reason why it should not be so, when our statute has made the very provision, in precise words, which had force in England only by the constructive and presumed intent of the statute.

But a writ against lands, issued before the return day against goods, is said only to be an irregularity, and not a void proceeding, so as to defeat the title of a purchaser of the land, who brought at Sheriff's sale: *Doe d. Spafford* v. *Brown*; and it cannot be that a return of "no goods" by the Sheriff, where there are goods, can be more than an irregularity to be complained of by the defendant or defendants, if the creditor be wrongfully abusing the process of the court, by going directly or by collusion against the lands, in place of first exhausting the goods: O. Bridgman, 474.

As to the second question, I think we are not now required to answer it; because, in the first place, the returns of no goods were not unreasonably, oppressively, or dishonestly made; and, in the second place, they were made for three weeks at least before the Bank of British North America acquired their title to the lands affected, at which time the lands were bound by the writs against them.

I am not certain that the heir at law, devisee or other person deriving title to lands from or through a deceased debtor, or any other person who might be so prejudiced, might not have the right to complain in some form or other, if a wrongful or collusive return of no goods were made, while there was sufficiency of goods, and his lands were taken under process to satisfy a debt, which the goods could and should have satisfied; just as the debtor, if living, could, on process against himself, complain in the like case.

As to the third question, I think it was objectionable, according to the authorities, to take out these concurrent writs: *Oswald* v. *Rykert*.

It would, perhaps, have been a more convenient method of proceeding on executions, to have had the one writ against goods and chattels and lands and tenements, with a direction to the sheriff to levy upon the goods and chattels, as in *elegits*, in the first place; and if there were no goods, or upon these being exhausted, to levy upon the lands, but not to sell them for twelve months after the seizure. This was what probably intended by the Imperial Parliament, in passing the 5 Geo. 11 ch. 7, when it declared, that real estates in the colonies should be assets for the satisfaction of debts by the like remedies as personal estates for the satisfaction of debts; it was, firstly, to subject lands to liability for debts, as personalty was; and then to simplify the remedy, by making one species of execution answer for all purposes, instead of adapting so many different species of writs, as *fieri facias*, *levari facias*, and *elegit*, which had to be pursued in England. For, at the present time, if there be five shillings' worth of goods, a creditor for a thousand pounds must go on and make that sum, before he can proceed against the lands; while the later execution creditors, by having their writs returned at once *nulla bona*, take precedence of him upon the lands; and every creditor must go through the routine, and add to the expense of suing out a writ against goods, although it is notorious that there are no goods to be levied upon.

I think that the plaintiffs, not having acted upon their writs against goods, could abandon them, and elect to go on upon the writs against lands: *Andrews* v. *Saunderson*, 1 H. & N. 725.

We think the rule should be discharged with costs:

Rule discharged with costs.

## PRACTICE COURT.

(*Reported by* R. A. Harrison, Esq., *Barrister-at-law.*)

### In the matter of the Arbitration between Fraser and Escott.

*Prosecution for selling liquor without a license—Not subject of compromise without leave of the court—Not subject of a reference—Award in part set aside.*

A prosecution for selling whiskey without a license cannot be compromised without the leave of the court, and therefore cannot form the subject of a reference to arbitration. Where, although the offence was not submitted, it was tried for the purpose of determining the liability of the parties as to costs, so much of the award as related to it was set aside.

[Practice Court, E. T., 1865.]

*Becher*, Q.C., for Escott, obtained a rule calling upon James J. Fraser to shew cause why the award made by John McMillan, E. V. Bothwell, and Archibald Clinies should not be set aside wholly or in part with costs, on the following grounds:—

1. If the award were made under the agreement set forth in the rule, then on the ground that Archibald Clinies, named only as an umpire, was called on by the arbitrators, and acted as an arbitrator before any disagreement between the other two arbitrators, there being no such disagreement.

2. If the award were made under the bond set forth in the rule, then the said Clinies was absent from the sittings of the arbitrators for one whole day, while the same was proceeding, and a number of witnesses being examined, and the said Clinies did not hear their evidence, nor take any part in the proceedings during the said day.

3. On the grounds that the information for selling whiskey without a license, or any evidence thereon, or appeal therefrom, or any costs thereof, could not be referred or awarded on.

4. That the award directed that Escott should pay $56, arbitrators fees, and $4 for a room, in all $60 as costs of the arbitration, without any power or provision therefor, either in the agreement or bond.

5. On the ground that the arbitrators have in the award directed Escott to pay the costs in certain suits without any taxation or settlement thereof by the proper taxing officer, and took upon themselves without knowledge or authority or any proper evidence to tax and settle and fix the amount of such costs.

6. On the ground that the award is uncertain as to both the items of such costs, $94 22 and $48 62, in not setting forth what suits the same

were in, the court, the style of the cause and the cause of action, and that the award is otherwise uncertain; and that in the meantime proceedings be stayed.

*Wells* shewed cause. He also moved absolute a rule for execution upon the award. As a preliminary objection he contended that the application was not properly supported The affidavits which were relied on for the purpose of impeaching the award were sworn to on the 10th and 15th of May, while the submission was not made a rule of court until after that time, the 17th of May, and so there was no matter properly pending in court at the time when these affidavits were made. He further contended that the rule should have been intitutled in the "Practice Court" as well as in the Queen's Bench, and that the affidavits were not entitled in any cause while several causes were referred.

Then as to the merits.

To the first objection, it is no cause for impeaching the award that the third arbitrator has acted unnecessarily, *Bates* v. *Cooke*, 9 B. & C. 407.

Second, the arbitrator who was absent for the one day was the third arbitrator, but he was not to act unless the other two first disagreed, and they had not then disagreed; and he was not therefore entitled to act after that day; Barnes 57, *In re Morphett*, 2 D. & L. 967.

Third, although the information for selling whiskey without license was referred, the arbitrators only adjudicated upon the costs, which they might do; *Beeley* v. *Wingfield*, 11 East. 46; Russell on Arbitration, p. 16, last ed.

Fourth, adjudicating as to costs is at most only bad to that particular part.

Fifth, ground, Mr. Becher said he would not press.

Sixth, the costs awarded are sufficiently determined in amount; it was not necessary to do more.

*Becher*, Q.C., supported the rule.

First, if the third person acted jointly with the other two, when he should not, the act of the other two cannot be assumed to have been their act, for he may have influenced them.

Second, if he should have acted with them, his absence invalidated the award; *Plews* v. *Middleton*, 6 Q. B. 845; *Little* v. *Newton*, 9 Dow. 437; *Peterson* v. *Ayre*, 14 C. B. 665; *Martin* v. *Kergan*, 2 U. C. Prac. Rep. 370; *In re Beek & Jackson*, 1 C. B. N. S. 695; *Morgan* v. *Bolt*, 7 L. T. Rep. N. S. 671. And if he should have acted alone, as he ought to have done if the other two had disagreed; then joinder with them was improper; *Tollit* v. *Saunders*, 9 Price, 612; *Re Salkeld* v. *Slater*, 12 A. & E. 767.

Third, as to the proceedings for selling whiskey without license, the arbitration disposed of it as far as it could do so, while the criminal proceedings were still pending, and it was an illegal subject to adjudicate upon; *The Queen* v. *Blakemore*, 14 Q. B. 544; Russell on Awards 15 2nd ed.

Fourth and Fifth, as to the costs of reference, see *Firth* v. *Robinson*, 1 B. & C. 277.

Sixth, the costs were awarded upon an uncertainty, because the suits should have been fully identified.

The affidavits were rightly entitled—not in a cause, because the submission is not a proceeding in a cause, but includes a cause.

