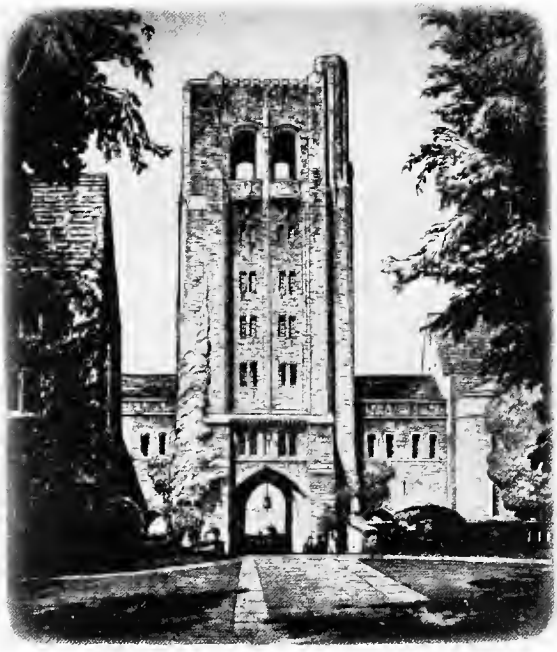

REPORTS OF CASES

DECIDED IN THE

COURT OF KING'S BENCH,

OF

UPPER CANADA.

BY

THOMAS TAYLOR ESQ.,

OF THE MIDDLE TEMPLE, BARRISTER AT LAW.

CONTAINING THE CASES DETERMINED
FROM TRINITY TERM 4 GEO. IV., TO TRINITY TERM 8 GEO. IV.;
WITH A TABLE OF THE NAMES OF CASES ARGUED,
AND DIGEST OF THE PRINCIPAL MATTERS.

SECOND EDITION.

TORONTO:

HENRY ROWSELL.

1862.

ROWSELL & ELLIS, PRINTERS, KING STREET, TORONTO.

JUDGES

OF

THE COURT OF KING'S BENCH,

DURING THE PERIOD OF THESE REPORTS:

THE HONOURABLE CHIEF JUSTICE POWELL.
MR. JUSTICE BOULTON.
MR. JUSTICE CAMPBELL.

Attorney-General:
JOHN BEVERLEY ROBINSON, ESQ.

Solicitor-General:
HENRY JOHN BOULTON, ESQ.

A

TABLE

OF THE

CASES REPORTED IN THIS VOLUME.

UPPER CANADA REPORTS

IN THE KING'S BENCH

CASES DETERMINED IN TRINITY TERM,
4 GEO. IV.

Present:

THE HONOURABLE CHIEF JUSTICE POWELL.
MR. JUSTICE BOULTON. (*a*)

JAMES ROY AND JULIA DUVAL v. JOSEPH DELAY.

Where a rule to shew cause why an attachment should not issue against an attorney for non-payment of moneys recovered for his client, had lapsed; the court refused to grant a new rule without a fresh affidavit, stating that the money was still unpaid.

Washburn obtained a rule last term to shew cause why an attachment should not issue against ——— one, &c., upon an affidavit, stating the receipt, non-payment, and refusal to pay, certain moneys received by him from the defendant in this action, to the use of the plaintiffs; and now he stated to the court, that the former rule had lapsed, and moved for another rule, *nisi*, upon the former affidavit; *sed per Cur.*

It appears, *prima facie*, from the rule not having been served, that the demand may have been satis-

(*a*) MR. Justice CAMPBELL was absent during the whole of this Term, from indisposition.

fied: a rule to shew cause cannot issue without a fresh affidavit, stating that the money sought to be recovered is still unpaid.

Rule granted upon affidavit made.

Williams v. Crosby.

The court will not grant a peremptory rule for the discharge of an insolvent prisoner without an affidavit that no interrogatories had been filed by the plaintiff.

Macaulay applied for an order to discharge the defendant out of custody, upon an affidavit, stating that the order of court obtained under the provincial statute (*a*) for payment of five shillings, currency, per week, to the defendant, a prisoner in execution, had not been complied with.

Boulton, J., (*absente* Powell, C. J.)—There must be an affidavit that no interrogatories have been filed by the plaintiff, or the application must be for a rule *nisi*. (*b*)

Rule *nisi* granted.

The King v. Harris.

Quære—Whether the court will award a mandamus to the treasurer of a district in this province.

Rolph obtained a rule last term to shew cause why a mandamus should not issue to the treasurer of the district of London, directing him to pay several sums of money to the gaoler of the district, under the orders of the justices in sessions. The affidavit in

(*a*) Prov. Stat. 45 Geo. III. (*b*) Prov. Stat. 2 Geo. IV., c. 8.

support of the application stated the issuing of several orders by the justices in sessions to John Harris the treasurer, requiring him to pay several sums to Beaupre, the gaoler; the presenting of those orders to Harris, his refusal to pay them, on the ground of there not being any money in the treasury, and the payment of several orders of a date posterior to, and which were presented after, those of Beaupre.

Boulton, Solicitor-General, now shewed cause. He contended, that the only grounds upon which a mandamus can issue are, that the party has no other legal or appropriate remedy, or that there is no court, except the superior court, competent to correct the acts complained of: that in this case, the legal and proper remedy was by indictment, or by application to the magistrates in sessions, to whom the treasurer was amenable for his conduct, and who had ample means of correcting him by removal: his accounts were audited and allowed by them, and it would be unreasonable that he should be proceeded against by mandamus, in a matter respecting those accounts, by any other court; he is the officer of the sessions, having the custody of moneys which are subject to their disposal only: that these positions are borne out by all the cases, none of which are contrary to, many bearing a strong analogy to, and several directly in point with, the present. In Doctor Walker's case, Lord *Hardwicke* says, (*a*) "Can it be said that ever a mandamus went to an officer of an inferior court to compel him to do his office? No, sure, for if the inferior officer will not do his duty, the judge of the inferior court must turn him out."

(*a*) Cases temp. Hardwicke, 218.

In the King against Bristow, (*a*) Lord *Kenyon* says, "This court have no difficulty, upon a proper case laid before them, in granting a mandamus to justices to make an order, when they refuse to do their duty; but it would be descending too low to grant a mandamus to inferior officers to obey that order: we might as well issue such a writ to a constable, or other ministerial officer, to compel him to execute a warrant directed to him, as to grant this application to the treasurer, to obey the order in question. It was once, indeed, made a question, whether the disobedience of an order of justice was an indictable offence; but since the case of the King v. Robinson, that point has not been doubted: the prosecutors must pursue the ordinary remedy in this case by indictment:" and my Lord *Bacon* says, "But, though these kind of writs are daily awarded to judges of courts to give judgment, or to proceed in the execution of their authority, yet are they never granted in aid of a jurisdiction, but only to enfore the execution of it; nor are they ever grauted where there is another proper remedy; and therefore will not lie to an officer of an inferior court, as to a serjeant at mace, an apparitor, &c., to compel them to execute their duty, for these are servants to the respective courts, and punishable by the judges of them; and for the superior court to interfere in obliging such inferior officers, would be to usurp their authority." (*b*)

That supposing this treasurer to be an officer to whom a mandamus could issue, the affidavit to ground the application was defective, inasmuch as it is not sworn that the treasurer had money in his hands

(*a*) 6 T. R. 168. (*b*) Bac. Abr. Tit. Mandamus, 310.

when the orders were presented, and that the orders themselves should have been annexed, and not a schedule; and the treasurer has sworn that he had no money.

BOULTON, J.—The affidavits are certainly too confined; in a similar application to the present, in England, I recollect that fact was expressly sworn to.

The magistrates, if necessary, can coerce this treasurer: no neglect is shewn upon his part. It is merely sworn that an order was issued, and that he did not pay it. He has produced his accounts, which shew he has no money in his hands, and they are supported by affidavit. The court will not therefore grant a mandamus to compel him to do what is physically impossible; nor will they order him to pay *de bonis propriis.*

Macaulay, contra.—The object of this application is not duly considered by the arguments on the other side: if the treasurer had no money in his hands, he should return that fact, upon which issue might be taken, and that issue might be tried by a jury. If the treasurer does not make such a return to the mandamus as will satisfy the court, he will be attached, and the object of the attachment will be, not to do that which is physically impossible, but to punish him for contempt of the process of this court. The treasurer is upon a different footing here to that which he is upon in England: he is here appointed under the sanction of an act of the legislature; his duties are chalked out by statute. When orders for payment of money are brought to him, it is his

duty to pay them out of the first moneys which come to his hands: he is not to pay subsequent orders before prior ones. In the affidavits in support of this motion it is distinctly stated, that he has made several payments upon orders issued after those of the gaoler. If the magistrates have neglected to exert their authority, in compelling the treasurer to perform his duty, this court will interfere. The case of the King against Bristow is very distinguishable from the present: that was an application from the sessions from a mandamus to the treasurer of a division quarter sessions, from parties who had the means of enforcing their own orders. It is expressly laid down in Kidd, that this court will visit all officers, and here the court will not hesitate to grant a mandamus; issuable facts may be returned upon it, traversed, and tried by a jury.

Rolph, same side.—The case of the King against Dean Inclosure (*a*) is in point. That was an application for a mandamus to commissioner of highways appointed by statute, and notwithstanding the quarter sessions had authority, the Court of King's Bench interfered, and it was laid down that an indictment against commissioners of an inclosure act, for not obeying an order of sessions, directing them to set out a road, as a public road, would not be such a remedy to the party as would induce the court to refuse an interference by mandamus. In the present case, an indictment or removal of the treasurer would be no remedy to the party; and when the law mentions a legal and specific remedy,

(*a*) 2 M. & S. 80.

it must contemplate one which would assist the party in the recovery of his rights.

Boulton, Sol.-Gen. in reply.—The case in Maule and Selwyn is very different to the present; the commissioners there were not inferior officers, but superior in their own court; an appeal lay to the quarter sessions, but as the time had elapsed for that appeal, the Court of King's Bench interfered, on the ground that the party would otherwise be without remedy.

There is no reason for considering a treasurer in this country as bearing a different character to that which he does in England. (*a*) It is not necessary that the mode of his appointment should be the same; he is amenable to his own court here as well as there. If the superior court saw it necessary to interfere with the treasurer, it would be by attachment, a process which the quarter sessions are not empowered to issue for disobedience to their orders. Is there any instance of this writ issuing, to order the performance of an impossibility, and of incarcerating a man for not obeying it? Suppose there may have been orders paid subsequent to the presentment of the gaoler's, they were not left with the treasurer, and he is not bound to keep a tablet in his memory of all orders that are issued. The point of law appears from all cases to be clear against thus issuing a mandamus in this case, and no grounds have been shewn why the court should interfere contrary to former determinations.

(*a*) As to the office and duties of a treasurer of a county in England, vide 14 G. III., c. 20; 12 G. II,, c. 29, & 6, 7, 8, 9, 12, cited in Burns, J.

CHIEF JUSTICE.—This is a beneficial writ prayed by Beaupre the gaoler, to supply the want of any other remedy adequate to his relief; the treasurer is a public officer, declared by statute so to be; he is to receive the public money to pay the orders of sessions for its disbursement, and to account to the sessions: when the gaoler presented his order, he was told that there were no means; other orders have been made upon the treasurer since that of the gaoler, which have been paid; but Beaupre has always been told that there was no money in the treasury. Upon principle the treasurer is bound to charge the orders as they occur; it would be monstrous that he should be permitted to prefer one person to another at his own caprice; if it is not the law at present, I should hope the legislature would make a statute for the payment of these orders in rotation; under the circumstances of this case, a mandamus appears to me to be the only remedy. I cannot consider the treasurer as an inferior officer; though he is appointed by the sessions, his duties are set forth by an act of the legislature: if the treasurer had no money upon the presentment of Beaupre's order, he should have been paid out of the first moneys which came into the treasury, and the affidavits state that the deponents verily believe there was money. The true principle of refusing a mandamus in the King's Bench, is not merely that there may be some other mode of seeking redress, but that it should be a means competent to the party. It has been contended that this gaoler should proceed by indictment, but that would not be an adequate remedy to him: the treasurer may be removed, and his securities may be resorted to,

by the justices, but still this would not relieve the applicant; his demand upon the treasury remains as long as there is money in the treasury, or money due to the treasury. The affidavit of the treasurer passes by any direct assertion, that he had not the means of payment at the time of presenting the order, or that he has not had the means since; it admits, that subsequent to the presentment of Beaupre's order a more recent order has been presented and paid. The opinion which I formed upon the former argument of this case is not altered, but rather strengthened: an indictment is not an adequate remedy here, and I think the mandamus should issue.

Boulton, J.—There are two points to be considered in this application: first, whether the treasurer of a district is an officer to whom a mandamus may issue: and, secondly, if he is so, whether the affidavits in this case are sufficient to warrant the extraordinary interference of this court. As to the first point, the cases say that a mandamus is always refused where there is a specific remedy; this is laid down in Douglas as well as the term reports: in the cases there reported the subject of the application was a treasurer, here it is the same—I can see no difference in the law, no difference in the application; every authority satisfies me that the writ cannot issue; the only pretence for a different decision, is the case in Maule and Selwyn, but it does not apply; that was respecting an original appointment; the commissioners were not inferior officers. As to the second point, it is not sworn in the affidavits in support of this application, that the treasurer has

money in his hands. It appears to me that it would be a hardship upon him to issue this writ, unless it was positively sworn that he had funds. In a similar application to the present, to the Court of King's Bench, in England, where that fact was sworn to, the writ was granted without opposition; that case, therefore, furnished but little authority. My first impression on this application was, that the writ might issue, but upon considering the law, and looking into the affidavits, I am satisfied that a mandamus should not be awarded.

The court being divided, *Rolph* took nothing by his motion.

Williams v. Crosby.

It is not sufficient that an affidavit to ground the detention of a prisoner who has applied for his discharge for non-payment of his weekly allowance, states his being possessed of property, but it must shew that he has secreted it, or fraudulently parted with it, and after such allowance has been paid, if the plaintiff discontinues it, he must have affidavits to produce in court, to justify such discontinuance at the time the defendant moves for his discharge.

Ridout shewed cause against the rule *nisi* obtained this term, for the discharge of the defendant, an insolvent debtor, upon affidavit, stating that the defendant was possessed of land in the township of King, which he became entitled to, subsequent to his imprisonment at the suit of the plaintiff. This affidavit had been sworn above a year ago and had not hitherto been made use of by the plaintiff, who had paid the defendant the weekly allowance ordered by the court, for about seventy weeks, and then discontinue it.

This prisoner cannot be discharged under the

statute, (*a*) until he answers the interrogatories to be filed by the plaintiff. The words of the statute are, "That when and so often as any prisoner or prisoners in custody, and charged in execution, for debt, in any civil suit, shall apply to the court whence such process or execution issued, either to be discharged or allowed a weekly maintenance, by reason of any alleged insolvency, it shall and may be lawful for the plaintiff or plaintiffs, at whose suit such prisoner is detained, his, her, or their attorney, to file such interrogatories as he, she, or they shall be advised or think expedient, touching or concerning, or for the purpose of discovering any property or credits which the prisoner may be possessed of, or which he or she may be suspected of having secreted, or fraudulently parted with, which interrogatories the prisoner is required to answer upon oath. That after such interrogatories shall have been filed, and a copy thereof delivered to said prisoner, his or her attorney, said prisoner shall not receive any further benefit from his or her application; and the orders or other proceedings thereon shall be stayed until the prisoner shall have fully answered the same." &c. It is immaterial, according to the words of this statute, at what time he came into the property. He is possessed of land, and not being the insolvent person whom the statute contemplates, the plaintiff is entitled to examine him upon interrogatories, and it is contrary to the intention of the statute that he should be discharged until he has an opportunity of doing so; the principle of this statute is the same with that of the Lord's act.

(*a*) Provincial Statute, 2 Geo. IV., ch. 8.

Macaulay and *Washburn*, contra.—It is not sufficient now that it is sworn that the prisoner has property; it must also be sworn that he has secreted it, or fraudulently parted with it. Plaintiffs cannot be permitted to pocket up affidavits for a length of time, and then produce them to prevent the discharge of a prisoner.

CHIEF JUSTICE.—It appears that the weekly allowance has been paid for a length of time, and is now discontinued. The plaintiff cannot cease this payment without shewing that the defendant has, subsequent to the order for the allowance, "concealed, fraudulently parted with, or made away with, his property." If this prisoner should be released the debt is not discharged: the plaintiff may resort to the property. Before he discontinued the payment, he should have had his affidavits of these facts ready. The affidavits you have may shew property to have come to him since his imprisonment, but shews no secretion of it, or that it has procured him a loaf of bread. A man is put into gaol, who swears he is worth nothing; after laying in gaol for some time, he procures an order for five shillings per week, which is paid for more than a year, and is then discontinued: he applies for his discharge, and then the plaintiff produces affidavits to shew that property has come to him. The prisoner must be discharged.

Per Curiam.—Rule absolute.

NICHALL ET AL., SURVIVING EXECUTORS, v. WILLIAMS.

Where one of these executors is deceased, and the survivors bring an action in right of their testator, the declaration must state that payment has not been made to the deceased executor.

The declaration in this case was for goods sold, and upon the common money counts; the breach stated that the defendant, not regarding his promises, &c., but contriving, &c., to defraud the testator in his life time, and the said William Nichall and Allan McPherson, since his death, in this respect, had not paid the several sums of money, &c., to testator in his life time, or to said James Nichall and Allan McPherson, executors as aforesaid, or to any of them, (without any averment of non-payment to the deceased executor.) To this declaration the defendant demurred generally.

Macaulay, in support of the demurrer. — No notice is taken in this declaration of the deceased executor; he is not even named. There should have been an averment according to the forms laid down, that no payment was made to the deceased executor during his life.

Baldwin and *Washburn*, contra. — This is not like the case of a deceased partner. In law, a negation of payment to one executor is a negation as to all.

CHIEF JUSTICE.—Each of the executors may receive money. To shew that the defendant is still indebted, you should aver that the third executor has not been paid.

Per Curiam.—Leave to amend upon payment of costs.

THE KING v. JOHN McINTYRE AND ALEXANDER MACKENZIE, ESQUIRES.

An attachment will issue against commissioners of a court of requests, who try a cause in which they are interested.

Boulton, Solicitor-General, had obtained a rule in Hilary Term last, calling upon Alexander Fraser, Alexander McMartin, John McIntyre, and Alexander McKenzie, Esquires, Commissioners of His Majesty's Court of Requests, held at Williamstown, in and for the county of Glengary, to shew cause why an attachment should not be issued against them for having illegally and corruptly given judgment in the said court against Alexander Wood, at the suit of the elders and committee of the church of Williamstown, and issuing execution thereon. The facts upon which the rule was granted, as stated upon affidavit were, that Alexander Wood having, with several others, signed a subscription paper or agreement for the allowance of six dollars each, per annum, for the support of a presbyterian minister, who was to have come from Scotland, and having refused to pay the same, in consequence of no minister having arrived agreeable to the terms, as he conceived, of the agreement; he, said Wood, was proceeded against to judgment and execution, before said Commissioners of the Court of Requests, for the sum of one pound, and costs amounting to seven shillings and six pence: that John McIntyre and Alexander McKenzie, who gave judgment against said Wood, were interested in the event of the said suit; the former being one of the elders, to whom the promise, if any in the said agreement or subscription paper was made, and the latter being personally bound to pay the salary of the minister then officiating. It was further stated upon affida-

vit, that goods and chattels of Wood of the value of twenty-two pounds were sold to satisfy the amount of the execution, being one pound seven shillings only. It was also sworn that the church was indifferently designated Williamstown or Lancaster.

Macaulay now shewed cause.—An attachment cannot issue against magistrates acting judicially, unless actual corruption is shewn. In this case, the parties are respectable persons, who could have no corrupt motive in what they had done. In the judgment of the court of requests, the plaintiffs are entitled the Committee of the Church of Lancaster; and in the rule *nisi* granted by this court, they are styled the Committee and Elders of the Church of Williamstown, a variance which will prevent the issuing of the attachment. In a strict legal proceeding, as the present is, the names of parties must be correctly stated, and though it is sworn that the elders and committee are indiscriminately designated as of Williamstown or Lancaster, that is not sufficient to cure the defect; as to the value of the property taken by the constable, to satisfy the execution, he has sworn that Wood told him he had no property, except a mare and two stacks of oats. —[CHIEF JUSTICE.—That is immaterial, the complaint against the justices cannot go further than issuing the execution.]—McMartin has sworn that several parties were sued upon the same agreement or subscription paper, and that they had a full opportunity of making their defence; and if Wood did not choose to do so, upon a mere surmise that his defence would not be attended to, it was his own fault. There is no evidence of corruption in this case;

the parties were mere agents, and not bound for the contracts of others. They may have erred, but certainly not from corrupt motives.

Boulton, Solicitor-General, contra.—In the affidavit to ground this application it is positively sworn that one of the magistrates (McIntyre) was one of the elders, plaintiff on the action upon which he sat and gave judgment; and that another (McKenzie) was personally bound to pay the salary to the present officiating minister. Wood was well entitled to refuse payment of the subscription, as the terms were not complied with, and the refusal of a copy of the judgment by the magistrates, upon the first application, was highly improper. They are certainly amenable to the common law as for corruption. In the case reported in 1st Lord Raymond, an attachment issued against a magistrate for giving judgment in favour of his own lessee.

Chief Justice.—Wood seems to have had grounds for refusing his subscription, as no clergyman came from Scotland to officiate under the agreement. One of the magistrates who was concerned in this matter very properly withdrew from the bench. A man must have no conscience at all who could sit in a cause in which he was concerned. There may not have been actual corruption, but the case comes under the law which is anxious to prevent it.

Per Curiam.—An attachment must issue against John McIntyre and Alexander McKenzie, Esqrs.

BROOKE v. ARNOLD.

Where the plaintiff, endorsee of a promissory note payable upon demand, had taken it two years after its date, and was cognizant of an agreement entered into between the holder from whom he took it, and the defendant (the maker) that the same should be set off against a bond of which the defendant was obligee, and the then holder the obligor; the court *held* that a plea stating these facts was good upon general demurrer.

The plaintiff declared in assumpsit, as endorsee of a promissory note made by the defendant, and upon the common money counts, and laid his damages at £——. The defendant pleaded to the first count: 1st, that John Arnold, in the first count mentioned, after the making of the note by Thomas, the defendant, and before the same came to the hands and possession of the plaintiff, to wit on the 6th day of September, 1819, endorsed the note in blank, and delivered the same to one Allan Napier McNabb, and authorised the said Allan to demand and have of and from the defendant the said sum of money in the said note specified, according, &c.; of which said endorsement and delivery, the defendant afterwards, to wit, on the day and year, &c., had notice: that after the making of said note, and before the same came to the hands and possession of the said McNabb, so endorsed as aforesaid, to wit, on the 4th day of September, 1817, said McNabb executed a bond to the defendant in the penal sum of £450 conditioned for the payment of £265 5s. 0d. by three instalments, &c. That at the time when said note, so endorsed and delivered to McNabb by John Arnold, and became the property of McNabb for the purposes aforesaid, to wit, on the 6th day of September, 1819, at York, &c., there was, and still is due and owing upon the said writing obligatory by the condition thereof for the second instalment in the said condition mentioned, the sum of £100, which said last men-

tioned sum of money so due and owing from McNabb to the defendant, greatly exceeds the amount of principal and interest due on said note, &c. That afterwards, and while the said note, so endorsed as aforesaid, remained and continued in the hands, and was the property of McNabb, to wit, on the day, &c., the defendant, at the special instance and request of McNabb in that behalf, consented and agreed that the sum of money in the said note specified (said note so endorsed as aforesaid, being still held and owned by McNabb as aforesaid) should be set off and allowed to McNabb for and on account of, and in satisfaction of, so much money so due and owing by McNabb to the defendant upon the said writing obligatory, by the condition thereof as aforesaid, of all which premises the plaintiff afterwards, and before the said note so endorsed as aforesaid, came to his hands as in the plea thereinafter mentioned, to wit, at York, &c., had notice: that afterwards, and before said sum of money so due and owing from McNabb to the defendant, upon said writing obligatory, by the condition thereof, or any part thereof had been in any other way paid, discharged, or satisfied, and whilst the same remained in arrear and wholly due and unsatisfied, and long after the said note became due and payable; to wit, on the day, &c., McNabb and the plaintiff, well knowing the premises, but wickedly contriving, &c., and to force the defendant unjustly again to pay said sum of money in said note specified, and to defraud him of his right to set off the same against the aforesaid sum of money so due and owing from McNabb to the defendant on the aforesaid writing obligatory by the condition thereof, did agree together that

McNabb should deliver the said note so endorsed in blank to the plaintiff, for the purpose of enabling him to sue and prosecute the defendant for the said sum of money in said note specified, by virtue of said endorsement thereon aforesaid, and the plaintiff did then and there accept the said note so endorsed from McNabb, for the purposes aforesaid, then and there well knowing, &c., by which means, and by no other, the plaintiff became and was the holder of the said note. Traverses that John Arnold, by the said endorsement of the said note, ordered and appointed the said sum of money in the said note specified, to be paid to the plaintiff, or delivered the said note so endorsed to the plaintiff. 2ndly. That the promissory note so endorsed in blank, came to the hands and possession of the plaintiff, by the delivery of McNabb, after and not before the agreement that the same should be set off against the bond of McNabb, and out of which said sum of money so due and owing from McNabb to the defendant, the defendant is ready and willing, and offers to set off and allow to the plaintiff the said sum of money so due and owing from the defendant in the said promissory note, according, &c. Traversing as in the first plea. And, 3rdly, general issue as to the second count in the declaration.

To this plea the plaintiff demurred generally.

Baldwin, in support of the demurrer.—This plea is an attempt to set off a bond debt due to the defendant by a third person, against a note due by the defendant to the plaintiff in this action; if this could be done, the plaintiff would be unjustly deprived of

taking those exceptions to this bond which the obligor might take in an action against him by the obligee: McNabb should have delivered this note up to Thomas Arnold, the defendant, the obligee in the bond, and have had the amount endorsed, or he might have brought his action; but this attempt to bind the plaintiff by an agreement to which he was not accessory or privy, cannot be supported. This plea charges the plaintiff with an intention to deprive the defendant of a right of set-off, a charge so vague and uncertain that the plaintiff cannot be called upon to answer it. The defendant, by his plea, acknowledges every circumstance necessary for the plaintiff to support his action: the making of the note by the defendant, the endorsement in blank by the payee, and the subsequent delivery to the plaintiff. If the court should support this plea they would deprive negotiable instruments of their credit, if not entirely destroy their negotiability, for who would take them if they were made subject to agreements entered into previous to their transfer; would the bank here be concluded by agreements, such as is here attempted to be set up, after a note had passed through a dozen hands? A note endorsed in blank stands upon the same footing as one payable to bearer, is transferable by mere delivery, and can be recovered upon, though it may have been stolen by a prior holder, as laid down in Douglas's Reports. (*a*) Supposing even that the plaintiff may have come to this note unfairly, it might be a consideration for a court of equity, but a plea in bar must contain matter of law, as laid down in Chitty. (*b*) It would be idle and absurd to contend that the plaintiff's demand in this action

(*a*) Peacock v. Rhodes, Doug. 611, 633. (*b*) Chitty on Pleading, c. 7.

could be destroyed by an agreement for a set-off, of which he had no knowledge. The second plea offers to set off this note against a bond due to the defendant by a third person, and it appears to me can only be intended to puzzle with new matter, for it is clearly established and well known, that to entitle a defendant to a set-off, the debts must be mutual, but in this plea he offers in fact to give credit to McNabb, a stranger to the action. An executor or administrator cannot set off, nor can a trustee.—(CHIEF JUSTICE.—A trustee has no property.)—Nor can any person set off unless the legal title to that which he attempts to set off may be gone into; if this plea were allowed, the plaintiff would be concluded by an instrument to which he has no access. In the case of Wake against Tinkler, (*a*) the defendant attempted to set off a bond executed by the plaintiff to a third person, and assigned by him to defendant; but, notwithstanding the equity of that case, the court determined against the plea, observing that they had nothing to do with other than legal rights. It is impossible to make this plaintiff a party to the bond. It is an attempt to apply to the equity of the court; but the plea is bad, inasmuch as no legal right is shewn. The traverse which concludes the plea is also bad, for nothing can be traversed which is matter of law, and the court will not allow this to pass without observation; for an endorsement is an order in law by the endorser to pay the holder. There is no matter shewn in this plea upon which issue can be taken; it offers that as a set-off which cannot be the subject of one.

(*a*) 16 E. R. 36.

Boulton, Solicitor-General, contra.—The object of this plea is not to set up a cross demand. The defence is grounded in fraud, which fraud is clearly and obviously set out in the pleadings: the plea charges a direct fraud and conspiracy: A. has a demand against B. for a note payable on demand, which is not endorsed until a great length of time after its date; after it has been agreed between them that this note should be taken as a set-off to a bond, A. agrees with a third person (Brooke) to deliver this note to him for the express purpose of defeating this agreement; Brooke, by the demurrer, admits these circumstances, which amount to a fraud and conspiracy—a complete answer to the action, for no fraudulent transaction can be a ground of action. The defendant does not seek an equitable right, but charges a fraud in which the plaintiff is concerned. The general issue in this case would have been too narrow; it was necessary that the circumstances should be pleaded specially: the plea states the agreement between the defendant and McNabb, and Brooke's knowledge of it, and that he, wickedly contriving to injure and defraud the defendant, and to force him unjustly again to pay the sum specified in the note, and defraud him of his right to set off the same against the money due upon McNabb's bond, agreed with McNabb for the delivery of the note to him for the purpose of enabling him to sue. If this had been an indictment for a conspiracy, and McNabb had been joined, these words would have supported a conviction. The distinction between taking a note before or after it becomes payable is well known.—[CHIEF JUSTICE.—A person taking such a note takes it with all exceptions.]—This note was

dated in 1817, and not endorsed until two years afterwards. McNabb could not have recovered against Arnold; the mutual agreement would have rendered the note invalid, which was endorsed such a length of time after it was payable, even though the endorsee had been ignorant of such agreement.—[CHIEF JUSTICE.—This note having been transferred two years after it was due, brings the case within the determination in the 3rd term reports. (*a*)]—Here its endorsement at so long a period after date, places Brooke, the plaintiff, in the situation of McNabb, who could not have prevented a set-off. It was the plaintiff's bounden duty to have enquired respecting this note; he is a *particeps criminis* upon the record, and cannot recover.—[CHIEF JUSTICE.—It did not appear to have been dishonoured at the time of the delivery to Brooke.]—In the case of Banks against Colwell, which was an action by an endorsee upon a note payable upon demand, tried before Mr. Justice *Buller*, the defendant was admitted to give in evidence that the note had been endorsed to the plaintiff, a year and a half after date, and to impeach the consideration by shewing that the note had originally been given for smuggled goods; and though no privity had been brought home to the plaintiff, the learned judge non-suited him. In this case much more than a reasonable time had elapsed between the date and transfer of the note; it was high time for the plaintiff to look out, high time that his distrust should have been excited. As to the objection made to the traverse, there can be no doubt but that that part of the plea is good, at any rate upon special demurrer.

(*a*) 3 T. R. 80.

CHIEF JUSTICE.—This is an action of assumpsit, and the plea much out of the common course: it cannot be concealed that McNabb had the possession of the note upon which the action is brought, and that the contents of it were due to him as assignee of the payee; that he had former transactions with Arnold, the defendant, with whom he entered into an agreement that the amount of this note should be set off against the second instalment of a bond, of which Arnold, the defendant, was the obligee, and McNabb the obligor: that this agreement took place before the note was negotiated to Brooke, the plaintiff, and that of this agreement Brooke had notice; the equity, or right of set-off, which Arnold the defendant had, would follow the note in the hands of Brooke; with a knowledge of that right he could not claim payment: it is admitted by the demurrer that he had that knowledge: it is also admitted that the note was transferred about two years after it came to the hands of McNabb. Under these circumstances I consider that the plea is good.

Per Curiam.—Judgment for the defendant.

ROBERTS v. HASLETON.

Where one of the bail to the sheriff had in consequence of the defendant leaving the province, and under an apprehension that he would not return to defend the suit, had given a cognovit in his own name to the plaintiff; the court upon an affidavit of merits stayed the proceedings upon the cognovit.

Washburn obtained a rule this term calling upon the plaintiff to shew cause (upon an affidavit swearing to merits) why the proceedings upon a cognovit given by Brundige, one of the defendant's bail to

the sheriff, should not be stayed until a trial of such merits could be had, upon payment of costs incurred by proceedings against the sheriff's bail, leaving the judgment by confession, which he gave, as security to the plaintiff, pleading issuably, and going to trial at the next Niagara assizes; and now,

Macaulay shewed cause.—A rule *nisi* was obtained in this case in Michaelmas Term last, which the party applying has suffered to lapse; after this laches and indifference he should not be permitted to apply again: several terms have elapsed since the plaintiff and defendant in this motion were parties in a suit. The plaintiff held the defendant to bail: he gave bail to the sheriff and left the province. One of the bail, (Brundige,) the person in whose behalf this application is made, voluntarily gave his own cognovit, undertaking to bring no writ of error, and some time afterwards, the defendant, who had left the province, returned, put in special bail long after the time allowed by the rules of the court; waits for several days before he gives notice; and, after all this irregularity, an application is made to stay proceedings upon this cognovit, and that the defendant may go to trial; the motion, affidavits, and rule, are altogether foreign to this judgment. The confession was voluntarily given by Brundige. He obtained time for the payment of the debt, and if the defendant has left him in the lurch he must resort to him. The rule, though entitled in the cause of Hasleton and Roberts, has nothing to do with it, but is in favour of another person, against whom judgment has been entered. The defendant did not enter bail in time: he was too late in perfecting it—

too late in his notice of justification, and he is certainly now too late in his application to set aside this judgment. It is laid down in Willes' Reports, that if application is made to stay proceedings upon a bail bond, the rule must be entitled in the action upon the bail bond: here the motion is made in an action altogether foreign to the judgment. The writ was returnable in Trinity Term last, the 2nd of July; on the 17th of July, after the cognovit was given by Brundige, and after the expiration of the time for putting in bail, it was put in, and last November we were entitled to execution against Brundige upon his cognovit.

Washburn, contra.—The rule for putting in bail within four days after the return of the writ, is intended of the first four sitting days: bail cannot be permitted to fix a defendant by signing a cognovit. The defendant had until the 8th day of July to put in bail, and it was actually put in on the 17th; notice was given, and an offer made to pay the costs accrued by the neglect, but the plaintiff having frightened Brundige into a cognovit, refused to relinquish his advantage. The case in the fourth term reports (*a*) shews that the affidavit in support of this application has been properly entitled; the former rule lapsed in consequence of the absence of the counsel. The affidavit of merits is a sufficient ground for this application, and the statute of (*b*) Anne does not confine the relief to be given to a defendant or the bail, to an action upon the bail bond alone, but extends it to any other security to be taken from such bail.

