[194] COLLINS AND MUXWORTHY. Writ of error amended [in the style of the Court to which it was directed].

Writ of error directed to the Mayor, Recorder, and Aldermen of the City of the Bath, whereas the stile of the Court, as appears by the record returned, is the Mayor, &c. Justices of the City of Bath.

Draper moves upon the statute of 5 Geo. I. c. 13 †, that the writ may be amended by the record, and had a rule to shew cause, and no body appearing at the day, the rule was made absolute (1).

BOUCHER AND LAWSON.

Ante, p. 85.

This cause was argued once in Hilary term last, by Serjeant Darnell for the plaintiff, and by Mr. Abney for the defendant.

Page, J. It was argued again in Trinity term last by Serjeant Chapple for plaintiff, and Serjeant Eyre for defendant.

For the plaintiff it was said, that the master is chargeable for things done by the servant in and about his office. *Boson and Sandford*, 1 Shower, 29, 101. *Mors and Sluce*, 1 Mod. 85.

As to the unlawful trade, it was said that it does not appear but that it was money received, and not the gold of Portugal, and, possibly, that law may inflict a penalty on the owner of the goods only, and not on the owner of the ship; but however the misfeasance is the gift of this action, and therefore, possibly, an action might not lie for not taking them on board, but when he had them on board, the contract was executed, and he must take care of the goods; as to the freight being payable to the master of the ship, yet still it is a benefit to the owners, for the master has the less wages; cites *Coggs and Barnard*, 1 Salk. 26, upon an undertaking without consideration, held that though no action lay for not doing, yet for misdoing he is answerable.

For the defendant it was said that the unlawfulness of the trade might be put out of the case; and it was argued that the owners **[195]** are not liable for contracts made by the master upon his own account; so the master may hypothecate the ship for his owners, but not for his own debt; *Bridgeman's case*, Hob. 11, and 1 Roll. Abr. 350 [(C.)], pl. 2. And though the mariners are the master's servants, yet he is not liable for their contracts. Molloy De Jure Maritimo, p. 234.

That, as there was no agreement in this case who should have the freight, it must be paid as the usage is found to be, to the master, and on this verdict that must be taken to be the custom; and if goods are sent abroad, generally, the freight must be paid as usual in such cases, Molloy, p. 257. That it appears from the case of *Boson and Sandford* in Lev. Shower, Comberbach and Carthew, that these sort of actions do not lie against the owners as being the appointers of the master, nor as being owners of the ship, for then disagreeing owners would be liable, but only as receiving freight.

Lord Hardwicke, C.J. One thing occurs to me on reading the record, which has not been spoke to; there are few cases of this sort reported, only two principal ones, viz. *Mors and Sluce*, and *Boson and Sandford;* the first was an action against the master only, and the opinion was, that it lay either against the master or owners, and the declaration in that case is founded on the custom of the realm in general; in *Boson and Sandford*, as appears by Carthew, the declaration lays the ship to be a ship usually carrying goods for hire, and thereupon the declaration is founded. In this case the declaration is different from both; for the first count, on which the verdict is given, is, that the plaintiff caused to be delivered and laden on board the said ship several goods and merchandizes to be safely carried to London, there to be

† The words of the statute are, (reciting that writs of error as the law then stood were not amendable) that all writs of error, wherein there shall be any variance from the original record or other defect, shall be amended, and made agreeable to the record by the Court where the writ of error is returnable.

(1) See 2 Lord Raym. 1587, and where the writ of error was brought in case where the original action was in covenant, amendment of the writ was allowed, 5 Taunt. 82; see also 2 Str. 892. 2 Cowp. 425.

delivered to the said Boucher, he paying freight; and that the defendant having received the goods into his custody, undertook to carry them safely; and that the ship arrived, and plaintiff is ready to pay the freight, but defendant refuses to deliver the goods. Now here no custom of the realm is laid, nor that it was a ship usually carrying for hire, but a special undertaking of the defendant; nor has the verdict found any thing more: so then the question is, whether this case comes up either to *Mors and Sluce*, or to *Boson and Sandford;* for the undertaking is only thus far verified by the verdict, that the ship being in the Tagus, the master took the goods on board by the lading; and, therefore, it deserves to be considered, whether if a ship be sent for a particular purpose, and not in the general way of trade, the master can take in goods to charge the owners? and if so, whether something further should not have been shewn in this declaration, and found by the verdict? For on this record, if we give judgment for plaintiff, we must say that in all cases, even though the ship be sent for a particular purpose **[196]** and not in the general way of trade, the master can take in goods to charge the owners.