Adam Wilson, J.—The submission which has been made a rule of court, is dated the 31st March last. It recites a controversy and law suit between the parties, namely three actions brought by Fraser against Escott; an information laid by Fraser against Escott for selling whiskey without license; and also a suit to recover $200 for damaging the house and property that Escott rents of Fraser; also a writ of ejectment caused to be served on Escott, to eject him from the house and premises he rents before the expiration of the lease; also a writ of summons caused to be served on Fraser by Escott for damages accruing to the property of Escott by Fraser in not repairing the premises according to a verbal agreement, and in not giving possession of the house at the time specified in the agreement.

The reference was then made of the said controversy to John McMillan, E. V. Bothwell, and "if the two cannot agree, the third man is to be Mr. Archibald Clinies" or any two of them.

The parties agree to observe the award to be made by the said arbitrators or any two of them, and the award is to be made in writing under the hands of McMillan, Bothwell and Clinies or any two of them, ready to be delivered on the 11th of April next.

Besides this agreement there is a bond made the 31st of March, 1865, by Fraser, in the penal sum of £125 to Escott, with the condition that if Fraser shall submit to the decision and award of McMillan, Bothwell and Clinies as arbitrators, by and on behalf of Fraser and Escott, including all and all manner of actions, cause and causes of action, suits, controversies, claims and demands whatever, provided award be made by McMillan, Bodwell and Clinnies or any two of them, ready to be delivered on or before 11th of April, 1865, &c.

On the back of this bond is endorsed a memorandum under the hands and seals of Fraser and Escott, dated 7th April 1365, extending the time for making the award until the 20th of April.

The award is dated the 19th of April, and is under the hands and seals of all three arbitrators. It recites the mutual bonds of the parties dated the 31st of March last. The three then award:

First, that Escott shall on or before the 1st of May, 1865, deliver up to Fraser the house he rents from Fraser.

Second, that Escott shall pay Fraser on or before the 1st of May, $239 59, being for costs incurred by Fraser in the suit entered against Escott for selling whiskey without license, which charge the arbitrators consider sustained by the evidence before them. For damages to the premises of Fraser, occupied by Escott, $54. For costs incurred by Fraser in the suit against Escott for damages, $94 22. And for costs incurred by Fraser in the suit against Escott to eject Escott from the said premises, $48 62. And for rent up to the time fixed by this award for Escott to leave the premises, $40; less $2 due to Escott by Fraser and $3 25 incurred by Escott caused by an unjustifiable issue of a landlord's warrant by Fraser, $34 75. And the

same shall be in full of all monies owing by Escott upon any account whatever. That in the suit of Escott against Fraser, each party shall pay his own costs. That each of the parties shall pay his own witnesses on the arbitration, and that the other costs of the arbitration, $60, shall be paid by Escott, being for arbitrators fees, $56, and for room, $4. And that the parties shall within 15 days next ensuing the date of the award, execute releases one to the other.

Escott swears that on the first day of the arbitration Clinies did not attend the arbitration, notwithstanding which the other two arbitrators proceeded and examined a number of witnesses. Fraser swears this was so, but that when Clinies came he was shown the whole of the evidence taken, and read it.

It appears the arbitration lasted four days after this, being five days altogether, and that Escott was present, as I gather, during the whole time and probably at this very time and occasion, and although he remonstrated fully against other things, he never made any objection to this.

The second objection then I cannot now entertain. The sixth objection has nothing in it. The fifth objection was not pressed. The first objection is of no weight, because the submission taken in connection with the bond was, I think, to the three arbitrators or any two of them. All three therefore had the right to participate. The fourth objection as to costs is only entitled to prevail as to the particular portion. This leaves the third objection only remaining to be considered.

As to the third objection, the charge or conviction for selling whiskey was not specially referred, the words are general, all and all manner of actions, &c., and the award is that Escott shall pay Fraser $8 for costs incurred in the suit entered by Fraser against Escott for selling whiskey without license, which charge the arbitrators consider sustained by the evidence before them. The affidavit shews that Escott was convicted of this offence by magistrates and fined $20 and costs, from which conviction he appealed to the Quarter Sessions; and it was while this appeal was pending and undetermined, and without the leave of court, that the arbitrators took it up and adjudicated upon it, as they unquestionably did.

By the Municipal Act, sec. 253, one half of the penalty goes to the informer and the other half to the municipality. And the question is whether this is an exercise of power beyond the authority of the arbitrators.

I have no doubt on this exposition of the law that a prosecution for selling whiskey without license cannot be compromised without the leave of the court, and therefore cannot form the subject of a reference to arbitration, because it is a matter of public concern and the prosecutor has no claim or interest in it for any private injury to himself, so that he could sustain an action against the party charged and recover damages. But the offence was not submitted although it certainly was tried for the purpose of determining the liability of the parties as to costs. If this could be done, the same might be done also as to the prosecutor's share of the penalty. But this would be manifestly against public policy, and so I think is the former, for it lessens the prosecutor's zeal in completing the prosecution which he has begun, and it is recompensing him for what he has begun but not completed.

This portion of the award I conceive to be separable from the rest, and as the defect appears on the face of the award itself, I may dispose of it without finally determining those formal and preliminary questions, which might have occupied me for some considerable time, perhaps not profitably, unless it can be said that every investigation of law must be presumed to be an interesting duty.

The rule moved on behalf of Escott will therefore be absolute, setting aside so much of the award as relates to the $8 costs of the prosecution and also as to the other item of $60 costs, and discharged as to the rest, but without costs on either side. And the rule moved on behalf of Fraser will be absolute, less the items before mentioned.

Rules accordingly.

## COMMON LAW CHAMBERS.

*(Reported by* Robert A. Harrison, Esq., *Barrister-at-Law.)*

### Gordon v. Robinson.

*Practice as to costs under the 22nd and 23rd rules of pleading T. T.*, 1856.

[Chambers, Aug. 26, 1865.]

The defendant in this case having obtained leave to plead several matters on which issue had been joined, subsequently obtained leave to add another plea containing matter of defence that had arisen subsequent to the institution of the suit, the plaintiffs thereupon filed a replication confirming the truth of this plea, and praying judgment for costs. The master declined to tax the costs of suit, or to enter judgment, while the other issues remained undisposed of upon the record.

*J. A. Boyd*, for the plaintiff, applied in Chambers to have these issues struck out, and for directions to the master to tax the costs, as if there had been no such other issues.

*J. B. Read*, for the defendant, contended that they were entitled to the costs of pleading several matters, in the same way as if the issues upon all the pleas except the one confessed had been found in their favor.

A. Wilson, J., inclined to this view, and made an order that all the pleas, and the issues thereon, except the plea confessed upon the record, should be struck out, and that the costs of such pleas should be set off against the plaintiff's general costs of the cause, to be taxed upon entering up judgment. No costs of the application to either party.

### Kerr v. Cornell.

*Certiorari—Costs of application for same.*

[Chambers, Aug. 30, 1865.]

This cause was removed by *certiorari* from the Division Court into the Common Pleas, at the instance of the defendant, who succeeded in obtaining a verdict in the court above. On the

taxation of costs, preceding the entry of judgment, the master allowed to defendant, in addition to the full costs of defence, the costs of and incidental to the removal of the cause, although the order granting the writ was silent as to costs. The plaintiff thereupon obtained a summons calling upon defendant to show cause why the taxation should not be revised, on the ground, amongst others, that the costs of the removal had been improperly allowed to defendant.

*J. Sidney Smith* showed cause.

*Foster* supported the summons, citing *Reg.* v. *Summers*, 1 Salk. 55; *Reg.* v. *Papman*, 1 E. & B. 2; *Corley* v. *Roblin*, 5 U. C. L. J. 225; Marshall on Costs, 7.

Morrison, J.—The master reporting that in his opinion he ought not to have allowed the costs of the writ of *certiorari*, order granted.

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### Miller v. Nolan.