(*a*) 4 T. R. 688. (*b*) 4 & 5 Anne, c. 16, s. 20.

Macaulay, in reply.—Neither the defendant or his bail are within the equity of this statute. Notice should have been given that the defendant would put in, and perfect bail on some certain day; the bail should have been justified, and the bail piece filed. The bail should be entered in the first four days; it should have been entered by the fourth of July, but it appears by the affidavit that it was not entered until the 17th. No notice was given until the 22nd, when it was too late to get to trial at the following assizes, by which the plaintiff lost a trial. The absence of counsel cannot be taken into consideration—the attorney was present. Twelve months after the return of the writ, an application is made to the equity of the court, which is, I conceive, with the plaintiff, and who is entitled to their protection. The cases in Willis and other cases are of irregular judgments, but here is a judgment upon the party's cognovit fairly obtained.

Chief Justice.—Where the parties swear to merits, it is usual to grant relief to the bail. The party appears to me to be entitled to the equity of the statute. The judgment was taken as upon a bail bond. It must be stayed, standing as a security for the event of the trial.

Per Curiam.—Rule absolute.

CRAMER v. NELLES.

When the judgment of a Court of Requests had been set aside upon the application of the defendant without any interference on the part of the plaintiff, the court refused to grant an attachment against him for non-payment of the costs of removing the proceedings. As to costs in error, see Gildart v. Gladstone, 12 E. R. 688.

In this case proceedings and judgments of the Court of Requests for the Gore district, had in a former term been removed into this court by certiorari, at the instance of the defendant, against whom judgment had been entered in their court, and those proceedings were by an order of this court set aside with costs, and now,

Small moved for an attachment against the plaintiff, Cramer, for non-payment of the same upon the usual affidavit. He contended that the defendant was entitled to the costs of the certiorari, and of setting aside the proceedings, and cited the statute of Henry the Eighth as in favour of the application. The defendant had not opposed the issuing the certiorari, or the setting aside the proceedings of the commissioners thereupon.

CHIEF JUSTICE.—In this case a certiorari has issued to magistrates, and their proceedings have been set aside. The plaintiff, who never heard of this certiorari, is called upon to pay twelve pounds costs. I cannot bring my mind to issue an attachment in this case.

Per Curiam.—Attachment refused.

Elizabeth Saunders v. George Playter.

The court will not, under the provision of the provincial statute for issuing commissions to examine witnesses about to leave the province, order such commission before declaration filed.

Baldwin obtained a rule this term to shew cause why the plaintiff should not be at liberty to examine Robert Emerod as a witness in this cause, upon the usual affidavit of his being about to leave the province, (the declaration had not been filed in the cause,) and now,

Boulton, Solicitor-General, shewed cause.—This application is out of season. The party making the affidavit is a stranger to the action, which is objectionable *in limine*; it would be unjust and absurd to examine witnesses before there was a charge in court for the defendant to answer. There is no instance of a commission issuing to examine witnesses before declaration filed; it would be contrary to common sense; the defendant could not cross-examine him, having no knowledge of the charge to be brought against him. When acquainted with the nature of the demand, he may perhaps give up his defence.

Baldwin, contra.—The determination in this case will settle an important point of practice. This application would, under the old statute (*a*) be granted as of course; and the law is not altered by the new one, except that the commission is to be granted upon hearing the parties upon motion. The defendant will know the questions to be propounded, and will have every opportunity of cross-examination. The object of this part of the statute (*b*) is to prevent the inconvenience of parties going to trial without evi-

(*a*) Provincial Statute, 34 Geo. III., c. 2, s. 23. (*b*) 2 Geo. IV., c. 1, s. 17.

dence; the words of the clause are, "in any action now pending, or hereafter to be brought." The equitable construction of it is, that as soon as an action is brought, a commission may issue to prevent loss of evidence. The affidavit shews all the necessary facts; and as to the objection of the party being a stranger who makes the affidavit, it is natural for him, and his duty as guardian to the plaintiff, to assist in this application.

CHIEF JUSTICE.—The party cannot be called into court without knowing for what, before declaration filed. I can conceive no propriety in an application like the present. In England, indeed, a party may obtain a commission from the Court of Chancery to examine witnesses, *de bene esse*. Under the former provincial statute application like the present might have been entertained, because, by that statute the declaration upon common process was attached to the writ, and the party could form an opinion of the nature of the action, and be prepared to cross-examine his opponent's witness.

BOULTON, J.—The statute evidently shews a discretion in the court. The plaintiff's council must know that there can be no such thing as issuing a commission where there are no proceedings.

Per Curiam.—This application cannot be granted. When the plaintiff has filed his declaration, he may apply to a judge at chambers.

BAYMAN v. STRUTHER.

If the sheriff has returned a writ, though in an informal manner, the court did not grant an attachment against him in the first instance.

Washburn moved for an attachment against the sheriff of Johnstown District for not returning a writ of *fieri facias* issued in this cause pursuant to rule. He stated that the sheriff had sent an informal return to the attorney at Kingston, which had been returned to him.

CHIEF JUSTICE.—It would be too harsh to issue an attachment under the circumstances which the counsel had stated. You may take a rule *nisi*.

Per Curiam.—Rule *nisi* granted.

MICKLEJOHN ET AL. v. HOLMES.

Where a plaintiff has left the province the affidavit requiring security for costs should state that he has become a stationary resident in a foreign jurisdiction.

Washburn moved that the plaintiff do give security for costs upon an affidavit, stating that the defendant had left this province, and was now residing in Lower Canada, if not lately departed thence for London.

CHIEF JUSTICE.—The affidavits usually state that the party has become a stationary resident in the foreign jurisdiction. This affidavit is not sufficient.

Rule refused.

MICHAELMAS TERM, 4 GEO. IV., 1823.

Present:

THE HONOURABLE CHIEF JUSTICE POWELL.
MR. JUSTICE BOULTON.
MR. JUSTICE CAMPBELL.

SAUNDERS v. PLAYTER.

Where a plaintiff suffers a nonsuit voluntarily the court will not afterwards set it aside.

This was an action of trover brought against the deputy sheriff of the Home District. The circumstances proved at the trial were, that the plaintiff, who had several years ago been married to one Saunders, had upon his decease taken possession of his effects without proving a will or taking out any letters of administration; she was afterwards married to one Elrod, then supposed to be an unmarried man, but who, it was afterwards conjectured, had a wife living in the United States; no proof was however produced at the trial of Elrod's former marriage, or of his first wife being alive at the time of his marriage with the plaintiff. The plaintiff cohabited with Elrod for several years, and they continued in the possession of the property until it was seized by the defendant under an execution against Elrod. Upon this evidence the counsel for the plaintiff permitted a nonsuit at the trial, and now moved for a rule to shew cause why it should not be set aside. *Sed per Curiam* where a party voluntarily suffers a nonsuit it cannot afterwards be set aside.

Rule refused.

TULLY v. GRAHAM.

This court will give leave to withdraw a demurrer upon payment of costs and pleading issuably though the plaintiff may have lost a trial.

Boulton, Solicitor-General, moved for leave to withdraw the demurred filed in this cause, and to plead the general issue although the plaintiff had lost a trial. He contended that although it was not the practice in England to allow a demurrer to be withdrawn after trial lost, the reason did not apply here. In England a party upon obtaining judgment upon demurrer assessed his damages immediately by writ of enquiry directed to the sheriff, whereas in this country he could only do it at the assizes, the consequence of which was, that a plaintiff would enforce his judgment (if he obtained one) at as early a period by going to trial as by arguing a demurrer.

That as the plaintiff would not be prejudiced by the demurrer being withdrawn, the court would allow it; for he contended that prejudice did not mean that the plaintiff would be deprived of any advantage he had obtained of preventing a defendant making so good a defence, but that a plaintiff would not obtain the fruits of his judgment at so early a period.

Macaulay, contra.—Contended that it was quite contrary to the practice to withdraw a demurrer after a trial lost. (*a*) That if this demurrer, which was merely filed for delay, were argued, the plaintiff would have a judgment in his favour, and would only have to assess his damages at the assizes, whereas if this procedure were allowed, a plaintiff might sustain serious injury by absence of witnesses,

(*a*) Tidd.

occasioned by the defendant filing a frivolous demurrer, merely for the purposes of delay—*sed.*

Per Curiam.—The demurrer may be withdrawn upon payment of costs and pleading issuably.

ORSER v. STICKLER.

The motion for a new trial must be made within the first four days of the term succeeding the trial, *i. e.*, before the expiration of the rule for judgment.

Boulton, Solicitor-General, moved for a rule *nisi* for a new trial in this cause though the first four days after the commencement of the term had elapsed. He stated that it had not been unusual to allow motions for new trials to be made after the expiration of the rule for judgment, and that the English rule in that respect has not been strictly adhered to. That he had not been able to make the motion earlier, not having received his brief.

Jones, contra.—It is not in the breast of the court to allow motions for new trials to be made after the four days have expired. The English practice has been adopted by rule of this court.

CHIEF JUSTICE.—The rule for moving for new trials has been considered as extending to the first four days on which the court actually sat, but the practice has lately become more rigid.

Per Curiam.—Rule refused.

PATERSON v. MCKAY.

A *scire facias* will not issue against an heir under the provisions of the 5th Geo. II., although an execution may have issued against the goods and chattles in the hands of the administrator, and a return of *nulla bona* has been made.

After a judgment and execution against the administrators of —— McKay, deceased, and a return of *nulla bona*, the plaintiff issued a *scire facias* under the provisions of 5th Geo. II., against the defendant, his heir, to shew cause why execution should not issue against the lands and tenements to which he had become entitled, as heir to the deceased. To this *scire facias*, the defendant demurred generally.

Boulton, Solicitor-General, in support of the demurrer.—There is no instance which I can find of a *scire facias* having issued in this case either in the colonies or in England; it might, indeed be convenient to the parties, but can only be authorised by an act of the legislature; this court, as the matter now stands, have no authority to issue it; there are only two cases in which a *scire facias* can issue, where a judgment has not been proceeded upon within the time prescribed by law, which raises a presumption that it may have been satisfied; or where the party to the original action is deceased, to revive the judgment against his representatives; neither of which is the case here; if this writ could be supported it would be to place two distinct defendants upon the same record; there would be two distinct judgments operating at the same time, one against the goods and chattels in the possession of the administrator, and the other against the lands and tenements of the heir; a *scire facias* must be accompanied with privity, either of blood, estate, contract, or representation. By the common law there was no privity even between executors and

administrators, though now there is by express statute, (*a*) there is no privity in this case, ergo, the writ cannot lie. As to inconvenience, the same exists in many cases for which writs are constantly issued in England, but which cannot issue in this country; as that of dower, summons in severance, and perhaps the beneficial writ of account, but those as well as that in the case which is now before the court, can only be remedied by the legislature.

Macaulay, contra.—The application of general principles to particular cases is not always strictly correct, as in this case. The argument, that because no *scire facias* has issued in a case of this sort, and therefore cannot issue, is insufficient; it perhaps would not have been necessary to resort to this remedy, that no execution would lie against lands and tenements, as assets in the hands of the administrator, and I conceive that the intention of the statute should be effected in one way or other. The act of parliament by fair implication creates a sufficient privity between the parties—the proceeding is quite analogous to that in England against the heir upon judgments recovered against the ancestor.

By the statute real property is liable to the simple contract debts, in like manner as real estates are by the law of England liable to the satisfaction of debts due by specialty, and are subject to the like remedies, proceedings and process in any court of law or equity in any colony, for seizing or selling them, and in like manner as personal estates in any of the colonies are seized, extended, sold or disposed of, for the satisfaction of debts. The words "in like manner"

(*a*) 17 C. II., c. 8, s. 2.

do not mean by a like proceeding, but that the lands shall be liable in the same manner or equally so as they are in England. The court have decided that no action will lie against the heir in the first instance, upon the principle, I presume, that so an heir might be ruined without resort having been had to the personal estate. This proceeding after a return of *nulla bona*, as directed by the provincial statute, 43 Geo. III., remedies this inconvenience; under it the heir has an opportunity of shewing fraud, distribution of assets to specialty creditors, (who, too, without this proceeding, might be defrauded of their priority over simple contract debts,) or any other circumstances, which an heir could show in a *scire facias* upon a judgment against his ancestor. It appears to me that the proceeding we have adopted is well calculated for the ends of justice, and is authorised, though not in express terms, by the spirit of the English and provincial statutes, and that not to support it would be to render these statutes of no effect.

Boulton, Solicitor-General, in reply.—The question is whether the remedy adopted is a proper one. I think the counsel on the other side concludes himself when he says that an action will not lie against an heir-at-law upon a simple contract debt, for a *scire facias* is an action to which a defendant may plead. Should this proceeding be supported there would be a judgment and execution against the defendant. Could this be without his being sued? The latter part of the statute does not contemplate the death of the party debtor. How are lands and tenements to be assets under the statute? In like manner as they are assets liable to debts by specialty,

and in no other way. They are liable to simple contract debts during the life of the party, but after his decease only to specialty debts, with this difference, that here the lands may be sold, but in England the proceeding is by *elegit* or *extendi facias*.

No argument can be drawn from the provincial statute requiring a return of *nulla bona*, that must be intended to apply to those cases where there is a judgment against the testator or intestate. The counsel on the other side has certainly mistaken his remedy, where there is no privity there can be no *sci. fa.*; statutes have been passed to remedy the want of privity in several cases, and nothing but a legislative provision can create a privity in this case.

CAMPBELL, J.—I have no doubt but that it was the intention of the legislature, to place lands in the colonies upon the same footing with goods and chattels. In other colonies they have followed up the British statute (*a*) by several enactments pointing out the mode by which it is to be carried into effect; only one writ issues upon the judgment, directing the sheriff in the first place to sell the goods and chattels, if they are insufficient, to sell the lands, and in case of their insufficiency, to attach the person. This method appears to me to be a very good one, and would perhaps be salutary here, if we had authority to make use of it, but as it is I think the only remedy is an action *de novo*.

CHIEF JUSTICE.—By the law of England, in England the administrator is considered as having assets

(*a*) 5 Geo. II.

as long as any colonial lands remain unsold. In this province the executions which issued under the British statute went at once against the lands, as well as the personal property, but a provincial statute (*a*) was afterwads made to save the lands, by directing that they should not both be included in the same writ, but that a *fi. fa.* should first issue and be returned against the goods. I lament the passing this act, for I think a rule of court restraining the sheriff would have been better.

The administrator of an intestate is the person to resort to for payment of a debt as he has possession of the goods, unless where the heir is bound by specialties. It has been determined that lands cannot be sold in an action against the administrator, and yet I do not see why the party should be driven to a second action. These difficulties furnish a strong inducement to some legislative provision, but as it is, the *scire facias* does not appear to me to be a remedy within our power.

Per Curiam.—Judgment for defendant.

The King v. Phelps.

Where an inquisition had been found against the defendant under the provincial statute 54 Geo. III., the court refused to set the same aside on the ground that the lands vested in the Crown by that inquisition had been granted by the Mohawk Indians to the defendant, for a term of 999 years, in trust for the support of his wife (a Mohawk woman) and three children.

An inquisition in this case had been found against Epaphrus L. Phelps in favour of the Crown, under the provisions of the provincial statute, 54 Geo. III., for declaring certain persons therein described aliens,

(*a*) 3 Geo. III., c. 1.

and vesting their estates in his Majesty. By a subsequent statute, Esther Phelps had been permitted to traverse the inquisition found against her husband Epaphrus Lord Phelps. The record, which was of Trinity Term, 1821, stated that it had been found by an inquisition indented, &c., at the township of Grimsby in the district of Niagara, on the 28th day of January, in the 58th year, &c., before Abraham Nelles, Esquire, one of the commissioners of the late King, &c., to enquire, &c., by the oath of William Nelles and others, (the jury,) that Epaphrus Lord Phelps in the commision named, on the day of committing the high treason in the said commission specified, to wit, on the 1st day of June, in the 53rd year, &c., and also on the day of the outlawry of the said Epaphrus L. Phelps, was seised of certain parcels or tracts of land, to wit, the unexpired term of a lease for 999 years, made to him by Captain Brant of 1000 acres of land, and of other land on the Grand river (in the record and inquisition described) being part of the Indian lands, &c., and that the commissioners, the premises aforesaid, into the hands of the said late Lord the King had taken and caused to be seized, &c., as by the commission was commanded, &c. That on Saturday, the last day of Trinity Term, by force of an act of the provincial parliament of this province, made and passed in the second year, &c., entitled an act to afford relief to one Samuel Hull and the said Esther Phelps, comes the said Esther Phelps in said act named, wife of the said Epaphrus L. Phelps in said commission named, by her attorney and prays oyer, &c., which being read, &c., she complains that she by colour of the premises is greviously vexed and dis-

quieted, and protesting that the commission and inquisition are not sufficient in law, and to which she has no necessity nor is bound by the law of the land to answer, for plea saith, that on the 25th day of October, in the year 1724, the Grand river, in the said district of Gore, in the said province of Upper Canada, constituted and formed part of the province of Quebec, that the Mohawk Indians, and others of the Six Nations of North American Indians, being on the same day, &c., and long before, the faithful and attached allies of his late gracious Majesty, King George III., and especially in the war then lately before that time carried on between his said late Majesty and the United States of America, by the event and pressure of which war, the said Indians were obliged to withdraw from their settlements and possessions within the said states, and his said late gracious Majesty, in consideration of that fidelity and attachment so early manifested to his interest by the said Mohawk Indians, and of the loss of their settlements and possessions which they thereby sustained, was pleased to direct that a convenient tract of land under his protection should be chosen as a safe and comfortable retreat for them, the said Mohawks, &c., who had either lost their settlements within the territory of the said American states, or who wished to retire from those states to the British; and Sir Frederick Haldimand, his said late Majesty's Captain-General and Governor-in-Chief of the province of Quebec and the territories depending thereon, &c., having in obedience to such his said late Majesty's directions, and at the desire of many of the said Indians, &c., purchased a tract of land from the Indians, that is to say the aboriginal Indians

occupying the same, situate between the lakes Ontario, Erie, and Huron, did afterwards, to wit, on the same day, &c., and while the said province of Upper Canada formed part of the province of Quebec, at the castle of St. Lewis at Quebec, &c., by instrument under his hand and seal at arms, as Captain-General, &c., and in his late Majesty's name, authorise and permit the said Mohawk nation, &c., to take possession of, and settle upon, the banks of the river commonly called the Ouse or Grand river, running into lake Erie, that is to say, the said Grand river, &c., allotting to them for that purpose, six miles deep from each of the said rivers, beginning at lake Erie and extending in that proportion to the head of the said river, to them and their posterity for ever, by which said authority, permission and allotment, the said Mohawk nation, &c., afterwards and on the same day, &c., did enter upon and take possession of the aforesaid allotment; and being so possessed, &c., they, the said Six Nations Indians, afterwards, to wit, on the 1st day of May, in the year 1804, at the Grand river, &c., by indenture bearing date the same day and year, &c., and made between them the said Six Nations Indians residing, &c., by Captain Joseph Brant, principal chief and agent for them the said Six Nation Indians, duly authorised, did, in consideration of the rents, covenants, and agreements in the said indenture mentioned, &c., grant, demise, lease, and to farm let unto the said Epaphrus Lord Phelps, his heirs, executors, administrators, and assigns, all that certain tract, &c., (land mentioned in the inquisition,) to hold the same for the term of 999 years, *for providing for one of the women of the said Mohawk nation, and three children born of her the said woman*, by the said

Epaphrus, that is to say, in trust for the purpose of providing for and maintaining the said woman and the said three children according to the custom of the said Six Nations. Averments that the lease mentioned in the inquisition and the indenture last set forth, are one and the same; and that the traverser is the woman mentioned in the indenture, and that the land mentioned in the indenture is the same with that mentioned in the inquisition. That the traverser on the 1st day of June, in the 53rd year, &c., and also on the day of the outlawry of the said Epaphrus Lord Phelps, and also at the time of taking the said inquisition, was and still is by virtue of said indenture, possessed of the issues and profits of the parcels and tracts of lands in said inquisition mentioned, to wit, &c., and all and singular which things, &c. The traverse concludes with a prayer for judgment, that the hands of our said Lord the King be thence amoved, and that the traverser to her possession, together with the issues and profits therein in the meantime perceived be restored. The Solicitor-General on the part of the Crown demurred to the traverse generally, as not being sufficient in law to amove the hands of the said Lord the King from the possession of the tenements aforesaid, and prayed judgment, and that the tenements, &c., in the hands and possession of the said Lord the King may remain, &c.

Boulton, Solicitor-General, in support of the demurrer. The traverse in this case is insufficient. It sets out that the traverser is an Indian woman, and that there is a custom among the Indians, to bestow lands in the manner stated, and that Brant made

such a conveyance for her benefit; but it shews no good title in him, or the Indians to do so. By the traverser's own shewing, she is a foreigner, and consequently no more entitled to hold lands than a Frenchman, or any other foreigner; for the Indians are bound by the common law.

Even if the title were good, it only conveyed a chattel interest, which a man cannot hold in trust for his wife.

Should the inquisition have been ill found, yet the lands being once vested by the finding in the Crown, they cannot afterwards be divested, without the traverser shews a better title, as appears in Dyer.

Baldwin contra.—Where both parties claim under the same deed neither can impugn it for defects, and therefore defects in title under those deeds (if such there are) cannot be set up by the Crown.

The foundation of the title from General Haldimand is evidently a treaty, and as such must be recognised by the court, for all courts of justice will recognise treaties, as is constantly seen in cases of seizures, &c.

The Indians must be considered as a distinct, though feudatory people; they were transported here by compact; they are not subject to mere positive laws, to statute labour, or militia duty, though perhaps to punishment for crimes against the natural law, or law of nations.

It may be considered as a ridiculous anomaly, but it appears from Vattel (*a*) that these sort of societies, resident within and circumscribed by another territory, though in some measure independent of it, frequently exist, and that the degree of independence may be infinitely varied; and however barbarous these Indians may be considered, the treaty under which they migrated to and reside in this country is binding.

Phelps had not such an estate as he could forfeit; it is a trust limitted to him for providing for the traverser, Esther Phelps and her children, plainly expressed in the words of the deed, and as laid down in Shepherd's Touchstone, not forfeitable for his treason, (*b*) though it perhaps might be by that of the *cestui que trust*. Should the court consider this instrument as a trust deed founded upon sufficient consideration, namely, that expressed in it of supporting Mrs. Phelps, then they will decide in favour of the traverser; and on the other hand, if insufficient, the inquisition will be quashed as nugatory; Phelps having nothing to forfeit, as the trust resulted for the benefit of the grantors. (*c*)

Boulton, Solicitor-General, contra.—If the title placed in the Crown by this inquisition is at all consistent, it cannot be disturbed, (*d*) though special circumstances might induce the Crown to re-grant the land. The supposition that the Indians are not subject to the laws of the country is absurd; they are as much so as the French loyalists who settled here

(*a*) C. 1, s. 5, 6. C. 16, s. 194, 5, 6. (*b*) Touchstone, 507 n. 8.
(*c*) Touchstone, 2 509. Bac. abr. uses and trusts 82. Preston 251.
(*d*) Com. Dig. prerogative.

after the French revolution, who came to this province from a country perfectly independent, and of which the independence was never doubted; and supposing them not to be so, confesses the grant from General Haldimand to be (as it was in fact) not warranted by law—as to the pretended consideration of the deed, it is perfectly nugatory; it purports to be made for the support of Phelps' wife and children, whom he was bound to support himself, nor could a husband be a trustee of a chattel interest to the use of his wife—and even supposing her to be a *bona fide cestui que* use she could not dispute the legal estate of the Crown once vested.

Per Curiam.—(*Absente*, POWELL, C. J.)—Judgment in favour of the Crown.

GARDNER v. BURWELL.

Where the witness who proved the notice required by the statute to be given to a J. P. before action brought, had in his examination in chief sworn that he had served a true copy of the notice produced in court, but upon his cross-examination said that it might vary a word or two, and the judge at *nisi prius* had in consequence directed the jury to find a verdict for the defendant. The court granted a new trial.

This was an action against a justice of the peace, requiring the notice of one month prescribed by the statute. (*a*) The witness who was called to prove the notice at the trial deposed that he had served a true copy of that produced in court, but upon his cross-examination said, that he did not know it was an exact copy, it might vary a word or two. Upon this evidence, the judge who tried the cause, directed a verdict for the defendant, upon the ground that the exigency of the statute had not been complied with.

(*a*) 24 Geo. II., c. 44 s. 1.

On a former day, in this term, *Baldwin* had obtained a rule to shew cause why a new trial should not be granted on the ground of misdirection in the judge who tried the cause, but the rule has been discharged; he contended that the evidence was sufficient to prove the notice, that if there was any defect in it, that should be shewn by the defendant who was in possession of it.

Boulton, Solicitor-General, and *Rolph*, on the other side, had argued that though if the plaintiff had given notice to produce the copy, and the defendant had not done so, the plaintiff might perhaps have given *viva voce* evidence of its contents; yet as no such notice had been given, the evidence of service was not sufficient to answer the exigency of the statute; that the words omitted might be those most particularly required by the statute, the nature of the action, or the name or address of the attorney. On this day the court (*dissentiente* BOULTON, J.) gave their opinion that the evidence given answered the exigency of the statute; that it was too violent a presumption to infer that the notice was incorrect after the witness who had provided the service had sworn it was a true copy, merely from the scruples he expressed upon his cross-examination, and the more especially as it was in the power of the plaintiff to shew the defects, if any, by its production; they therefore directed

A new trial.

McGregor v. Scott.

Where a plaintiff had arrested a defendant for a considerable sum of money, and evidence had been given in court of a larger sum being due to the plaintiff, and the cause was then referred, with other matters, to arbitration, and the arbitrators awarded the possession of a mill to the plaintiff and six or seven pounds only in money. The court refused to give costs to the defendant under the provincial statute for preventing vexatious arrests. And *semble*, the words of the statute, "being arrested and held to special bail," are satisfied by a defendant being arrested and imprisoned.

This was an application by *Ridout* for costs to be ordered to the defendant, under the provisions of the provincial statute 49 Geo. 3., cap. 4, for the more effectual preventing frivolous and vexatious arrests.

This cause had been brought into court at the assizes for the western district, and evidence given of a much larger sum being due to the plaintiff than the sum sworn to, but a juror was withdrawn by consent of the parties, and this and two other suits referred to arbitration. The arbitrator only awarded six or seven pounds to the plaintiff with the possession of a mill of considerable value. The defendant had not put in special bail to the action.

Elliot, against the application, contended that to entitle a defendant to costs under the statute, he must have put in special bail, the words of the statute being "arrested and held to special bail," and that at any rate under the circumstances of this case the defendant was not entitled to costs.

Ridout, contra.—There is no distinction between special bail and bail to the sheriff.

Chief Justice.—I consider that if a party is put in prison, it is the same thing as to the operation of

this act, as if he had put in special bail, but under the circumstances of this case, I do not consider the defendant as entitled to the benefit of this statute.

CAMPBELL, J.—The question is whether the plaintiff had sufficient justification at the time he took the affidavit.

Per Curiam.—Application refused.

McINTOSH v. WHITE.

An application for costs under the provincial statute, 49 Geo. III., cap. 4, must be supported by affidavit, stating that the defendant was arrested without reasonable or probable cause.

Made an application for costs for the defendant under the provincial statute, 49 Geo. III., cap. 4, but it was not stated in the affidavit to ground the application that the defendant was arrested without reasonable or probable cause.

Per Curiam.—Application refused.

TERRY v. STARKWEATHER.

Where in an action for defamation brought by a person describing himself in the declaration as a druggist, vender of medicines and apothecary, the witnesses proved that several persons practising physic had purchased medicine from him; this evidence upon a motion for a nonsuit was considered as sufficient to support the verdict.

This was an action tried at the assizes for the Niagara district, for defaming the plaintiff in his business of a druggist, vender of medicines, and apothecary. The facts of defamation were satisfactorily proved, the evidence adduced to support the introductory part of the declaration, namely, that the plaintiff exercised the profession of a druggist, vender of medicines, and apothecary was, that he kept

a drug store, and that several persons practising physic, had purchased medicines from him; a verdict was found for the plaintiff with £10 damages. A nonsuit had been moved for at the trial, but had been refused, and now, *Boulton*, Solicitor-General, moved for a rule to shew cause why the verdict should not be set aside, and a nonsuit entered on the ground that no evidence had been produced of the plaintiff having exercised the business of an apothecary. In actions of this kind, the whole gist depends upon the fact of exercising the trade set out in the introductory part of the declaration, as laid down in Smith v. Taylor, (*a*) where for want of that proof, the verdict was set aside; the whole allegation must be proved, viz., that the plaintiff was a druggist, vender of medicines, and apothecary at the time of the supposed injury, and has ever since continued so. If a person allege more than necessary he must prove it; the evidence in this case only goes to prove that the plaintiff kept a druggist's shop. An apothecary, as appears by the explanation of the term in dictionaries and encyclopædias of repute, is one who practises the art of pharmacy, which is a very different business to that of a mere druggist, who only sells the article in its rude uncompounded state. An apothecary in England not only compounds medicines, but prescribes them, and should therefore be a person of skill, to injure whose reputation would call for much heavier damages than to defame that of a mere vender.

This plaintiff has chosen to designate himself of three trades or professions, each of which has its

(*a*) 1 Bos. and Pal. 196.

individual meaning, but he has merely proved his keeping a druggist's shop, and cannot, therefore, maintain this verdict.

Washburn, contra.—These matters of inducement the books say, may be omitted, as well in the action of slander as in other actions on the case. It was clearly proved at the trial that the plaintiff kept a druggist's shop, and as to distinctions arising from the three terms in the declaration, two are synonymous. The pleading the general issue with a justification, admits that the plaintiff is the character which he describes himself to be, and the general reputation of his practising physic was proved.

Boulton, Solicitor-General, in reply.—It is extraordinary that counsel on the other side should consider these words as matter of inducement only. A person cannot read the authorities without seeing that they are matter of substance, the very gist of the action; the way to ascertain whether an allegation is material or not, is to strike it out of the declaration, and observe whether it has its full effect without it.

Chief Justice, (*Assentiente* Campbell, J.)—There is a specific and distinct meaning to the term apothecary as well as to that of druggist, and where terms of art are in question, reference may be had to dictionaries of authority; it however appears to me, that proof of having sold *medicines* as well as drugs, having been adduced at the trial, is sufficient to entitle the plaintiff to maintain his verdict.

Boulton, J.—I do not consider that there is suffi-

cient evidence to support the allegation of the plaintiff being an apothecary, which I think is a *sine qua non*.

Per Curiam.—Rule refused.

BEADSTEAD v. WYLLIE.

Where in an action for seduction of the plaintiff's daughter, evidence had been given of connivance on the part of the mother, and great negligence on the part of the father, and the jury found a verdict for the plaintiff with £200 damages, the court granted a new trial.

This was an action brought to recover damages for loss of service by the seduction of the plaintiff's daughter, and tried before the Chief Justice at the assizes for ———, and a verdict for the plaintiff for £200. The facts of service and criminal intercourse were proved, and that the plaintiff's daughter had borne a child to the defendant. On the part of the defendant it was proved, that the witness (the son-in-law of plaintiff) had, previous to his marriage, slept with another young man in one bed, and the two daughters of the plaintiff in another bed in the same room, (a two bedded room.) That he had lain in bed with both the daughters previous to his marriage; that the indecencies which took place between plaintiff's daughter and defendant, were notorious to the family; that they were laying in every corner of the house to be stumbled over. That the mother had been informed of the indecencies which took place between her daughter and the defendant, but did not discountenance them; that the plaintiff had also been informed of them, and though he reprobated the defendant's conduct greatly, he took no means to prevent it.

The CHIEF JUSTICE observed at the trial, that this was a state of manners which could not, at least in England, be considered as affording a ground for this action, although it had been admitted that the plaintiff was a decent orderly man, and had family prayers in his house every day.

Boulton, Solicitor-General, had in a former part of the term, obtained a rule *nisi* to set aside the verdict and grant a new trial; and now *Robinson*, Attorney-General, shewed cause. This is a question altogether for the consideration of juries; it is a moral and not a legal one. The damages in this case can by no means be considered as outrageous or excessive, which alone would warrant the interference of the court, as laid down in all the authorities. In a case of *crim. con.*, (between which and the present there is no essential difference,) though the real injury was merely nominal, a jury gave £5,000 damages, and the court refused to interfere. (*a*)

This vice, which is so mischievous to the morals of a country, has become too prevalent; and though parents should guard the conduct of their daughters, how great an opening may be made for inroads on the other side, by courts interfering with the verdicts of juries? In this case there is nothing to entitle the defendant to consideration; he lived in the house of the parent; was a man of forty or perhaps older; was guilty of daily indecencies in the presence of the family, to which the father was not privy: these circumstances have all been considered by the jury, and I cannot conceive they were wrong in their determination.

(*a*) Duberly v. Gunning.

Boulton, Solicitor-General, and *Jones*, contra.—Actions of this nature are supported on the ground of injury to the parent's feelings; but where such transactions take place under his own eye, his conduct is much worse than weak or silly if he does not prevent them. If a father opens a door for misbehaviour he cannot say where it is to stop, and he shall not afterwards come and say to a jury, I have by my own folly brought this inconvenience on myself, and now I come to you for damages. If this jury have not acted upon vicious, they have acted upon erroneous feelings; they must have supposed they were to punish the error of the defendant, whether the father had received any injury to his feelings or not. In the case of Smith and Book in this court, a new trial was granted because the plaintiff had permitted her daughter to lay upon a bed with the defendant, a case in its general circumstances by no means so strongly calling for a new trial as the present.

Per Curiam.—Rule made absolute upon payment of costs.

Large v. Perkins.

In an action for goods sold, and upon an account stated, where the plaintiff's demand had been of several years' standing, and the jury gave a verdict for £18, the court upon a motion for a new trial considered, that evidence of an acknowledgment by letter of an account being due, and of an account having been read over to the defendant to which he made no objection, coupled with evidence that an item of two pounds which was contained in the bill of particulars produced in court, was the same with that contained in the account so read over to the defendant, and with the witness' belief that the accounts were the same, was sufficient to support the verdict, though one principal ground of the witness' belief of the accounts being correspondent arose from his knowledge of the plaintiff's character.

This was an action of assumpsit for goods sold and upon an account stated, tried at the assizes for the

Home District, and a verdict for the plaintiff for £18.

The material part of the evidence, as it appeared upon the judge's notes, was, that there were dealings between the plaintiff and defendant, commencing in the year 1817, and continued until the year 1819.