Lee, J. My Lord Chief Justice's observation seems to be very right, because the plaintiff should state such a case as the law and custom of the realm as to merchandize can operate upon. The owner is liable, as well as the master; in respect of such custom and of receiving freight; and the owner, as well as the master, may bring an action for the freight, and it is on that foundation that he is liable to the freighters.

It was again argued this term.

Bootle, for plaintiff. If this case depended only on the general question, whether the owners were liable for the neglect of the master, there are so many cases to that purpose, that there could be no doubt, but that they are so for all matters which fall within the compass of the master's employment; so that the question here is, whether there be any thing found which can distinguish this case. Now, it is found, that the master is to take the whole freight, unless there be some special agreement to the contrary, and that there was none in this case; now, though freight be one reason, yet it is not the only reason; for the employment by the masters is another reason for making them liable; and so it is held by Holt in the case of *Boson and Sandford*, so Molloy, p. 234, 5. So that the owners are liable, even upon that head; but that it cannot be supposed, even here, that the master was, absolutely, to have the whole advantage, and that no advantage was to accrue to the owner; for, no doubt, the master received the smaller wages in respect of profits to be made this way; but, however, they are liable from the employing the master without any other consideration. As to what was said about the unlawfulness of the trade, it is sufficient to say, that it is far from being unlawful in England, but on the contrary is encouraged by the laws, for foreign money may be imported hither without warrant or fee. Book of Rates, 133.

As to the form of the declaration, that it does not alledge this to be a ship usually carrying for hire, he argues that it is not necessary; for, there are many instances of declarations without it, and possibly this may be a new ship, and yet it would be equally liable as if it had made many voyages; so likewise of a carrier that makes his first journey; so likewise drawing a single bill of exchange makes **[197]** a man a trader for that purpose, and will warrant a declaration. Show. Rep. 125. Carth. 82. Salk. 125, pl. 2. 2 Ventr. 295, 310. Comb. 45, 152, 153. So a declaration alledging the defendant to be a lighterman is good without saying a common lighterman; for it is the delivery that makes the contract, Palmer, 523, *Simonds and Darknell*, and the foundation of the action is the trust and recompence: so that whether this ship had usually carried for hire, or this were its first voyage, there is no difference; cites Cro. Jac. 262, *Rogers and Head:* declaration against one as a common carrier, alledging that he is a common carrier, and objected in arrest of judgment that though he is now, he might not be so at the time of the delivery of the goods, and unless he were so he cannot be charged but by a special action; and held that the action lay upon the assumpsit to carry safely, but not because he was a common carrier. This case, indeed, cannot be mentioned upon the defendant's assumpsit because there is not quid pro quo; but this action is founded upon the deceit in negligently carrying. He cited also 1 Sid. 244, where the plaintiff declared upon the custom of the realm that the defendant was a common carrier, but did not shew he was so at the time of the delivery of the goods; and, objected, that this was a misrecital of the custom; but

held that the declaration is good enough without recital, and therefore a bad recital shall not vitiate, it being a recital of the common law, though a bad recital of the statute, which need not be recited, shall vitiate. He cited also a case of *Brandon and Peacock*, in C. B. Pasc. 3 Geo. II. (1)[1], and affirmed upon a writ of error, Pasc. 4 Geo. II., where the declaration was exactly like this, without stating that it was a ship usually carrying for hire.

Lord Hardwicke, C.J. In that case I suppose it was a general verdict upon an assumpsit.

Serjeant Wright, for defendant. The verdict is found on the first count of the declaration; which does not charge the defendant as having carried for hire, and therefore he must be liable by the special undertaking found by the verdict, or not at all: so the case in Cro. Jac. [*Rogers* v. *Head*], the assumpsit made him liable. But the question here is, whether the assumpsit laid be found in this case; so in the case in Palmer, [*Simonds* v. *Darknell*], the declaration was, that he carried for hire; which is tantamount to alledging him a common carrier; because they must charge him as a common carrier. We do not object to the declaration as a bad declaration, but that they have not made it good. The only question is, whether the undertaking of Lawson the defendant is found to be so by the verdict? or, whether the undertaking found, be not the undertaking of the master of the ship? If ownership, alone, were sufficient to charge the owners, then a disagreeing owner would be liable, which he is not. Carthew, 63. Comberbach, **[198]** 117. All that is found in this case is, that the defendant was sole owner, and appointed Fletcher to be master; so that it does not appear that he was to carry for hire, nor that it was the nature of the master's employment so to do; and he might be employed in the owner's business alone, and not as a carrier to take in for hire. Indeed the master is to some purposes able to bind the owners, as for repairs of the ship; because that is necessary and arising from the nature of his office: but the contract in question does not concern the government of the ship, and the Court will intend no other matter to maintain the action than what the plaintiff himself has shewn, 3 Co. 52 b. Cites *Ward and Evans*, 2 Salk. 442, that the act of a servant shall not bind his master, unless he acts by his master's authority. If a master of a ship can, in any case, contract for himself, he has done so here.