*Interpleader—Sale after claim made—Delay.*

Where notice of claim to certain goods seized by the sheriff was given on the 30th June, and the greater part of the goods were sold (as being perishable) by the sheriff on the 5th July, on an application for an interpleader order, made the 3rd August,

*Held*, that the sheriff was not justified, by the fact that the first seizure did not embrace all the goods of defendant, in delaying to apply till he could get possession of the residue.

[Chambers, Aug. 30, 1865.]

By a summons granted on the 3rd August, at the instance of the sheriff of the county of Frontenac, the claimant to certain goods seized by him and the plaintiff in the cause were called upon to state the nature and particulars of their respective claims, &c. The affidavits filed on both sides disclosed the following facts: Plaintiff gave his notice to the sheriff on the 30th June. As a portion of the property so seized was perishable, the sheriff proceeded to a sale on the 5th July.

The reason for not applying at once was thus stated: "My reason for not applying immediately for an interpleader order herein was as follows: I understood a portion of the defendant's property had been concealed or removed, and I was desirous, as this was part of the property claimed by the claimant, that the whole should be disposed of at the same time, without the necessity of making a second application; and since such sale I have discovered and have now under seizure in my possession a valuable mare; that as soon as I had discovered the said mare, being all the property which I thought it likely I might find, I instructed my attorney to apply for the usual interpleader order."

*J. S. Smith* for the sheriff.

*Foster*, for claimant, contended that the sheriff, having exercised his discretion (*Crump* v. *Day*, 4 C. B. 760) and parted with the possession of the goods (*Wheeler* v. *Murphy*, 1 U. C. Pr Rep. 336) after a claim had been made to them, was not in a position to ask for protection. That the claimant should not be forced to interplead for the proceeds of the sale of goods when he had claimed the goods themselves The hardship of having goods seized and sold for less than their value and receiving only the proceeds of the sale was a proper matter to be pressed before the judge (*Abbott* v. *Richards*, 15 M. & W. 191; *Booth* v. *Preston & B. Railway Co.* 3 U. C. Pr. Rep. 90). That the delay to apply was not satisfactorily accounted for (*Thompson* v. *Ward*, 1 U. C. Pr. Rep. 269; *Ridgway* v. *Fisher*, 3 Dow. 567; *Cook* v. *Allan*, 2 Dow. 11).

Adam Wilson, J.—The sheriff received the notice of claim on the 30th June, and sold part of the goods on the 5th of July, because, he says, the same were perishable. The rest, he says, he did not sell then. He does not say to what extent he sold or did not sell. The notice of claim shows the goods were not perishable, but even if so, I do not see what difference it would make, and the claimant says all the goods seized, but one mare, were sold many weeks ago. The sheriff's excuse for delay—for he does not apply till the 3rd August—is, that he had not seized all the goods, and he did not apply at his first seizure but was waiting till he could get the residue. This is no reason for his selling on the 5th July after the claim made. This was his own act, and he should bear it himself. Upon these grounds I discharge the summons with costs.

Summons discharged with costs.

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## ENGLISH REPORTS.

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### QUEEN'S BENCH

### Mainprice v. Westley.

*Principal and agent—Sale by auction—Peremptory sale—Liability of auctioneer—Reserve price.*

The mortgagee of certain premises instructed an auctioneer to offer them on a specified day by public auction for peremptory sale. A handbill was thereupon issued by the auctioneer, announcing the sale "by direction of the mortgagee," and also stating that further particulars might be obtained "from Mr Hustwick, solicitor, or the auctioneer." At the sale the plaintiff made the highest bid, with the exception of Hustwick, who, acting for the vendor, outbid the plaintiff and bought in the property.

In an action brought against the auctioneer for refusing to sell the premises peremptorily, as advertised:—

*Held*, that, under the circumstances above mentioned, he was not liable.

[July 4, 1865.]

This was an action tried before Bramwell, B., at the Cambridgeshire Summer Assizes, 1864. The declaration stated that the defendant, being an auctioneer, was retained to sell by public auction a certain messuage, shop, and appurtenances, situated at Soham; and the defendant thereupon circulated certain handbills and other notices wherein it was stated and represented by him that he would offer the said messuage, &c., for *peremptory sale* on the 1st of April, 1864. And the plaintiff accordingly attended the sale, and the said messuage, &c, was offered for sale in pursuance of the said handbills, &c; and the plaintiff there and then bid the highest price for the said messuage, &c., except a certain price which was then and there, to the knowledge of the defendant, wrongfully and contrary to the terms whereon the said messuage, &c., were offered for sale, bid and offered by a certain agent on behalf of the vendor. Then followed the averment of performance of conditions pre cedent.

Breach—That the defendant, well knowing the premises, did not nor would not sell the said

messuage, &c., peremptorily, or accept the said offer and bid of the plaintiff, or declare the plaintiff to be the highest bidder and purchaser, whereby, &c.

The defendant pleaded not guilty, and traversed the various allegations of the declaration as to the circulation of the handbills, &c., and the breach. He also pleaded that "the said price bid and offered at the said sale by the said agent was not a price bid and offered contrary to the terms on which it was stated by the defendant as alleged, that the said messuage, &c., would be offered for sale."

Upon the trial it appeared that in March, 1864, the defendant caused certain handbills to be posted in Soham and its neighbourhood, announcing a dwelling-house, grocer's-shop, and beer-house at Soham, Cambridgeshire, for *peremptory* sale by auction, by direction of the mortgagee, on the 1st of April, 1865, at the Crown Inn, Soham. At the foot of the handbills were printed the following words: "For further particulars apply to Mr. Hustwick, solicitor, or the auctioneer."

On the evening of the sale the plaintiff attended the auction. At his request the conditions of sale were read by the agent of the vendor, and and in them it was stated that the "highest bidder should be the purchaser." No right of bidding was reserved to the vendor. The biddings slowly increased from £130 to £187, which was offered by the plaintiff, and no higher sum being mentioned, the defendant, who acted as auctioneer, inquired of the agent of the vendor (Mr. Hustwick) whether there was any reserve. He was told that there was, and that the sum was £195. There being no advance on this price, the property was accordingly knocked down to the vendor as unsold. The plaintiff almost immediately afterwards claimed the property of the defendant, but it was not delivered to him. He thereupon brought this action.

A verdict was entered for the plaintiff, subject to leave reserved to enter it for the defendant. A rule *nisi* was obtained accordingly in Michaelmas Term, 1864, by *O'Malley*, Q.C., calling on the plaintiff to show cause why the verdict should not be entered for the defendant, on the grounds that the plaintiff made out no cause of action, that the allegations of the declaration were not proved; that the breach was not proved; that on the facts proved the verdict should have been for the defendant, that there was no contract in writing to bind the defendant; or why judgment should not be arrested, on the ground that the declaration disclosed no cause of action.

*Lush*, Q.C., *Douglas Brown*, and *Markby* showed cause, and contended that at a *peremptory* sale the highest bidder was of necessity the purchaser.

*O'Malley*, Q.C., and *Keane*, Q.C., in support of the rule, contended that although the sale was advertised as *peremptory*, yet the vendor had a right at the auction to place a reserve price on his property.

The following cases were cited:—*Franklyn* v. *Lomond*, 4 C. B. 637; *Dingwall* v. *Edwards*, 12 W. R. 597; *Warlow* v. *Harrison*, 7 W. R. 133, 1 E. & E. 295; in error, 29 L. J. Q. B. 14; *Manser* v. *Back*, 6 Hare, 443; *Hanson* v. *Roberdeau*, Peake N. P. Rep. 163.