That the defendant had written to the plaintiff acknowledging an account and apologising for the neglect of payment; that the defendant being near the plaintiff's store, requested his account, upon which the plaiutiff called him in, and read over an account to him in the presence of the witness (Kellar); that he listened attentively to it, and made no objection; that after the commencement of the suit, the same witness copied an account out of the plaintiff's book, which account being produced in court, he swore he believed to correspond with that read over in the presence of the defendant; he also recollected one item for two pounds as composing a part of the account read over to the defendant. Upon his cross-examination he said, that he believed the account which he copied from the plaintiff's book and produced in court, corresponded with that read over to the defendant, because the plaintiff had told him so, and he believed him to be an honest man.

Boulton, Solicitor-General, had in the former part of the term, obtained a rule *nisi* to set aside the verdict and to enter a nonsuit, or to have a new trial, upon the ground that improper evidence had been received at the trial, or, if the evidence was admissible, it was insufficient to support the issue; and now *Baldwin* shewed cause: he contended that the evi-

dence appearing upon the judge's notes was properly received and sufficient to support the verdict, a letter acknowledging an account, an account read over and no objection taken, a long tacit acknowledgment, the account produced in court, sworn to be the same as that read over to the defendant, to the best of a witness' belief.

Boulton, Solicitor-General, contra.

The first question is whether Kellar, the witness, should have been allowed to produce this account; I contend that he should not; an account or memorandum can only be produced to assist the memory of a witness, but he cannot be permitted to produce an account, that he may swear he believes it to be true, because another person told him so, more particularly the plaintiff in the action; it would be receiving proof in fact upon the plaintiff's own *ipse dixit;* the witness could only remember an item of two pounds, which does not at all prove the truth of any of the other items; he should have been able to identify the account read over with the one proved, or should have sworn to the particular items. The admission of evidence of this sort, which is mere hearsay, and that from the plaintiff, would subject every person in the country to the greatest frauds and impositions. In this case the plaintiff might have added new items or altered the sums after the account was read over. Upon this evidence, which I contend should not have been admitted, the plaintiff has obtained a verdict which he could not have obtained without. The account should have been taken from his hand, unless he used it merely to refresh his memory; but he was allowed

to read it, merely upon the plaintiff's assertion that it was correct, his opinion of whose honesty can be no evidence at all. The inconvenience, difficulties and hardships of proving accounts by persons who have no clerks, have been urged, but they have it in their power to take notes or memorandums, and it would be a much greater hardship upon the country and more productive of fraud, if accounts were allowed to be proved by this sort of evidence.

BOULTON, J.—There is no positive proof in this case of the delivery of the goods except to the value of two pounds. I should be sorry that merely being present at the hearing of an account, without acquiescence, should be considered as proof of the items contained in it. I dare say we all consider the plaintiff as an honest man, but it appears to me, that in this case the necessary evidence is wanting, that there is not the slightest testimony of the delivery of the goods, and that the verdict cannot be supported.

CAMPBELL, J.—This is an action for goods sold and delivered, the sum sought to be recovered is small, but nevertheless the verdict ought to be supported by proper evidence, if not, a new trial should be granted. As to hearsay evidence no one would be less inclined to receive it than myself, and if I thought this verdict depended upon such, I should not consider that it ought to stand, but I conceive that it depends in no degree upon it; what has been considered as such is not so; if it were it would be of the very worst kind as coming from the plaintiff himself, but I attribute to it a different character. There is evidence uncontroverted of a subsisting ac-

count, of a subsisting debt, no less than a letter acknowledging it, and an apology for delay of payment; this is followed by the evidence of Kellar, that about two years ago he heard the defendant ask the plaintiff for his account; that plaintiff took him into his house and read over his account, to which the defendant listened attentively and made no objection, nor did it appear that he did make any afterwards, until the action was brought. I do not consider that silence is always a mark of consent, but I think that in this case, under these circumstances, it was.

The more objectionable part of the evidence is that which connects this account with the bill of particulars; the witness is asked if it is the same as the account in the plaintiff's book; he says he has no doubt but it is, and his ground of belief is, among other grounds, that the plaintiff told him so, and that he believes him to be an honest man; this, which has been called hearsay, I consider no more than a person accounting for his ground of belief, he was so convinced from the plaintiff's character that the account was the same with that read to the defendant, that he did not hesitate to give it as his belief upon oath; there was also an item for two pounds which he identified as being in the account read over to the defendant, as well as in that produced in court. This evidence was left to the jury, and I consider that justice has been done between the parties.

Chief Justice.—In this case there was full evidence of transactions between the parties; upon application for payment, apologies were made for delay, the defendant went into plaintiff's house and

heard the account read over, and I think his silence, in some sort, admitted the account; a long time afterwards the action is brought, and the same witness in whose presence the account was read, copies an account out of the plaintiff's book, which he verily believes to be the same. I think, under all the circumstances, that the evidence was fairly left to the jury, and as the judge who tried the cause is satisfied, I am of opinion that the verdict should stand.

Per Curiam.—Rule discharged.

GENERAL RULES PUBLISHED THIS TERM.

Many of the rules of this court, having become unnecessary in consequence of legislative provisions, and others inconvenient, the following are published as standing orders of this court, all others being rescinded:

1st. In future the practice of this court, as well as the quantum of costs to be allowed in all proceedings, are to be governed (where not otherwise provided for) by the established practice of the Court of King's Bench in England.

2nd. When the attorney in any cause depending in this court, resides without the district where the action is brought, all notices, demands, and other papers and pleadings, to be served on such attorney, shall be deemed regular by being put up in the Crown office, in the district, wherein such action is brought, unless such attorney have a known agent within the said district, in which case, service on the agent shall be required.

3rd. As soon as may be after filing any inquisition taken under authority of the statute, passed in the fifty-fourth year of George III., the clerk of the Crown shall cause an extract therefrom containing the name of the person found to be an alien, and describing the land found to have been in his possession, or to which he had a title subject to forfeiture, in order that any person having claim may traverse the said inquisition, and he shall expose such extract in his office from the date thereof to the end of the year from the date of the inquisition.

4th. Some person competent to the duties of the office of the clerk of the Crown and Pleas, is to attend there in vacation, from nine in the morning until three in the afternoon, and in term from nine till three, and from six to eight in the evening.

5th. Neither the clerk of the Crown and Pleas, or any of his deputies are to file any affidavit, declaration, plea, roll, record, or other paper or proceeding in any cause, which shall be printed in part, or in the whole, except the ordinary writs and process of the court.

6th. All rules, which by the English practice may be had as a matter of course upon signature of counsel at side bar, or are given by the master clerk of the papers, or clerk of the rules in England, are to be given by the clerk of the Crown and Pleas, or his deputies in this province, in the same manner, and the same may issue either in term or vacation.

7th. No judgment is to be entered up on any warrant of attorney to confess judgment, or upon any

cognovit actionem, unless the same has been obtained through the intervention of some practising attorney, whose name shall be endorsed on the warrant or cognovit at the time of taking thereof, and such endorsement stated in the affidavit of the execution of such warrant or cognovit to have been made thereon, at the time of taking thereof.

8th. No less than eight days inclusive shall intervene between the teste and return of all mesne process hereafter to be sued out in any personal action, to be henceforth instituted in this court.

9th. The sheriff to whom any execution, or process in the nature of an execution, shall be directed, shall include in the returns of such execution or process, the amount of his fees levied by virtue thereof, and shall specify in the margin the particular items of the same.

10th. In all causes pending, or hereafter to be brought in this court, defendants shall plead within eight days after common bail and declaration shall have been filed and the plea demanded.

11th. Every attorney not resident in the Home District, shall enter in alphabetical order, in a book to be kept for that purpose by the clerk of the Crown, his name and place of abode, and also in an opposite column, the name of some practising attorney, resident in the town of York, as his agent, who may be served with notices, summonses, and all other papers (not required to be personal); and if any attorney shall neglect so to enter his name, with that of his agent as before mentioned, fixing up the notice, summons, or other paper in the Crown office, shall be deemed good service.

HILARY TERM, 4 & 5 GEO. IV., 1824.

Present:

THE HONOURABLE CHIEF JUSTICE POWELL.
MR. JUSTICE BOULTON.
MR. JUSTICE CAMPBELL.

THE KING v. McKENZIE AND McINTYRE, ESQUIRES.

Where defendants had been brought into court upon an attachment, although they cleared themselves upon interrogatories of the imputed contempt, the court refused to allow costs against the prosecutor, although he had omitted a fact in his affidavit which might have affected their decision upon the granting the attachment, and although one of the affidavits upon which the attachment was moved for, was not filed early enough for them to answer it by a counter affidavit.

Robinson, Attorney-General, stated that these magistrates were in court in the custody of the sheriff of the ——— district under an attachment issued against them in Trinity Term last for a supposed contempt committed by them, as commissioners of the Court of Requests. That one of the affidavits upon which the attachment was grounded was only sworn in July, and was produced in court for the first time on the day upon which the attachment was awarded, by which means they had no opportunity of procuring a counter affidavit; that the court had probably proceeded, in a great measure, upon this affidavit, and that if the defendants had had an opportunity of answering it, the court would not have granted the attachment. That if any objection should be made by the counsel for the prosecution, that the application which he was about to make for the discharge of the attachment, was too late, he contended that if

the court should consider that it ought not to have issued, they would not permit such an objection to militate against justice.

That the court upon being more fully acquainted with the circumstances of this case, would discharge the attachment, (and that with costs,) as having issued upon an affidavit, which the parties accused had no opportunity of answering.

Boulton, Solicitor-General.—The counsel seems to think, that McK.'s was the sole affidavit upon which the attachment was granted; in that supposition he is mistaken; the matter was argued for two or three terms, and there is no pretence for surprise; all the affidavits were read, and now, a second term after the attachment has issued, it is moved to discharge it with costs, the application is too late, and, at any rate, it should be made for a supersedeas.

Mackenzie, the magistrate who kept the records, refused the prosecutor a copy of the judgment which had been pronounced against him, which is a strong fact; his name was signed to the copy after he gave it, and it appeared upon affidavit that he was interested in the cause. [CHIEF JUSTICE.—The impression of the court was, that if there had not been actual corruption, there had been a gross misprison.] They have had every opportunity of answering the matters alleged against them, but in this stage of the proceedings, affidavits will not do: the proper course is for them to answer to interrogatories. The conduct of these magistrates has been incorrect, and if the prosecutor has been injured by their proceedings,

whether arising from their ignorance or error, there can be no pretence to saddle him with costs. As to the contempt, they must purge themselves of it (if they can) by interrogatories before the master.

Attorney-General.—These magistrates would give the public a very unfavourable opinion of their conduct if they should consent to pay costs; if this attachment has been issued erroneously can they be decently called upon so to do? To pay them without a struggle would admit every imputation which has been cast upon them. [CHIEF JUSTICE.—It appeared that one of the gentlemen felt an impropriety in presiding at the cause, which has been the origin of these proceedings, and withdrew from the bench. And had not Mackenzie and the others bound themselves to pay a certain annual sum?] They were not bound to stand between the clergyman and the subscribers. [CHIEF JUSTICE.—It appears to me that a wild party spirit is the origin of this affair.]

Per Curiam.—Let the ordinary rule issue to administer interrogatories in four days, and let the defendants, in the meantime, enter into recognizances.

THE KING v. MCKENZIE AND MCINTYRE, ESQRS.

The master having reported to the court, that the defendants had by their answers to the interrogatories, filed by the prosecutor, purged themselves of the imputed contempt, the court were proceeding to order their discharge, when,

Boulton, Solicitor-General, objected, that the answer to the interrogatories, not having been communicated to the counsel for the prosecution, the discharge would be premature, the court thereupon deferred the order until a future day, Mr. Justice *Campbell* observing, "the question as to contempt being first decided, that as to costs will become a subsequent consideration."

THE KING v. McKENZIE AND McINTYRE, ESQRS.

The defendants being again in court, the CHIEF JUSTICE observed, that they having purged themselves of the imputed contempt the court would discharge them upon the application being made, which he found, upon looking into the authorities, it was usual to make in these cases.

Robinson, Attorney-General.—These magistrates are not only entitled to their discharge, but being fully acquitted as they have been of the accusation upon which they were brought here, they are also entitled to be indemnified for their expenses. This evidently appears from the case in 3 Burrow of The King v. Plunket. (*a*) In that case the court were induced to order costs to the party accused because the prosecutor knew that he was not guilty of the alleged contempt; these gentlemen are in the same situation: their prosecutor had not the slightest pretence for this accusation.

It originates in a trifling suit in the court of requests, wherein he chose to let judgment go by

(*a*) 3 Burr. 1329.

default; in his affidavit facts are stated, which are wholly false, and of the falsity of which he might easily have satisfied himself; he might have known whether they were committee men or not, and that, as elders, they had nothing to do with the management of the temporal concerns of the church: it is true, when this cause was called on, Mr. McIntyre said, that he, as being an elder, would have nothing to do with it, and desired those present to take notice that he gave no judgment; all these facts the prosecutor might have known, and if he did not choose to make a defence, he acknowledged the justice of the judgment. What has happened in consequence of this wilful ignorance? These magistrates are dragged three hundred miles without the slightest ground, and that there was no such ground, the prosecutor must have known.

It is the duty of this court to protect magistrates, even had they (which I do not admit) committed an error in judgment, and particularly so in this so penal a mode of procedure. Where an information is filed against them they are tried by a jury of the country, and are much protected by the laws. Supposing even what has been stated against these magistrates to be true, and that they have been mistaken from beginning to end, shall a prosecutor be allowed with impunity to drag them three hundred miles for giving judgment by default in a one pound cause, which he as defendant did not think proper to attend? There are two substantial reasons for giving costs, namely, to protect magistrates where there is no proof of intentional misconduct, and to discourage vexatious attacks upon them, and upon this principle

in the case of The King v. Young and Pitts, (*a*) and The King v. Cox (*b*) in Burrow, informations were discharged with costs. If the country supposed that magistrates could be harressed in this manner by payment of heavy costs, it would be impossible to find persons of respectability to undertake their duties.

Boulton, Solicitor-General, contra.—No person can feel more strongly than I do the propriety of protecting magistrates; but when you look at this case, it is impossible to consider that these gentlemen have acted properly, nor does it at all appear that the prosecutor has been actuated by malice. If magistrates will go beyond their duty, and proceed in cases where they have no jurisdiction, an attachment lies against them as laid down in Hawkins, and, though looking at the situation of this country, if magistrates are not fairly protected, respectable persons could not be procured to fill the office; yet, on the other hand, how many poor persons may be day after day harrassed by their oppression if they are so ignorant as to exercise jurisdiction in cases where they have no pretence to do it as too often happens? In the case before the court there is great doubt whether they were not interested; a clergyman was called from Scotland at a stipend of £200, and the names of both these magistrates were appended to the instrument, and although their names are signed as elders only, as approving it, yet any common person reading it would suppose they were much more bound to see the promises contained in it complied with, than Wood, a common subscriber, was. I do

(*a*) 1 Burr. 556. (*b*) 2 Burr. 787.

not say that they considered themselves as so bound, nor that they were actually so, but I do think that it might be a fair ground of litigation; the words are "we concur and approve of the above;" and if persons of information can hesitate as to the effect of this subscription, how natural is it for ignorant persons, such as the prosecutor, to consider that they were actually bound? The subscription paper, which is dated in 1815, is bottomed upon matter which could only be the ground of a special action, even if it had been brought a week after it had been signed, and more especially at this distance of time, only one action could be brought upon this instrument, the parties could not be harrassed by several actions. [CHIEF JUSTICE.—We are not trying ignorance in law.] These magistrates have acted very erroneously and that knowingly. By the process of attachment alone, Wood could have restitution, (the court being competent to make that the condition of discharging it, that is upon restoring to the prosecutor what he has lost by the execution being so improperly issued against him and paying his costs,) an indictment or information would have been of no use to him; if he has been ill treated, he is not to be saddled with costs. No person can say he has commenced this prosecution without grounds. These magistrates have subscribed a paper promising a minister a salary of £200 a year, which sum was to be made up by the subscriptions of Wood and others. It was very reasonable to suppose they had guaranteed this subscription, and if they had produced it as they ought to have done upon the several motions which have taken place, the court might have formed that opinion as to the defendants being bound as

guarantees or otherwise, which might have affected their decision; as to issuing the attachment, their not having done so is their own fault, and they must take the consequences; however, at all events, the essence of the accusation against them is made out, namely, sitting in a case where they were implicated; one of them, McIntyre, has sworn that he gave no judgment in the cause, but how was Wood to know that? He could only form his opinion by the copy of the judgment, and can Mr. McIntyre after it has been certified, and after all these proceedings had upon it, come in and say that he was no party to it, and shall these magistrates call upon the prosecutor to pay costs in consequence of their own errors? The learned counsel says that Wood's conduct has been wilful against these gentlemen; but it clearly appears from the whole proceedings that he had good reason to suppose he was acting rightly. [CHIEF JUSTICE.—In the case of the King v. Plunket, which is, I believe, the only case where costs have been given against a prosecutor after an attachment has issued, the truth was, that in taking the answers to the interrogatories it was found that nothing had been sworn by the prosecutor in his affidavit which was not true, although the accusation against the defendant was unfair and unwarranted, and the court dismissed the attachment with costs against the prosecutor, because he could not be punished in any other way; but in the case before us, if costs should be given against the prosecutor, what is to prevent his being punished a second time by indictment?]

Attorney-General in reply.—Wood had not a shadow of ground to make this complaint, as appears

by the answers to the interrogatories. As to the copy of the judgment about which so much has been said, Mr. McKenzie gave him a copy of it upon his first application, although he refused to give him a second after he had moved for an attachment against him, until he took advice from his attorney. The omission of this fact (so very important a feature in the case) in Wood's affidavit, was an imposition upon the court, and was a matter which, if it had been fairly disclosed, would no doubt have influenced them materially.

Mr. McIntyre, as an officer of the church, refused to give judgment against Wood, but this was no admission of interest, in fact neither of the magistrates were at all liable, except as individual subscribers, a fact which Wood might have well known if he had read the call; as to the illegality of this transaction I will not say that in a court of law their proceedings and judgment would be considered regular, probably the minister should have sued upon this paper; but according to the statute (*a*) which gives them jurisdiction, courts of request are to proceed according to equity and good conscience, in which particulars I cannot think these magistrates have failed. Were I a magistrate to-morrow it is probable I might in a similar case do as they have done, substituting the clergyman perhaps as plaintiff. Wood, at any rate, can have no pretence to consider himself as injured after putting his name to the subscription paper. As to the distinction which has been attempted to be made between the two churches of Williamstown and Lancaster, it appears that they composed but one

(*a*) Provincial 56, 9, 3, c. 5, s. 2.

congregation; and whatever difference their being committee-men for managing the temporalities of the congregation would have made, is of no consequence, for neither of these magistrates held that situation, and even supposing that an elder was more interested than others in the payment of this subscription, yet McIntyre cannot be criminated as having sat in judgment in Wood's case, merely from the circumstance of his name being set to the judgment paper; he gave no opinion, and called the persons present to take notice, that he had nothing to do with giving the judgment; if there had been an hundred causes tried at the court of requests that day, it is most probable that the names of all the magistrates would have been mentioned, though some of them might not have been present at the hearing or decision of half of them; therefore to criminate McIntyre by McKenzie's copy of the judgment, would be the height of injustice: McKay's affidavits, which state the facts of these magistrates having signed the subscription paper, and the refusal by one of them of a copy of the judgment, (facts which no doubt weighed much with the court,) were not filed until the 13th day of July, only five days before the pronouncing the judgment for the attachment, a space of time within which it was impossible to procure counter affidavits. The prosecutor has not the least pretence to say he has been unjustly dealt with, in a cause which he did not think it worth while to attend.

Chief Justice.—The only question with me is as to punishing the supposed perjured person. If we should award costs to the magistrates we should be in fact prejudging the prosecutor. If, indeed, it

clearly appeared that there were no other means of punishing him (supposing him to have behaved ill) I should think it fair to consider the propriety of giving costs to the magistrates.

The court deferred pronouncing judgment until to-morrow.

THE KING v. MCKENZIE AND MCINTYRE, ESQRS.

The court proceeded to give judgment in this case.

CAMPBELL, J.—Upon the return of the rule *nisi* obtained against these magistrates, the court were of opinion that the affidavits filed on their part, did not sufficiently answer those that were filed against them, and therefore granted the attachment, upon which they are brought up from the extremity of the province, a distance of several hundred miles.

They have now upon interrogatories fully purged themselves of the alleged contempt, and are therefore ordered to be discharged; and the question now under consideration is, whether or not they are to be allowed their costs.

Upon hearing counsel, and full consideration of all the affidavits, we are all of opinion, that there was some probable ground for the complaint exhibited against them, inasmuch as it appears they interfered in some degree as magistrates in a matter, strictly considered, in which they should have refrained from acting at all; but we also seem to be all of opinion, that in so far as they did act, it was in pursuance of

what they considered their public duty, and for a good and beneficial purpose to the community, and that their conduct therein was honest, conscientious and candid, and without malice, oppression, revenge, or any ill intention whatever, such, at least, is my own opinion of their conduct, and therefore upon the authority of several cases, particularly that of Palmer and Baine, and others (*a*) I should be disposed to allow them costs; but when it is farther considered as now appears, that the complainant has practised a deception on the court, by withholding the disclosure of a material fact within his knowledge, at the time of making his affidavit, and also that another material affidavit had not been communicated to the magistrates in sufficient time to be answered by them, at the time of shewing cause, I have no doubt of their being entitled to their costs.

BOULTON, J.—There is not an instance of allowing costs after an attachment has issued except the solitary one of the King v. Plunket, mentioned by the counsel for the defendants and the *Chief Justice.*

In the case before the court it appears to me that the prosecutor has made his charge upon probable grounds, and that it is not for the court in this stage of the proceedings to conclude that he has sworn falsely. To make it reasonable that he should be charged with costs, it should appear that he knew he was acting wrong, but it appears that he proceeded upon an opinion which he had formed, as to the effect of the subscription paper or call produced in court; and if he acted fairly, according to the best of his opinion, that discharges him from corrupt motives.

(*a*) 2 Burr. 1122. See also, Rex v. Cox, Esq., 2 Burr. 786.

My learned brother has perhaps, in some measure, relied upon the cases cited by counsel where costs have been given to magistrates in cases of informations, but these differ both in law and practice from that of a party being brought up upon attachment. Probably there is no blame to be attached to Wood.

Whether he has sworn the truth or not in his affidavit, is not for us to determine, it would be to say whether he was foresworn or not.

Many persons looking at these papers would form the same opinion upon them which he appears to have done. If, indeed, he had stated in his affidavit some facts which he has omitted, it might have had some effect upon the opinion of the court when the attachment was granted, but these affidavits are commonly drawn up by the attorney, who does not usually insert any thing which may make against his client; I however think that there was a sufficient proportion of facts set forth to lead the court to their decision, and, as it is altogether without precedent, I am of opinion that costs should not be given to the defendants.

Chief Justice.—The decision of the court in awarding the attachment, was founded upon the affidavits of the prosecutor, and the facts stated in those affidavits have now been answered by the oaths of the adverse party, the court contents itself by the prosecutor's affidavits being contradicted by positive testimony to the contrary, by the parties accused swearing that they are not guilty. Where there is oath against oath, there must be perjury some where,

but it is not the practice of the court by its determination to say where it lies, which it would in effect do if it gave costs to the defendants.

In the singular instance before referred to (*a*) of costs being allowed to a defendant brought in upon attachment, the affidavit of the prosecutor was not controverted; the accused was unable to swear that the facts were not true, but it appeared by the answer to the interrogatories that there had been a practice upon the court of a concealment, which, if disclosed, must necessarily have altered their decision upon the motion for the attachment; upon this ground and from the great injustice evinced by the prosecutor in that case, the court gave costs to the defendant, but in the case before this court there is oath against oath. I cannot undertake to determine the question of perjury between the parties, nor do I consider it my duty to prejudge it. I am therefore of opinion that the court should not give costs to these defendants.

Per Curiam.—Let the defendants be discharged.

Lossing v. Horned.

This was an action upon bond conditioned for the performance of an award. *Baldwin* moved for a rule to shew cause why the venue should not be changed from the Home District to the District of London, upon an affidavit stating, "that the plaintiff's cause of action (if any) arose in the said District of London, and not in the Home District or elsewhere, and that all the material witnesses of the defendant were resident in said District of London."

(*a*) King v. Plunket.

Macaulay, contra.—This venue cannot be changed without special grounds, it is laid down in Tidd and all the authorities, that in actions of debt upon bond or other specialty the court will not without such special grounds change the venue. In this case the only issue must be *non est factum* or performance.

Per Curiam.—Application refused.

Crawford v. Ritchie.

Macaulay moved to set aside the proceedings in this case for irregularity, the writ having been issued in the deputy clerk of the Crown's office, in the District of Gore, and the venue being laid in the Home District. He contended that the statute allowing proceedings to be instituted and carried on in the outer districts, was always understood to be confined to cases where the venue was laid in those districts. That a judge of assize of the Home District, would not recognise the signature of the deputy clerk of the Crown of an outer district to the *nisi prius* record.

Per Curiam.—The plaintiff may have leave to amend upon payment of costs.

Hasleton v. Brundige.

Where the defendant, one of the sheriff's bail, had from misapprehension given the plaintiff in the original action a cognovit, and had moved for and obtained an order to stay proceedings upon it until the action against the principal could be tried, which order was conditional upon payment of "all costs incurred by proceedings against the sheriff's bail," the court determined that the costs of the proceedings upon the cognovit should be considered as such costs.

An application had been made in a former term in the case of Hasleton v. Roberts, to stay proceedings

upon a cognovit given by Brundige, the present defendant, who had become Robert's bail to the sheriff. It had been given under an apprehension that Roberts, who had left the province, would not return to defend the action ; it was given in the name of Brundige, the defendant, without any reference in it to his situation as bail ; an execution had been issued against the present defendant, according to the terms of the cognovit, but the court, upon an affidavit that there were merits in the suit against Roberts, had stayed the execution until a trial might be had in the original action. The terms of the rule were, "that all costs incurred by proceedings against the sheriff's bail should be paid, leaving the judgment by confession as a security."

The costs of entering up judgment and issuing execution upon the cognovit, not having been paid, *Macaulay* had last Michaelmas Term obtained a rule to shew cause why the plaintiff should not issue execution against Brundige, the present defendant, for the amount of the sum secured by the cognovit and costs, and now,

Washburn shewed cause.—He contended, that as the rule only required the costs to be paid upon any proceedings that had taken place upon the bail bond, (but which remained still in the sheriff's office unassigned,) the defendant was not by the terms of the rule called upon to pay any costs, as none had been incurred. That although it might have been the intention of the court, that the costs upon the cognovit should have been paid, yet, that as the defendant had omitted to do so under a misapprehension, the court

would again stay the execution against Brundige, the defendant, upon these costs of the cognovit being now paid.

Macaulay, contra.—Contended that the defendant in this action, by the former application to stay the proceedings upon this cognovit, had himself considered the proceedings upon it as proceedings against bail, and that it was upon that principle that he obtained the relief granted by the court, and that he could not after his own neglect by non-payment of these costs, come forward and say that they were not proceedings against the bail; that it was his duty to have got these costs taxed and paid them, that it was a condition precedent to going to trial in the original action, and that it was now too late for this application.

Chief Justice.—The former application made to this court for staying the proceedings and allowing the merits to be tried, was made in favour of Brundige quoad a bail, and as such entitled to the equitable relief which the court is empowered to give under the statute,—the plain intention of the rule was, that he should pay the costs of the proceedings upon the cognovit, which security was contended by his counsel to be within the equity of the statute.

Per Curiam.—Rule made absolute.

McDougall v. Camp.

Where the plaintiff's attorney had attended a meeting of arbitrators and they had made their award, the court refused to set aside the same upon the ground that the plaintiff had not attended to give his evidence agreeable to the provision in the rule of reference, from the miscarriage of a notice sent to him by his attorney for that purpose, and although the decision of the arbitrators proceeded principally upon the evidence of the defendant.

Macaulay moved for a rule *nisi* to set aside the award, on the ground that the arbitrators who had been appointed by a rule of reference made at *nisi prius*, had not full evidence upon the subject matter submitted to them, the plaintiff not knowing of or being able to attend the said arbitration.

The rule of reference upon which the award was made, ordered "that the parties and their respective witnesses might be examined before the arbitrators."

The affidavit upon which the motion was grounded, stated the plaintiff's residence at York—the arbitration taking place at Niagara—the non-receipt of a letter which had been sent to apprise him of the time and place of meeting, and that the award principally proceeded upon the affidavit of the defendant, which the plaintiff, if present, could have rebutted.

Boulton, Solicitor-General, contra. — Contended, that as the attorney for the plaintiff attended the arbitration; as the same had been postponed in consequence of the absence of a witness on the part of the plaintiff, who afterwards attended and was examined, and the arbitration gone into in the attorney's presence, the award could not be set aside. That it was a pure case of negligence on the part of the plaintiff, or his attorney, in which the court would not interfere. That the application was analogous to

that for a new trial, which was never granted in consequence of a party's neglect to produce his witnesses.

Per Curiam.—Rule refused.

McGill v. McKay.

Semble, that where a plaintiff has taken a *fieri facias* against lands and tenements belonging to a defendant in several districts, the court would interfere to prevent more of those lands being sold than would satisfy the plaintiff's demand.

Dixon moved for a rule upon the sheriffs of several districts to suspend the sale of the lands of the defendant, taken by them in execution at the suit of the plaintiff in this action, until it could be ascertained whether the proceeds of the sale of the lands in one district would not be sufficient to satisfy the plaintiff's debt.

The court inclined to grant a rule *nisi*, but Dixon withdrew his application upon the counsel for the plaintiff (*Macaulay*) undertaking that the sales should take place in succession.

Scott v. McGregor.

There is no occasion for the seal of the court to be affixed to a record of *nisi prius* in an outer district where the suit has been instituted and cause tried there.

This was a case of demurrer in which judgment was given for the plaintiff. In the course of the argument the defendant's counsel had objected to the want of a seal to the *nisi prius* record. It was asserted by the plaintiff's counsel,

Boulton, Solicitor-General, and assented to by the court, that there was no necessity for a seal to be

affixed thereto in the outer districts, as there would be but one seal of the court, which remained in York at the principal office, and consequently as the deputy clerk of the Crown, in each district, was authorised to issue the writ or record of *nisi prius*, his signature alone must be sufficient. The counsel referred to a former case of Lancaster v. Curtis, where this point had been determined.

DAVY v. MYERS, (EXECUTORS OF).

Where the plaintiff had recovered a verdict against executors for a breach of promise of marriage made by their testator, this court would not (on the ground that such an action could not lie against personal representatives) arrest the judgment.

This was an action brought against the defendants as executors of —— Myers for a breach of a promise of marriage, and upon which the plaintiff had obtained a verdict against them for five hundred pounds. The cause was tried before the *Chief Justice*.

Robinson, Attorney-General, had, in a former part of the term, obtained a rule to shew cause why the judgment should not be arrested upon the ground that this action did not survive against executors, and now *Boulton*, Solicitor-General, shewed cause.

This is an action of assumpsit brought by the plaintiff, Miss Davy, against the executors of William Myers, for a breach of promise of marriage in the life time of the defendant's testator, and a verdict having been found for the plaintiff, a motion is made in arrest of judgment, upon the ground that no such action can be maintained against executors. The

Attorney-General contends that this is a personal action, and therefore dies with the person.

That it is an action of the first impression, and that no precedent can be found of such a one having been maintained.

That as the personal estate of the testator gained nothing by the contract, (so far as appears by the record,) the executors cannot be called upon to pay any damages for a breach of it.

That the damages being *in pœnam*, and therefore for a *quasi tort*, cannot be recovered against an executor, and finally he argues *ab inconvenienti*, that it would be impolitic to sustain such an action, because there must have been many circumstances in the knowledge of the testator from the nature of the cause of action which might materially lessen damages, which the executors can know nothing of.

With regard to the first objection, the rule "*actio personalis moritur cum persona*," so far from being universal, is not even general, as by far the greater number of personal actions survive, and lay as well by as against executors. All actions are either real, personal or mixed, and as to personal actions it is laid down in Hambly v. Trott, (*a*) that where the cause of action is for money due or a contract to be fulfilled, gain or acquisition, by the labour or property of another, or a promise by the testator, express or implied, the action survives against the executors, *secus* if it be *tort* or arise *ex delicto*, sup-

(*a*) 1st Cowper.

posed to be by force or against the peace. Here it is expressly decided that if the cause of action is a promise to the testator either express or implied, or a contract to be fulfilled, the action survives against the executor, which is the case here; the testator promised and contracted with plaintiff to marry her, and broke that promise and contract in his life time, as appears by the record; therefore, this action comes within the plain terms of this authority, consequently unless the defendants' counsel can shew, that the particular species of contract or promise is an exception to this rule, the plaintiff is entitled to judgment. When a general rule is applied in argument to answer an adverse proposition, we must look at the reason of the rule, because if the reason of the rule is not applicable, the rule itself fails. Now the reason why some (because we have shewn the rule is not general) personal actions, viz., for *torts*, will not lie against executors is this, that the judgment in those cases is guilty and *quod defendens capiatur*, which is in the nature of a conviction for a crime, and no man can be put to answer criminally for the fault of another. This objection arises purely from the form of the action.

The remaining personal actions which will not lie against executors, are actions of debt upon simple contract, and the reason of the rule as applied to these actions, is, that the testator, if living, could wage his law, and as the executors could not do so for him, compelling the executors to answer would deprive them of a mode of defence which the common law gave.

These observations apply when the action is

brought against an executor, but when the action is by an executor, the reason of the rule is quite different.

The reason why an action for a tort or for any other cause, in which the damages to be recovered are *in pœnam* and for an injury to the person, character, feelings, &c., of the plaintiff's testator, will not lie, is, that the executor is the representative of the personal estate and not of the person or personal wrongs of the testator.—Williamson v. Chamberlayne.

This latter case was for a breach of promise of marriage by the defendant to plaintiff's testator, and the reason given by Lord *Ellenborough* why the action could not be supported, was, "that the plaintiffs were not the representatives of those injuries, a compensation for which was sought to be recovered; that they were the representatives of the personal estate of the testatrix and not of her person or personal wrongs, from whence it appears that the reason of the rule '*actio personalis moritur cum persona,*' is different as applied to actions brought by and against executors, in the first case being for want of representation, and in the last on account of the judgment being guilty, or that defendants are deprived of their wager of law."

Secondly.—An action being of the first impression is no objection, it is only a reason (if true) why caution should be used to see that it comes within the general principle by which it is endeavoured to be supported; but it is highly probable that the reason why the Attorney-General can find no case of this

kind reported in the books is, because it was never before questioned.