In the case of *Boson and Sandford* (1)[2] the owners were charged as common carriers, and found to be such, and freight found to be received by them; and, that was the ground of the resolution in that case, as appears from Salk. 440.

Lord Hardwicke, C.J. As to myself, I have no doubt in this case; there are three questions, viz. whether this case is different from the former cases? either 1st, from the finding in the verdict that the freight is to go to the master? or

2dly, as this is a trade unlawful in Portugal? or

3dly, if there be found upon the whole matter sufficient to charge the owners?

As to the 1st, I think the owners will not be discharged upon that head; for there is no difference between the freight's going to the master by the owner's special agreement, or by the custom of the trade; it is the same thing; and as Hale says, 1 Vent. 239, that in effect the merchant pays the master's wages, for that it is but handed over by the owners to the master; so likewise the freighter does in effect pay the owners, for it is handed to them by the master.

2dly, I think the unlawfulness of the trade makes no difference, for it is not material to us what the law of Portugal is, but what the law of England is, and here in England it is not only a lawful trade, but very much encouraged.

3dly, but what determines my opinion, is this last point, which occurred upon comparing this declaration with those in *Mors und* **[199]** *Sluce*, and *Boson and Sandford* (1)[3]; for I think that upon this declaration taken with the verdict, judgment must be for the defendant. The question is, whether sufficient appears in this case to charge the defendant? Now he must be charged upon the custom of the realm, as usually carrying for hire, or else by his express undertaking. As to the custom of the realm, it is not now necessary it should be set out in the declaration, though all the old entries are so, but that being reckoned part of the common law, is not therefore necessary to be alledged; but yet, the plaintiff must prove a sufficient case within

(1)[1] Cited, p. 86, ante. (1)[2] Cited p. 86, ante.
(1)[3] References to both, p. 86, ante.

the custom, and upon all general verdicts [the Court] will take such a case to have been proved; but this being a special verdict, we can only take the case to be as it is found; and I think the case now found, is not within the custom; for it is not found to be a ship usually carrying for hire, nor that it was employed in this case to carry according to the custom. In *Boson and Sandford* (2)[1], it is laid, that the ship usually carried for hire, and the jury likewise find that it usually carried for hire, and that the plaintiff delivered the goods on board, &c. so that though it is not laid or found as the custom, yet such facts are laid and found as bring it within the custom. As to its being a new ship if that were so, yet the master would be liable, but then it must appear that the ship was employed in that voyage to carry goods for hire; for any thing that appears in this case this might be a ship sent to Lisbon for a special purpose, and if so, no one can say that the master, by taking in goods of his own head, could make the owners liable. In the case of common carriers, you must either set forth, that in that particular instance he carried for hire, or declare upon the custom of the realm. In the case of *Coggs and Barnard* (3)[1], the great doubt was, whether some consideration should not have been laid; and the Court held that the defendant having undertaken, he was answerable for the misfeazance; but that was by reason of the personal undertaking, and it would have been an action to charge the master for his servant. Nothing appears here of any personal undertaking in the owner, but only an undertaking of the servant, which can only charge the owner by the custom; and as to the case of *Brandon and Peacock* (1), that was a general verdict; so that the Court was bound to take a sufficient case to have appeared before the jury. This is no reason why these cases should be carried any further than they have been already. So I think the defendant must have judgment.

Page, J. The finding, as in this case, that this was merchandize, and that freight was to be paid for it, is, indeed, evidence that it was a carrying for hire; but it is no more than evidence, and not a finding, and therefore we cannot take notice of it.

[200] Lee, J. There are no circumstances here to vary this case materially from the cases cited; if goods are put on board a trading ship, either the owners or master may bring an action for the freight; *Fry and Marsh*, cited in the margent of the case of *Boson and Sandford* (2)[2]. The delivery of goods to the master of a ship trading for hire is a delivery to the owners; but there has been no case cited where owners have been held to be liable, but upon the custom of the realm, or as trading for hire, or upon a special undertaking. Owners can never be liable but in respect of the delivery of goods to a ship trading for hire, where the delivery to the master is a delivery to the owners, and where the owners can in respect of such delivery have an action for the freight; for you must shew a benefit accruing to the person against whom you bring your action, or else a special undertaking; so that I think it is a material objection upon the face of the declaration. Court unanimous for the defendant.

Bootle then moved, that as the merits were with the plaintiff, he might have leave to discontinue upon payment of costs.