The judgment of the Court* was delivered by

BLACKBURN, J.—The declaration in this case contains averments that the defendant, being an auctioneer, retained to sell by public auction a house and shop, published and circulated handbills, in which it was stated and represented by the defendant that he, the defendant, would offer the said messuage and shop for peremptory sale by public auction on a day and at a place named: that the plaintiff, confiding in these statements and representations, attended at the time and place; and that the messuage was offered according to representations and statements, and the plaintiff then bid a price, which was the highest bid, except a sum which, to the knowledge of the defendant, was bidden by an agent on behalf of the vendor, contrary to the representation that the sale was peremptory; yet the defendant did not, nor would sell the messuage peremptorily, or accept the offer of the plaintiff, or declare the plaintiff the highest bidder and purchaser. There were pleas, amongst others, of "not guilty," and a denial that the defendant caused the handbills to be published and circulated as alleged. If it had been alleged that any part of this representation was false to the knowledge of the defendant, and that the plaintiff was induced by such deceit to incur expense by going to the place of action or the like, the count would have been good, and the plaintiff on proof of the deceit would have been entitled to such damages as he might have sustained by reason of expenses or loss of time occasioned by his attendance at the sale, or possibly to merely nominal damages. But intentional deceit is neither alleged nor was it attempted to be proved; what the plaintiff relied on was, that there was a contract on the part of the defendant that if the plaintiff was the highest bidder the premises should be knocked down to him, and if he had proved such a contract, the declaration would, probably, after verdict, be understood as alleging it, or at all events might easily be made to do so by an amendment. But we think that no such contract was proved.

It appeared on the trial that the defendant was an auctioneer, and that he had circulated handbills in which it was stated that the premises, on the day in question, would be offered for peremptory sale by auction, by Mr. J. Westley, the defendant, by direction of the mortgagee, with a power of sale subject to such conditions as would then be declared, and at the bottom of the bill was a statement in large capitals "for further particulars apply to Mr. Hustwick, solicitor, or the auctioneer." There is no doubt that this was a representation by the defendant that he intended to put up the premises for peremptory sale, but it also contained a statement that he did so by direction of the mortgagee and as agent for him, and though the name of that mortgagee is not disclosed on the bill, the name of the solicitor, Mr. Hustwick, is disclosed, and he is referred to as being the party from whom further particulars were to be obtained. These parts of the hand-bills very materially qualify the representation stated in the declaration, and it appeared that they were true. Hustwick was the solicitor of the vendor, and the representations were made by his authority, and the plain-

* Cockburn, C. J., Blackburn, J., Mellor, J., and Shee, J.

tiffs complaint was that Hustwick bought in the premises. If there was a contract on the part of the defendant that the sale should be peremptory, it was truly enough said that the contract was broken by allowing the property to be bought in.

The plaintiff's counsel, in the argument before us, mainly relied on the authority of the case of *Warlow* v. *Harrison*, where in the Exchequer Chamber three learned judges gave their opinion that where an auctioneer advertised a sale without reserve, not disclosing in any way who his principal was, he personally contracted that there should be a sale without reserve. Two other learned judges did not agree in this view, and it appears that ultimately the Court of Exchequer Chamber pronounced no other judgment than that the pleadings should be amended to enable the parties to raise the question, unless they consented to a *stet processus*, which they did. We do not think therefore that we are precluded by this as a judgment of a court of error, and, if necessary, we should be at liberty to consider the question whether even in a case where the name of a principal is not disclosed by an auctioneer there is a contract by the latter such as is now insisted on. The Lord Chief Justice and my brother Shee are of opinion that there is not, inasmuch as the character of an auctioneer as agent is unlike that of many other agents as to whom so long as the fact of their having a principal is undisclosed it remains uncertain whether the contracting party is acting as principal or agent; while in the employment and duty of an auctioneer, the character of agent is necessarily implied, and the party bidding at the auction knowingly deals with him as such, and with the knowledge that his authority may at any moment be put an end to by the principal; I myself should pause before deciding upon this ground. I do not, however, wish to express dissent from the view thus expressed, and we are all of opinion that it is unnecessary to decide this point. The three judges who formed the majority of the Court in *Warlow* v. *Harrison*, base their opinion entirely on the fact that the vendor was not disclosed—that he was a concealed principal; but in the present case the passages in the hand-bill (which are not set out in the declaration) showed that the defendant was acting for a principal, the mortgagee, who was described, and whose agent, Mr. Hustwick, was named. Now, as a general rule, where an agent acts for a named principal, the contract, if any, is *primâ facie* with the principal, not with the agent, and accordingly acting on this principle the Court of King's Bench, in *Evans* v. *Evans*, 3 A. & E. 132, decided that where premises were let by auction by the plaintiffs as auctioneers, but at the foot of the written conditions was written "approved by David Jones," the contract of letting was not with the plaintiffs as auctioneers, but with David Jones. Patteson, J., saying "on the document I can see no doubt, if the plaintiffs let for themselves why is David Jones' name added?" We think this an express authority, that, if there was any contract in this case it was with Hustwick, not with the defendant. We are not to be understood as deciding that the plaintiff could not have maintained this action against Hustwick, but merely that he has failed in proving any case against the defendant. The rule therefore must be absolute to enter the verdict for the defendant.

Rule absolute.

## UNITED STATES REPORTS.

### SUPREME COURT OF ERROR OF CONNECTICUT.

William Morris v. Delos Platt and Another.

*Assault authorizing belief of design to take away life—Self-defence—Fire-arms.*

(Continued from page 307.)

But in that the court were mistaken. A man who is assailed, and under such circumstances as to authorize a reasonable belief that the assault is with design to take his life, or do him extreme bodily injury which may result in death, will be justified in the eye of the criminal law if he kill his assailant, and in an action of trespass if he unsuccessfully attempt to kill him, and he surviving brings his action, for the killing would have been lawful and of course the attempt lawful; and no man is liable in a civil suit or criminal prosecution for an injury lawfully inflicted in self-defence and upon an actual assailant. Doubtless the question whether the belief was reasonable or not, must, in either proceeding, be ultimately passed upon by a jury; and the assailed judges at the time, upon the force of the circumstances, when he forms and acts upon his belief, at the peril that a jury may think otherwise and hold him guilty. But, in the language of Judge Bronson, in the thoroughly considered case of *Shorter* v. *The People* (2 Comstock, 193), "he will not act at the peril of making that guilt, if appearances prove false, which would be innocence if they proved true." And such is the law as cited by Judge Swift (2 Swift Dig. 285), from *Selfridge's case*, and as held on a careful review of all the cases in *Shorter* v. *The People*, and in numerous other cases which may be found cited there, and in Bishop on Criminal Law (vol. 2, p. 561); and it is the law of the land. That part of the request of the defendant used the term "excusable," instead of "justifiable," in respect to the homicide, and the latter term would have been more accurate. But the import of the request is not materially varied by that, and we cannot intend that it influenced the decision of the court.

2. The plaintiff, in answer to the defence made, denied that he was an assailant, and claimed that he was a by-stander merely, and requested the court to charge the jury, in substance, that if they so found, he was entitled to recover, although they should also find the defendant to have been lawfully defending himself against his assailants, and the injury to the plaintiff accidental. That request of the plaintiff embodies the unqualified proposition that a man lawfully exercising the right of self-defence is liable to third persons for *any* and *all* unintentional, accidental injurious consequences which may happen to them, and the court so charged the jury. Although there are one or two old cases and some dicta which seem to sustain it, that proposition is not law.

It is well settled in this court that a man is not liable, in an action of trespass on the case, for any unintentional consequential injury resulting from a lawful act, where neither negligence nor folly can be imputed to him, and that the burden of proving the negligence or folly, where the act is lawful, is upon the plaintiff. *Burroughs* v. *Housatonic R. R. Co.*, 15 Conn. 124. Is the rule different in trespass, where the injury is the immediate and direct, though undesigned and accidental result of a lawful act?