The third objection is, that the testator's personal estate gained nothing by the contract, this is the case in many actions which were never questioned, and notoriously do lie against executors, such for instance as actions of covenant, for title, and for further assurance entered into by testator. (*a*)

It has also been urged that an action will not lie against an executor for the non-performance by the testator of a personal act, which the executor cannot perform in his stead; and my learned friend tauntingly says, which of the executors would you have marry this good woman? In this remark there is more wit than argument; for there are many actions in which the contracting party (much less his representatives) will not be permitted to perform the act contracted to have been done, when a breach has ensued. In actions of debt on bond, payment after the day named in the condition, could not, at common law, have been pleaded in bar of an action for the penalty; and in actions on special assumpsits, performance after a breach will not bar an action for damages arising from that breach; and in the case just cited of King v. Jones and others, the executors could not have performed the contract for a breach of which the action was brought; and although it has been asserted, that no action will lie against executors that will not lie for them, the proposition is incorrect, for in King v. Jones and others, it was not objected that such an action could not be sustained

(*a*) King v. Jones *et al.*, 5 Taunt. 418, Burrow, 1199.

against the executor, yet in a similar case in Maull v. Selwyn, brought by an executor, it was decided that the action could not be supported.

Robinson, Attorney-General, contra.—This is an action brought by the plaintiff against the defendants, executors of J. W. Myers, for a breach of promise of marriage, alleged to have been made by their testator. Except the singularity of its being brought against executors, (which seems never to have been attempted before,) it is in the ordinary form of such actions—there is no special averment or allegation of any kind on the record, nothing to distinguish this case from any other of breach of promise of marriage, in which one of the contracting parties has died, and consequently the single question for the court to determine is, whether in every case an action can be sustained against the personal representatives for breach of promise of marriage; if it can in this, it can in every other, because there is no particular averment on the record to support this action, no statements but those which are ordinary and indispensable in all actions of this description. The general principle is therefore alone to be considered. I contend that, on general principles, this cause of action does not survive but dies with the party; and, on that ground, I move in arrest of judgment.

In the first place I venture to state, that no instance can be pointed out of any attempt having been made before the present, to maintain an action for breach of promise of marriage against the executors of a contracting party; not a dictum can be found in any book, in any treatise on any one branch of the

law, to authorise such an action; no report can be produced of any decision to support it, none in which a question or pretence of the kind has been discussed; in no book of precedents can any form be found of any declaration, pleading or judgment, in an action of this kind. There being then no express and particular authority or precedent to support it, it remains to be enquired, whether, according to general principles of law, it can be sustained.

The maxim every where repeated is "*actio personalis moritur cum persona;*" but, though in very ancient times this maxim was construed much more strictly than was reasonable, and than the law now is, yet, I admit, it was never taken to mean that all actions that are technically called personal actions, die with the person; for that, as is remarked even in the oldest authorities, would exclude the ordinary matters of debt and contract. It rather meant that actions for personal injuries, or wrongs for causes that affect the person, rather than the property, do not survive. A distinction was early taken, that an action could not be brought against executors for breach of contract, which the executors could not perform, or such rather as could only be performed by the testator in person. On this principle, the case in Levinz was decided; and though there have been contradictory decisions with respect to that particular case, of breach of covenant for not instructing an apprentice, the latest seems to overrule the contrary decision, and to decide that such an action would not lie against executors, by reason that it was covenant for a personal thing to be performed only by the testator, and the executors might not be of the trade,

and therefore not capable of performing it. The maxim may in this case have been advanced too far, because the executors might cause the apprentice to be instructed by one who was competent; but, as it is certain the executors in this case could not be compelled to marry the plaintiff, (if indeed they had not already wives of their own,) and as they could not easily find her another husband, or compel her to accept one of their offering, the principles which were applied in the case in Levinz apply with more force in this. The old authorities state most comprehensively, what actions in their nature survive, and what die with the party; and no one can read that case or any of the early decisions in Dyer, Croke, and Levinz, without feeling satisfied from the very doubts raised as to other causes of action. That in the judgment of the learned men who decided those cases, the very idea of attempting such an action as this, against the personal representatives, would have appeared altogether absurd. In later times the case of Hambly v. Trott was decided; and if the case, arguments and judgment of the court are read attentively, (and not in detached sentences to make them appear to give countenance to doctrines evidently not supported by them,) it will be found to militate against rather than to support the present action.

These, however, are only cases that can supply reasons from analogy, not one of them relates expressly to this cause of action, nor can any such be found, at least none in which the question is raised, whether such an action can be brought against the personal representatives.

Fortunately, however, there is among the decisions

of very modern times, one case that appears completely to determine the general principle that it does not survive, although that case is one of an action brought by and not against the personal representatives. In Chamberlayne v. Williamson, (*a*) an action was brought by administrators for a breach of promise of marriage to their intestate. It struck the judge who tried it at *nisi prius*, as an extraordinary action, but he suffered a verdict to be taken, and saved the point. The Court of King's Bench declared that it was the first instance of such an attempt, and, though they admitted that was not conclusive, they declared it to be a strong presumption at least against the action, because it proved that the general sense of mankind was against it.

To the same extent only, is the total absence of precedent or authority urged in this case. After solemn argument and great deliberation as the case expresses, the court decided clearly and without a doubt against the plaintiffs, and every reason on which they decided that executors cannot maintain this action, apply a *fortiori* to prove that it cannot be maintained against them. Lord *Ellenborough* says, "it is an action sounding altogether in damages, that it is for an injury—for a wrong to the person; that the damages are vindictive and *in pœnam*."

Now nothing is more clear than that actions for wrongs, for injuries, do not survive against executors, that they are not liable for damages *in pœnam*. And when it is once admitted that this action is to be so regarded, the reason of "*actio personalis moritur cum*

(*a*) 2 M. & P. 408, M. S.

persona," applies beyond a question. There is no case in which, by the common law, an action can be brought against executors, which cannot be brought for them; and since it has now been decided in the only case that appears ever to have occurred, that such an action will not survive to the executors, and decided on grounds that must apply with equal force, and do apply with greater when the parties are reversed, it must be taken to be clearly established by that decision that this action cannot be sustained.

There the action was against the original contracting party, who ought, undoubtedly, to perform all his promises, and has the means of making a full defence; and the only question is, can he be sued upon a cause of action so completely personal, the other contracting party being dead.

The court say—generally we think not, the action is *quasi ex delicto*, and does not survive; but if you could prove special damage to the estate, perhaps it might. Why? Because the estate should then be made good against this injury to the benefit of creditors, and others entitled.

But reverse this—the same objection as to the personal nature of the action remains—the liability of the executors must turn upon that objection, and if they are liable, the estate is subject to be reduced to nothing by a vindictive verdict in an action sounding wholly, as the court say, *in pœnam*, for loss of personal advancement, mortified feelings, and considerations wholly personal, and out of the limits of calculation; and creditors for *bona fide* debts would thus be left without assets to answer their demands.

It is evident too, that in such actions, of all others, the executors could not make a proper defence; they could not know the objections which may have justified the breach, but which honour and delicacy may have induced their testator never to reveal. Indeed, it is probable were this action sanctioned, that artful persons would wait, in some cases, until the death of a party put it in their power to proceed against those who could make no defence.

The whole reasoning of the case lately decided must apply to this, but not the exception, which, it is said, might possibly, in a particular case, sustain the action.

The doubt there was—the plaintiff does not represent the original contracting party as to contracts of this nature, but he does represent the estate, and, therefore, if it were specially alleged and proved, that the estate has been damnified by the breach, perhaps he may sustain this action against the original contracting party.

Here, on the general principles recognised in that case, the defendants do not represent the contracting party in an action of a nature so purely personal: on what particular ground then could it be sustained? Not because the plaintiff, one of the original contracting parties, has been damnified, for that is the case in every trespass, in slander, and in all actions which it is not pretended can survive. Perhaps the corresponding condition might be, if the plaintiff had alleged specialty, that gain had accrued to the estate of the testator by his non-performance, he might sus-

tain this action; but there is no such allegation, nor can it be inferred. It might have been far otherwise; the testator might have married less advantageously and left a widow fully entitled to dower. The record, at all events, authorises no inference one way or the other, and we can intend nothing to support it.

That it has never been conceived such an action can survive, is clearly seen from the observations of the court upon the first and last experiment that has ever been made in England; if it had been attempted, we must have been able to find some trace or mention of it.

The statute of William, which allows plaintiffs to proceed by *scire facias* against executors of a defendant dying after interlocutory judgment, in all cases in which the action could have originally been maintained against executors, would of course apply in this cause of action, if it survives as is contended. Many instances must have happened in which plaintiffs having proceeded to that stage in such an action, have been stopped by the death of the defendant; yet, none of them ever appear to have made the attempt of reviving it by *sci. fa.* against the executors. No case can be found which leads us to think so; no book says it can be done; no form is given of the proceedings that would be required.

It is evident unless such an action would lie in England, it does not lie here; nothing has been or can be brought to shew that it has been attempted in England; whatever principles and cases bear upon the subject are against it; and it appears repugnant

to reason as well as experience, that it should be maintainable. The court will therefore, it is presumed, not now sanction so entire an innovation, which would lead the way to many similar actions, unsupported as they would be by any other precedent.

The arguments employed by the learned counsel for the defendant, are ingeniously built upon cases not bearing on the question. The cases cited by him are of actions upon covenants and other specialties, (where the question was not and could not be, whether the action survived or not, but whether it survived against the executor or the heir,) against the representative of the real, or the personal estate; and if the positions which have been called from them, are taken with reference only to the point in the respective cases, however generally they may be expressed, they will be found not to apply in any degree to the question here before the court.

CHIEF JUSTICE.—This is an action against executors for breach of contract by the testator.

At the trial the contract by the testator to marry the plaintiff, and by the plaintiff to marry the testator, were proved and admitted.

That in conformity to the contract they did intermarry, and cohabited as man and wife in the face of the world and their families, until the death of the testator, who, in consideration of such marriage, left by will his wife to her lawful claims on his estate.

It appeared in evidence, that they were married

by a Lutheran minister, whose authority was supposed by the plaintiff to be questionable, but overruled by the testator, as being legally authorised to solemnise the marriage.

It was in evidence, that subsequently doubts as to the validity of the marriage arising in the mind of the testator, he proposed to have the ceremony renewed by Mr. Stuart, the church minister; that the plaintiff declined this offer; and it did not appear, that in any other way she had required the testator to fulfil his contract, or that he had refused so to do.

The judge was of opinion, that the action lay for damages for breach of the testator's contract, but that the breach on his part was evidently the refusal on the part of the plaintiff, and that the verdict must be for defendant; but the jury found for plaintiff and £500 damages.

The present motion is in arrest of judgment without reference to a new trial. It has been fully argued, and, although a question which must have frequently occurred, it appears doubtful if the action lies at all, without an averment of special damage in the life of the testator.

The cases on the survival of actions for and against executors, are still confused, and appear to be decided rather on particular circumstances, than on general principles.

Supposing in the present case that the plaintiff had proved an express demand on her part, and refusal

of the testator to fulfil their contract, and that the testator had then married another woman and died, is it contended that the action did not survive to plaintiff against the executors for the breach of the contract without the averment of special damages, which, as against them, would have been one-third of the value of the moveables?

Then, if it would lie in such case, the proof of the facts failing is no ground for arrest of judgment but for a new trial. A new trial is never granted after failure in arrest of judgment, (unless the case in Douglas (*a*) is to be considered as authority,) and, in so just a case as this is, it is fortunate that the verdict can stand.

CAMPBELL, J.—This is an action on the case in assumpsit brought by the plaintiff, a single woman, against the defendants as executors, to recover damages for breach of promise of marriage by the testator, and in which she has recovered a verdict for a considerable amount, and now the defendants move in arrest of judgment on the following grounds, viz.:

First.—That such action is not maintainable against executors, the cause of action being in the nature of a personal *tort*, within the maxim "*actio personalis moritur cum persona.*"

Secondly.—That the declaration does not state any allegation of special damage, and

Thirdly.—That no precedent being found for such

(*a*) Vide Doug. 745.

action, affords a presumption that it cannot be maintained.

With respect to the precise application of the common law maxim, there has been some difference of opinion both before and since the statute *de bonis asportatis in vita testatoris*, (*a*) but a variety of modern decisions seem to have removed all difficulty on that point, and the distinction, as now I think clearly established, is, that where the cause of action is a mere personal *tort*, or is founded upon any *malfeasance* or *misfeasance*, or arises *ex delicto*, and generally where the declaration states the injury in such manner, that defendant must necessarily plead not guilty, the rule "*actio personalis moritur cum persona*," will apply; that rule, however, has never been extended to actions founded on *nonfeasance* or arising *ex contractu* whether special or simple, as debt, covenant, promise, &c. In such cases the action generally survives, and assumpsit or other appropriate action will lie against executors or administrators. This doctrine is, I think, sufficiently established in a variety of cases, of which I need only mention those of Hambly v. Trott, Kingdon v. Nottle, Chamberlayne v. Williamson, and the note on Wheatly v. Lane in Saunders; if therefore the decision of the present question depended on the general principle stated as the first ground of this motion, I should have no hesitation in saying, that the rule *nisi* ought to be discharged; but the same authorities and several others recognise, I think, with equal certainty a distinction which I apprehend must have an important bearing on the second ground of the motion, viz.: the

(*a*) 4 Ed. III., c. 7.

want of any allegation of special damage on the record. In the case of Hambly v. Trott already cited, Mr. *Buller*, in shewing cause against a motion similar to the present, observes, that actions to recover specific property, or the value thereof, will lie against executors or administrators; but where the damages are in their nature vindictive, or *in pœnam*, or uncertain, no action will lie against such representatives. I would not cite the opinion of counsel, however eminent, were it not recognised and confirmed by judicial authority. Lord *Mansfield*, in delivering the unanimous opinion of the court in that case, cites and adopts the doctrine laid down by Mr. Justice *Manwood* in Sir Henry Sherrington's case, as reported by Sir T. Raymond, "that in every case where any price or value is set upon the thing in which the offence is committed, if the offender dies, his executor shall be chargeable; but where the action is for damages only in satisfaction for the injury done, the executor shall not be liable." This his lordship calls a fundamental distiuction, and is, I imagine, the same distinction to which Mr. Justice *Bayley* alludes by what he terms a pre-existing proveable debt, in contradistinction to vindictive or uncertain demands of damages, for injury to the person, or personal feelings, or at most to the personal comfort, unaccompanied by any specific pecuniary loss, and therefore inadmissible against the representatives of a person deceased, or against the assignees of a bankrupt, as being incapable of any other mode or means of estimation than the capricious or accidental feelings and discretion of a jury. But a special damage alleged on the record, such as loss of marriage to another person, the relinquishment or loss

of certain pecuniary advantages, or the giving up a profitable trade or employment, in consequence of the promise of marriage, are in the nature of pre-existing proveable debts, as being as capable of specific proof, and precise estimation, as any other debt, and in which the jury in estimating the amount of damage, must be governed entirely by the evidence in support of such special allegation of loss.

In the case of Chamberlayne v. Williamson it was expressly decided, that administrators cannot have actions for breach of promise of marriage made to intestate, without an allegation of special damage. But it is contended that that decision does not apply to the present case, that being an action by the personal representatives, and this against such representatives—I cannot see the distinction. The doctrine there laid down appears to me to be general.

Lord *Ellenborough*, in giving the unanimous opinion of the court, expresses himself to this effect: the general rule of law is *actio personalis moritur cum persona*, under which rule are included all actions merely personal. Executors and administrators are the representatives of the personal property of the deceased, but not of his wrongs, except where those wrongs operate to the temporal injury of the personal estate, but in that case the special damage ought to be stated on the record, otherwise the court will not intend it. Where damage can be stated on the record, that involves a different question. Although marriage may be regarded as a temporal advantage to the party, as far as respects personal comfort, still it cannot be considered as an increase of the transmissible per-

sonal estate. Loss of marriage may, under circumstances, occasion a strict pecuniary loss to a woman, but it does not necessarily do so, and unless it be expressly stated on the record by allegation, the court cannot intend it; and his lordship concludes his remarks by saying, "on the ground therefore that the present allegation imports only a personal injury, to which the administrator is not by law, nor is he in fact, shewn to be privy, the action cannot be maintained." All this perfectly agrees with the principles laid down in the other authorities. Were it otherwise, the parties to a suit like the present could not be upon equal footing with respect to the prosecution and defence of the suit, as in the present case the executors may not have had the same advantage of pleading specially to the action, as the testator would have had, if the action had been brought in his life time, such as that he was always ready and was then ready and willing to perform his promise, but was prevented by the plaintiff, &c. For aught that appears on this record, it may have been the case that testator really was willing and desirous to perform his promise, but that plaintiff on her part delayed or declined performance, or relinquished her claim by consenting to cohabit with him unmarried, to the time of his death, in which case her right of action would have been destroyed, not by his default, but by the act of God. I am of opinion that without an allegation of special damage this action is not maintainable against executors, and I consider the third ground of the present motion as strongly corroborative of this opinion, and therefore that judgment ought to be arrested.

BOULTON, J.—This is a motion in arrest of judg-

ment in an action brought by the plaintiff for a breach of promise of marriage made to the plaintiff, by defendant's testator.

Mr. *Attorney-General* has moved in arrest of judgment on the following gounds:

First.—That upon the old maxim of law, which says, "*actio personalis moritur cum persona,*" the action does not lie.

Secondly.—That should this maxim not apply in this case, the plaintiff could not recover on the ground, that the declaration did not contain any allegation of special damage, which it ought to do, under the authority of Chamberlayne v. Williamson. (*a*)

Thirdly.—That this being an action novel in its kind, and not any instance cited or suggested of its having been maintained, (although frequent occasions must have occurred for bringing such an action,) it cannot be supported.

I have perused most of the cases cited on each side, and many others, the result of my own research.

Although I have many older authorities, (Coke, Gro. Rolle, &c.,) I shall begin with the case of Hambly v. Trott, 16 Geo. III. This was an action of trover, where the plaintiff, on the principle of the maxim, failed, but in that case various rules of law on the subject are laid down. Mr. Justice *Aston* says, "the rule is *quod oritur ex delicto, non ex con-*

(*a*) 2 M. & S. 408.

tractu shall not charge an executor, and cites 2 Bac. 444, tit. executors.

Lord *Mansfield* observes, that the maxim *actio personalis*, &c., upon which the objection is founded, not being generally true, and much less universally so, leaves the law undefined as to the kind of actions which die with the person, or survive against the executor.

He remarks, "where the cause of action is money due, or a contract to be performed, or a promise of the testator, express or implied; where these are the causes of action, the action survives against the executor; but where the cause of action is a *tort*, or arises *ex delicto*, there the action dies, as battery, false imprisonment, &c."

No action where, in form, the declaration must be *quare vi et armis et contra pacern*, and where the plea must be that testator was not guilty, can lie against executors.

Upon the face of this record, the cause of action does not arise *ex delicto* but *ex contractu;* the verdict therefore, I think, cannot be disturbed.

It is now agreed that executors are answerable in all personal actions, which arise *ex contractu*, and not *ex maleficio*, (*a*) for every contract implies a promise to perform it, in which the testator could not wage his law, because he could not make oath that he had discharged a duty before the quantum had been ascertained by the jury.

(*a*) 3 Bac. tit. executors and administrators; 9 Coke 87, 10 Co. 77, 6; Croke Tas. 293, Vaughan, 101.

And it hath been resolved, that there is no difference between a promise to pay a debt certain, and a promise to do a collateral act, which is uncertain and rests only in damages, as to give a fortune to his daughter, to deliver up a bond, &c., and that whereever in those cases the testator himself was liable to an action, his executor shall also be liable. (*a*)

An action lies against an executor upon every contract, debt, or covenant, made by a testator, or intestate, which appears by any record or specialty, so upon any debt or contract without specialty, where the defendant could not have waged his law, so where the cause of action is money due on a contract, or a contract to be performed, or a promise by the testator expressed or implied, the action survives against the executor, *secus* if it be a *tort*, or arise *ex delicto* supposed to be by force and against the peace.

As to the second point, that should this maxim not apply, the plaintiff could not recover, on the ground that the declaration did not contain any allegation of special damage, which it ought to do under the authority of Chamberlayne v. Williamson. This leads us to a minute investigation of that case. In Michaelmas Term, 1814, a rule *nisi* was obtained for arresting the judgment on the ground that this action was not maintainable by the personal representatives, or for a new trial on the ground of misdirection.

Upon the first point the statute *de bonis asportatis in vita testatoris*, and 31st Edward III., were cited;

(*a*) Cro. Tas. 405, 417, 471; Cro. Tas. 662; Rolle, 266, 3 Bac., tit. executors and administrators.

and also Com. Dig. tit. administrator B. 13. It was said that by the equity of these statutes, an executor or administrator shall have every action for a wrong done to the personal estate of his testator; but this, it was contended, was not a wrong to the personal estate; and in Mordant v. Thorold, 1 Salk. 252, it was resolved, that the administrator was not entitled to a *sci. fa.* upon a judgment in dower obtained by the intestate, where she died before the damages had been ascertained on a writ of enquiry, because the writ of enquiry being in the nature of a personal action for the damages, it died with the person; and as to the misdirection it was objected, that the criterion of damages could not be the same, as if the action had been brought by the intestate herself, by reason that she would have been entitled to damages for the loss of personal comfort, and advancement in life, and also for personal feelings; whereas, the administrator could only be entitled in respect of the damage or deterioration of the personal estate. Upon this point Lord *Ellenborough* observes "that the declaration did not contain any allegation of special damage, and the question was, whether the action was maintainable by the personal representative."

That the general rule of law is "*actio personalis moritur cum persona,*" under which rule are included all actions or injuries merely personal. Executors and administrators are the representatives of the personal property, that is, the debts and goods of the deceased, but not of their wrongs, except where those wrongs operate to the temporal injury of the personal estate; but in that case, the special damage ought to be stated on the record, otherwise the court

cannot intend it. That where the damages done to the personal estate can be stated upon the record, that involves a different question; that although marriage may be regarded as a temporal advantage to the party, as far as respects personal comfort, still it could not be considered in that case, as an increase of the individual transmissable personal estate; that loss of marriage may, under circumstances, occasion a strictly pecuniary loss to a woman, but it does not necessarily do so; and unless it be expressly stated on the record by allegation, the court cannot intend it. On the ground, therefore, that the allegation in that case imported only a personal injury, to which the administrator is not by law, nor is he in fact shewn to be privy, the court were of opinion that in the absence of any authorities, the administrator could not maintain the action. Lord *Ellenborough* plainly shews, that in an action by an executor or administrator, special damages must be stated on the record, for the court cannot see that the personal estate is injured—consequently cannot see that the executor is qualified to bring the action.

As to the third point, "its being a case of novelty," I think it no ground for arresting the judgment; the not finding any precedent for such an action, rendered it highly proper that the court should pause in order to look at the cases.

On reason and principle, I think the action maintainable. Its being novel in its kind, is not a decisive ground of objection. I am therefore of opinion that the rule should be discharged.

Rule discharged.

McIver et al. v. McFarlane.

Where a note was made payable at a particular place although no averment of its being presented there for payment appeared upon the record, this court after a verdict for the plaintiff, and proof at the trial of a subsequent promise, refused a nonsuit.

This was an action upon a promissory note made payable at a house at Glasgow, in Scotland. It was tried before the *Chief Justice* at the assizes for Cornwall, where the defendant's counsel had moved for a nonsuit upon the ground, that the declaration contained no averment that presentment had been made at the house appointed in the note. A subsequent promise had been made.

The *Chief Justice*, considering the recent enactment of the British legislature, which makes the averment necessary only where it is expressed on the note, that it is to be payable at a particular place and not elsewhere, overruled the objection and directed a verdict for the plaintiffs.

Jones had last Easter Term obtained a rule *nisi*, to set aside the verdict and enter a nonsuit, or grant a new trial.

Robinson, Attorney-General, now shewed cause. He contended that the want of averment should have been taken advantage of upon special demurrer, and that, at any rate, the proof of a subsequent promise and a verdict cured the defect; that the courts have determined in a variety of instances, that after a verdict it shall be presumed that all has been proved which is necessary; that an express promise, in the cases upon notes and bills of exchange, will relieve from notices which would otherwise be required; that this doctrine as against an acceptor, has

never been disputed, and the drawer of a promissory note is in the same situation.

That the court are fully entitled, if indeed they are not bound, to notice the new act of the British legislature ; that there were many decisions before its passing which determined that it was not necessary to aver upon the record the presentment at a particular place ; that there were indeed conflicting decisions ; that even if the late act had not passed, which set the matter at rest, the court would have been fully at liberty to adopt that decision which appeared to them best founded in reason and principle ; but, that now, the court could not hesitate ; for that the British statute may be fairly considered as declaratory of what class of decisions are the most correct and beneficial to the public.

Boulton, Solicitor-General, contra, contended, that although proof of a subsequent promise would be evidence to go to a jury that the averment of presentation had been complied with, yet that such proof could not dispense with its appearing upon the record ; that the plaintiff had in fact gone down to trial without any cause of action to try ; that as to the British statute it is not in force here, and the passing it shews that the former decisions were good law ; that we are guided in this country by the law as it stood in 1792 ; that the determination he contended for, had been the law of England ever since bills of exchange were known ; that there is no cause of action stated upon the record, dehors which you can prove nothing. Other facts offered to be given in evidence, would be irrelevant ; that the court can

neither look at impertinent evidence, nor can they presume that this note was presented according to its exigency ; that should the court determine against a nonsuit, undoubtedly the judgment must be arrested. If the cause of action is alleged faultily, the judge at *nisi prius* should direct a nonsuit ; that for want of form you must demur specially ; but for want of substance you may either demur or arrest the judgment ; that if the plaintiff had meant to rely upon the subsequent promise he should have set it forth upon the record.

Per Curiam.—Rule discharged.

ARMOUR AND DAVIS v. JACKSON.

A writ of *venditioni exponas* against lands and tenements having but a few days between the teste and return, is irregular, although the exigencies required by the provincial statutes respecting the teste, delivery, and return of the *fieri facias* upon which it was grounded, may have been complied with.

Boulton, Solicitor-General, had on a former day in this term obtained a rule to shew cause, why the writ of *venditioni exponas* issued against the lands of the defendant should not be set aside, there not being a sufficient period between the issuing and the return of the same.

The *fi. fa.* against the lands and tenements of the defendant, was issued on the 23rd day of August, 1821, and was returnable on the first return of Michaelmas Term, 1822, comprising between its issue and return, the full period required by the provincial statute. (*a*)

(*a*) 43 Geo. III., ch. 1, s. 2.

The sheriff upon this writ returned, that he had taken the defendant's lands in execution, but that they remained in his hands for want of buyers.

On the 9th of November, in Michaelmas Term, 1823, twelve months afterwards, the plaintiff issued the *venditioni exponas*, and made the same returnable on the last return of the same term, there being only a few days between the teste and return.

He had contended that the period of twelve months required by the provincial statute, extended to a writ of *venditioni exponas* against lands as well as to the *fi. fa.* upon which it was grounded, the language of the statute being sufficiently general to embrace it, the words being "that the writ against the lands and tenements should not be made returnable in less than twelve months from the teste thereof.

Baldwin now shewed cause.—He contended that the *venditioni exponas* was only a continuation of the *fi. fa.* which it recites; that the exigency of the statute had been complied with, by the period of twelve months having elapsed between the delivery and return of that writ.

That the *ven. ex.* was issued according to the determination of the court, in Boulton v. Small, where eight days were laid down as a sufficient time between the teste and the return of an execution.

That the present application was made by the sheriff, who can have no right to do so, the parties themselves being satisfied.

Boulton, Solicitor-General, contra, contended, that the sheriff was perfectly correct in this application to the court.

If he should sell under this writ wrongfully, he would subject himself to an action of trespass; and, on the other hand, if he should refuse to sell, and the court were against him, he would be liable to an attachment. He may always apply to the court for its decision in these cases.

That the late decision of the court respecting the period between the teste and return of an execution, related to those against goods only.

That those against lands were *sui generis* and regulated by legislative provisions.

That by the last judicature act, the sheriff is not to sell lands without advertising the sale several months before it takes place.

That the object of the statute is, that sufficient notice may be given, that purchasers may assemble; but that in the case before the court the formed advertisement is nugatory, the day appointed by it for the sale being long since past.

That it is impossible that the sheriff can execute this writ, he could not give any notice that could answer the intention of the statute.

That it may be an inconvenience to wait so long, but that must be remedied by the legislature, or

perhaps by sum rule of court to meet the intentions of the statute.

CAMPBELL, J.—I cannot consider that the intentions of the statute are complied with by the advertisements under the *fieri facias;* if there were not purchasers at the time appointed for the sale by those notices, it is not probable there will be any at the return of the *venditioni exponas.*

These returns and notices required by law are not fictitious proceedings.

If the law says nothing in precise terms respecting the time required between the delivery or teste and return of this writ, we must refer to some principle for direction, but it is clearly quite contrary to the spirit of the statutes that such a proceeding should take place instanter.

POWELL, C. J.—Common sense tells us, that the intentions of the statute are not complied with in this case.

The lands are not sold for a year after the return of the writ under which the notices required by law were given ; at the expiration of those notices, the sale was put off indefinitely, after lying by for twelve months the plaintiff issues a peremptory writ with only a few days between the teste and return.

Can it be supposed for a moment that, relying upon a former notice, these lands can be sold under this proceeding ?

It is the custom in the lower province to issue an *alias*, and after a certain lapse of time, a *venditioni exponas*, under which the same course as to notification takes place as under the former writ.

The court declared the writ to be irregular, but gave leave to alter the return.

Gee v. Atwood.

This court refused to set an award aside on the ground that the arbitrators had desired it not to be delivered until the costs for making it were paid.

Rolph had in a former term obtained a rule *nisi* to set aside the award in this case upon an affidavit stating that the arbitrators were to meet on the 2d day of September next ensuing the date of the arbitration bond, and that the award was to be ready to be delivered to the parties in ten days after said meeting; that the award was accordingly made on the fourth day of September, 1822, and left with a person with instructions not to deliver it until the costs of the arbitration were paid or security given for the payment; that the awards consisting of two copies remained in his hands until the 9th day of September, when they were given to the plaintiff upon his giving the security required. He contended that this condition being attached to the award, rendered it void, as it could not, when so conditioned, be said to be ready for delivery.

Macauley now shewed cause.—He contended that the condition did not vitiate the award, if there was no award it would be an answer to the action upon the bond, that the condition of the bond had been

complied with by the award being signed and ready for delivery, there was no occasion for its being actually delivered. (*a*) That having signed the award the arbitrators were *functi officio*, and if they had no right to annex a condition of payment to the delivery, the party interested might recover it by action; that requiring payment of the expenses was a matter extrinsic to the award, and which could not destroy it. (*b*)

Rule discharged.

THE KING v. ELROD.

A writ of *exigi facias* will be awarded by this court upon the application of a prosecutor, without its being applied for by the Attorney-General.

Baldwin on a former day had moved for an exigent against the defendant, against whom an indictment for bigamy had been found at the assizes. The Attorney-General had suggested a doubt whether as the forfeiture of the goods of the party outlawed, went to the Crown, the proceedings under the provincial statute (*c*) should not take place under the sanction of the Crown officers, who in this province conducted all prosecutions in capital cases.

On this day the court observing that there were no words in the statute restraining the proceedings under it to the superintendence of the Crown officers.

Ordered the exigent to issue.

(*a*) Caldwell on arbitrations, 168. (*b*) 6 E. R. 309, and see Grove v. Cox, 1 Taunt. 165; 3 Taunt. 461, 4 E. R. 584. (*c*) 55 Geo. III., ch. 3.

TRUESDALE v. McDONALD.

A defendant who takes upon himself to abate a nuisance, viz., a mill-dam, may be called upon to pay damages for any injury done to the plaintiff's property beyond what was necessary for the purpose of removing the public inconvenience.

This was an action of trespass for pulling down the plaintiff's mill-dam; and was tried before the *Chief Justice* at the last assizes.

The defence set up at the trial was that the dam was a nuisance, inasmuch as though it did not itself stand upon the highway, yet it caused the water to overflow a neighbouring public road. It appeared in evidence satisfactory to the jury that the defendants had pulled down more of the dam than was necessary to remove the inconvenience, and they, under the direction of the judge, recommending them only to consider such damages as the plaintiff had sustained beyond what were necessary to abate the nuisance, found a verdict for the plaintiff for £50.

Robinson, Attorney General, had on a former day obtained a rule *nisi* to set aside the verdict, and grant a new trial on the grounds of excessive damages and the discovery of new evidence.

Macaulay now shewed cause.—He contended that this being a case in *tort* the damages were peculiarly for the consideration of the jury; that the defendants had undertaken to abate this nuisance at their peril, and by doing more damage to the dam than was necessary for that purpose, they had subjected themselves to an action; that the damages given by the jury, instead of being excessive, were very moderate, and to obtain a new trial on the

ground of excess in an action of *tort*, it should appear that they were vindictive; that it was of much more consequence to the public that mills should be protected than that the wetting of a person's foot should be visited by the destruction of a species of property so valuable and useful; that as to the discovery of new evidence which consisted merely of admeasurements taken after the verdict, they should have been taken before, as it was the plaintiff's duty to come prepared with his evidence.

Per Curiam.—Rule discharged.

EASTER TERM, 4 & 5 GEO. IV., 1824.

Present:

THE HONOURABLE CHIEF JUSTICE POWELL.
MR. JUSTICE BOULTON.
MR. JUSTICE CAMPBELL.

HAGERMAN v. SMITH.

Where a debtor is indebted upon two accounts and makes a payment without directing to which account it is to be placed, the creditor has his election to place it to which he pleases, unless there is a specific direction for its application or circumstances in the case tantamount to one.

Boulton, Solicitor-General, had obtained a rule to shew cause why two several sums of £75 and £19 18s. should not be deducted from the amount required to be levied under the writs of *fieri facias* issued in this cause.

The ground of the application, as stated upon affidavit, was, that the defendant had paid the plaintiff the said sums in part satisfaction of the judgment obtained against him, under the authority of which the *fi. fas.* had issued. That at the time of defendant's paying the same, the plaintiff did not object to receive the said sums in part satisfaction of the said judgment, or express any wish to apply the same to any other account or demand.

At the time of making these payments, the defendant was indebted to the plaintiff in other sums upon promissory notes, to account of which the plaintiff had placed these payments, except a small balance

which he had placed to the account of the judgment. The plaintiff stated upon affidavit, that when the defendant made these payments, he had not given him any instructions as to what account they should be placed.

Robinson, Attorney-General, shewed cause.—He contended, that no instructions having been given to the plaintiff, or any arrangement made as to the account to which the moneys paid should be placed, that he was entitled to place the same to what account he pleased; and relied upon Newmarsh v. Clay (*a*) and others, and the authorities there referred to. In that case certain acts had taken place which clearly evinced the intention of both parties; but here there was nothing of the kind. The general rule, as laid down in the cases, was clear that a creditor might place money paid to him by his debtor to any account he pleased, unless there was an express stipulation to the contrary, either by words or acts sufficiently denoting the intention of both parties.