Lord Hardwicke, C.J. I do not remember any instance of its being done after a special verdict found and argued. This is not the case of an uncertain verdict, where the Court take upon them to award a venire de novo. It has been done upon doubt even after the opinion of the Court given.

Page, J. Did you ever know a discontinuance after a general verdict? and yet this is the same.

Cur'. Let defendant have judgment unless cause.

At the day given Bootle for plaintiff shews cause.

Lord Hardwicke, C.J. I have looked into this, and am satisfied that a discontinuance may be after a special verdict.

Bootle. It has been done after a judgment upon demurrer, 1 Saunders, 39 (3)[2], and frequently after argument; cites 5 Mod. 208, *Keat and Barker*, "It may be allowed after a special verdict and an argument at Bar; so likewise after a joining in demurrer. But the stat. 2 Hen. IV. c. 7, ordains, that after a verdict a plaintiff shall not be nonsuit; which was otherwise at common law, for if he did not like his damages he might be nonsuit."

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(2)[1] Reference, p. 86, ante.
(1) Reference, p. 86, ante.
(3)[2] 2 Wms. Saund. 73, n. (1).
(3)[1] Reference, p. 194, ante.
(2)[2] Reference, p. 86, ante.

Abney for defendant. This is entirely at the Court's discretion, and stands upon the same footing as granting new trials, which the **[201]** Court never does in hard actions. 2 Salk. 644. And this is a hard action.

Serjeant Wright with him, admits that it may be done after a special verdict, though not after a general one, and so is 1 Salk. 178, *Price and Parker;* but as the book says it is a great favour; and this is a hard action, being to charge the defendant upon strict construction of law, and not for any act of his own.

Bootle replies, that this is different from the cases of new trials, and is like cases of mistakes in the pleadings; for here this verdict was found upon a mistake; that discontinuances have been in hard actions, he cites *Jones and Pope*, 1 Saunders, 39, and 1 Sid. 305: discontinuances allowed after argument upon demurrer in an action of debt for an escape though the objection was made of a hard action. So 2 Saund. 73; leave given to discontinue in a bad action though the plaintiff had another remedy. Admits that in Salk. [178] it is said to be great favour, but in Comberb. 363, 171, it is laid down generally. And he offered an affidavit that the ship is since sold, and therefore the plaintiff has no remedy in the Admiralty Court.

Lord Hardwicke, C.J. We must take it upon the record, and cannot go out of it; and this is not like a new trial where we go into the fact, for the special verdict is now upon record. The question is, whether after all these arguments, and the opinion of the Court given thereupon, the plaintiff may have leave to discontinue. It is certain that after a special verdict found and argued, there may be leave given to discontinue, but it is a great favour, and the Courts never allow it but where very strong circumstances are, which do not appear in this case. And I think it is properly compared to the cases of new trials in hard actions, which are always denied! and in *Smith and Frampton*, [2] Salk. 644, it was denied, though Holt said he was not satisfied with the verdict; so, [2] Salk. 653, *Dunkly and Wade*, a new trial granted where verdict for plaintiff in a hard action, though Cur' said, had it been for defendant they would hardly have granted it: so the Court denied it in one case because it was a hard action, and allowed it in the other for the same reason. And this case is the more similar, because the Legislature have altered the law in that case (which was for burning, setting fire to another's house by burning mine by accident) as well as in this, for now no such action for burning the house can be brought. Now to compare this case; it is against a master for gold lost by the negligence of his servant without any privity of the master, and the opinion of the Court is, that here is not a sufficient contract laid, and the Legislature have since declared that it is a hard action, and mischievous **[202]** to the public, and therefore we have the strongest warrant to say it is a hard action, and to determine [in] our discretion to deny a discontinuance.

Lee, J. It is clear that there have been discontinuances after special verdicts and arguments at the Bar, and the opinion of the Court given; and it is as clear that when the party applies for leave, that the Court must have a discretion to grant or refuse, or else it might be done without asking.

Rule absolute. Judgment for defendant (1).

BLAGNEY'S CASE. A gentleman pensioner, being an officer on the Checque roll, is exempt from serving on juries.

At the first sittings at Nisi Prius in Middlesex, one Blagney was excused from serving on the jury, he being a gentleman pensioner, which is an officer upon the

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(1) For the principal point, this is referred to as a leading case in Abbott, 120. And as to the general question, see id. part ii. c. ii. part iii. c. v. where the authority of the master in the employment of the ship, and the limitation of the responsibility of the owners and master, are concisely yet luminously treated. And for the secondary point, as to the practice in permitting the party to discontinue in a hard action, this case is referred to 2 Wms. Saund. 73, n. 1.

The stat. 7 Geo. II. c. 15, by which the responsibility of owners, &c. in the cases there expressed, is limited to the value of the ship and freight, may also be referred to.