In respect of this question there is some confusion in the books, arising from two causes. First, the decided cases directly involving the point are few, but the question has been very frequently adverted to by way of illustration or argument, in cases where the point was whether case or trespass was the appropriate form of action. Such, with a single exception, were all the cases which the plaintiff has cited on his brief from our own or other reports in which the dicta originated. In all that large class of cases the dicta are thus thrown out *obiter*, and assume the fact without determining it, that the party is liable in one or the other form of action. (See on this subject the remarks of Shaw, C. J., in *Brown* v. *Kendall*, 6 Cushing, 395.) And in the second place, accidents (cognizable in actions at law, and distinguished from those peculiarly regarded in equitable proceedings) resulting from lawful acts, differ in character, and the distinctions and the right use of terms to characterize them have not always been sufficiently appreciated or regarded. A careful attention to those distinctions and the authorities will, I think, enable us to determine the question in hand with entire satisfaction.

An accident is an event or occurrence which happens unexpectedly, from the uncontrollable operations of nature alone, and without human agency, as when a house is stricken and burned by lightning or blown down by tempest, or an event resulting undesignedly and unexpectedly from human agency alone, or from the joint operation of both; and a classification which will embrace all the cases of any authority may easily be made.

In the first class are all those which are *inevitable*, or absolutely unavoidable, because effected or influenced by the uncontrollable operations of nature; in the second class, those which result from human agency alone, but were *unavoidable under the circumstances;* and in the third class, those which were *avoidable* because the act was not called for by any duty or necessity, and the injury resulted from the want of that extraordinary care which the law reasonably requires of one doing such a lawful act, or because the accident was the result of actual negligence or folly, and might with reasonable care adapted to the exigency have been avoided. Thus, to illustrate, if A burn his own house, and thereby the house of B. he is liable to B for the injury; but if the house of A is burned by lightning, and thereby the house of B is burned, A is not liable: the accident belongs to the first class, and was strictly inevitable or absolutely unavoidable. And if A should kindle a fire in a long unused flue in his own house, which has become cracked without his knowledge. and the fire should communicate through the crack and burn his house, and thereby the house of B, the accident would be unavoidable under the circumstances, and belong to the second class. But if A, when he kindled the fire, had reason to suspect that the flue was cracked, and did not examine it, and so was guilty of negligence, or knew that it was cracked and might endanger his house and that of B, and so was guilty of folly, he would be liable, although the act of kindling the fire was a lawful one, and he did not expect or intend that the fire should communicate.

And so, to apply these principles to this case, if the defendant had been in the act of firing the pistol at an assailant in lawful self-defence, and a flash of lightning had blinded him at the instant and diverted his aim, or an earthquake had shaken him and produced the same result; or if his aim was perfect, but a sudden violent puff of wind had diverted it or the ball after it passed from the pistol; and in either case the ball, by reason of the diversion, had hit the plaintiff, the accident would have been so affected in part by the uncontrollable and unexpected operations of nature as to be inevitable or absolutely unavoidable; and there is no principle or authority which would authorize a recovery by the plaintiff.

And, in the second place, if, while in the act of firing the pistol lawfully at an assailant, the defendant was stricken, or the pistol seized or stricken by another assailant, so that its aim was unexpectedly and uncontrollably diverted towards the plaintiff; or if, while in the act of firing with a correct aim, the assailant suddenly and unexpectedly stepped aside, and the ball passing over the spot hit the plaintiff, who till then was invisible and his presence unknown to the defendant; or if the pistol was fired in other respects with all the care which the exigencies of the case required or the circumstances permitted, the accident was what has been correctly termed "unavoidable under the circumstances," and whether the defendant should in such case be holden liable or not is the question we have in hand. For, in the third place, if the act of firing the pistol was not lawful, or was an act which the defendant was not required by any necessity or duty to perform, and was attended with possible danger to third persons, which required of him more than ordinary circumspection and care, as if he had been firing at a mark merely; or if the act, though strictly lawful and necessary, was done with wantonness, negligence or folly, then, although the wounding was unintentional and accidental, it is conceded, and undoubtedly true, that the defendant would be liable.

In this case the rule of law claimed by the plaintiff, and given by the court to the jury, authorized them to find a verdict for the plaintiff if they found the accident to belong to the second class, and to have been "unavoidable under the circumstances." We have seen that if the injury had been consequential, and the form of action case, the defendant would not have been liable, and the question returns, whether he can and should be holden liable because the injury was direct and immediate. and the form of action is trespass. I think not, whether the decision of the question be made upon principle or governed by authority.

If the question is to be settled upon principle, it seems very clear that the form of the action

should not be regarded, for the liability of the defendant must be determined by the nature of the accident, whether avoidable or unavoidable under the circumstances, or inevitable, and not by the fact that the injury was direct or consequential. The *foundation* of that liability in every case of accident, where it is the result of human agency influenced by the operations of nature, and the act is lawful, is really *negligence*. This is true of collisions between vessels on the water, or horses or vehicles and persons upon the land, which constitute the largest class of cases; for, as the accidents result from steering or driving, and are therefore direct injuries, trespass is the only remedy. So when a man, in firing at a mark, unintentionally wounds another, the injury is direct, and the form of action is trespass, but the ground of liability is negligence in doing an unnecessary and avoidable though lawful act, without that extraordinary degree of care which the law demands in such circumstances, and which would have prevented the accident. As, therefore, the foundation of the liability is the same in both cases, irrespective and independent of the question whether the injury was direct or consequential, there is no reason for any distinction in respect to the justification in the two actions.

And to that effect is the current of authority. In England the dicta cited from Raymond were disregarded by a majority of the court in *Scott* v. *Shepherd*, although urged by Blackstone, J., who dissented, and the *decision* is in point for the defendant. No case in point for the plaintiff is cited upon his brief. The case of *James* v. *Campbell*, 5 Car. & P. 372, is not so, for in that case Campbell the defendant and another were fighting unlawfully, and in breach of the peace, and while thus fighting and attempting to hit his antagonist, Campbell hit the plaintiff, who was a by-stander. But there the act was every way avoidable.

Mr. Hilliard, in his work on Torts, vol. 1, c. 5, sec. 9, so states the law, and cites the English case of *Wakeman* v. *Robinson*, 1 Bingham, 213, and the case fully sustains him. The action was *trespass*, for driving against the horse of the plaintiff, and the rule of law recognised by the court as applicable to the action is stated in the head-note thus: "If one does an injury by unavoidable accident an action does not lie, *aliter* if any blame attaches to him though he be innocent of any intention to injure." If there be any later case overruling that, it has not been pointed out to us, or fallen under our observation. As late as 1850, and in the tenth edition of Roscoe's Digest of the Law of Evidence at *Nisi Prius*, that case is cited as law.

In this country, though the cases are few, they are all, so far as we are informed, with the defendant. In the case of *Vincent* v. *Stinehour*, 7 Verm. R. 62, which was an action of trespass against the defendant for driving a horse and sulkey against the plaintiff, the defendant claimed that the accident was unavoidable under the circumstances, for that his horse became ungovernable, and the injury could not be prevented by prudence and care, and the Supreme Court in an elaborate opinion held that a defence. In *Brown* v. *Kendall*, 6 Cushing, 292, which was an action of assault and battery, the defendant accidentally hit the plaintiff, a by-stander, while raising a stick to strike and part two dogs which were fighting. This was the precise case put for the purpose of illustration by some of the English judges, as cited on the brief of the plaintiff's counsel. Yet the court in Massachusetts, Chief Justice Shaw giving the opinion, held that the defendant was not liable "unless the act was done in the want of the exercise of due care, adapted to the exigency of the case, and therefore such want of due care became part of the plaintiff's case, and the burden of proof was on the plaintiff to establish it." The same principles are recognised by the Supreme Court of the State of New York, in the case of *Bullock* v. *Babcock*, 3 Wend. 391, although they were not applied because that was a case of avoidable accident, the injury having been inflicted by an arrow, while shooting at a mark without reasonable care. And it is sufficient to add that the case of *Vincent* v. *Stinehour* was cited by Judge Williams, in giving the opinion in *Burroughs* v. *Housatonic R. R. Co.*, 15 Conn. 131, with evident approbation, although, as the case did not call for it, the principle involved was not in terms adopted. But the broad proposition subsequently stated without qualification in respect to the form of action, that "where there is neither negligence nor folly in doing a lawful act, the party cannot be chargeable with the consequences," tends to show the inclination of his mind, and we cannot doubt that if the case had required it, the rule as settled in *Vincent* v. *Stinehour* would have been adopted by the court.