Chief Justice.—By the French law a creditor who receives a payment from a person indebted to him upon two accounts must apply it in satisfaction of the most onerous debt; but by the law of England the creditor may make his election, unless the debtor specifically declares at the time of payment to which account it shall be applied. In this case, if the defendant had intended that these payments should have gone in discharge of the judgment, he should have made them to the sheriff, or taken a special receipt from the plaintiff.

Per Curiam.—Rule discharged.

(*a*) 14 East. 243.

THE HON. G. H. MARKLAND ET AL. (*Commissioners for settling the affairs of the pretended Bank of Upper Canada,*) v. DALTON.

The declaration, at the suit of a corporation, named the individuals composing it, and also described them in their corporate capacities. The breach was in their names as individuals only. The court held that a *non pros* might be signed and execution issue against them in their private capacities.

Washburn, on a former day, had obtained a rule to shew cause why the judgment of *non pros* for not going to trial, signed in this cause, and the *fi. fa.* issued thereon against the plaintiffs, should not be set aside for irregularity, on the ground that the suit having been commenced by them as commissioners and trustees under the act of the provincial parliament, a nonsuit could not be entered, and execution issued against them, in their private capacities, and he instanced the cases of bankrupt's assignees, and of executors.

Boulton, Solicitor-General, contra, contended that the plaintiffs were authorised by the statute to bring actions as a corporation only, not in their names as individuals, as they have done in this case, which being erroneous they had not chosen to go to trial; that their situation as a corporation was not analogous to that of executors or assignees of bankrupts, who, notwithstanding their situations as such, must be sued as A. B. and C. D., &c. That the plaintiffs having concluded their declaration without adding the description which they had used in the commencement, was conclusive as to the correctness of the plaintiffs taking out execution in their names as individuals.

Washburn, contra, contended that these plaintiffs had not sued as individuals, and therefore were not

liable to be nonsuited as such; that their names preceding their description, (which was in the very words of the statute appointing them commissioners,) could not alter their character as plaintiffs; and though their description was omitted in the conclusion of the declaration, its having been used in the commencement and throughout, was sufficient to couple it with their names in the conclusion.

Per Curiam.—Rule discharged.

MITCHELL v. TENBROEK, ONE, &C.

Where a bill had been filed against an attorney in the office of an outer district and proceedings had thereupon to verdict and judgment, the court refused to set them aside for irregularity.

The defendant in this case was an attorney of this court, had been sued by bill and proceeded against to judgment. The bill had been filed in the office of the clerk of the Crown in the London District, and the subsequent proceedings and verdict had in that district.

Macaulay had obtained a rule *nisi* to set these proceedings aside, as being altogether irregular and defective, on the ground that the bill should have been filed in the principal office at York.

Boulton, Solicitor-General, and *Rolph*, shewed cause.—They contended, that the words of the statute were sufficiently general to admit of proceedings being filed against an attorney in the district office. That an attorney may waive his privilege altogether, and if the proceeding was incorrect, he has waived it. It is a mere matter of practice. If the defendant

had applied at a proper stage of the proceedings to have had the bill filed at York with a view to a trial at bar, or in the Home District, his application might have been attended to; but that after verdict and judgment, it was clearly too late.

Per Curiam.—Rule discharged.

Myers v. Rathburn.

The court permitted an amendment to be made in the address. Cause of action and teste of a writ of capias.

Upon the application of *Macaulay*.—The court (upon the authority in 8 T. R., where a writ was amended which had by mistake been made returnable in C. B. instead of K. B.) allowed the writ of *capias ad respondendum* issued in this cause, to be amended by striking out the direction "To William Brown, Constable," and inserting "to the sheriff of the," by striking out "in a plea of debt of eighty pounds," and inserting "in a plea of trespass on the case upon promises," and by striking out "before us this 23rd day of February, 1824, in the fourth year of our reign" in the teste, and inserting in lieu thereof "thirty-first day of January in the fifth year of our reign."

Boulton v. Randall.

This court fully recognises the rule of Hilary Term, 3 James I., which orders that no cause once argued and determined, shall again be brought before the court.

In this case, *Rolph* applied for a rule to shew cause why the proceedings and judgment should not be set aside for irregularity, and why the writ of *fieri facias*

issued upon the said judgment against the lands and tenements of the defendant, should not be superseded with costs, and restitution made to the defendant.

A judgment by default had been signed in this case, and execution issued and the lands sold under it several years ago, and an application similar to the present had been made by *Stewart*, counsel for the defendant, who, in Michaelmas Term, 1821, had obtained a rule *nisi*, but which, upon argument, had been discharged. Various irregularities were upon the present application pointed out by Mr. *Rolph*, some of which had probably not been insisted upon by Mr. *Stewart* upon the former motion. The counsel now went considerably at length into all the supposed irregularities, and also read an affidavit (which was filed) containing a statement of those irregularities and of the facts and merits of the applicant's case, adverting also to the partial want of consideration for the debt upon which the judgment was obtained. He also cited many cases of new trials at law and rehearings in equity which he considered as analogous.

Robinson, Attorney-General, contra, read an affidavit rebutting those facts and circumstances, but relied upon the universal practice of courts of law (to which no one exception could be found) which does not permit a cause once determined upon motion and argument to be again brought forward either upon the ground of the same or other irregularities not before insisted upon. He cited and read the rule of Hilary Term, 3 James I., by which it is ordered, "That if any cause shall first be moved in court in the presence of the counsel of both par-

ties, and the court shall then thereupon order between those parties, if the same cause shall again be moved contrary to that rule so given by the court, then an attachment shall go against him who shall procure that motion to be made contrary to the rule of court so first made, and that the counsel who so moves, having notice of the said former rule, shall not be heard here in court in any cause in that term in which that cause shall be so moved contrary to the rule of court in form aforesaid."

The counsel also cited authorities to shew that no motion can be made upon the ground of irregularities not noticed upon a first motion.

CAMPBELL, J.—Upon the opening of this matter I thought it strange and was indignant that the irregularities pointed out by the defendant's counsel should have taken place.

Whatever were the grounds, it now appears those irregularities have been discussed and decided upon for many terms back.

The counsel has referred to a number of authorities which it was to be supposed he referred to as upon a first application and discussion, but it appears that was not the case. If they are to be considered as furnishing authority for opening and re-considering matters already discussed and decided upon, they do not apply.

Upon reference to the order in Hilary Term, 3 James I., it appears such second discussions cannot be permitted. Were it not for this salutary rule,

nothing could be more uncertain than the proceedings and decisions of courts of justice. There is also a penalty attached to the breach of the rule, which, as this is the first time it has been attempted to be infringed in this court, I should not wish to see enforced; but upon any future attempt of the kind I should.

CHIEF JUSTICE.—I concur with my brother *Campbell*, and for the reason given by him, I also consider that the penalty may be dispensed with.

Per Curiam.—Application refused.

DOE ON THE DEMISE OF STANSFIELD v. WHITNEY.

Though a probability exists that a defendant in ejectment may have merits, the court will not necessarily grant a new trial, the verdict in ejectment not being conclusive upon the parties.

This was an ejectment tried at the assizes for the Midland District.

The facts on the part of the lessor of the plaintiff were, that Daniel Washburn, under whom he claimed, being in possession of the premises, left this country and went in 18— to the United States, where he died, leaving one Short in the possession and charge of the premises; that Simeon Washburn was his brother and heir at law; that Daniel Washburn being at the time of his death indebted to the lessors of the plaintiff in a considerable sum, his heir at law, Simeon, by the advice of counsel, by bargain and sale, transferred the property to them in satisfaction of the debt. This deed, it appeared, had not been

registered until after the commencement of the suit. It further appeared in evidence, that Whitney, the defendant, became the tenant in possession by breaking into the premises after the death of Dan. Washburn, and before any entry had been made by his heir, Simeon Washburn, but after the bargain and sale made by him to the lessors of the plaintiff; the defendant's claim to the premises was under a mortgage made by Daniel Washburn to him, and which had become forfeited. The defendant's attorney, under an impression that it was necessary to make out his title by proving the original grant from the Crown, and which, as well as subsequent conveyances to Daniel Washburn, he presumed would have been proved by the plaintiff's lessor, to support his own title, had not given the deed of mortgage in evidence, and the jury had in consequence found for the plaintiff.

Macaulay had, in a former term, obtained a rule *nisi* to set aside the verdict, and to grant a new trial on the ground, first, that the lessor of the plaintiff should have commenced the proof of his title by producing the original grant from the Crown; secondly, that the bargain and sale made by Simeon Washburn to the plaintiff's lessors was void, first, as being without consideration and *nudum pactum*, it being made upon a general presumption that the lands in the hands of the heir were liable to the ancestor's simple contract debts, which was not true as a general proposition, but only *sub modo;* secondly, the consideration not being expressed in the deed to be pecuniary; thirdly, as not being registered before action brought; fourthly, for uncertainty, as

not being descriptive of any particular lands ; fifthly, because the heir, Simeon Washburn, could not make a title before entry upon the lands, his estate being abated by the entry of Whitney.

Thirdly, on the ground of mistake in the defendant's counsel, which originated in a surprise, the plaintiff's attorney having given notice to produce title deeds which he did not afterwards call for, on a presumption of his doing which the defendant did not come prepared to prove them.

Fourthly, on the ground of merits, the defendant having a clear title under his mortgage.

Robinson, Attorney-General, now shewed cause.—If justice has been done the court will not grant a new trial upon antiquated technical points of law, as abatement, disseisin, &c., especially when they were not moved or reserved at the trial. (*a*) The only reservations were whether the plaintiff's lessors should not have gone back with his title to the King's deed, and whether the bargain and sale to him from the heir, was not void for want of consideration.

As to the first, it is clearly laid down, as well by Mr. J. *Buller*, (*b*) as in Phillips' evidence, that it is sufficient to commence the proof of a title by the death and seisin of the ancestor; as to the second objection, the want of consideration, I consider that it was good and valuable—a debt due from the ancestor to the plaintiff's lessor, the bargainee, and which debt the lands of Simeon Washburn, the heir

(*a*) 2 Taunt. 217 ; 2 T. R. 4 Edmonson v. Machell ; 1 Bos. and Pal. 338, Cox v. Kitchen. (*b*) Bull N. P. 103.

of the bargainor, were chargeable with under the 5 Geo. II. The advantages the plaintiff has obtained by this verdict are no other than he should have had without it, namely, being a defendant instead of a plaintiff, for the defendant, if entitled, should have brought his action and not have forced Stansfield to become plaintiff by a forcible entry. The reasons for refusing new trials upon technical objections apply more strongly to cases of ejectment than to any others, as the judgment is not conclusive, as laid down in 10 Mod. 202.

Macaulay contra.—The cases urged by the Attorney-General would apply in this, if, as in those, a fair trial had been had; but the defendant, in fact, has had no trial at all.

His attorney received notice from the plaintiff's attorney to produce the original title deeds, from which he presumed they would be called for by the plaintiff's counsel, and did not therefore bring witnesses to prove them; but the plaintiff, instead of beginning his title with these deeds, commenced by the death and seisin of Daniel Washburn, the counsel for the defendant erroneously supposing, that it was necessary for the plaintiff to commence his title by proving these original deeds, and being unprepared with such proof gave up his case, and the defendant was thereby, in fact, deprived of a trial. The entry of Whitney has also been urged as an objection; if it was an independent fact, it might make against him; but coupled as it was with a good title and the possession of deeds, it was a fair assertion of his right. If the several objections to the plaintiff's title

had been stated in a case, or upon a special verdict, I might without doubt have gone into them all; and I conceive I may do so if they appear upon the judge's notes.

There are many cases of new trials being granted upon grounds not moved at the trial, where the ends of justice required it.

In Sutton v. Mitchell (*a*) a new trial was granted the defendant upon grounds which, by the mistake of his counsel, were not noticed at the trial; and in D'Aguilar v. Tobin (*b*) the court granted a new trial on account of the mistake even of a witness.

In the cases of Cox v. Kitchen, Edmonson v. Machell, and other authorities cited, the court refused to grant new trials upon points not reserved at the trial, because they considered that justice had been done, or that the proposed defences were not conscientious; but the merits here are with the defendant; he holds a mortgage for which he paid his money long before the plaintiff took his deed, the very taking which, under such circumstances, subjects to the charge of buying up a pretended title.

I conceive that the lessor of the plaintiff should have commenced his title with the original grant from the Crown. The titles here are not upon the same footing with those in England; there a tenant is presumed to be in, with the consent of the lord of the fee, but here all the lands having been in the Crown within sixty years, that presumption fails, and a

(*a*) 1 T. R. 18. (*b*) 2 Marsh, 265.

grant from the Crown should be proved. On this ground the plaintiff, I conceive, should have been nonsuited. Short's possession, too, was not such as to be that of D. Washburn's; he should have been a tenant paying rent, whereas he was a mere casual occupant not recognised by the law.

To make the consideration for the bargain and sale to plaintiff good and valuable, it should have been shewn that the lands in possession of Daniel Washburn's heir, were, in fact, liable to his debts, and further, that the consideration was a pecuniary one, as laid down in Cruise's Digest, vol. 4, and also in the 8th report.

[BOULTON, J.—You may shew a pecuniary consideration, satisfied in oxen or other valuable.]

This instrument is void, too, I contend, for uncertainty; it describes no land in particular, but all the land Daniel Washburn died possessed of. I conceive it was void too for want of registry. The English statutes appoint a time within which deeds must be enrolled, and after registry the title is retrospective; but here no time is appointed, from whence it may be fairly concluded that the title is not complete until the deed is registered. This instrument indeed could not be properly registered, for it mentions no county in which the lands lie.

Upon these grounds of objection to the title of the lessor of the plaintiff; upon that of merits, which is clearly with the defendant, and upon the broad principle laid down by Mr. Justice *Buller* in Estwick v. Cailland, "that upon the application for a new

trial the only question is, whether under all the circumstances of the case, the verdict be or be not according to the justice of the case," (*a*) I conceive that the defendant is entitled to a new trial.

Robinson, Attorney-General, in reply.—It is important to the real justice of this case that the defendant should not have an opportunity of bringing forward the antiquated doctrine of abatement, disseisin, &c., and therefore I contend that these points not having been moved at the trial should not now be taken into consideration.

Were this a case in which justice could not be done without considering them, I might not perhaps object to their consideration ; but it is not so. Injustice would take place by allowing the defendant to take advantage of his own wrong in making a forcible entry. Justice is not his object, but he wishes to meet us with defects in our title. The seisin of D. Washburn is sufficiently substantiated. It is not necessary for a person to be confined to his house to continue the possession of it ; if he has fifty houses he may move from the one to the other, and continue his possession by having an agent or servant, or even by keeping a key. There is no occasion for a person claiming title to go back farther than to the death or seisin of the ancestor here, more than in England. He is not obliged by commencing his proof beyond that, to subject himself to make slips or breaches in the chain of title.

(*a*) 5 T. R. 425.

The ancestor dying seised makes the heir's title *prima facie* good, and it is for the defendant to shew a better title.

The objection to want of registering has been taken from a supposed analogy between our registry acts, and the English statutes for the enrolment of deeds of bargain and sale ; no such analogy in fact exists ; there are registry acts in England as well as here, upon the same principle and for the same purposes, namely, that of giving notice to subsequent purchasers, but not to substantiate or confirm the title.

The consideration for the plaintiff's deed was the best possible ; there was a just debt due by the ancestor, to which the lands were liable under the 5 Geo. II. The consideration may be money or moneys worth, as laid down by my Lord *Coke*, who says, that a bargainee may aver money or other valuables as the consideration. If the defendant has merits, he, in his turn, may bring an ejectment, which he ought to have done at first.

Chief Justice.—The points urged by the counsel for the defendant appear to be worthy of consideration ; but the trial had, not being conclusive, as the defendant has an opportunity of bringing forward any merits he may have, upon an ejectment to be brought by himself, the court are of opinion that the rule *nisi* should be discharged.

Per Curiam.—Rule discharged.

JOHNSON v. SMADIS.

A defendant may upon the affidavit required for the arrest of the persons of debtors issue an execution against the body of a plaintiff who has suffered a judgment of *non. pros.*

In this case the defendant had obtained a judgment of *non. pros.* and had issued a *ca. sa.* upon it.

Boulton, Solicitor-General, moved to set the same aside, on the ground, that this writ did not lie for a defendant, the words of the statute authorising it being confined to plaintiffs, and not sufficiently general to embrace defendants. They only point out the affidavit to be made by plaintiffs.

CHIEF JUSTICE.—The costs in this case have become a debt, and I consider a defendant entitled to the same remedy a plaintiff might have had if he had recovered.

CAMPBELL, J.—The case here too turns upon a fraud, which must have been stated in the affidavit.

Per Curiam.—Application refused.

EX PARTE RADENHURST.

A person may be admitted an attorney of this court upon his own affidavit of service where the attorney to whom he was articled is absent from the province.

Mr. Thomas Radenhurst applied this term to be admitted an attorney.

Mr. *Ridout*, with whom he had been articled, being absent from the province, the court admitted Mr. *Radenhurst* upon his own affidavit of service for five years without the usual certificate.

TRINITY TERM, 5 GEO. IV., 1824.

Present:

THE HONOURABLE CHIEF JUSTICE POWELL.
MR. JUSTICE BOULTON.
MR. JUSTICE CAMPBELL.

McGILVRAY AND WIFE v. McDONNELL.

Where to a declaration in debt upon bond, the plea stated that the plaintiffs had not made a conveyance according to agreement. The plea *held* bad upon special demurrer for want of shewing what the agreement was, although the agreement was referred to and its contents might be collected from the condition of the bond as set out upon oyer.

Declaration in debt upon bond for £900.

Oyer prayed of bond and condition.

Bond set out in common form. Condition as follows: whereas the above John and Jane McGilvray have by agreement bearing equal date with these presents, and for and in consideration of £850 bargained, sold, aliened, and transferred unto the said Allan Ban McDonnell, and unto his heirs and assigns for ever, all that certain parcel or tract of land, situate, &c., and have entered into a bond with the said Allan Ban McDonnell, the condition whereof is, that the said John and Jane McGilvray shall and will execute and deliver a good and perfect deed of conveyance and title in the law of the said premises, unto the said Allan Ban McDonnell, his heirs and assigns for ever. And, whereas the said Allan Ban McDonnell, hath paid unto the said John and Jane McGilvray the sum of £400, part of the above men-

tioned consideration, and the further sum of £450, the rest thereof still remains to be paid; now the condition of the above obligation is such, that if the above bounden Allan Ban McDonnell, shall and will well and truly pay, or cause to be paid, unto the said John and Jane McGilvray, or either of them, their heirs, &c., the aforesaid sum of £450, which remains still due to them, for the said lands by the instalments, and at the periods following, that is to say, £100, part thereof, when and as soon as a deed of conveyance, according to agreement, shall be executed and delivered by the said John and Jane McGilvray for the above mentioned lands unto the above named Allan Ban McDonnell, one hundred pounds more, another part thereof, at the end of one year, one hundred pounds, another part thereof, at the end of two years, and one hundred pounds, another part thereof, at the end of three years, and the fifty pounds, the rest part thereof, at the end of four years, all which terms of years are to commence from the day that the above mentioned deed of conveyance shall be delivered according to the true intent and meaning of the agreement entered into, concerning the premises, and in case the said payments shall be well and truly made according to the true intent and meaning of the agreement entered into concerning the premises, and in case the said payments shall be well and truly made agreeable to the above arrangement, then this obligation to be null and void, but otherwise shall remain and be in full force, virtue and effect.

Plea, that the said John and Jane McGilvray, or either of them, have not at any time heretofore exe-

cuted and delivered to him, the said Allan Ban McDonnell, a good and perfect deed of conveyance and title in and to the said before mentioned premises according to their agreement, &c.

Demurrer assigning for cause that it is stated in the said plea that the said John McGilvray and Jane McGilvray, or either of them, have not at any time heretofore, executed and delivered, or caused to be executed and delivered, to him the said Allan Ban McDonnell, a good and sufficient deed of conveyance and title in the law in and to the premises in the said plea mentioned, according to their agreement; and yet it does not appear in and by the said plea what the said agreement was, joinder.

Boulton, Solicitor-General, in favour of the demurrer, contended, that defendant to be relieved from his bond, must shew that he has performed the condition or an excuse for the non-performance. This excuse is that the plaintiffs have not made a deed according to their agreement.

But in order to shew that they have not done it according to agreement, the defendant must shew the agreement, which must necessarily be in his own possession, and the agreement appears to be in writing by the recital in the bond.—4 East. 346. And as the bond gives a *prima facie* demand to plaintiff, defendant must discharge himself by shewing that he has done all he could. Now the agreement may be that the plaintiffs were to make a deed at a given place, on a given day, in which case it would be necessary for defendant to say he was at the place

on the day with the money, ready to receive the deed, but that no deed was tendered; and the counsel cited 4 East. 340; Douglas, 688; Com. Dig. Pleader, 640, 1; Croke, James, 360.

Robinson, Attorney-General, contra, considered the arguments and authorities produced not as quite in point. They applied to cases where the party pleading them was to perform them; in the present case the defendant pleads a non-performance by the plaintiff.

The agreement to be performed by the plaintiff in this case, was clearly set out in the condition of the bond, and it was unnecessary that the court should intend any other agreement. That referred to was a mere minute and subsidiary to that set out in the bond. The reference to it may be considered as surplusage, which does not vitiate a plea in bar.

The plea states, that they have not made a title according to agreement, viz., according to the agreement recited and set out in the condition of the bond.

That the courts have relaxed in requiring the common averment of readiness to perform. At any rate, to take advantage of its absence, the want of it must be set down as a cause of demurrer, it being only matter of form.

Boulton, Solicitor-General, in reply.—That it was impossible to take issue upon a recital; that the defendant, by erroneous pleading, had prevented the plaintiff from taking those objections to the agree-

ment referred to, which a more authorised course of pleading would have enabled him to do. If the whole agreement had been set out he might have pleaded *non est factum*—forgery, &c.; that its construction might have been different; that it might have embraced matters of defence for its non-performance; that the plaintiff might have had oyer as it was not for him to set out a deed in the possession of the adverse party; that the plea being bad for uncertainty and one upon which it was impossible to take issue, the plaintiff was entitled to judgment.

The court gave their opinion in favour of the demurrer, but allowed the defendant to amend.

HINNERLEY v. GOULD.

Where with a view to give a defendant time, the plaintiff had upon the misinformation of the deputy sheriff given a receipt for the debt, as the only proper mode of staying the execution, and which receipt the sheriff had stated in a return to the writ of *fi. fa.*, the court ordered an alias to issue.

Robinson, Attorney-General, applied for leave to take out an alias writ of *fieri facias* against the goods and chattels of the defendant, to levy the residue of the debt and costs in this action, notwithstanding the return of the sheriff to the last writ of *fieri facias* upon matters disclosed to the court on affidavit, suggesting that the same is yet unsatisfied.

The sheriff's return stated, that by virtue of the writ he had the plaintiff's receipt for £675 10s. 1d., and had levied of the goods and chattels of the within named Seth B. Gould, £17 10s., and his fees.

The affidavit of the plaintiff stated the issue of the execution.

That he the plaintiff was applied to by the defendant to delay proceedings thereon for a certain specified time; that plaintiff being willing to do so, wrote to the sheriff to that effect; that he was informed by the deputy sheriff that proceedings could not be delayed beyond the return thereof, unless plaintiff would execute a receipt written by the said deputy, which he accordingly signed, supposing that the same was intended merely as a stay of proceedings; that deponent had not received any money under said execution except the costs paid to his attorney.

The deputy sheriff's letter, requiring the receipt as a means of staying proceedings, was annexed to the affidavit, and sworn to be written by him.

Application granted.

BROWN v. STUART.

Held, that the entry of the incipitur upon the roll, is a sufficient entry to enable the defendant to move for judgment as in case of a nonsuit.

Boulton, Solicitor-General, had obtained a rule *nisi* in this cause for judgment, as in case of a nonsuit for not going to trial pursuant to notice.

Macaulay shewed cause, and contended that the issue should be entered at length upon the roll before this motion could be made and cited.—1 Archbold, 130; 2 Tidd, 801.

The defendant's counsel contra, contended that the incipitur being entered upon the roll, was sufficient, as may be collected from Tidd, who lays down that

the record is a transcript of the issue roll, and that the record cannot be passed until the issue is entered, but that the incipitur answers to the issue.

CHIEF JUSTICE.—With regard to trial, an incipitur is sufficient; but when an application is made to the court above, the issue should be entered and the roll completed.

Per Curiam.—(*Diss.* C. J.)—Rule discharged upon plaintiff's paying costs and undertaking peremptorily to go to trial at next assizes.

BOULTON v. RANDALL.

The proper style of this court is "before his Majesty's justices" not before the King himself, *coram vobis*, not *coram nobis*.

Washburn moved for the allowance of a writ of error, *coram nobis*.

Boulton, Solicitor-General, objected that the writ should have been *coram vobis*—that all writs here should be returnable before his Majesty's justices. In England, the Court of King's Bench is ambulatory, following the person of the King, but here it is stationary. In England the parliament may sit in Westminster, and the Court of King's Bench where the King himself is; but in this country, the court must sit where the parliament sits.

The *Attorney-General* observed, that if the writ was defective it might be quashed in this court or in the Chancery.

To this observation the CHIEF JUSTICE assented, observing, (with the court) that the style of the court hitherto adopted in writs was improper, but that they would not interfere with a practice which had obtained for such a length of time.

Per Curiam.—Writ allowed.

HON. G. H. MARKLAND ET AL. (*Commissioners for settling the affairs of the pretended Bank of Upper Canada*) v. BARTLET.

The statute vesting the property of a particular bank in the hands of commissioners with power to hear and determine claims made upon the bank by creditors—though stated in the preamble to be made "on behalf of a great portion of the inhabitants of the province," was not considered by this court as a public statute.

Robinson, Attorney-General, had, in last Easter Term, obtained a rule to shew cause why a nonsuit should not be entered upon several points stated and insisted upon at the trial; the first ground for the application, was, that the provincial statute (*a*) under which the plaintiffs acted, was a private and not a public statute, and therefore should have been set out in the declaration, and proved at the trial.

Boulton, Solicitor-General, shewed cause.—The first point reserved for the decision of the court is, whether the provincial statute which vests in the hands of the plaintiffs as commissioners all the stock of the pretended Bank of Upper Canada, lately established at Kingston, is a public or private statute. The intention of the legislature, I contend to be the ground which should decide this question, and

(*a*) 4 Geo. IV., c. 22.

that, if it appears from the statute itself, that the legislature intended it to be a public statute, the court will give it that construction.

This act states in its preamble, "that the bank association had stopped payment, whereby a great portion of the inhabitants of this province, holding their bills or notes, and who had taken their stock, as well as others, are defrauded of the same, and are likely to be without redress, unless some legislative remedy should be provided for their relief."

For whose relief? For that of a great portion of the inhabitants of this province, as well as others. These words are so general, that I am surprised it could ever have been doubted whether a statute having such a preamble was public or private.

It is the practice and law of parliament not to make private acts, except upon petition; it is evident that this statute could not have been so made; it purports to be for the benefit of a great portion of the inhabitants of the province, and others, and no individuals are, or indeed could be pointed out or designated, for whose benefit, or upon whose petition, it could have been framed.

This act is not at all confined, either in its language or its objects, as many British statutes are, whose provisions affect a great many individuals, such as those relating to particular associations of different trades, as butchers, chandlers, &c., which are considered as private acts, because their operation is confined to certain designated persons, pointed out,

if not by their names, as individuals, by that of their profession or mystery, but this statute applies to the public *co nomine*.

The board established by it is a court of record, with power to hear and determine, open to all the King's subjects, not restricted, either as to amount or persons possessing an authority as to its generality equal to that of the King's Bench, inasmuch as every member of the public body may become a suitor in it.

It is laid down in Bacon's abridgment (*a*) that although the words of a statute may be particular, its general application may make it a public statute. The act before the court is particular as applied to the bank, but general as it affects the public at large, in the same manner as a statute, regarding a particular trade, if made expressly for the benefit of the country in general, is a public act.

Again, what inconveniences would arise by considering this as a private act? No person could take advantage of it, except by pleading it specially—it would be a nuisance, instead of a benefit; its object is to afford an expeditious and easy remedy for the holders of bills, bank paper, or securities, to enable them in person to go before the board constituted by it, and to obtain a *quasi* judgment at a trifling expense; its intention is not to take away any remedy which may be had under the 14th Geo. II., ch. 37, but to furnish an additional one, the proceedings under that statute, being expensive and inconvenient;

(*a*) Tit. Statutes, 374.

but should it be construed to be a private statute, it would furnish no additional remedy whatsoever.

The act authorises the board to issue subpœnas, an authority incidental to it indeed, as a court of record ; but if the act is to be considered as a private one, a witness might refuse to attend unless the suitor obtains a subpœna or exemplification of the statute under the great seal, and this is not an ideal inconvenience, but one which would frequently arise. The same observation applies to commissioners in the King's Bench, who are authorised to take affidavaits touching matters before the board, who need not recognise this act (if it is a private one) without a similar authority.

The King is interested in the proceedings under this statute, which as laid down in Skinner (*a*) makes it a public act. The board constituted by it, is authorised to take recognisances, the forfeitures of which go to the Crown.

The act creates the public offence of perjury, the fine upon a conviction upon which, would also go to the King.

The ancient doctrine which affected to confine every thing to genera and species is now exploded, and many statutes, which would, by Lord *Coke* and other lawyers, have been considered as private, are now considered as public.

The statute regarding all sheriffs, (*b*) would have

(*a*) King v. Bags, Skinner, 428. (*b*) 23 Hen. VI., ch. 9.

been considered as a private one, because, say these ancient lawyers, all officers are a genus, but all sheriffs are only a species.

But this exposition is now changed to one more rational as appears in Lord *Raymond*, (*a*) who lays down that the act for the discharge of poor debtors, is a public act, because all the people of England may be concerned as creditors to these poor debtors, and so may all the people of Canada, or of the United States, be creditors to this poor bank. Another very important ground of the decision in Lord *Raymond*, and which applies most forcibly to the act before the court, was that the expense of pleading the poor debtor act specially, would put the insolvents to so great an expense as to disable them from taking advantage of it.

The sheriff's act would now be considered as a public statute, and that does not affect the interest of every member of the public body, for there are many large divisions of it, as peers, lawyers, and others, who are not subject to be arrested.

On these grounds, namely, that the act it made expressly for the benefit of a great portion of the public, without petition, the very general jurisdiction which it establishes, that the King is interested in its provisions, and the great inconvenience which would arise from a contrary construction, I contend that the act of legislature before the court should be considered as a public statute.

Robinson, Attorney-General, contra.—Immediately

(*c*) Jones v. Axed, 120.

after the trial of this cause I insisted upon the distinction which takes place between public and private statutes, in the proceedings which are had upon them in courts of justice, viz., that the former are recognised, but that the latter must be set forth and proved.

To lead to the decision of the question before the court, viz., whether the statute under consideration is public or private, I will first refer to Bacon's abridgment, where we find the following summary:

That a statute which relates to all the subjects of the realm, is a public statute.

That a statute which concerns the King, is a public statute.

That a statute which concerns the public revenue, is a public statute.

That a statute which concerns trade in general, is a public statute.

And which is to be observed as applicable here; it is there laid down that the statute of Henry VI., by which *all* corporations and licenses granted by that prince are declared to be void is a *private* statute.

The act under consideration does not concern *all banks*, for if a similar institution were to arise to-morrow, it would not be effected by it. It is impossible that an act so confined in its operation, can be entitled to the privileges of a public statute, without

the clause so frequently inserted, with a view to entitle private acts to be considered as public.

If acts relating to such bodies as the universities, are to be considered as private, is it at all reasonable to suppose that one relating to a single obscure bank should be treated as a public one?

It concerns only certain creditors of the Kingston Bank. It is not a general law of the land, but made to relieve certain individuals, and cannot, upon any principle, be considered other than a private act.

An act relating to all trades, would be considered as a public statute, but one relating to a company of grocers, butchers, or other specific trade, would be private acts, although in their operation, such acts might materially affect the public, but this statute does not even relate to banking associations in general, and did it relate to all banks in Kingston, it would still be private.

The British statutes relating to the chartered charitable corporations of London (*a*) were regarded upon general principles as private statutes; the first, similar in its provisions to the act in question, was made a public act by an express clause, the second is printed in the statutes as a private act. [C. J., that statute was made public by the clause, because it was brought into the house upon petition.] If your lordship means to infer that where statutes are not brought in upon petition, they are public statutes, I should conceive such inference as not founded upon

(*a*) 6 Geo. II., c. 36.

authority, for if that were the case, we should never hear of long arguments to shew whether a statute was public or private, but the court would direct the rolls to be searched.

In the discussion which is stated in the term reports (*a*) respecting a particular trading company, Mr. Justice *Buller* does not hint at a distinction of that sort. Among our own provincial statutes there are many of a private nature which have not been brought in upon petition, as the acts for erecting gaols and court-houses, giving sums of money to particular individuals or districts. And on the other hand, if the great body of the province were to petition for the redress of some public grievance, could it be said that a statute redressing it was private? So that I should infer that the circumstance of an act being brought in, either upon or without petition, does not furnish sufficient ground to make it public or private, but that the distinction must evidently be drawn from the statute itself, and not from the manner in which it originated.

Many British statutes have given very extensive and general remedies and powers, fully equal to those in the act under consideration, but which are evidently, upon general principles, considered as private statutes, as a clause has been added to give them the advantages of public acts—as the charitable corporation act before referred to, and our own back acts. [C. J. that clause was necessary to prevent their being considered as private acts because they arose upon petition.] Your lordship will never find that

(*a*) 6 Geo. II., ch. 36; 7 Geo. II., ch. 11.

petition or no petition, has been the ground of decision; surely A. B. or C. petitioning for a public bill could not make it private, as for instance for an act of *habeas corpus* or a reform in parliament; the object of it, and not the manner of bringing it in, must decide its character.

I will refer to a number of British statutes acknowledged to be private, and I am convinced that the court upon comparing them with the one under consideration, will not hesitate to declare it to be a private act.

The 55 Geo. III., c. 3, is for the establishment of the London Dock Company, and gives very large powers of fining.

The same statute, c. 9, for building a court house, &c., for the county of Hereford, gives very large powers, and yet both these acts have the clause.

There is not one argument the counsel has adduced to shew this a public act, and which he has drawn from the powers given to the commissioners under it, but which might be applied to these two statutes, which are acknowledged to be private.

The same statute, c. 45, for preserving the public records of the county of Surrey, and which gives fees to the clerk of the peace, which all persons may be interested in the payment of, is considered as private.

The same statute, c. 91, for enlarging Cheapside and establishing the new post-office, establishes a

court of record, authorises imprisonment, fines, the summoning juries, &c. This statute, I take it for granted, did not arise upon petition, yet it has the clause.

The same statute, c. 99, regulating the assize of bread within the bills of mortality, and within ten miles of the Royal Exchange, general as it is, has the clause.