Such are the general rules of law applicable to accidental injuries by which we must be governed in deciding the question as raised on the motion. But we are not insensible to the fact that the danger of accidental injury to third persons from the use of firearms, even in lawful self-defence, is comparatively very great; that the bearing of these arms is becoming needlessly general, and their use in populous places and thoroughfares quite too frequent; and that some further protection to the public from injury by them seems necessary. That protection might be afforded by us, perhaps, if we should hold, first, the use of firearms, even in lawful self-defence, to be attended by so much contingent danger to innocent third persons, that accidental injuries by them should be deemed exceptional and wholly inexcusable as matter of law, or inexcusable unless the defendant should show that they were inevitable or absolutely unavoidable; or, second, that *all* such injuries should be deemed *primâ facie* negligent, and that it should be left to the jury to say whether in the particular case the danger of injury to third persons was so slight and improbable that the case was exceptional, and the defendant wholly free from blame, either in having or using the instrument. It is obvious, however, that if we should thus introduce an exception into the law to meet new contingencies, we should be going beyond the exigencies of this case (there being other errors), and encroaching upon the peculiar duties of the legislative branch of the government; and to that branch, with this statement of the condition of the common law, and suggestion in respect to the importance of a remedy, we must leave the matter.—*American Law Register.*

(*Note by Editor.*)

This case may be regarded as important upon both points raised and decided, although in regard to the first question there is little ground of doubt.

1. The very necessity of the case, in self-defence, presupposes that the party must be permitted to act upon appearances; but if he acts rashly or negligently, he is responsible for consequences, as well to the party whom he mistook for an assailant, as to all others accidentally damaged by reason of the rash or negligent attack on his own part. This is declared in *Levett's Case*, cited in *Cook's Case*, Cro. Car. 537, 538, where the master of the house, supposing his house attacked in the night time by burglars, rushed down stairs with his drawn rapier, and seeing the glimpse of a servant girl of one of the neighbors, whom one of his own servants had secreted in the buttery, and mistaking her for a burglar, thrust her through the body, by which she died immediately, and was held guilty of no crime. And the same was maintained in an early case, where the gamekeeper shot the owner of the preserve, mistaking him for a deer-stealer, and it was held excusable homicide. The same doctrine has always been maintained in the English courts, and is the established rule in America: *State* v. *Scott*, 4 Iredell (N. C.) 409; *Stewart* v. *The State of Ohio*, 1 McCook, 66; *Oliver* v. *State of Alabama*, 17 Alabama, 587. This rule of the common law is too well established to admit of question. In cases where life is concerned, there is no doubt it should be held under severe restraint, and especially where firearms are resorted to. But we do not perceive any safer rule than that of the common law, that the party be allowed to act, and to carry the action to the extreme limit of taking life, where he, upon just grounds, earnestly believes his own life to be in peril, and there is no way of escape open to him. And the rule will equally apply where he is under the same apprehensions of grievous bodily harm, for the law does not require men to incur such peril of life or limb, looking to the law for redress. In all such emergencies the primary laws of nature revive, as against the outlaw; and one who puts himself in the place, or presents himself in the guise of an outlaw, or a murderer, or burglar, must be content to be treated according to his apparent character. This is not a point, at the present day, open to much discussion.

2. The other case decided in the question might seem, at first view, more doubtful; but we believe it will be found, upon careful analysis, equally free from doubt. The question here is not, as in *Leame* v. *Bray*, 3 East. 593, and that numerous class of cases, whether the action shall be trespass or case, but whether any action will lie for an accidental injury or damage resulting from a *lawful act*; for so long as the act itself is not lawful, there is no question the agent is legally responsible in some form for all the direct and natural consequences of his act. That was decided in the leading case of *Scott* v. *Shepherd*, 2 Black. 892; 1 Smith's Lead. Cas. 210. But the question in the principal case before us is, whether, if the act done in self-defence is done upon a justifiable excuse, and in a prudent and careful manner, the agent is responsible for any unforeseen and accidental consequence of the act, whether direct or indirect. It would seem there could be but slight doubt in regard to a proposition of this kind.

It is not whether the use of firearms is allowable in self-defence; that has been settled by common consent ever since their invention. It is much the same question as their use in war. Self-defence is war, private war; allowing the party to resume, as against an outlaw, or one who comes in the guise of an outlaw, the primitive rights of a state of nature, the ante-social state, and to repel force by force.

Neither is it the inquiry, whether firearms may be used in self-defence in the midst of a melee or street fight; for the law does not require a man to use one mode of self-defence on one occasion, and not upon others. He has a right to use all the means which "God and nature have put into his hands." It is the primitive war of natural forces, and he is not obliged to mete them out with a scrupulous regard to possible consequences to others. Others must be content to take their chance, as they do in regard to other legal acts, or as they do in regard to all accidental consequences where no one is in fault. If the law of self-defence requires qualification, in consequence of the more destructive character of the instruments of modern warfare, it should be done by the legislature, rather than by the courts.

This doctrine is very ably defended by Shaw, C. J., in *Brown* v. *Kendall*, 6 Cush. 292, and by Williams, C. J., in *Vincent* v. *Steinhour*, 7 Vt. 62. It is well said by Lawrence, J., in *Leame* v. *Bray*, *supra*, and, as applied to the present question, by Shaw, C. J., in *Brown* v. *Kendall*, *supra*, that if the agent is to be made responsible, he must be so to the full extent; and if death ensue, it will be manslaughter at the least. The result of this will be, that if, in self-defence, where one may kill his assailant, he should accidentally kill another, he would be liable to punishment for manslaughter. It is very obvious no such consequence could flow from a lawful act.

The late case of *Hummach* v. *White*, 9 Jur. N. S. 796, has some bearing upon the question before us. It was there held, that where one took a horse, purchased the day before, into a crowded street to train him, and the horse becoming restive rushed upon the sidewalk or pavement and killed a man rightfully there, there could be no action, civil or criminal, maintained against such rider or owner of the animal, without distinct affirmative proof of negligence on his part. The mere happening of the injury or damage is not evidence to be submitted to the jury; there must be some distinct affirmative evidence of negligence, to entitle the plaintiff to go to the jury.

I. F. R.

## GENERAL CORRESPONDENCE.

To the Editors of the Law Journal.

*Necessity of an Admiralty Court.*

Gentlemen,—Having seen an excellent article in your September number under the head of "An Admiralty Court," and wishing to see the subject fully discussed by abler pens than mine, I have, hoping to draw them out, ven-

tured to say something on the subject, should you deem it worthy a place in your *Journal.*

The commercial marine is so thoroughly mixed up with trade that without this branch, ordinary commerce would be of little account, but so striking are the peculiarities of the former that it requires special laws to meet the various questions that arise out of it.

Navigation, accordiug to history, is of very ancient date. Old Captain Noah, I suppose, takes rank as the first navigator. The Greeks at the siege of Troy had a pretty large navy of war vessels; and Solomon, about one thousand years before the Christian era, had a fleet of ships capable of making a voyage of three years duration, manned principally by Tyrian sailors. This shews that at that early day navigation must have been brought to great perfection. We find also, according to Eusebius, that these ancient Phenician navigators boldly passed the Pillars of Hercules and discovered Great Britain: and we find from other writers that tin from Great Britain was a very early article of commerce.

The Rhodians, perhaps, were the first who found it necessary to have marine laws to regulate their maratime affairs, and actually established a code, some parts of which are embodied in modern admiralty law at the present day. Among these are the laws of Jettison and General Average. It would be too tedious even to glance at the history of the ancient maritime laws of Tyre, Crete, Persia, Greece, Macedonia, Egypt, Carthage, Rome, and others, suffice it to say, that the necessity for such has been increasingly felt, and every maritime state in the present day has its Admiralty Court, owing to the fact that common law does not apply to maritime causes.

It was set forth very clearly in the leading article of your September number, that it is hopeless to get an intelligent verdict in a marine cause from a jury of landsmen. I say this without any disparagement to them, because it is a subject with which they are not acquainted, and of which they can have no practical knowledge.

Suppose a case of collision: a lawyer fully determined to get a verdict for his client (the jury being composed of landsmen), will tell them that two vessels meeting on the lakes are just the same as two teams meeting in the road, and each must "gee off" according to law to pass in safety, that it is a simple case, it is quite clear, and they must give a verdict according to his directions. He will be careful not to remind the jury that there are no fences on each side of a ships' road, that vessels are crossing each other's track in all directions, or how far such large bodies should be apart when it is necessary to put them on their proper course to pass each other in safety; or that when a vessels lights are dim she will appear much farther off than she is, or be further off than she appears, if her lights are bright.

These are some of the points on which he will give the jury no information, and perhaps in some instances he cannot give them any, simply because he has not studied the subject. Thus the matter would be left in the dark.

I stated above that all modern maritime states have admiralty laws, I should have excepted Canada West and part of Canada East, for Montreal is as bad as ourselves. Although our lakes are fresh yet we have "great waters" in which to "do business," and a very extensive marine which requires the same laws for its regulations as does traffic by sea.

Our waters are now navigated by sea-going vessels, and thus we are connected with the outer world. For the last three years our ports have been regularly visited by vessels from Norway. There is also a regular line of vessels owned in Liverpool trading thence to the upper lakes, passing through our canals. Thus we become a maritime state in reality. Suppose a foreign vessel should collide with one of ours on these waters, our vessel with a valuable cargo being totally lost, the foreign vessel may proceed to sea, and although she may be altogether in fault, we have no law to stop her, nor has the owner of the lost vessel or cargo any means of getting redress in our courts by any existing law.

Another case presents itself to my mind. One of our most respectable shipbuilders stated to me, that on one occasion, a short time ago, he did some repairs to an American vessel owned in Chicago, when on her way to Ogdensburg. The captain promised to pay the bill on his way up, but when he returned he disputed the bill, said he could get the repairs done much cheaper in Chicago, and that he would not pay so large a sum. The shipbuilder knowing that he had no redress, and could not detain the vessel and enforce

General Correspondence.

payment, had to submit to a large reduction in the amount in order to get it settled, although the regular prices only were charged in the bill.

The want of an Admiralty Court is being felt more and more among us, and I am of opinion the people will not quietly submit much longer to be without one. The law of salvage is a dead letter among us, and bottomry is a thing not known, but it will not do to splice a piece of admiralty law on to our common law.

Admiralty law is said by some to be expensive. What law is not expensive? Cannot admiralty law be administered as cheap as other law? In England experts are appointed, two of whom I think form a court, before which small causes to the amount of fifty pounds sterling may be tried with small expense. This plan might be adopted in Canada and perhaps improved upon.

They have also a panel composed of merchants and shipowners, who are well posted in maritime affairs, from which, when an important cause comes up, a special jury may be selected to try it.

If admiralty law were not a benefit the maritime nations would expunge it from their respective codes; they do not expunge it, therefore it is a benefit.

I would like to see this subject thoroughly ventilated, or else I would not seek to occupy a place in your *Journal*.

Sheer Hulk.

Kingston, 26th Oct., 1865.

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[It is with much pleasure that we publish the above letter, not only because it shews that a deep interest is felt in this matter by those most concerned, but also because it is written by a practical man who well understands what is required to place our lake marine upon a proper footing. It is by a full discussion of the subject by such persons that we may expect to obtain that extension of our laws, and the adaptation of the laws of other countries, which will eventually, and so far as possible, provide for the protection not only of those who risk their capital in vessels, but also of the sailors and mechanics, without whom such vessels would be of little use. We shall return to the subject in our next issue.—Eds. L. J.]

To the Editors of the Law Journal.

Gentlemen,—Will you please give your views on the following query:

"Leave to file affidavits in support of County Court rule within one week from this date, October 7th, otherwise rule then to expire."

No affidavits were filed until 14th.

It is contended that, by the County Court rules, the first day is inclusive, as also the seventh day; consequently the week expires on the 13th.

But on the other hand it is argued that the question is one of common sense, and cannot be decided by the County Court rules, which (152 sec.) simply decides a question of computation of time in such cases where the days are prescribed by the rules of practice, &c.: whereas in the case under consideration, the period referred to is one to be decided by opinion or precedent, and that the case of *Young* v. *Higgon*, 6 M. & W. 49, referred to in Archbold's Practice, page 145 (13th edit.), decides that "when time within a certain time of a particular period is allowed, &c., the first day is to be reckoned exclusively."

But, per contra, it is urged that if the filing was not too late on the 14th, then the party has one day more than the week. Had the leave been to file affidavits within one week *after* this date, then clearly the first day would have been exclusive; and this seems reasonable.

I am puzzled how to decide this; and as the question of computation of time is one generally of interest, perhaps you would give your views and enable me to have a better knowledge of the same hereafter.

Yours obediently,

A Law Student.

Guelph, Nov. 2, 1865.

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[We think that the affidavits might have been filed on the 14th. The words "within one week, &c.," we take to mean the same as within seven days from this date; and if so, the ordinary test of first day exclusive and last inclusive must be applied. How would it be if the order were *within one day*, &c. This could not mean that the affidavits should be filed on the same day as the order was made, that day must therefore be excluded, and if excluded in one case must be equally so in the other. See *Scott* v. *Dickson*, 1 U. C. Prac. R. 366.]—Eds. L. J.

## MONTHLY REPERTORY.

### BANKRUPTCY.

June 30.

Ex parte Caldwell. Re Strahan, Paul and Bates.

*Proof of debt by residuary legatees—Executor declining to act—Practice.*

Where the executor under the will of a creditor of a bankrupt firm, declines to make proof against the estate of the bankrupts, on the ground that he is ignorant of the circumstances under which the debt accrued, the court will allow proof by the residuary legatees under the writ, subject to a direction for payment of the dividend to the executor. (13 W. R. 952.)

### COMMON LAW.

L. C. Green v. Crockett. July 20

*Practice—Compromise of suit—Petition to confirm minutes agreed on by counsel.*

Where the terms of the compromise of a suit had been agreed on by counsel, and one of the parties afterwards repudiated the authority of his counsel and refused to be bound by the agreement, the Court refused, on the petition of the other party, to enforce the compromise, or to make a decree according to the proposed minutes. (13 W. R. 1052.)

Q. B. T. T., 1865.

Ontario Bank v. Muirhead et al.

*Writs against goods and lands—Right to issue concurrently—Practice—Right to move.*

A plaintiff cannot at the same time deliver to the sheriff a writ against goods and another against lands, both to be acted upon.