These clauses are added to prevent inconvenience; but if the argument which the counsel attempts to draw from inconvenience were applicable, the clause in these statutes would be quite unnecessary.

The 46 Geo. III., establishing the Philanthropic Society, arose probably upon petition from the long string of facts; and from the purport of the act now before the court, it might reasonably be inferred that it also arose upon petition, yet neither in the one case or the other should I conceive that as a ground of decision.

This last statute uses the word "public," as ours does "a great portion of the public," from which I infer that the use of either of those terms as designating the object of a statute would not constitute it a public act.

The 46 Geo. III., c. 32, for preventing frauds in the admeasurement of coals in several parishes in Surrey, an act giving great and very general powers, has the clause.

In the 2nd and 3rd of Anne, establishing a registry in the county of York, there are clauses that

would overturn all arguments which attempt to shew that the act before the court must be a public statute, merely on account of the powers vested in the board or the proceedings to take place under it; yet it was thought necessary to declare this to be a public statute by the special clause.

I consider that this act has no more title to be considered as a public act, than one which would for the benefit of creditors make a person subject to the bankrupt laws, who was not so before.

Every one might, by possibility, be a creditor to the bankrupt, but that would not make it a public act.

The counsel's argument as to the number of persons who might be interested as creditors to this self-constituted bank, applies much more strongly to ferries and highways, all acts relating to which are nevertheless private, unless aided by the clause.

I agree that many acts which would formerly have been considered as private, would now be considered as public. They have been pointed out by the counsel on the other side, but there is no authority to shew that an act relating to a particular company of trading men, is to be considered as a public act, however numerous their creditors may be.

The act respecting weavers is in Levinz (*a*) determined to be a private statute, and yet that, as well as similar acts, contain certain rules for the government of different trades, which are highly beneficial to the public, but as their immediate objects are cer-

(*a*) 1 Levinz 294.

tain trades only, and not trade in general, they are private statutes, unless made otherwise by the special clause. The same distinction is laid down in Gilbert's evidence by *Loft*, and the doctrine laid down in *Coke* is referred to in those authorities.

In none of the arguments respecting the nature of a statute, can I find any question made as to whether it arose upon petition or not.

[CHIEF JUSTICE.—It is the modern practice of parliament not to entertain private acts without petition.]

I should doubt whether the rule is so general as to determine that a private act could not be entertained without petition ; I should conceive it possible that a member in his place asserting a grievance would be attended to, though it might be of a private nature.

When a counsel rises at *nisi prius*, and asserts for the first time that an act is private, I should not expect that the court would enquire how it originated, or require that the counsel should have searched the rolls of parliament before his circuit.

If the act before the court even extended to all banks set up since a certain period, it would be private upon the same principle that the statute declaring all charters made in the reign of Henry VI. is construed to be so.

Any restriction as to time or place makes a statute private.

A statute affecting a single bank in Kingston, is certainly more particular than one which takes in a whole king's reign, and much more so, if confined to individuals, even though its enactments might be beneficial to the province at large.

[CHIEF JUSTICE.—Modern times do not sustain private acts, unless upon petition, and it is acknowledged in *Comyns* that such a proceeding makes them private.]

Blackstone does not recognise the distinction, and even were it so, your lordship may infer more from it than the fact would warrant; it is not a British statute which is under consideration, therefore nothing could be drawn from that practice, unless it was also a rule of this legislature.

[CAMPBELL, J.—The legislature may make arrangements for convenience to the house.]

Can a court be bound by a rule of the houses of legislature? A statute must be construed as a will must, from itself looking at itself only. An inference drawn from its being brought in by petition or otherwise would go too far. It would follow that all acts brought in upon petition, however general, would be private, and one upon the most trifling matter, if brought in without petition, must be declared a public statute by the judges; but there is nothing in Comyn or Dyer, to lead to a supposition that petition or not was ever considered in adjudging an act to be public or private.

If this act gave an authority to try all causes that

might arise in the province, it would be public, but it must neither be confined to place or persons.

The act for the relief of all friendly societies (*a*) did not arise upon petition, yet it has the clause. It is upon principle quite impossible to consider that act as private and ours as public. The same may be said of the act in favour of the Globe Insurance Company.

My learned friend says, look at the intention. I say so too, but that we are not to go out of the act. If he means to say that we are to consider the probable intention of the legislature collected otherwise than from the act itself, he goes too far.

The legislature may have supposed they knew the distinction between a public and a private act, and have been mistaken.

What says the preamble to this statute? "That certain persons set on foot an association." What is the title? "An act vesting in the hands of certain commissioners all the stock and property of the pretended Bank of Upper Canada." In every member there is a particularity.

It does not, in its provisions, establish a general court of record, but one to wind up the bank concerns. If the parliament were to make an act to settle any one man's affairs, it might equally claim to be a public statute if his creditors happened to be numerous.

(*a*) 33 Geo. III., ch. 34.

Look, the counsel says, at the inconvenience of its being construed a private act. The legislature should have remedied that as they have done in our own bank act by a clause.

As to the King being interested, he is equally so in most of the acts I have cited.

In fact, all my learned friend's arguments I consider as answered upon principle, strengthened as it is by the numerous British acts avowedly private, but possessing infinitely more claim to the privilege claimed for this statute than it possibly can.

Boulton, Solicitor-General, in reply.—From the well known practice of parliament to frame private acts upon petition, and the fact that the act under consideration was brought into the house without petition, I argued it to be a public statute, but this was only one of several grounds of argument.

The learned Attorney-General has referred to the Registry Act and many British statutes, and wishes it to be inferred that if statutes of so great importance as to the objects they embrace, and of so general an influence in their operation, are to be considered as private statutes, that it is quite unreasonable to suppose the act before the court can be deemed a public one ; but the evident distinction is, that the acts he has referred to are necessarily confined in their operation to certain individuals, as the Yorkshire Registry act to persons holding lands in that county; the act respecting friendly societies, to the members of each particular society ; as if an act was

made to establish a bank in each district of this province, it would be a private act.

The acts respecting ferries and highroads have been referred to as of great public concern, yet private acts.

They are of public concern inasmuch as all travellers may be interested in them, but the provisions in the acts relating to them have for their objects the persons concerned in their management, and those acts are therefore private. The same may be said of acts relating to the management or fund of theatres. It is the pecuniary benefit to individuals, and not the pleasure or convenience which spectators or travellers may derive from them, which the law considers.

The relief proposed by the statute is not confined to the holders of bills, but is intended for many others, as for persons who may have deposited money, plate, title deeds, or other valuables in the bank.

It is true, as urged by the Attorney-General, that courts of pretty extensive jurisdiction have their origin from private statutes, but however extensive, they are local; whereas the jurisdiction given by this act is not confined to Amherstburgh or Cornwall, but extends over the whole province.

The act respecting poor prisoners is very similar to this, and the principle upon which Lord *Raymond* decided upon that act, fully applies to this, "that

every person in the country might be a creditor under it," and "that without considering it as a public statute, it would be useless."

The counsel on the other side has in argument assumed, that all the statutes which he has referred to would have been considered as private, if the clause had not been added to them; but as applying to several of them, the inference is not warranted; it may have been inserted *ex abundanti cautela*, to prevent a possibility of doubt.

The post-office act which has been remarked upon, though an act very beneficial to the public, immediately affects the property of individuals.

That respecting the admeasurement of coals, however important, is nevertheless local.

Acts relating to courts of justice in particular counties are private, because they cannot affect all the King's subjects, but there is a legal possibility of all the inhabitants of this province becoming suitors in the court established by this statute.

The title to an act is no key to its construction, though the preamble is, as far as it goes; there are, nevertheless, clauses and provisions in many statutes quite unconnected with the preamble.

Some clauses may be public, others private; but it would be absurd to consider the clause in this statute respecting affidavits as public, and the rest of the statute as private.

Our act has recognised, and, as it were, made a part of itself, the public British statute 14 Geo. II., which is another reason for its being considered a public statute.

The distinctions respecting the British acts have been so various and contradictory that the court are left to decide upon the general broad principle, whether the act is made for the benefit of the public or for that of individuals.

I consider that I have shewn this statute to be public from the great public benefits it had in view, as well as from the other grounds I previously laid before the court.

CHIEF JUSTICE.—On the first view of this point made for the opinion of the court in this case, I considered that the act of assembly in question must be taken to be a public act, but I have endeavoured to catch the distinction as found in the books, where I find much to doubt and little to fix my opinion.

It appears to me, however, that the same act may be in some parts private and particular, to be pleaded or given in evidence, and in others public and general, to be noticed by the judge as such.

The enactment transferring the stock and credits of the bank to the commissioners I consider a particular provision, which, as relating to the parties only, is particular and private, and therefore must be pleaded, or at least given in evidence.

The terms of the reference rendering such con-

struction fatal to the verdict, I hold it unnecessary to offer any opinion on the other points, unless the majority of the court should be against me on this.

CAMPBELL, J.—It appears that the plaintiffs have by an act of the provincial legislature been constituted a board of commissioners or trustees, for the special purpose of settling the affairs of a certain insolvent, unauthorised association, called the pretended bank of Upper Canada, and in that capacity have brought the present action under authority of the said statute, to recover the amount of two bonds for the benefit of the creditors of the said banking association; and the question now under consideration of the court, arises on a point reserved at the trial, stating that the statute under which the action is brought is a private act, and as such ought to have been specially pleaded and set forth by the plaintiff.

Similar questions have heretofore undergone much discussion in the courts at Westminster, attended in some instances with such difficulty as to have produced contradictory decisions, a circumstance which has in the present case afforded to the learned counsel, on both sides, an ample field for argument, and a more than usual opportunity of citing authorities in support of their respective positions, and of which they have certainly availed themselves with much ingenuity and talent.

The broad distinction between public and private statutes is, that the former are general laws which regard the whole community, and of which the courts

must *ex-officio* take judicial notice, without being specially pleaded—the latter are such only as regard either individuals or distinct parts of the community, and therefore must be specially set forth or shewn in the pleadings by those who claim remedy under them. Many, however, of the latter description are so complex in their provisions and enactments, or so extensive in their operation, as to render it extremely difficult to ascertain the precise line of distinction, and this has been the cause of the differences of opinion I have alluded to, amongst judges of great eminence, such as *Rolle*, *Glynn*, *Hale*, *Twisden*, *Montague*, *Mansfield*, and others. In order to avoid such serious inconveniences in the administration of justice, the legislature have in modern times been much in the habit of stamping the character of public acts on statutes of very extensive although not of general operation. This is done by adding an express clause to that effect. Such are the 2nd and 3rd of Anne, ch. 4, for the registry of deeds in the west riding of the county of York, the 33 Geo. III., ch. 3, for regulating the trade and business of pawnbrokers, and ch. 54, for the relief and encouragement of friendly societies, and many other British acts besides our own Bank act, all which the courts of law would be under a necessity of considering as private, were they not made public statutes by the addition of those special clauses.

The act now under our consideration has no such clause, consequently we are left to decide its public or private character, by comparing the act itself and its avowed purposes, with the doctrine and principles laid down in the best authorities on the subject.

A very great number of British statutes of much more extensive operation in regard of persons and property than the act before us, are nevertheless private acts.

Mr. Justice *Buller* lays it down as the distinguishing characteristic that public acts of parliament are such as concern *the whole kingdom*, and must be judicially noticed by the courts, without being set forth, and private acts such as *do not concern the whole kingdom*, and therefore must be exhibited to the court.

If, however, the matter be ever so special, yet if it relate equally to all, it is a general law and need not be shewn; but if it relate only to some particular *county* or *parish*, or *trade*, it is special and must be set forth. A law that concerns all *lords* is a general law, because it affects the whole property of the kingdom, which is holden under lords mediate or immediate; but a law that concerns the nobility or lords spiritual is but a particular law, because it relates only to a particular set of persons. A law, however, that relates to all spiritual persons is a general law, inasmuch as the religion of the kingdom is the concern of the whole kingdom. Such are the acts, 21 Henry VIII., 13 Eliz., c. 10, and 18 Eliz., c. 11; but the 11 Eliz., concerning Bishops' leases, is but a private act, for it relates only to the concerns of one set of spiritual persons. An act that relates to all trades is a general law, because it relates to traffic in general; but an act that relates to any one trade, as grocers, butchers, &c., is but a private act.

This principle is acted upon by the same eminent person in his judicial capacity in the case of Kirk v. Nowell, 1 T. R.

If this be so as regards a whole trade or parish or county in England, many of which, we know, embrace the interests and concerns of a much greater portion of his Majesty's subjects than the whole population and wealth of this province, how much more forcibly must the principle apply to the concerns of an obscure association of speculative adventurers, and the comparatively few individuals, who have foolishly placed confidence in their credit and stability? Acts of parliament relating to all officers are public acts, because they concern the general administration of justice; but an act relating only to particular officers is a private act.

The misapplication, or rather the misapprehension of this distinction has heretofore occasioned a difference of opinion respecting the 23 Henry VI., c. 9, requiring sheriffs to take bail, which has at different times, and by different judges, been considered a public and a private act, particularly before the statute of Anne, authorising the assignment of bail bonds; but the better opinion seems to have been that it was always a general law, for although it relates only to officers of a certain description, yet all the King's subjects are within the benefit of it; but without this universal effect, it undoubtedly must always have been considered a private statute.

There is also another mode of rendering a private statute public, which is by some recognition of it, how-

ever slight, by any subsequent public act, either expressly or impliedly, confirmatory, or even alternative of its provisions or enactments, and on that ground, amongst others, it is intimated to us that this act should be considered public; this ground however entirely fails, for there is no such recognition, nor indeed any recognition at all of it by any public act of parliament. It is true the act in question contains a clause referring to or recognising a previous public act of the British parliament; but what is the nature and effect of this recognition, it is merely to this effect, that this provincial private statute shall not alter or repeal that previous public British statute.

The application of that principle of law is therefore out of the question in the present case.

The statute before us is entitled "An act vesting in the hands of certain commissioners therein named, all the stock, debts, bonds and property of the pretended Bank of Upper Canada, lately established at Kingston, for the benefit of the creditors of that institution." So far as the title explains the purpose and intention of the act, it is no more than would have been the title of an act vesting the property of A. B. in the hands of C. D. for the benefit of the creditors of A. B., and which I imagine no professional man would for a moment consider a public statute.

The preamble states in substance, that certain persons did, in the year 1819, set on foot an association under the style and title of "The president, directors and company of the Bank of Upper Canada, and procured subscriptions to a considerable amount for the

avowed purpose of raising a joint and transferable stock," upon the credit of which to issue bank bills, and carry on the business of banking, which adventurers afterwards stopt payment of their bills, and became insolvent, whereby a great portion of the inhabitants holding their bills and notes have been defrauded and are likely to be without redress; without any reference at present to the truth or fallacy of the latter allegation, or to the legality or criminality of the association itself, I see nothing in this description essentially different from the case of any insolvent individual or company, and his or their specific creditors, except perhaps the very extraordinary assertion that the defrauded persons are likely to be without remedy.

This statement, however, whether true or false, can make no difference in the nature of the transaction, nor in the parties, debtors and creditors, whose interests and affairs it concerns. Unless perhaps it might have afforded to the legislature a pretext for conferring upon this act the character of a public statute; this, however, they have not thought fit to do, nor do I conceive it to be in the power of this court to supply the defect, if I am right in my conception of the doctrine laid down in all the authorities on the subject.

As to the specific enactments and provisions of the act, they do not appear to me to contain or embrace any matter whatever that can alter or enlarge the character given to it in its title and preamble, the whole having relation only to the private concerns of certain specific insolvent debtors, and their credi-

tors, with whose affairs the community at large have no more to do than with the object of the associated adventurers, which appears to have been a matter of private gain and emolument, undertaken not only without authority, but in direct violation of a positive and highly penal act of the British parliament.

I am therefore of opinion that the statute in question is a private act, and as such ought to have been specially set forth.

Boulton, J.—In this case there are ten points reserved, but as the determination on one in favour of the defendant will answer the end of arguing the whole, it is considered sufficient to argue one material point.

The one selected for that purpose, is whether the act of parliament appointing the commissioners is a private or public act?

Having given this question my best consideration, I am of opinion it is a public act. Private acts are those which concern only particular things or persons, of which a judge will not take notice without being pleaded. Some acts are called public general acts, others public local acts, such as canals, &c., ch. 9, a statute for the discharge of poor prisoners, the same exception was taken, viz.:—"It is a private statute and should have been pleaded." But *per Cur.* This shall be construed to be a public act because all the people of England may be interested as creditors of the prisoners, so in this case all the people in the province of Upper Canada may be interested as cre-

ditors of the pretended bank, bringing it most clearly within the decision in Lord *Raymond.*

Trueb, C. J., says, in the case of Jones v. Axen: If the act concerning bishops were to be determined now it would be determined a general act.

The act in question having embraced the English act on the same subject, places the point beyond doubt.

Ex parte Lyons.

A certificate from the master, and an affidavit of the person entitled, stating "that he had during his clerkship done every thing required of him," was held not sufficient to entitle him to be admitted an attorney of this court.

Mr. John Lyons applied to be admitted an attorney of this court. His own affidavit and the certificate of service from the attorney with whom he had been articled, stated his having entered into articles for the time of five years, and that he had always been ready during that time to perform any services that had been required of him, or to that effect.

The court considered the certificate and affidavit as insufficient.

Application refused.

MICHAELMAS TERM, 5 GEO. IV., 1824.

Present:

THE HONOURABLE CHIEF JUSTICE POWELL.
MR. JUSTICE BOULTON.
MR. JUSTICE CAMPBELL.

SHUTER & WILKINS v. MARSH & UX., EXECUTRIX.

Where husband and wife, executrix, are sued, service of process upon husband only is sufficient as well as in other cases.

In this case process had been taken out against the husband and wife as executrix, but the husband only had been served in time, the process having been served upon the wife after the return.

Washburn moved to set the proceedings aside on the ground of irregularity. He contended that though in ordinary cases service upon the husband alone was sufficient, yet that where the wife was sued as executrix it was necessary she should be served also.

That the plaintiff, having undertaken to serve the process upon the wife, should have served it in time.

Boulton, George, denied that there was any distinction between a wife sued as executrix or otherwise, there being no authority to that effect, and the principle being the same in both cases, of which opinion was the court.

Application refused.

LOGAN v. SECORD.

This court will not order satisfaction to be entered upon a judgment without payment of interest.

Washburn had obtained a rule last Trinity Term to shew cause why, upon payment into court of the sum of £125 13s. 8d., balance of the judgment in this cause, satisfaction should not be entered on the roll, and why, in the meantime, all proceedings should not be stayed on the writ of *fieri facias* issued therein.

A judgment for the sum of £1861 17s. 11d. had in the year 1812 been entered of record in this court by the plaintiff against the defendant.

The affidavit in support of this application stated that the defendant had paid to the plaintiff upon this judgment the sum of £1736 14s. 3d.

The affidavits against the application stated that the deponent, who was the agent of the plaintiff, had always considered and intended that the payments made by the defendant were in satisfaction of interest accrued as well as the principal, until both principal and interest should be fully paid, and that one payment in particular, viz., 400 acres of land valued at £150, was by the defendant tendered to the deponent, and by him accepted in part satisfaction of the interest on the subsisting debt; further, that an agreement or agreements had taken place between the deponent and the defendant as to what period some particular payments should draw interest for.

The amount due upon a calculation of principal and interest amounted to £821 17s. 3d.

Robinson, Attorney-General, shewed cause.—The judgment upon which satisfaction is required to be entered by the defendant in this case is dated 1812. A number of payments have been made upon it, but the agent of the plaintiff has insisted and the defendant has agreed that those payments should be placed to account of the interest, and even had there been no agreement to that effect, natural justice would entitle him to it. He was entitled to interest upon the account upon which the judgment was founded, and *a fortiori* he must be entitled to interest upon the judgment itself.

A jury would give it by way of damages in an action upon the judgment, and it would be unjust that the plaintiff should be deprived of it by an application of this sort.

The right of a plaintiff to interest upon a judgment is clearly established in Saunders, (*a*) where it is laid down that the court itself will, with the consent of the plaintiff, tax interest by way of damages, and if, by a direct exercise of authority, they will enforce the payment of interest, they cannot, by granting an application of this sort, deprive a plaintiff of that which he would be entitled to by the verdict of a jury, or by the summary interference of the court.

The late provincial statute, too, I consider, has a retrospective operation (*b*) not confined to judgments obtained since its enactment.

The right of plaintiffs to interest upon judgments

(*a*) Holdipp v. Otway, 2 Saund. 105. (*b*) Provincial Statute.

is alike laid down in the term reports, (*a*) in East, (*b*) in Maule and Selwin, (*c*) and in Atkins. (*d*)

Washburn, contra.—In actions upon bonds there is no doubt but that interest may be allowed upon the judgment without the intervention of a jury, but there is no case of interest being allowed by the court upon judgments in actions of assumpsit without a verdict. The case cited from Saunders was one of debt upon bond, and in other cases interest was considered as matter of consideration for a jury.

The passing of the late provincial statute directing sheriffs to levy interest upon judgments, clearly shews that it was not considered that a plaintiff was before entitled to it. If the plaintiff is entitled to it in this case why does he not levy it?

If the counsel on the other side could produce a report where interest has been given by the court in judgments upon assumpsit, I should not contend for an entry of satisfaction in this case, but none of the cases cited are against this application.

Attorney-General, contra.—The counsel on the other side allows that interest would be in the discretion of a jury, and yet by this application he would deprive us of that right.

The new act is to facilitate the recovery of interest—to enable a plaintiff to recover his due at a less expense, and rather shews that he had a former right than creates a new one.

(*a*) Blackmore v. Flemming, 7 T. R. 446. (*b*) M'Clure v. Dunkin, 1 East 436. (*c*) M. and S. (*d*) Godfrey v. Watson, 3 Atkins 517.

The observation that the cases which relate to interest do not apply in the present is not warranted, for Lord *Kenyon* has declared in the case of M'Clure & Dunkin, which I have before cited, that he saw no difference in this respect between our own and foreign judgments, and the latter are in express terms called assumpsits in the books.

If natural justice as well as legal decisions, strengthened as in this case by the parties' agreement, give us a right of interest, this application cannot be sustained.

Chief Justice.—It appears to me that if a party defendant applies to have satisfaction entered upon a judgment, this court may say he should pay interest; and I am also of opinion that the court cannot be called upon to order an entry of satisfaction where the nature or amount of payments are disputed by the parties.

Per Curiam.—Rule discharged.

Prior v. Nelson.

An affidavit to hold to bail stating that the defendant is indebted to the plaintiff upon a certain bond or obligation is insufficient.

The affidavit to hold the defendant to bail in this cause stated that the defendant was indebted to the plaintiff in £135, upon a certain bond or obligation.

Ridout moved to cancel the bail bond and to enter common bail, the affidavit being insufficient as not

stating that the sum sought to be recovered upon the bond was due and payable. (*a*)

Per Curiam.—Application granted.

BINKLEY v. DEJARDINE.

An application for a judge's certificate that a cause is a proper cause for a special jury, must be made immediately after the trial on the same day the cause is tried.

This cause was tried by a special jury at the assizes for the Gore District. The jury retired at ten o'clock at night to consider of their verdict; some time afterwards they returned to court in the absence of the plaintiff's counsel and gave a verdict in his favour.

On the following morning no business having been entered into, the plaintiff's counsel at the opening of the court moved for the judge's certificate "that the cause was a proper one to be tried by special jury."

The *Chief Justice* refused to grant the certificate, not being, as he considered, authorised by the statute so to do. (*a*)

Robinson, Attorney-General, now applied for a certificate or an order upon the master to allow him his costs of striking the special jury.

He referred to the court, whether, although the statute directs the application to be made immediately after the trial, those words might not by a liberal

(*a*) 4 M. & S. 330. (*b*) Provincial Statute 48 Geo. III., ch. 13.

construction be considered to intend before any other trials were gone into.

The court considering the words of the act as not capable of extension, concurred with the decision of the judge at *nisi prius*.

Application refused.

——— v. HUGHES.

Where a plaintiff has special counts in his declaration, but abandons them and recovers upon counts within the competence of a district court the court will order judgment to be entered on those counts only.

In this case the plaintiff had declared upon a special agreement, an account stated, and other common counts.

The special count had been abandoned by the plaintiff at the trial, and he had taken a general verdict for £20 8s. 1½d.

Mr. Justice *Campbell*, who tried the cause, had refused to grant a certificate under the provincial statute (*a*) to enable the plaintiff to receive the costs allowed in this court.

Such costs would have been taxed by the master on view of the proceedings, the verdict appearing to be in a special action above the competence of a district court; but,

Boulton, Solicitor-General, had obtained a rule to show cause why the verdict should not be entered

(*a*) 58 Geo. III., ch. 4.

upon the common counts agreeable to the judge's notes, no evidence having been given upon the special counts.

Macaulay shewed cause.—He contended that the plaintiff by a verdict upon an account stated might recover King's Bench costs.

That the district court act, which confines its jurisdiction in sums above £15, to accounts liquidated, is to be considered to intend those settled by note or some express acknowledgment of the parties, as a certain price for a piece of goods. The principle does not apply to accounts stated where there may be £80 upon one side and £120 upon the other, for though parties may have stated their accounts, they may contend against and correct inaccuracies, as laid down in the term reports. (*a*)

That the plaintiff having brought his action *bona fide* upon the agreement, should not be deprived of his costs because he had been obliged to abandon it perhaps upon some nice construction upon the Statute of Frauds.

Boulton, Solicitor-General, contra, contended that in this case the plaintiff having given no evidence upon, and having abandoned his special counts, the court could not give judgment upon them.

That the defendant was entitled to have the verdict entered upon those counts to which evidence had been given, not as a matter of grace, but as a matter of right.

(*a*) 1 T. R. 42.

An action upon an account stated is clearly of the competence of the district court, although it may be contested, and so may the amount of a note.

Macaulay, contra.—The object of this application is to deprive the plaintiff of costs which he is equitably entitled to; looking at that object the court will refuse the application.

As I have brought authorities to shew that accounts stated may be opened, I consider that it may be inferred that an account stated if above £15 need not be brought into the district court.

The defendant should have insisted upon the right now applied for at the trial. As the granting it would be attended with injury to the plaintiff, it ought not to be allowed at this stage of the proceedings.

Rule absolute.

MEAD v. BACON.

A rule to plead is necessary in bailable actions.

Rolph had obtained a rule *nisi* to set the interlocutory judgment signed in this cause aside for irregularity, the same having been signed for want of a plea—no rule to plead having been entered.

Robinson, Attorney-General, shewed cause.—He contended that the late act for regulating the proceedings of the court of King's Bench, had dispensed with the necessity of giving a rule to plead.

That statute (*a*) directs that in all actions or suits where the defendant had appeared, the plaintiff or his attorney should, after filing a declaration in the office from which the writ issued, and service of a copy thereof on the defendant by a demand in writing, call for a plea, and that if after the expiration of eight days from the service of such demand no plea is filed the plaintiff may sign judgment.

That though these directions of the statute were given in that part of it which more particularly applies to actions not bailable, yet there was no reason to require a rule to plead more in those actions that were bailable than in others.

The statute intends to take away the necessity of the rule to plead in both cases, as it could only have been taken out at the principal office, a circumstance very inconvenient in the outer districts.

That if a rule to plead was considered as necessary, it would follow that a defendant in a bailable action would not be entitled to a demand of plea of eight days, which was a beneficial arrangement in his favour.

Rolph, contra, contended that in this point of practice we must be governed by that of the King's Bench in England, it being a case not provided for by our own statute, the regulations of which respecting the time for pleading are expressly confined to actions not bailable. That in all cases not provided for by our own statute, we are referred to the English practice by the rule of this court.

(*a*) Provincial Statute, 2 Geo. 4 ch. 5.

As to the inconvenience of taking out a rule to plead from the office in York, that has been remedied by rule of this court.

Rule absolute.

HATHAWAY v. MALCOLM.

Evidence of a promissory note, although varying from that set out in the declaration, was considered as sufficient to support the common counts.

This was an action by the payee against the maker of a promissory note, and tried before the *Chief Justice* at the assizes for the London district.

There was a material variance at the trial between the note as declared upon and given in evidence.

The plaintiff closed his case with the proof of the note, and insisted that such proof was sufficient to entitle him to a verdict upon the money counts, and took a verdict accordingly for the amount of the note proved, subject to the opinion of the court.

Robinson, Attorney-General, now contended that a nonsuit should be entered.

That the note alone was not sufficient evidence of the money counts, but that the plaintiff, after failing upon the note count, should at least have proceeded to give such evidence as would have shewn that it was given for some of the considerations stated in the declaration.

He cited a case from Buller's *nisi prius* (*a*) where *Eyre*, Chief Justice, after demurrer and judgment

(*a*) Randolph v. Regendon Bull N. P. 137

for the defendant upon the note count, refused to allow the note to be given in evidence at the assizes to support the count for money lent.

That the present case was *a fortiori* in favour of the defendant, as the plaintiff might set out his note properly in a fresh action, whereas in the cases cited he had no remedy; he also cited Levinz.

Rolph, contra, contended, that proof of a note being given by the defendant to the plaintiff, though varying from that set out in the declaration, was sufficient to entitle the plaintiff to a verdict upon the account stated or other money counts.

That as before the statute of Anne it was competent to a plaintiff to give a note as evidence upon those counts, so it might clearly be done now, as that statute did not take away any remedy which a plaintiff had before its enactment, but gave a concurrent one. (*a*)

That the principle reason for inserting the common counts in the declaration, was to enable a plaintiff to give his note as evidence upon those counts in case he should from variance or other cause fail to recover upon the note count.

That it is laid down by Lord *Ellenborough*, that in an action by the payee against the maker of a note the note itself is evidence of money lent; and in Bayley, that it is evidence of money paid by a holder to the use of a drawer, and in the same author

(*a*) Storey v. Atkins, Strahan 719.

that it is evidence of money had and received by the drawer to the use of the holder, and that an acceptance is evidence of money had and received by the acceptor to the use of the drawer, (*a*) and in the case of Israel v. Douglas (*b*) it is laid down that an acceptance is evidence of an account stated.

That these determinations are decisive in the present case, as it is well known that the maker of a promissory note and the acceptor of a bill of exchange are upon the same footing.

That in many of the cases it has been decided that the note was evidence without being declared upon, and the reasoning is stronger in favour of a plaintiff where his note, as in the present case, has been declared upon.

Per Curiam.—Application refused.

McLean v. Cumming.

The rule of this court requiring the name of an attorney to be endorsed upon a cognovit does not apply where an attorney is plaintiff. An affidavit not considered as inefficient because the place of taking it was omitted in the *jurata*.

Motion to stay proceedings upon a judgment entered upon a cognovit—*actionem*.

Boulton, Solicitor-General, objected that the name of a practising attorney had not been endorsed upon the cognovit at the time of taking it, and that such endorsement was not stated in the affidavit of execution, agreeable to rule seventh of this court.

(*a*) Bayley on Bills. (*b*) 1 H. B. 239; 13 East. 100.

The court overruled this objection, observing, that the plaintiff being an attorney was sufficient; the reason and intention of the rule being to prevent persons from taking cognovits who were not amenable to the court.

The counsel also objected to the reading an affidavit because the place where the same was taken had not been inserted in the *jurata*, which he contended was necessary as had been clearly determined.

That to dispense with this rule of practice would only be to perpetuate inaccuracies from year to year.

On the latter point the *Attorney-General* contended that in cases where persons are called upon to perform a duty, it is to be *prima facia* supposed that they have performed it properly. The court here would not suppose that the commissioner had exceeded his authority, by administering an affidavit in a place where he had no right to do so. The court here knew all the commissioners, which made the case different to that of a commissioner in England. That the principle in the case of Maule and Selwyn (*a*) might well be applied in this. That it had not been usual in this court to examine the *jurata* of affidavits with that nicety which had lately taken place in England, nor were we bound to alter our own practice to make it conform to an overstrict regard to the niceties of practice there.

The court overruled the objection and allowed the affidavit to be read, considering the principle of the

(*a*) 1 M. and S.

case of an affidavit sworn before a Chief Justice in Ireland where his jurisdiction had not been inserted in the *jurata*, and which was allowed notwithstanding the objection to be read in England, as sufficient to warrant the decision.

Per Curiam.—Application refused.

MADILL v. SMALL, ONE, &c.

Proceedings against an attorney set aside, the rule to plead having been given before the bill served.

Macaulay had obtained a rule to shew cause why the assessment of damages and interlocutory judgment in this cause should not be set aside for irregularity with costs.

The defendant had been proceeded against as a privileged person. The bill had been filed on the 10th of ——, the copy had been served on the 13th. but the rule to plead had been entered on the 10th before the service of the bill. The interlocutory judgment was signed upon these proceedings for want of a plea. No appearance had been entered according to the statute.

The court considering these proceedings as irregular, set the interlocutory judgment aside.

CROSS AND FISHER v. CRONTHER.

Costs allowed by this court for not proceeding to assessment of damages pursuant to notice.

Smith obtained a rule to show cause why the plaintiff should not pay costs for not proceeding to assessment of damages pursuant to notice.

The rule was afterwards made absolute without argument.

HILARY TERM, 6 GEO. IV., 1825.

Present:

THE HONOURABLE CHIEF JUSTICE POWELL.
MR. JUSTICE BOULTON.
MR. JUSTICE CAMPBELL.

BROWN v. SMITH.

Where by the operation of provincial enactments a plaintiff is unable to give a proper date to the notice at the foot of a *ca. re.*, a general notice to appear on the first day of the term was held sufficient.

Macaulay moved to set aside the proceedings in this case upon the ground that the notice to the defendant to appear was insufficient.

It required him to appear on the first day of the then next (the present) Hilary Term, without specifying the day of the month agreeable to the form given by the provincial statute for regulating the proceedings of the Court of King's Bench.

The statute passed 6 Geo. IV., provides for the establishment of the present Hilary Term, and for remedying defects in process by the following section: (*a*) "And be it further enacted, that in this present year the Term of Hilary shall commence on Monday, the 17th day of January, and end on Saturday of the week ensuing, any law to the contrary in anywise notwithstanding, and that any writ, process, entry or proceeding, which hath been or shall be

(*a*) 2 Geo. IV., ch. 1 & 4; 6 Geo. IV., ch. 1 & 3.

issued, had or made before the said 17th day of January, in which the Term of Hilary during this present year or any return day thereof is described and set forth otherwise than according to the provision in this clause contained, shall nevertheless be valid and effectual, and the commencement and end of such Term of Hilary and other return day therein mentioned, in any such writ, &c., shall with respect to such writ, &c., and all subsequent proceedings thereon, be deemed and taken to be as it should and ought to have been according to the periods in this clause appointed for the commencement and duration of the said Term of Hilary."

The counsel submitted to the court, whether a defect so obviously contrary to the provision of our own statute, as well as the English practice, could be cured by the provision in the late act; he considered that had some date been mentioned, though an erroneous one, it might have been cured by the words of the late statute, but that no date being stated in the notice, was a defect neither contemplated or aided by the statute.

CHIEF JUSTICE.—The defect has arisen *ex necessitate rei*. The plaintiff adopted that mode of specifying the return of the writ, because he had no other course. I consider that by a fair and liberal construction of this statute, it may be considered as remedying the defect in this process.

Per Curiam.—Application refused.

GARDNER v. BURWELL AND JUSTICES.

When magistrates commit a party upon a general charge of felony given upon oath, they will not be liable to an action of trespass, although the facts sworn to in order to substantiate that charge, may not in point of law support it.

This was an action of trespass, in which the declaration stated that the defendants, justices of the peace, on the eighth day of October, 1822, with force and arms made an assault on plaintiff, and under a false and pretended charge made before them by one James Trainer, against plaintiff, for feloniously stealing a saddle, and by them as such justices, &c., knowingly and oppressively heard and received and pretendingly credited, caused plaintiff to be apprehended by one James Taff, a constable, and several other men his assistants, without just or probable cause, and to be brought before defendants as justices, and that afterwards under colour of the said false charges, defendants did unlawfully and oppressively without examining on oath any witness or accuser or prosecutor in the presence of plaintiff, and without reading or causing to be read in the hearing of plaintiff any deposition or evidence taken before them upon the charge aforesaid, and without due examination of the plaintiff, give and order him into the custody and charge of the said James Taff, and one James Young, as constables, to be conveyed to the common gaol for the false and pretended cause aforesaid, and then and there caused the plaintiff to be forcibly, against his will and the law of the land, carried and conducted in custody of said James Taff and James Young a great distance, fifty miles, to the town of Vittoria, and there to be detained two hours in custody till plaintiff was forced and obliged for his deliverance to find and procure bail for his appearance before the next

court of Oyer and Terminer to be held in and for the district of London, whereby plaintiff was hindered in his business and was put to great trouble and expense, and lay out £10, about his imprisonment and in the procuring of bail and his discharge from the said imprisonment. Plea, not guilty.

It appeared in evidence at the trial before the *Chief Justice* at the last assizes for the London district, that the plaintiff being liable to statute labour on the highway, had, under the authority or connivance of one of the overseers, performed his statute labour on a piece of road convenient to himself; and that moreover he had some undue pleasure or gratification in doing so, that he might evade the statute labour which he ought to have performed elsewhere under the direction of the defendants as magistrates. That Trainer, another overseer of highways, had ordered the plaintiff to work upon another portion of the roads, which he had refused; and that upon complaint to the defendants as magistrates, plaintiff was fined five shillings under the statute, and two shillings and six pence costs, and execution issued to Trainer, as constable, who proceeded to plaintiff's house, (plaintiff being absent,) and seized a waggon, which, being put up to sale, the constable bought himself for six pence, and sold to a bystander for a shilling, through whom the plaintiff again received his waggon. This sale not producing the necessary sum, the constable took a saddle of plaintiff, and offered it for sale. The constable himself bought the saddle for seven shillings and six pence, and carried it to his house.

Plaintiff complained, and the defendant Burwell told Trainer, the constable, to give him back his saddle if he performed his statute labour; and the other defendant Patterson, being in company with the plaintiff at a public house, proposed (as was alleged by one witness) that if he would call for some liquor he should have his saddle again.

Another witness, however, said that there was no bargain respecting the saddle at that time.

Some days afterwards the plaintiff went to Trainer's house in his absence, and notwithstanding his wife's objections took away the saddle.

Trainer then went before the defendants and made oath that the plaintiff had feloniously stolen the saddle. That a warrant issued and the arrest and imprisonment followed. It further appeared in evidence that the plaintiff when brought before the magistrates behaved in a very violent and indecent manner.

The defendants' counsel objected at the trial that upon this evidence the action could not be sustained against the magistrates, they having proceeded upon a charge of felony sworn to before them. That at any rate the cause of action alleged was the subject of an action on the case and not of trespass, and the *Chief Justice* being of that opinion, offered a nonsuit, which was declined by his counsel.

Robinson, Attorney-General, having obtained a rule to shew cause why the verdict should not be set aside and a nonsuit entered—

Baldwin, shewed cause.—He contended that it was not the legality or illegality of the first act of the magistrates nor their design that gave character to the action whether trespass or case; but the fact of the injury being immediate to the person of the plaintiff or consequential, as laid down in Leame v. Bray. (*a*) That in this case the immediate injury was the arrest and imprisonment; that it was analogous to seduction and crim. con., in which cases trespass lies.

That had the magistrates acted under a *bona fide* error, the false accusation of Trainer would have so far excused them that the plaintiff could only have had an action on the case for such portion of the wrong as might not be excusable by the information. But that the defendants being privy to the false accusation, and well knowing that no felony was committed, they were wrong doers. That an accusation false within the knowledge of the magistrates is as no accusation; and that, therefore, trespass only lay as laid down in the case of Morgan v. Hughes, (*b*) where Mr. Justice *Buller* says, that where it is stated on the record that a warrant is illegally granted, it never was doubted that trespass was the proper remedy. That although it is laid down in Windham v. Clere (*c*) that though the information be false yet the justice is excusable, in no case will it be found to say that an information false within the knowledge of the magistrate excuses him, as may be collected from the case of Lowther v. Radnor, (*d*) as well as from that last cited; from both which cases it may be inferred, that the error or ignorance of the magis-

(*a*) 3 East. 593. (*b*) 2 T. R. 231. (*c*) Cooke, Eliz. (*d*) 8 East. 119.

trate must be a *bona fide* error, or positive ignorance of facts that can excuse him.

Robinson, Attorney-General, contra, contended, that the magistrates were justified by the information on oath laid before them, although persons well acquainted with the nice legal distinctions between a felonious taking and trespass, might perhaps not have granted a warrant in this case.

That it was well known, that from a want of knowledge of those distinctions persons were sometimes proceeded against and tried for larcenies where the judges did not consider that the facts adduced were sufficient to constitute a felony, and that without any imputation upon the counsel for the Crown who had not always an opportunity of investigating criminal accusations until the day of trial.

That the offer to return the saddle, which had been insisted upon on the defence, did not affect the case, as it was made (if at all) before any felony had been committed.

That the positive oath of Trainer was sufficient to excuse the magistrates from a charge of trespass, unless, perhaps, some collusion could have been charged and proved against them, which had not been done; and that, if any consequential injury had arisen, the action should have been case and not trespass.

That it had been brought without precedent and could not be supported.

That the distinction between trespass and case, is clearly laid down by Mr. Justice *Ashhurst* in the

case of Morgan v. Hughes, before cited; he there says, that where an immediate act of imprisonment proceeds from a defendant the action must be trespass; but that where it proceeds from a person in consequence of the information of another, case is the proper remedy.

That the learned judge's distinction, which was assented to by the whole court, governs the present case; and that the law on this head is considered by Lord *Ellenborough* as settled accordingly in Leame v. Bray. (*a*)

That if a complainant therefore makes a positive charge upon oath, the magistrate cannot be sued in trespass however liable the prosecutor may be to that action.

That the want of examination in the presence of the accused, though irregular, could not make the supposed injury a trespass.

That it is not pretended by the declaration, that the magistrates had solicited or induced Trainer, the prosecutor, to make the charge—such an allegation laid and proved might have altered the case.

That persons possessed of much greater legal information than justices of the peace usually are, would have been justified in acting as the defendants had, and that whether their opinion as to felony or no felony was erroneous or not, trespass could not lie.

Baldwin, in reply, contended, that the counsel for

(*a*) 3 East. 198.

the defendant had not answered his case, which was one where magistrates, defendants, knew that the facts before them did not support the accusation.

That where they proceed against a person for felony in a case where they must have known from circumstances that no felony had been committed, they should be considered as trespassers.

And that the *scienter* of the magistrates is supported by the verdict.

CAMPBELL, J.—This is an action of trespass brought by the plaintiff against the defendants as magistrates for having, as he alleges, by their warrant unlawfully imprisoned him; and the present motion on the part of the defendants is for a nonsuit, on the ground that such action will not lie, they having acted in a matter within their jurisdiction, and upon complaint made to them on oath. Upon reference to the evidence, it appears that the complaint was, that he, the plaintiff, had stolen a saddle, such charge upon the face of it certainly implies a felony, of which the justices had jurisdiction, and fully justified them in issuing their warrant to apprehend the supposed felon, in order that the complaint might be farther investigated, and, if on such investigation the magistrates were satisfied that the charge of felony was well founded; that is, if it appeared to them upon examination, that the manner of taking this saddle was such as shewed a felonious intent of privately stealing, it then became their duty to commit the person so charged in order to be tried for the felony, and for so doing neither trespass nor case would lie

against them; but it is to be recollected that magistrates and not complainants, are the legal judges of the offence complained of, and if they mistake the law, they do so on their own responsibility, and however excusable in a criminal or penal prosecution, they become liable to action by the party grieved, and such action would be case and not trespass; but if it had appeared in evidence on the trial of the present action that those magistrates at the time of the investigation of the complaint before them were made sufficiently aware that the circumstances of the taking of this saddle were such as in law could amount only to trespass and not to felony, either as privately stealing or open robbery, by a forcible taking and putting in fear, and with such knowledge, wilfully and maliciously imprisoned the plaintiff, then this action would undoubtedly lie, and I should not feel myself justified in granting a nonsuit. I am, I believe, sufficiently upheld in this opinion by the doctrine laid down by Lord *Ellenborough* in delivering the unanimous decision of the court in the case of Lowther v. Lord Radnor, (*a*) stating in substance that trespass lies not against magistrates acting upon a complaint on oath in a matter within their jurisdiction, although the real facts of the case might not have supported such complaint, if such facts were not laid before them at the time: it had certainly been stated to this court, and impressed upon my mind, erroneously it seems, that such was the case in the present instance, but on reference to the *Chief Justice's* notes, it does not appear that any evidence of the kind was given at the trial. I am therefore constrained to agree to a nonsuit, as in the absence of

(*a*) 8 East.

such testimony trespass will not lie against magistrates, which otherwise would, as clearly laid down in all the authorities, of which it may be sufficient only to cite that of Morgan v. Hughes, (*a*) where *Ashhurst* and *Buller*, justices, sufficiently state the distinction between trespass and case in matters of this kind, adding, "it had never been doubted that trespass was the proper remedy where a warrant had been illegally granted."

Per Curiam.—Rule absolute for nonsuit.

The King v. Nash.

Where a vessel is seized as not being British built under the provisions of 7th and 8th of William III., the *onus probandi* lies upon the claimant, *i. e.*, to recover it he must prove that the vessel in question was built at a British port.

The vessel belonging to defendant had been seized as foreign built under the statute 7th and 8th Wm. III.

A verdict had been taken for the Crown at the assizes for the —— district, subject to the opinion of the court upon the following point, viz.: whether the *onus probandi* lay upon the Crown or upon the defendant.

Washburn, for the defendant, contended that there being no provision in the statute of William to throw the onus upon the defendant, this case must rest upon the general principles of the common law, and that it was therefore incumbent upon the Crown to prove the negative, viz.: that the vessel seized was not

(*a*) 2 T. R.

British built, which would be effected by shewing that she was built in foreign parts, *e. g.*, in the United States.

That this was agreeable to the doctrine laid down in Williams v. The East India Company, (*a*) viz.: that the law will not presume a party to have been guilty either of a criminal act or culpable neglect, but that such must be proved by evidence although that evidence must necessarily be negative ; and to that in the case in which it had been determined, that proof of a clergyman not having read the thirty-nine articles must come from a person proposing to establish that negative. That as the provincial statute 4 Geo. IV. had in case of the seizure of goods provided that the onus should lie on the defendant, that provision was *prima facie* authority against the Crown in this case.

Boulton, Solicitor-General, on the part of the Crown, insisted, that there was not occasion for a statute to lay the onus upon the defendant in this case, the common law being sufficient for that purpose, as under the game laws a person must shew himself to be qualified.

The defendant traverses the boat Fanny being foreign, it is therefore incumbent upon him to shew that she is not so, by proving her to be British built.

That the defendant claiming this boat after a seizure is not sufficient to entitle him to restitution; he must prove his right, his whole case.

(*a*) E. R. 193.

The defendant himself is not charged with a crime; this is a proceeding in *rem*. The property has become derelict—is seized by the officers of the Crown, and the defendant to get it restored must shew that it is not a subject of seizure.

The proceeding resembles that of taking lands to which there is no heir; there the lands being once vested in the Crown, any person claiming must shew his title.

That this point had been determined in the case of the King v. McCartney in Michaelmas Term, 1822.

Per Curiam.—Judgment for the Crown.

McLauglin v. McDougal.

The filing the roll with the clerk of the Crown or his deputy, is a sufficient entry of the issue upon record to enable a plaintiff to move for judgment as in case of a nonsuit.

Boulton, Solicitor-General, had obtained a rule *nisi* in this cause for judgment as in case of a nonsuit upon an affidavit, stating that the issue roll had been filed in the office of the deputy clerk of the crown and notice of trial given in the year 1822, and a second notice in 1823, but that the plaintiff had not proceeded to trial.

Ridout, shewing cause, contended—1st. That this affidavit was insufficient; that it ought, agreeable to the forms in the books of practice, to state that issue had been joined. 2nd. That in this case the issue had not been entered agreeable to the course laid

down in the books of practice, that is to say, by entering the whole of the proceedings on record and carrying them into the office; and that until this was done by the plaintiff, either voluntarily or in consequence of his being ruled to that effect, the defendant is not in a situation to move for judgment as in case of a nonsuit, and cited 4 T. R. 195, and 1 Doug. 197.

Boulton, Solicitor-General, contra, contended that the affidavit was sufficient, that the roll being filed with the clerk of the Crown or his deputy was a sufficient entry of the issue, and,

Of this opinion was the court; the rule was, however, discharged upon the plaintiff's undertaking to go to trial and pay the costs.

Brookfield v. Sigur.

Smallness of damages no objection to a new trial where a verdict is manifestly contrary to evidence and the judge's opinion. A nonsuit cannot be moved for in bank, unless a point has been reserved at *nisi prius*.

This was an action of trover tried at the last assizes for the Niagara District. It appeared in evidence that the defendant, a constable of the district, had exposed to sale by auction a yoke of steers which he had taken in execution under a process of the court of requests. The plaintiff bid them off, but not having the money to pay for them immediately, it was agreed between him and the constable that they should be deposited in the hands of some third person for a short time until the plaintiff could procure money to pay for them.

Plaintiff some time afterwards offered a part of the money, which the constable refused to take, and re-sold the steers.

The jury, contrary to the charge of the judge, found a verdict of £6 10s. No point was reserved at the trial.

Washburn had moved that the verdict be set aside or a nonsuit entered; but it being determined by the court that a nonsuit could not be moved for unless a point had been reserved at the trial, he had insisted upon and obtained a rule *nisi* for a new trial alone.

Macaulay shewed cause, he contended—1st. That the counsel on the other side could not be allowed to alter his motion, and that in the form it was originally framed nothing could be granted him by the court; that a motion to set aside a verdict was in itself nugatory without being followed by a new trial, and that the court would not grant indirectly that which they would not grant directly. That setting aside a verdict agreeable to the plaintiff's motion, would in effect be granting a nonsuit which could not be done unless a point had been reserved. Upon this point, however, the court overruled the counsel, it being suggested and allowed that the irregularity of the defendant's motion had in some measure arisen from some observations of the court. He contended,

2ndly. That the damages in this case were so very small that the court would not interfere; that the minimum as established by the English practice for granting new trials, which we have adopted, was

£20, as laid down in Chitty's reports. 3rdly. The counsel assumed that the facts appearing at the trial varied from the judge's notes, and proposed reading affidavits of jurymen and persons at the trial in explanation of the judge's notes; but in this he was overruled by the court; *Campbell*, J., observing, that affidavits of jurymen or other persons could not be read unless the judge had any doubt upon his mind as to the facts, which was not the case here.

4thly. That the jury having upon evidence found a verdict for the plaintiff, the court would not allow a mere point of law to be litigated, viz.: whether there was a sufficient charge of property to maintain the action, which in fact was the point attempted to be litigated.

Rule absolute for a new trial.

Myers v. Rathburn.

Where a defendant had neglected to put in special bail upon the representation of the plaintiff that it was unnecessary, (they being about to compromise,) proceedings upon the bail bond were staid for one month, to give defendant an opportunity to put in such bail.

In this case an action had been commenced upon the bail bond in consequence of bail above not having been put in and perfected, and *Robinson*, Attorney-General, had obtained a rule to shew cause why the bail bond should not be delivered up to be cancelled upon affidavits stating a treaty for settlement of the action between the plaintiff and defendant; and that in consequence of such treaty being on foot, plaintiff had told defendant that there was no necessity for entering special bail, and that plaintiff had also informed one of the bail to the sheriff that he

might consider himself as no longer responsible for the appearance of the defendant, as himself had settled, and that defendant had been dissuaded from entering special bail by plaintiff frequently stating to him that there was no necessity so to do.

Macaulay shewing cause, insisted that a bail bond being a writing under seal could not be destroyed by a parol agreement.

That the settlement proposed between plaintiff and defendant not having taken place, it became necessary that the defendant and his bail to the sheriff should have proceeded in the cause by putting in special bail.

That there was no ground for the equitable interference of the court, unless merits were sworn to, and that if there were such, the proceedings might be stayed upon payment of the costs incurred in the action commenced against the bail, putting in bail above and going to trial.

Per Curiam.—Proceedings to be stayed for one month, to enable defendant to put in bail above.

Doe dem. Griffin v. Roe.

Plaintiff's attorney having served his declaration in ejectment with notice to appear in a term not issuable agreeable to a modern rule of the court of K. B. in England, not introduced into this country, nor appearing in Tidd's edition of 1817, the judgment was set aside. The English rule is now adopted.

Agreeable to a rule of court ordered by the court of King's Bench in England, of Easter Term, 2 Geo. IV., and printed in Bamawell and Alderson's re-

ports, (*a*) the plaintiff's lessor in this case had served his declaration in ejectment immediately before last Michaelmas Term, with notice to appear in said Michaelmas Term; and, upon the usual affidavit of service, had moved for and obtained his judgment *nisi* against the casual ejector; and the tenant in possession not having entered into the usual consent rule, he had signed judgment and issued a writ of possession to the sheriff.

Taylor had obtained a rule to shew cause why the judgment against the casual ejector, signed in this cause, should not be set aside and the tenant restored to his possession on the ground, that although by rule of this court, the practice thereof is to be governed by that of the court of King's Bench in England, that rule must be construed as extending only to such rules and practice as the practitioners have an opportunity of knowing by reference to the acknowledged books of practice.

Macaulay, shewing cause, contended, that the English rule in question was sufficiently old to be considered as part of our practice; that no limitation was made by our own rule as to what parts of the English practice we were to adopt, but that we had embraced it in toto.

The court were of opinion, that as Tidd's practice was that to which the practitioners usually referred for authority in this country; and as the English rule in question had not, as appeared, been published in that work, it would be unreasonable that suitors or

(*a*) 4 B. & A. 539.

practitioners should be surprised by its production, and directed that the edition of 1817 should be considered as that which regulated the practice of this court.

Rule absolute.

CUMMING v. ALLEN.

Where there is no provision in an order of reference at *nisi prius* to make it a rule of court, the court will not set aside the award.

In this case a verdict had been taken for £250, subject to the award of arbitrators; but the order of reference contained no provision to make it a rule of court. The arbitrators had awarded that the defendant should furnish the plaintiff with a suit of clothes.

Washburn had obtained a rule *nisi* to set the award aside on the ground of uncertainty, and that articles of dress were not the subject matter of the submission.

Boulton, Solicitor-General, shewing cause, contended, that there being no provision for making the order of *nisi prius* a rule of court, that this court had no authority to interfere; that the case was analagous to that of a submission by bond, where, if there was no such provision, it could not be summarily proceeded upon in this court. That the case of Smith v. Abbot was in point, where the parties having referred disputes to arbitration, applied to the court to make their submission a rule of court, but the application was refused upon the ground that there was no provision for such a proceeding in their submission.

Washburn, contra, contended, that there being a verdict in this case made a material distinction, inasmuch as it was subject to the equitable interference of the court, although no provision was made for making the order of *nisi prius* a rule of court.

That the exercise of the authority of the court in this case would be analogous to that of granting a new trial.

Rule discharged.

FERGUSON v. MURPHY.

An affidavit to hold to bail stating, "that the defendant was indebted to the plaintiff in the sum of £50, for the use and occupation of a certain tenement," *held* sufficient.

Macaulay had in a former part of the term obtained a rule *nisi* to cancel the bail bond and file common bail in this cause for defects in the affidavit, which stated, that the defendant was indebted to the plaintiff in the sum of fifty pounds for the use and occupation of a certain tenement.

He cited the case of Taylor v. Forbes (*a*) as in point, contending that as in that case the affidavit was adjudged to be defective for not stating that the goods were sold and delivered by the plaintiff to the defendant, so in the present case, the affidavit was equally faulty in not stating that the tenement was let by the plaintiff to the defendant.

Boulton, Solicitor-General, shewed cause.—He insisted that the affidavit was sufficient, and relied

(*a*) 11 East. 315.

upon a case decided in Trinity Term, 40 Geo. III., cited in Tidd, wherein it was determined that an affidavit, made by a married woman, "that the defendant was indebted for the rent of lodgings," was sufficient, although it did not state to whom the lodgings were let.

Macaulay, contra, contended, that the case cited from East. was in point with the present, and that the principle there laid down by Lord *Ellenborough* should not be departed from, viz.: that the strictness required in affidavits was intended not only to guard against perjury, but to prevent misconceptions of the law by persons making them. That the case cited from Tidd was not to govern the present, it being but loosely referred to without the name of the cause. That such a defective statement of a cause of action would be insufficient in a declaration, and a *fortiori* should be so in an affidavit to arrest the person.

CAMPBELL, J.—This is a rule to shew cause why an affidavit to hold to bail should not be set aside for uncertainty; it is undoubtedly true that uncertainty in such affidavit in a part material is fatal: affidavits for holding to bail must be direct and positive as to the cause of action, and not merely argumentative or by way of inference or reference to books, accounts, notes, or bills of exchange, or as deponent verily believes. (*a*)

The strictness, however, required in this respect must not be carried to an unreasonable extent, and must ever be governed by the nature of the transac-

(*a*) *Vide* 1 T. R. 716; 8 East. 106; 7 East. 194; 8 T. R. 333.

tion and the relative situation of the parties, for besides the general exception in favour of those who sue in another right, such as executors, administrators, assignees, or trustees, who are only required to swear to their belief of the debt being still due and unpaid, it has been decided in Bradshaw v. Suddington, (*a*) that an affidavit of a person suing in his own right, stating the debt to be due on a certain bill of exchange without stating in what capacity the plaintiff sued, whether as payee or endorsee, was sufficient; an affidavit of a married woman stating merely that defendant was indebted for rent of lodgings without saying to whom the lodgings were let, and also for money lent by her to defendant, (although she was incapable of lending money,) was held sufficient, for it was reasonably inferred that the lodgings were let to defendant, and that she might probably have lent the money as agent for her husband; in the case of Barclay and others, assignees, v. Hunt, an affidavit stating, as appears to deponents by the last examination of bankrupt, and as they verily believe, was held sufficient, this of course is within the general exception already mentioned; but Lord *Mansfield*, in delivering the unanimous opinion of the court, took occasion to observe that the courts ought never to lay down a rule to be so rigidly construed as to lay unreasonable difficulties upon suitors, and to render them liable to inconveniences worse than those the rules were intended to prevent; the same liberal principle was acted upon in the case of Moutley v. Richardson (*b*) by *Forster* and *Wilmot*, justices, who admitted an affidavit stating "that the defendant was indebted to him in such a certain sum as he the

(*a*) 7 East. (*b*) 2 Bur. 8 T. R.

plaintiff computed it," observing that the more rigid rule had gone a great way; and in Copenger v. Beaton, it was the unanimous opinion of the court, consisting of Lord *Kenyon*, C. J., and *Grose Lawrence*, and *LeBlanc*, Justices, that an affidavit stating "that defendant was indebted to plaintiff in £12,000 and upwards for money had and received on account of plaintiff," without saying received by the defendant, was sufficient, upon which occasion they observed that no precise words were required in an affidavit to hold bail, it being sufficient to state, "defendant being indebted to plaintiff in a certain sum," and specifying the nature of the demand, and the courts ought not to entangle suitors in unnecessary niceties; yet the same judges, with the exception of Lord *Kenyon*, whose place was supplied by Lord *Ellenborough*, a few years afterwards, seem to have altered their opinion and to have laid down a much more rigid rule, as appears by their decision in Perks v. Severn, Cashrow v. Haggar, and finally, in Taylor v. Forbes, where they rejected affidavits, stating defendants being indebted to plaintiffs for goods sold and delivered—omiting to say delivered by plaintiffs to defendants. Very great deference is undoubtedly due to the opinions of those last mentioned eminent judges, but certainly not more so than to the opinions of such men as *Forster*, *Wilmot*, *Mansfield*, and *Kenyon*, whose more liberal sentiments I am inclined to prefer. All authorities, however, agree, that affidavits for holding to bail should be sufficiently explicit and positive to sustain (if false) a prosecution for perjury, which I believe to be the only true criterion, and I am inclined to think the affidavit before us is sufficiently explicit and posi-

sitive for that purpose according to the authorities I have cited, or at least the more liberal part of them. But those authorities are not all we have to govern our decisions in cases of this kind: with us the law of arrest and holding to bail turns upon a very different principle to that of merely swearing to a debt, which, however positively sworn to, and to whatever amount, seems to be but a secondary object in the affidavit for holding to bail—the principle being the apprehension of intended fraud by leaving the province without paying the debt, and without swearing to which no one in this province can be arrested or held to bail for any amount of debt. In the present case the law seems to be sufficiently complied with in that respect also, and therefore I am of opinion that the rule should be discharged.

Per Curiam.—Rule discharged.

EASTER TERM, 6 GEO: IV., 1825.

Present:

THE HONOURABLE CHIEF JUSTICE POWELL.
MR. JUSTICE CAMPBELL.*

RUGGLES —— GOODFAME, ON THE DEMISE OF, v. CARFRAE.

Semble, that a *fi. fa.* cannot issue against lands and tenements of an intestate deceased, as being assets in the hands of an administrator.

This was an action of ejectment tried at the assizes for the Home District, and a verdict for the lessor of the plaintiff who claimed as heir at law to James Ruggles, his father, deceased, and supported his claim by the ordinary testimony of the ancestors dying in possession and his own title as heir.

The defendant claimed as purchaser at a sheriff's sale, and produced the following documents in support of his title:

A judgment entered and docketed against James Ruggles, the ancestor, in favour of John Grey.

A *scire facias* against the administratrix of Ruggles, deceased.

A *fieri facias* against the goods of the deceased, and a return of *nulla bona.*

* Mr. Justice BOULTON did not take his seat upon the bench after the 19th of April, until his return from England.

A *fi. fa.* against the lands of the deceased.

The sheriff's deed to the defendant, he having been the highest bidder at the sale.

Upon these facts the judge at *nisi prius* directed the jury that he considered the law to be in favour of the plaintiff, it having been determined in this court that lands were not assets in the hands of administrators; and the jury accordingly found a verdict for the plaintiff.

Baldwin moved for a rule *nisi* upon the ground of misdirection in the judge who tried the cause.

He submitted that there was a difference to be taken between the case of Wycott v. McLean referred to by the judge who tried the cause and the one before the court, the former being a case where no judgment had been obtained against the intestate, whereas, in the present, a judgment which bound his lands had been entered and docketed before his death, which clearly subjected the lands to the provisions of the 5th George II.

The counsel referred to the case of Gray and Wilcox, in which it had been decided upon appeal to the King in Council, that a *fi. fa.* could issue against lands and tenements in this province.

He further observed, that the latter decision of Wycott v. McLean, if it affected the present case, had been decided long after the defendant Carfrae had been in possession of the premises of which he was attempted to be dispossessed by the verdict in the present action.

Macaulay, contra, observed that there was no distinction whether the judgment was obtained against the testator or intestate, or against the administrator. That in neither case did any thing appear upon the record on which to ground an execution against lands as in the possession of the personal representatives.

That, in the case of Gray and Wilcox, the lands were in possession of the party himself, against whom the execution had issued, and the refusal of the execution appeared on record.

[The *Chief Justice* observed, that on a writ of appeal the party could state his grounds.]

The counsel considered that there was no difference between a writ of error and an appeal. That they would be equally nugatory in this case, as no facts could appear upon the record upon which the superior court could adjudicate.

POWELL, C. J.—The law, as now ruled in this province, is that which was stated by Mr. Justice *Boulton*, who tried the cause, viz.: that an execution cannot issue against the lands and tenements which belonged to a deceased person as assets in the hands of his administrator, it having been so decided by a majority of the judges of this court, although with my own dissent. I therefore do not think that a new trial can he granted in this case, particularly as Mr. Justice *Campbell* concurred in that decision. (*a*)

Per Curiam.—Application refused. (*b*)

(*a*) The 5 Geo. II., cap. 7, sec. 4, enacts, "that the houses, lands, negroes, and other hereditaments and real estate, situate or being within any of the said plantations belonging to any person indebted, shall be liable to

THROOP v. COLE.

A plaintiff cannot, after taking out his *ca. re.* in one district, file his declaration in another.

The defendant had been arrested upon *a capias*, issued out of the office of the deputy clerk of the Crown, in the Newcastle District. The plaintiff filed his declaration in the Home District.

Macaulay moved for and obtained a rule *nisi* to set aside the declaration on the ground of irregularity.

Per Curiam.—Application granted.

---

and chargeable with all just debts, duties, and demands of what nature or kind soever, owing by any such person to His Majesty or any of his subjects; and shall and may be assets for the satisfaction thereof in like manner as real estates are by the law of England, liable to the satisfaction of debts due by bond or other speciality; and shall be subject to the like remedies, proceedings, and process in any court of law or equity, in any of the said plantations respectively, for seizing, extending, selling, or disposing of any such houses, lands, negroes, or other hereditaments, and real estate, towards the satisfaction of such debts, duties, and demands, in like manner as personal estate in any of the said plantations respectively are seized, extended, sold, or disposed of, for the satisfaction of debts.

(*b*) It appears from the case of Gray and Wilcox, referred to by the counsel for the defendant, that it was doubted in the year 1808, whether a writ of *fieri facias* could issue against lands and tenements in this province, under the provisions of the statute of Geo. II. In that case the plaintiff had signed a judgment upon a *cognovit actionem*, and had obtained a rule in this court to shew cause why a writ of execution should not issue against the lands and tenements of the defendant, which rule was afterwards discharged, and the proceedings being removed to the court of appeal in this province they were affirmed.

They were afterwards by the plaintiff referred to the King in Council, who, by decree dated the 15th of February, 1809, reversed the decisions of the Court of King's Bench and Court of Appeal, and directed that a writ of execution should be awarded to the appellant against the lands and tenements of the respondent.

The case of Wycott v. McLean, admr. of Robinson, referred to by the judge who tried this cause, was argued upon demurrer and a judgment for the defendant.

The plaintiff had brought his action against the defendant as administrator, who pleaded *plene administravit*. The plaintiff replied that the defendant had assets, viz.: lands, which had belonged to the intestate, to which replication the defendant demurred and had judgment.

This it is presumed was the case referred to by *Powell*, Chief Justice, in that of Patterson v. McKay, in which case he observed, that it had been determined, that lands could not be sold in an action against an administrator, and that the difficulties in carrying the provisions of the statute Geo. II. into execution, furnished a strong inducement to some legislative provision.

LANG v. HALL.

Where an action is commenced in K. B., and arbitrators upon reference award damages under £15, the plaintiff is not deprived of costs under the district court act.

In this case the plaintiff had brought his action for a sum which excluded the jurisdiction of the district court. The matter had been referred to arbitration, and the arbitrators had awarded the plaintiff a sum with costs, which, if recovered by verdict, would, by the district court act, have deprived the plaintiff of his costs, unless the judge at the trial had certified under the statute.

Boulton, Solicitor-General, moved for an order to the master to tax the plaintiff such costs only as he would have been entitled to, if he had brought his action in the district court.

Sed per Curiam.

Parties are not confined to district court costs in cases where they have had no opportunity of applying to a judge at *nisi prius* for a certificate.

Application refused.

SECORD v. HORNOR.

Where an action was brought upon a promissory note, the consideration for which had arisen in the district of A., and the plaintiff brought his action and recovered a verdict under £15 in the district of B., this court refused to set aside the judge's certificate to entitle the plaintiff to costs under the district court act.

In this case the plaintiff resided in the district of Gore, and the defendant in the district of London. The defendant had contracted a debt to the plaintiff, in the district of Gore, and had afterwards given his promissory note for the amount at Berford, in the district of London.

The sum for which the note was given was within the jurisdiction of the district court. The plaintiff commenced his action in the Court of King's Bench, and obtained a verdict for the amount of the note at the assizes for the district of London.

After verdict he applied to the judge who tried the cause for a certificate under the district court act, upon the ground that the debt for which the note had been given having been contracted in the district of Gore, the plaintiff would, if called upon to prove the consideration of the note, have been obliged to resort to the district of Gore for the testimony of witnesses whose attendance he could not have compelled by district court process.

The certificate was granted. McAulay applied to discharge it.

Sed per Curiam.—Application refused.

WARD v. STOCKING AND DALEY, BAIL OF MOSIER.

Where a defendant presented himself to the sheriff in discharge of his bail, before the return of the *ca. sa.* which had been lodged in the office merely to fix the bail, and the plaintiff nevertheless proceeded against them, this court set aside the proceedings.

Macaulay had obtained a rule *nisi* to set aside the proceedings against the defendants in this case, upon an affidavit stating that the defendant in the original action had presented himself to the sheriff before the return of the *ca. sa.* which had been lodged in his office for a return of *non est inventus*, and had required him to take him in discharge of his bail, (the defendants in this action.)

The plaintiff's attorney had ordered the sheriff by letter not to take the defendant in the original action.

The counsel submitted that although the sheriff was not bound to hunt for the defendant, yet, as he had presented himself to him for that purpose, he should have taken him.

Baldwin shewed cause.—He contended that it was not the duty of the sheriff to take the defendant, and that it was the regular and common practice to issue a *ca. sa.* against a defendant for the purpose of giving notice to the bail, which was an indulgence to them. But that if it was the duty of the sheriff under the circumstances to have taken the original defendant, the sheriff should have done so; and that it would be unjust to punish the plaintiff for neglect of duty in the sheriff. The counsel cited the cases below to shew that sheriffs may refuse to take defendants against whom a *ca. sa.* has issued as a notice merely that a plaintiff intends to proceed against the bail.