The plaintiffs issued a writ against defendants' goods to the sheriff of W., which on the 22nd of April was returned *nulla bona*, with the consent of one of the defendants, and on that day *fi. fas.* against lands issued to the same and to other sheriffs, and an *alias fi. fa.* goods to the sheriff of W., on which latter writ he seized certain stock. A motion to set aside these writs was made on behalf of two of the defendants, and of the Bank of British North America, to whom they had given a mortgage of lands on the 17th of May, 1865; the objections being that there had been no proper issue and return of writs against goods and that the writs against land and goods were concurrent.

*Held*, that the return of *nulla bona*, if any of the defendants had goods, could be only an irregularity, against which the Bank could not move, nor the defendants who had consented to it; but

*Held*, also, that as the alias writ against goods issued on the same day as the writs against lands, and had been acted upon, the latter writs were illegal, and must be set aside.

*Held*, also, that the mortgage to the Bank could not have prevailed against the writs, which bound the lands from their receipt by the sheriff. (24 U. C. Q. B. 563.)

Q. B. T. T. 1865.

Lett v. The Commercial Bank of Canada.

*Married Women's Act, C. S. U. C. ch. 73—Construction of—Property purchased after marriage out of the wife's separate estate.*

In an interpleader issue the plaintiff, a married woman, claimed goods seized under an execution against her husband. It appeared that the property consisted of stock, farming implements, and growing crops, and was seized upon a farm on which she and her husband were living, and which had been devised by the plaintiff's father to trustees for her benefit, the rents to be payable to her for her separate use; and that most of it, except the crops, had been purchased by the husband at sales, but paid for by the claimant out of the rents of other lands devised in the same manner. She had been married before the 4th of May, 1859, without any settlement.

*Held*, in the absence of any evidence to the contrary, that the reasonable presumption was that the husband was tenant of the land, and if so the crops would be his.

2. As to the other property, that, apart from our statute, it would not be the claimant's merely because it had been purchased by money which belonged to her under the will.

3. That as to the statute, it should be construed as creating a settlement before marriage in the terms of the first and second sections; and if in this case the property was bought by the wife to enable her husband to carry on the farm for his own benefit and that of his wife and family, it would be liable to satisfy his debts.

In the County Court it was left for the jury to say whether the property claimed did not belong to the husband, he having reduced it into possession. *Held*, that this was an insufficient direction, and that their attention should have been drawn more explicitly to the effect of the statute, to the presumption arising from the husband being the head of the family, occupying and farming the land, to the use to which the property was put, and to the wife's apparent object in purchasing it.

*Quære*, if this had been trespass instead of an interpleader, whether the wife could have sued alone.

S. C., Cal. Hooper v. Wells et al. U. S.

*Liability of common carriers and forwarders.*

The liabilities of common carriers and forwarders, independent of any express stipulation in the contract, are entirely different.

The common carrier who undertakes to carry goods for hire is an insurer of the property intrusted to him, and is legally responsible for acts against which he cannot provide, from whatever cause arising; the acts of God and the public enemy alone excepted.

Forwarders are not insurers, but they are responsible for all injuries to property, while in their charge, resulting from negligence or misfeasance of themselves, their agents or employees.

Restrictions upon the common law liability of a common carrier, for his benefit, inserted in a receipt drawn up by himself and signed by him alone, for goods intrusted to him for transporta-

tion, are to be construed most strongly against the common carrier.

If a common carrier, who undertakes to transport goods, for hire, from one place to another, "and deliver to address," inserts a clause in a receipt signed by him alone, and given to the person intrusting him with the goods, stating that the carrier is "not to be responsible except as forwarder," this restrictive clause does not exempt the carrier from liability for loss of goods, occasioned by the carelessness or negligence of the employees on a steamboat owned and controlled by other parties than the carrier, but ordinarily used by him, in his business of carrier, as a means of conveyance. The managers and employees of the steamboat are, in legal contemplation, for the purpose of the transportation of such goods, the managers and employees of the carrier.

A receipt signed by a common carrier for goods entrusted to him for transportation for hire, which restricts his liability, will not be construed as exempting him from liability for loss occasioned by negligence in the agents he employs, unless the intention to thus exonerate him is expressed in the instrument in plain and unequivocal terms. (5 Amer. Law Reg. N. S. 17.)

## CHANCERY.

V. C. K. —— June 22.

Stewart v. The Great Western Railway Co. and Saunders.

*Railway company—Compensation for an injury—Equitable fraud.*

A tradesman and his wife were passengers by an excursion train to which an accident occurred, and they received injury and were attended by a surgeon, and two others employed by the company, and they accepted and signed a receipt for £15 as compensation, but subsequently brought an action for £1,700, to which the company pleaded not guilty, and set up the receipt. The plaintiffs then filed a bill alleging a fraud, by which they were induced to accept the £15, and asking a declaration that, under the circumstances, the payment was not a full compensation, and to restrain the company from relying on the plea of the receipt. A demurrer to this bill overruled. (13 W. R. 886.)

And it was held, on appeal, that although the adoption by the company of the act of their agent would enable the plaintiff to resist their plea at law, yet the plaintiff was entitled to the interference of a court of equity; and that it was no objection to his bill that he did not ask for compensation in equity. (*Ib.* 907.)

Ch., N. J. Brewer v Norcross. U. S.

*Set-off—Debts accruing in different rights.*

Bill filed by one partner against his copartner for an account of the partnership transactions. Defendant by his answer claims that there are moneys due him from complainant and from complainant and a third party on various accounts; he asks also a settlement of these accounts, and that the amount found due him may be allowed by way of set-off to the demand of the complainant. On exceptions to this answer it was *held*, that these matters having no connection with the subject-matter of the bill, but being entirely distinct and unconnected, cannot be set off against complainant's demand.

The general rule in equity as well as at law is, that joint and separate debts, and debts accruing in different rights cannot be set off against each other. Courts of equity, however, exercise a jurisdiction in matters of set-off independent of the statutes upon the subject. Whenever it is necessary to effect a clear equity, or to prevent irremediable injustice, the set-off will be allowed though the debts are not mutual.

When the interference of the court is asked because the defendant believes that the business was of such a character that justice requires that all the accounts should be inquired into and settled at the same time, the answer must allege some fact, which shows such belief of the defendant to be well founded. Nor can defendant have such relief by way of answer. He must file a cross-bill. (5 Amer. Law Reg. N. S. 63.)

## APPOINTMENTS TO OFFICE.

NOTARIES PUBLIC.

JOHN TWIGG, Esq., and PATRICK JOSEPH BUCKLEY, Esq., LL.B, Attorney-at-Law, to be Notaries Public for Upper Canada. (Gazetted Nov. 18, 1865.)

## TO CORRESPONDENTS.

"Sheer Hulk"—"A Law Student"—Under "General Correspondence."

H. McM., thanks for report—will appear as soon as possible

Few men are bold enough to fight a great railway company on any question, and especially on one involving only a small amount, and one result of this has been that railways have been virtually exempt from the penalties attaching to breaches of contract made by undue delay in the arrival of trains as advertised in the published time tables. It has long been settled law that, unless special damage can be proved, the company is not liable for mere delay, but wherever, in consequence of delay, expense are incurred, there is every ground for making the company liable.

Mr. Best, a commercial traveller, recently brought an action in the Bloomsbury County Court against the London and North-Western Railway Company, to recover the sum of five guineas for expenses incurred by him in consequence of his detention while travelling on their line. The company, on their part, said they expressly stipulated that they did not guarantee the times stated for the arrival and departure of the trains, and that on the days in question they conveyed a very large number of excursionists at a cheap rate, which interfered with the punctuality of their ordinary trains. Mr. Lefroy, the judge, said that this statement did not protect them, except in cases in which an accident, or circumstances which could not be anticipated, came in the way; that if persons made their arrangements on the faith of the time-tables, and the company departed from them, they were answerable for losses sustained by the passengers.—*Solicitors' Journal.*