Macaulay, contra, observed, that the cases cited were where parties had attempted to surrender after the return of the *ca. sa.*, and, therefore, were not in point: that the sheriff was discharged by the plaintiff's letter.

Per Curiam.—Rule absolute.

MATTICE v. FARR ET AL.

In trespass *q. c. f.* and for destroying goods, the township laid is descriptive and must be proved as laid, and if the trespass is proved to be in another township, the variance will not be cured, because the township laid has the same name with the county in which the true township is situate.

This was an action of trespass for entering plaintiff's house, and destroying his goods, &c., which the declaration stated to be in York, in the Home District, and a verdict for the plaintiff.

The proof, at the trial, was, that the defendants committed the trespass in Etobicoke in the Home District. The defendants' counsel had moved for a nonsuit at *nisi prius*, upon which *Boulton* had obtained a rule *nisi* to set aside the verdict upon the ground of variance between the declaration and proof.

Baldwin, shewed cause.—He contended that the gist of this action being the destruction of the plaintiff's furniture rather than the trespass upon his land, that *locus in quo* was not the subject of dispute; and therefore the word "York," in the declaration, was to be considered rather as venue than description; and that York being the county in which Etobicoke is situated, the declaration was substantiated. The counsel cited the authorities below. (*a*)

Boulton, Solicitor-General, contra.—That the name York is not venue, but was in fact the *locus in quo*, which was necessary to be stated and proved, which not being done the plaintiff must be nonsuited; the language of the declaration is broke and entered his house there situate, &c., which situation must be proved as laid. The counsel cited the authorities below. (*b*)

(*a*) 2 East 501; Archbold, 103; Phillips, 174. (*b*) Salk. 452; Strange, 595.

Baldwin, in reply, contended, that York was venue and not local description, and that the court would give it such a meaning, viz., would consider it as the county of York, to support the verdict, and relied upon the case cited, (*a*) where it was contended, in a nuisance case, that the injury must be laid in the proper vill, but that opinion was overruled by Lord *Ellenborough*, who said it was unnecessary, the *locus* not being the gist of the action.

CHIEF JUSTICE.—The question is, whether in spite of reason and common sense we can consider that York means the county and not the township?

Where a trespass is charged to have been committed upon your close, the least you can do is to bring it into a township if not a vill. I don't see how, considering York as a county, as has been contended for, can mend the matter. It is clear that to enable a defendant to make his defence in an action of *quare clausum fregit* that a township should be laid.

Per Curiam.—Rule absolute.

LOSSING v. HORNED.

It seems to be sufficient in an action upon bond, conditioned for the performance of an award upon the plea of *non est factum* and subsequent suggestion of breaches by the plaintiff, to prove the bond and submission set out upon the record, and an award tallying with it. That if a defendant proposes to object to matter apparent upon the face of the award or to variance between it and the submission, he should pray *oyer* and *demur*.

This was an action against the defendant as co-obligee upon a bond of submission, and tried at the assizes for the London District. Declaration in debt

(*a*) 1 T. R. 479.

upon bond. Plea, *non est factum.* The condition, as enrolled by the plaintiff, recited that a controversy of a very important nature had arisen between Hugh Webster (the co-obligee) and the plaintiff, and they had agreed to refer it to David Curtis, James Mills and three others named, and were to abide their award. Breach, that said David Curtis, John Mills, &c., made their award, &c., by which said David Curtis, John Mills, &c., awarded that all controversies should cease touching the said premises, and that said Hugh Webster should, on demand, &c., pay to the plaintiff £125, with costs annexed, that is to say, £77 17s. 6d. for costs of reference, fees and expenses of said arbitrators. Averment of diligent search for Webster, that he could not be found—non-payment by Webster, and demand of the £125 awarded, at the house of Horned. Non-payment by him. Similar averments as to the £77 17s. 6d. costs. There was a verdict for plaintiff upon the breaches for the amount only of the sum awarded to the plaintiff.

Boulton had obtained a rule to shew cause, why the assessment of damages should not be set aside on the following objections:—

Firstly.—That no evidence had been given at the trial to shew that the bond produced was the same with that declared upon.

Secondly.—That no evidence had been given to connect the award with the submission, under which the arbitrators were supposed to act.

Thirdly.—That the award was void on the face of

it, the arbitrators having awarded themselves costs, which they had no right to do, and inasmuch as there was no mutuality.

Fourthly.—That the demand of debt and costs was not a demand of the debt alone.

Fifthly.—That the demand should have been personal.

Sixthly.—That the submission varied from the award, the former being in the name of James, and the latter in that of John.

Macaulay shewed cause, as to the two first objections he observed that there was no variance between the evidence and the record; and that all the plaintiff had to do was to prove the breaches suggested, which he had done by producing a bond and submission, and an award tallying with it; to this point he cited (*a*) the authorities below.

As to the third, he contended that the defendant's objection came too late. If he had intended to insist that the award was void upon the face of it, that should have been done by special pleading and not after verdict. That a note might as well be impeached after assessment of damages upon it as this award. The one as well as the other is only laid before the jury for the purpose of ascertaining the plaintiff's damages. That if the defendant had meant to contend that the award was intrinsically void, he ought to have demanded oyer and demurred.

(*a*) 2 Camp. 87; 7 T. R. 766.

The counsel cited *Caldwell* in support of this position, as also the (*a*) authorities below.

As to the objection to the want of mutuality, he contended that the direction of the arbitrators that all controversies should cease touching the said premises, constituted a sufficient mutuality, as appeared from the case of ——— v. Grevett, (*b*) and that the sum awarded the plaintiff, must be taken to be awarded in satisfaction.

As to the fourth objection, he observed that as there was a doubt as to the manner in which the demand of the damages awarded and the costs had been made, that it might fairly be inferred that the bill of the arbitrators' costs having been upon a separate paper, although annexed to the award, that the demands were several, as indeed had been found by the verdict.

As to the fifth, he contended that a personal demand was unnecessary except for the purpose of subjecting a party to attachment; and referred to the presentment of bills of exchange and services of law proceedings, between which and the service of an award for the purpose of an ordinary suit, he contended there was no distinction, and cited 5 Taunton; 1 Bos. and Pull. 394: Chitty 17, 18, and Caldwell 191, to shew that the not being able to find Webster, was a sufficient excuse for not making a personal demand, if such could be considered as a condition precedent. The counsel cited the cases of Roper v. Hodges, and Cresswell v. Randolph, (*c*) to shew that a request was not necessary, and he

(*a*) 1 Saunders 327, B.; 3 Veal v. Warner in notes. (*b*) 1 Lord Raymond, 961. (*c*) 1 Raymond, 234, 594.

relied particularly upon the case of Brandon v. Brandon, (*a*) as clearly shewing that where an action is brought upon an award, no personal demand is necessary; observing that in that case, although Lord Chief Justice *Eyre* consented with the other judges that it had been the practice to require a personal demand in cases of attachment, yet he did not think it was even in those cases required upon principle.

As to the sixth, that the word "said," made it evident that the arbitrators in the award were the same with those in the reference.

Boulton, Solicitor-General, contra, contended, that it was necessary for the plaintiff to have proved the breaches assessed step by step. That for any thing that appeared in evidence, there might have been another bond on which the arbitration had proceeded. Further, that the award should have been connected with the bond by evidence, and cited African Company v. Mason. It should have been shewn that the subject matter of the recital, namely, the controversy of an important nature, was referred and no other; whereas it appeared by the award that the arbitrators had made their award concerning "all controversies." To shew that the recital was important and the key to lead the arbitrators, he cited the authorities below. (*b*) Further, that it should have been shewn that the bond from Horned to Lossing was the same document as that from Horned and Webster, and that it should have been proved that the arbitrators had proceeded upon the bond upon which the action was brought, and cited Hodgkinson v. Marsden. (*c*)

(*a*) 1 B. & P. 394. (*b*) Strange, 297; 2 Sanders, 414. (*c*) Com. Dig. 542.

That the award was void upon the face of it, for that the arbitrators had awarded themselves costs. It was also void inasmuch as the arbitrators had awarded that all controversies should cease, whereas they only had been authorised by the condition to arbitrate on one matter, and nothing can be inferred to have been submitted to them, which does not appear to have been referred by the submission. He admitted that the submission might have been extended by averment, but then the averment must be proved as in Gansford v. Griffith. The award was insufficient, inasmuch as it does not award a release to be given to the defendant.

As to the fourth point, want of demand, that demand of the two sums awarded could not be considered as a demand of one. That the instances of bills of exchange, &c., adduced on the other side, were not in point, being cases where the law raised an assumpsit, and where no demand was necessary.

The award was also void for the variance between the submission and award. In support of which he cited Bos and Pull, and concluded by observing, that the plaintiff had not proved his breaches as suggested, viz., that the arbitrators had made their award under the submission.

The CHIEF JUSTICE observed, that the court thought the two subjects of the demand being stated upon different papers as in evidence, (if a demand was in fact necessary,) it might be considered as such, and a demand of that which the plaintiff was entitled to receive. That the court considered the objections

futile, except the one to the arbitrators awarding costs to themselves, which they had no right to do, and which circumstance the jury had considered in their verdict.

Per Curiam.—Rule discharged.

RULES OF COURT.

Regula Generalis (English.)

Michaelmas Term, 1820.

Whereas by the common consent-rule in actions of ejectment, the defendant is required to confess lease, entry, and ouster, and insist upon his title only: and whereas in many instances of late years, defendants in ejectment have put the plaintiff, after the title of the lessor of the plaintiff has been established, to give evidence that such defendant was in possession (at the time the ejectment was brought) of the premises mentioned in the ejectment, and, for want of such proof have caused such plaintiffs to be nonsuited: and whereas such practice is contrary to the true intent and meaning of such consent-rule, and of the provisions therein contained for the defendant's insisting upon the title only; it is therefore ordered, that from henceforth in any action of ejectment the defendant shall specify in the consent-rule for what premises he intends to defend, and shall consent in such rule to confess upon the trial that defendant (if he defends as tenant, and in case he defends as landlord, that his tenant) was at the time of the service of the declaration in possession of such premises; and that, if upon the trial the de-

fendant shall not confess such possession as well as lease, entry, and ouster whereby the plaintiff shall not be able further to prosecute his suit against the said defendant, then no costs shall be allowed for further prosecuting the same; but the said defendant shall pay costs to the plaintiff in that case to be taxed.

Easter Term, 2nd Geo. IV.

It is ordered that in all country ejectments which hereafter shall be served before the essoin day of any Michaelmas or Easter term, the time for the appearance of the tenant in possession shall be within four days after the end of such Michaelmas or Easter term, and shall not be postponed till the fourth day after the end of Hilary or Trinity terms respectively following.

Provincial.

It is ordered that in future where a rule to shew cause is obtained in this court to set aside an award, the several objections thereto, intended to be insisted upon at the time of making such rule absolute, shall be stated in the rule to shew cause.

By the Court.

TRINITY TERM, 6 GEO. IV., 1825.

Present:

THE HONOURABLE CHIEF JUSTICE POWELL.
MR. JUSTICE CAMPBELL.

DOE ON THE DEMISE OF LINK v. AUSMAN.

Semble, that a will is sufficient to give an estate although not registered, provided no previous transfer of the property has been registered.

This was an action of ejectment tried at the assizes for the ——— district and a verdict for the plaintiff. There were several points reserved at the trial, but the only one to which the court above adverted in its decision, was one raised upon the registry act, viz., whether by that statute it was necessary that a will should be registered within six months after the decease of the testator, (or at least before a transfer of lands by his heir at law,) although no previous registry of the land had ever taken place. Myers, the tenant in fee of the land in question, had included it in a residuary devise to his grand-children. The will was not registered, and Myers the younger, his heir at law, had conveyed the premises in question to the lessor of the plaintiff. It was contended for the defendant, that the will was valid, there being no occasion for a registry unless some other instrument affecting the property had been previously registered.

The judge who tried the cause directed the jury

that the will was void for non-registry, and consequently that the conveyance to the plaintiff's lessor was valid.

Baldwin, for the plaintiff's lessor, now contended that the exposition of the statute by the defendant's counsel was by an astute and unwarrantable construction of its clauses entirely departing from its object. That a rigid grammatical dissection of the sentence would render it nonsense or unintelligible. That whoever reads it must necessarily infer its meaning; that the reasonable reading seems to be, "that every deed of lands shall be held to be void against the subsequent purchaser unless the older deed should be registered before the memorial of the subsequent deed," and to this construction it must be confined, for the preamble of the statute proposes such registration for the purpose of the more perfect knowledge of the transfer of property devised by grant from the Crown; and the preamble of the second clause to the same statute commences the proposed operation of the law from and after the confirmation by grant, &c., so that unless some express exception was made in favour of the first conveyance from the grantee of the Crown exempting it from the necessity of registry, the law must be applied to every conveyance from the king's deed downwards *ad infinitum*.

According to the arguments of defendant's counsel, if A., the grantee of the Crown, sells to B., and B. does not register, neither need his grantee C. nor any of his subsequent assigns, which is defeating the object of the statute, which is to make those transfers

known. As a further instance under this construction, if A., the grantee of the Crown, sells to B. for valuable consideration, and again sells to C. for valuable consideration without B.'s knowledge and to his fraud, it being in the discretion of B. and C. to register or not, and both equally innocent of wrong, C. acts upon his discretion and does not register; now defendant's counsel say that B.'s deed is not to be considered as fraudulent and void against C., because A.'s title to B. was not registered first; and that in the case before the court the will cannot be deemed fraudulent against the title of Link, the plaintiff's lessor, because no previous transfer had been registered, which is the very evil the law was meant to oppose.

That plaintiff's counsel further urged, that this provincial statute seemed copied from the 2nd and 3rd of Anne, ch. 4, s. 1, which contains the same words, "at any time," &c., but it is to be observed that a subsequent statute 7th Anne, ch. 20 s. 1, which in its general wording is borrowed from the last cited, omits those ambiguous members of the sentence on which the counsel relies without any reason given for such omission. That it is fair to suppose they were omitted for their ambiguity or inutility; that the court will not now suffer a member of a sentence, ambiguous, or equivocal, to defeat the broad, obvious, and salutary object of the law.

Macaulay, for the defendant, insisted that the words of the statute were too plain to allow of any forced construction; no will or deed is void by the statute for not being registered unless some previous regis-

tration of the property in question has been made. The statute makes provision for registering deeds at the election of parties, and directs "that any deed and conveyance that shall at any time after any memorial is so registered be made and executed of the lands, &c., comprised or contained in any such memorial, shall be adjudged fraudulent and void against any subsequent purchaser or mortgagee for valuable consideration, unless such memorial be registered as by the act is directed, before the registering of the memorial of the deed or conveyance, under which such subsequent purchaser or mortgagee shall claim." And that every devise by will of the lands, &c., mentioned or contained in any memorial registered as aforesaid, that shall be made and published after the registering of such memorial, shall be adjudged fraudulent and void against a subsequent purchaser or mortgagee for valuable consideration, unless a memorial of such will be registered, &c.

The same words being used in that part of the statute which relates to wills, shew that they were not inserted by error or oversight, but that they were intended to convey that plain and obvious meaning which they evidently do, and which is contended for by the defendant.

CHIEF JUSTICE.—As the judge who tried the cause thinks there was a misdirection, I consider that there must be a new trial.

CAMPBELL, J.—I have no doubt as to there being no necessity to have this will registered.

New trial.

SHANKLAND v. SCANTLEBURY ET AL.

A plaintiff and defendant having settled the action between themselves without paying the attorney's costs, the court refused to make the attorney produce his warrant in an action instituted against the bail to recover those costs.

Debt upon recognisance of bail.—The defendants were bail of one Baxter in an action at the suit of Shankland the plaintiff. The plaintiff and defendant in that action had settled it between themselves, but without paying the attorney his costs, and Shankland gave Baxter a receipt for the debt, and a release to the action; the release was not sealed.

The plaintiff's attorney, however, proceeded in the original cause to judgment and execution, and afterwards commenced the present suit against the bail, without taking a warrant of attorney from the plaintiff.

Washburn, on the part of the bail, moved that Mr. *Bidwell*, the plaintiff's attorney, be ordered to produce his warrant of attorney, contending that his authority in the original action was no sufficient warrant for his proceeding in this against the bail.

He also supported his motion by an affidavit that the plaintiff was a foreigner, residing without the jurisdiction of the court. (*a*)

Application refused.

(*a*) Tidd, 107, 545.

SHERWOOD v. JOHNS.

A plea stating that plaintiff enjoyed an estate without eviction, held not a sufficient answer to a count setting out a covenant that plaintiff should enjoy free from incumbrances.

Declaration in debt upon bond.—Condition as set out upon oyer stated, "that if plaintiff, his heirs, &c., should and might peaceably and quietly hold and enjoy all and singular the above mentioned premises (those mentioned in the recital) with their and every of their appurtenances, free and clear of and from all former and other bargains, sales, surrenders, forfeitures, judgments, charges, debts, and incumbrances whatsoever had, made, done, committed, or suffered by the said Solomon Johns, or any other person or persons whatsoever; and also that if said defendant at the time of the execution of the aforesaid deed of bargain and sale (that set forth in recital) was the lawful and rightful owner of the whole and every part and parcel of the aforesaid premises, &c., and was at the said time lawfully and rightfully seized in his own right of a good, sure, perfect, absolute and indefeasible estate of inheritance in fee simple," of and in the whole and every part and parcel of the aforesaid premises, and had a good right and lawful authority to sell, dispose and convey the same as aforesaid to the plaintiff, then the obligation to be void, &c. Plea.—That before and at the time of the execution of the deed of bargain and sale in the condition of bond mentioned, the defendant was the true, lawful and rightful owner of the whole and every part and parcel of the premises in said deed mentioned, and was lawfully and rightfully seized, &c., and had a good right and lawful authority to sell, dispose of, and convey the same to the plaintiff, and that from the execution of the said deed and writing obli-

gatory, until the commencement of the action, the plaintiff did, under and by virtue of said deed, peaceably and quietly hold and enjoy all and singular the above mentioned premises, with their appurtenances, without any eviction thereof, by reason of any former or other bargain, &c. General demurrer—joinder.

Macaulay, in support of the demurrer, contended that the statement in the plea that the plaintiff did under and by virtue of said deed peaceably and quietly hold and enjoy the premises, &c., without any eviction thereof by reason of any former or other bargain, &c., was insufficient, inasmuch as it did not fully embrace the covenant, which was that plaintiff should enjoy the premises free and clear of and from all other bargains, &c. That the statement of the performance of a covenant in a plea should be as large and ample as the covenant itself, as laid down in Bosanquet and Puller, where it is stated that the words of the plea should follow those of the covenant. (*a*)

That the plea was defective in form, as it should have stated how the plaintiff enjoyed the premises free from incumbrances, and that he went into possession as laid down by Croke. (*b*)

That where the covenant goes to possession only such a plea might do ; but where the covenant embraces freedom from incumbrances, it is evidently insufficient.

That if the defendant had in this case (as he ought to have done) followed the words of the cove-

(*a*) 1 B. & P. 445. (*b*) Croke, James, 165.

nant, the plaintiff would have replied and shewn incumbrances. That it would be unreasonable that the plaintiff should wait for actual eviction to bring his action, which might not happen until after the death or insolvency of the defendant, when the very object of taking the security by bond would be lost.

Boulton, Solicitor-General, contra, contended that as it was plainly the object of the bond to protect the plaintiff from such incumbrances only as should affect the premises after its execution, that he could not resort to his bond until judgments or other incumbrances actually attached upon the premises, and that he had no right of action on account of incumbrances existing at the sale.

That a contrary construction would affect most vendors in the country, it being a general practice to give such bonds without the parties having any intention that they should have a retrospective operation.

That if defendant can by any means satisfy judgments or incumbrances without their being put in execution against the premises, he has a right to do so, and the condition of the bond is answered.

That the plea stating that the plaintiff did under and by virtue of the deed peaceably hold and enjoy, implies possession.

That the plaintiff, moreover, holding title by bargain and sale is in possession by the operation of the statute of uses, and must therefore be evicted, to be divested of that possession and so have a right of action.

That the plaintiff having enjoyed the premises agreeable to the manifest and well known intention of this and similar bonds, a plea stating such enjoyment, without eviction, was sufficient.

The court decided in favour of the demurrer, but gave leave to amend upon payment of costs within one month.

BROCK v. MCCLEAN, SHERIFF.

The court will not change the venue on the ground that defendant's public duty prevents his attendance at the assizes.

Action of debt for escape.

Washburn moved to change the venue on the ground of the defendant's inability to attend at the assizes of the district where the venue was laid, he being obliged to attend at the assizes for the district of which he was sheriff, and those for the district where the venue was laid being held immediately afterwards.

Application refused.

DOE ON THE DEMISE OF GRIFFIN v. LEE.

A landlord may be admitted to defend in ejectment, without an affidavit stating that he is so.

Taylor moved (without affidavit) that Richard London, the landlord of the premises in question, should be allowed to enter into the consent rule and defend. He cited Impey, 8th edition, 643, and Tidd.

Macaulay contended, that an affidavit was necessary to ground this motion, and relied upon Adams, 136, 2 Sellon, 102, and Barns, 179.

Per Curiam.—Application granted.

PURDY *qui tam* v. RYDER.

Semble, that a grantee of the Crown never having taken possession, is subject to the provisions of the statute of Henry the eighth.

This was an action for purchasing real estate contrary to the provisions of the statute 27th Henry VIII., ch. 9, s. 2; the words of the statute are, "that no person shall from henceforth bargain, buy or sell, or by any ways or means obtain, get or have any pretended right, or title, or take, promise, grant or covenant to bar any right or title of any person or persons, in, or to any manors, lands, tenements or hereditaments, except such person or persons which shall so bargain, sell, give, grant, covenant, or promise the same, their antecessors or they by whom he or they claim the same, have been in possession of the same, or of the reversion or remainder thereof, or taken the rents or profits thereof, by the space of one whole year next before the said bargain, covenant, grant or promise made, upon pain that he that shall make any such bargain, sale, &c., shall forfeit the whole value of the lands, &c."

Declaration in debt upon the statute. Plea, *nil debet*.

The evidence given at the trial was, that the plaintiff was many years ago in possession of the land, for

the purchase of which this *qui tam* action was brought under a contract from one Albertson.

That said Albertson (who was nominee of the Crown) did not take out the king's patent for the lands until the year 1822, and on the 3rd April, 1823, (never having had any actual possession,) assigned them by bargain and sale to the defendant in this action, who thereupon ejected the plaintiff.

That Ryder, the defendant, at the time he purchased, knew of the previous contract between the plaintiff and Albertson.

A registered copy of the old contract, between Albertson and Purdy, the plaintiff, was proved, as well as the deed from Albertson to Ryder, the defendant.

It was also proved that the plaintiff, as nominee of Albertson, had applied to the commissioners in the year 1822, and they had, under the statute 42 Geo. III., made a report in his favour.

Upon this evidence the jury found a verdict for the plaintiff, with £400 damages.

Boulton, Solicitor-General, had, in a former term, obtained a rule to shew cause why a nonsuit should not be entered or a new trial had, the verdict being contrary to law, and improper evidence having been admitted at the trial.

Baldwin now shewed cause.—He contended that Albertson, as grantee of the Crown, had no actual

possession; that his possession was merely constructive, not such as could defeat the provisions of this statute.

That there were two objects intended by the statute, the first was to punish persons buying or selling pretended titles; the second was to prevent the sale of lands of which the vendor was not in possession without reference to his title.

That where a king's patentee enters, the king having no right to grant, he is a disseisor.

That the commissioners in this case having made a report in favour of Purdy, the plaintiff, the king had no right to grant to Albertson, and that he and his assignee were consequently disseisors. (*a*)

That the king being out of possession by virtue of the commissioners' report, Albertson, his assignee, was in the same situation as any other intruder. That Purdy being in by contract with Albertson, could not be considered as an intruder, for the courts in this country have always recognised the title of a nominee of the Crown, which Albertson was; that it would be most inconvenient to the country if every man or his assignee who was in possession of lands before the king's grant issued was to be so considered.

That the maxim that the possession of lands to enable a vendor to make title without incurring the penalties of the statute, must be actual and not constructive, was unanswerable.

(*a*) 2 Hawkins, ch. 86, s. 4; Co. Litt. 369; 1 Plowden, 88; Com. Dig. 265, Tit. Seizin.

Boulton, Solicitor-General, contra.—To bring this defendant within the statute, it is necessary that three things should concur:

First.—That the right of Albertson was a pretended right.

Secondly.—That he had not been in possession or taken the profits.

Thirdly.—That defendant knew these facts as to the first. Right or title may be pretended two manner of ways:

First.—When it is merely in pretence and nothing in verity.

Secondly.—When it is a good right or title in verity, and made pretended by the act of the party. (*a*)

With regard to the first kind of pretended right, there is no ground for asserting, nor can it be pretended, that Albertson's title was nothing in verity, since he claimed under the king's patent, and therefore the only question to be considered is, whether Albertson's good title has been made pretended by the act of himself and the defendant.

That it had not for the following reasons:

Littleton says that a right or title may be considered three manner of ways:

First.—As it is naked and without possession.

(*a*) Co. Litt. 369.

Secondly.—When absolute right cometh to wrongful possession, and no third person has *jus proprietatis* or *jus possessionis.*

Thirdly.—When there is a good right and a wrongful possession.

I will dispose of the two last first, as such titles are most obviously not like Albertson's, as Albertson's absolute right was coeval with his possession, or as plaintiff contends, was all he had, (as he denies his ever having been in possession,) and for the latter reason he cannot come under the third notion of title. I will now return to the first, which is the description of title plaintiff contends Albertson had, namely, a mere naked right without possession, which having been sold to defendant becomes, according to Littleton, (*a*) a pretended right within the statute; for the statute created no new offence, but was only in affirmance of the common law, (*b*) giving however an additional penalty, the value of the land, and a naked right to land cannot be bargained upon the same principle, that a chose in action which is similar to it cannot be made the subject of a sale or transfer by the common law. Therefore it remains only for me to shew that Albertson had the possession, as well as the right and absolute title, to the land when he sold to defendant; and first, the king, under whom Albertson held, cannot be disseised or ousted of his possession, but by matter of record, (*c*) nor can there be a tenant at sufferance against the king, but he that holdeth over is an intruder, (*d*) and for the same reason a person cannot be indicted for a forcible entry on the king because he cannot be disseised. (*e*)

(*a*) Litt. 369. (*b*) Plowd. Com. 88. (*c*) Com. Dig., Prerog. D. 71, 11 East. 448. (*d*) Co. Litt. 57, Bac. Abr. Prerog. 562. (*e*) Bac. Ab. Prerog. 563.

And for that the king has possession by matter of record as well as title, when a subject traverses an inquisition vesting title in the Crown he prays judgment *quod manus domini regis amoveatur de possessione*, (*a*) which shews that the record gives actual possession to the king.

2ndly.—The king being in contemplation of law in possession of the Crown lands, transfers that actual possession and seisen together with the right and absolute title by his grant. For the king's grant is equal to a feoffment with livery and clears all disseisins, abatements, intrusions, and other wrongful or defeasible estates, and the grant or deed is in lieu of livery, and the livery gives seisen in deed; and his estates pass without livery by force of the patent, for the king's dignity will not permit him to make livery. (*b*)

3rdly.—As the grantee of the Crown is in possession by his grant, and as any person on the land of the Crown without matter of record is an intruder, the grantee may maintain trespass against such intruder continuing after the grant, (*c*) for entry does not imply disseisin, and entry without disseisin does not imply possession, (*d*) so that the intruder upon the king continues such upon his grantee, the possession in deed being in the grantee by force of the patent. (*e*) But a man must be in actual possession to maintain trespass.

A grantee of the Crown may maintain trespass against an intruder upon the king's possession at the

(*a*) 4 Inst. 209. (*b*) Co. Litt. 9 & 29; Plowd. 232; Bac. Abr.—Pre. F. 37; Plowd. 213, 242. (*c*) Rolles Abr. 659. (*d*) Plowd. 232. (*e*) Bac. Trespass, 566; 2 Rolls, 554.

time of the grant who continues to intrude after the grant.

Therefore a grantee of the Crown is in actual possession, notwithstanding the intruder's continuance after the grant.

CHIEF JUSTICE.—Albertson sold, and the defendant Ryder bought a lawsuit, and, I consider, are within the intention of the statute.

Per Curiam.—Rule discharged.

MICHAELMAS TERM, 6 GEO. IV., 1825.

Present:

THE HONOURABLE CHIEF JUSTICE CAMPBELL.*
MR. JUSTICE SHERWOOD.

CARRUTHERS v. ——— ONE, &c.

An attorney of this court practising in the district court is liable to an attachment for not paying over money received for his client.

Baldwin applied for a rule to shew cause why an attachment should not issue against an attorney of this court, for not paying over money recovered for the client, plaintiff in an action in the district court.

The court after consideration entertained the application, observing that its interference was not to be considered as depriving the court below of jurisdiction, but merely as exercising a concurrent one.

Per Curiam.—Application granted.

JOHNSON v. EASTMAN.

In an action of slander a defendant may give facts and circumstances in evidence in mitigation of damages.

This was an action for slander against the plaintiff, a clergyman, tried at the assizes for the ——— district.

*The Honourable Mr. Justice CAMPBELL this term took his seat upon the bench as *Chief Justice*, in the place of the Honourable Chief Justice POWELL, who retired.

LEVIUS P. SHERWOOD, Esquire, took his seat as judge, in the place of the Honourable Mr. Justice CAMPBELL.

Mr. Justice BOULTON was absent during this term.

It appeared by the notes of the judge who tried the cause, that the defendant had, at the trial, offered to give in evidence certain facts and circumstances in mitigation of damages, and that such evidence had been rejected.

Macaulay had obtained a rule *nisi* to set aside the verdict and for a new trial without costs, upon the ground that the defendant was entitled to give facts and circumstances in evidence in mitigation of damages upon the general issue, provided they did not amount to proof of the truth of the words spoken; for any thing that appeared in this case, the fact attempted to be proved might have been a general rumour that the plaintiff had been perjured.

Washburn shewed cause.—He contended that, although general rumours could be given in evidence, facts, which might amount to a justification, could not.

Macaulay, contra, contended, that facts which went near to prove perjury might be given in evidence, even proof of an oath in an extrajudicial matter. (*a*)

That upon principle, it was much more just that facts should be given in evidence than mere rumours, which might be easily fabricated or set afloat by a malicious defendant. (*b*)

Per Curiam.—Rule absolute for a new trial without costs.

(*a*) N. P. 289; Campbell, 254; M. & S. 286. (*b*) Starkie.

WHELAN v. STEVENS.

Omitting to state the conviction of a defendant in his warrant of commitment, will not subject a justice of the peace to an action for false imprisonment, provided the actual conviction is proved upon his defence.

This was an action of trespass and false imprisonment, brought against defendant as a justice of the peace. He had committed the plaintiff to gaol under the 6 Geo. III., but had omitted to state in the mittimus the conviction of the plaintiff. The warrant and conviction were both produced and proved at the trial. A verdict had nevertheless been given for the plaintiff with £100 damages.

Macaulay had obtained a rule to shew cause why the verdict should not be set aside being contrary to law and evidence, and a new trial granted on the ground, that although upon a *habeas corpus* a prisoner detained under a warrant in execution will be discharged, unless such warrant states his conviction. Yet, if an action is brought upon the informality, it will be a good defence for the defendant to have the conviction at the trial, as was done in the present case. He cited the cases below. (*a*)

Cartwright shewed cause.—He contended that the warrant of commitment being informal and not being stated to be upon conviction, gave the plaintiff a right of action which could not be taken away by its subsequent production.

That if (as was admitted by the other side) the warrant of commitment was informal, and such as could not legally detain the defendant; that if he had been detained under it, it was a false imprisonment.

(*a*) 4 J. R. 220; 12 East. 67; 16 East. 21; 7 J. R. 631; 8 East. 113.

That where the liberty of the subject was concerned, the court would insist upon a rigid adherence to the formalities required by law.

That magistrates must be presumed to know the law, which is clearly laid down in Burns and Williams, who state that every warrant or execution must state the conviction of the defendant. He also relied upon the King v. Rhodes (*a*) and the King v. Cooper. (*b*)

Macaulay, contra, insisted, that as long as a conviction remained it operated as a justification to the magistrates.

That even upon a *habeas corpus*, though the warrant of commitment might be defective as in the present case; yet, if the conviction itself accompanied the warrant, the defendant would not be discharged.

That even in cases of felony, though a commitment may be defective, the courts upon *habeas corpus* will call for the depositions and re-commit a criminal.

CAMPBELL, C. J.—To some purposes the documents in question are separate and independent, but in the present case, as the conviction and warrant accompanied each other, they should have been taken as one and should have been so considered at the trial.

Per Curiam.—Rule absolute without costs.

(*a*) 4 J. R. 220. (*b*) 6 J. R. 509.

DOE EX. DEM. CLARKE v. ROE.

The order of this court which authorises rules to be taken out in the deputy's office in the country, does not include rules *nisi* in ejectment.

In this case the declaration and notice in ejectment had been served upon the tenant in possession in the London district. The originals had been filed and the rule *nisi* for judgment against the casual ejector had been taken out in the office of the deputy clerk of the Crown of the district under the rule of this court, of Michaelmas Term, 4th Geo. IV.

Baldwin moved to set aside these proceedings for irregularity, submitting to the court that the rule could not be considered as extending to proceedings in ejectment.

That it was a proceeding not usually contemplated or included in the ordinary rules of court.

That the proceedings are to be inspected and the irregularities in them (if any) detected and reported to the court, which could not be expected from the deputy in the country.

That the deputies are not provided with an ejectment book, which is essential to the proceedings in ejectment.

Rule granted.

McGUIRE v. DONALDSON.

It is not compulsory upon a judge at *nisi prius* to grant a certificate under the 43rd of Elizabeth.

In this case, which was an action of trespass and false imprisonment, a verdict had been found for the plaintiff with 6d damages only.

The defendant's counsel applied to the judge who tried the cause for a certificate under the 43rd of Elizabeth.

The judge refused to give the certificate required, on the ground that the statute was not compulsory, with leave to the party to apply for the opinion of the court above.

The court established the opinion and decision of the judge at *nisi prius*.

Application refused.

Hogle v. Ham.

Gross neglect on the part of the parents, is held a ground for a new trial in an action of seduction.

An action brought to recover damages for loss of service by the seduction of plaintiff's daughter, tried at the assizes for the Midland district, and a verdict for the plaintiff for £250.

The facts of service and criminal intercourse were proved. That plaintiff's daughter had borne a child to defendant. That plaintiff's daughter and the defendant had been school-fellows. That he had paid his addresses to plaintiff's daughter as a suitor, and had been considered as such by the family and neighbours.

On the part of the defendant it was proved that he had been permitted to pass whole nights with the daughter in a bed room with the father's knowledge. A witness, Impey, had also given evidence that

plaintiff's daughter had had criminal intercourse with himself, and that she had told him that the child she had borne was probably not the child of the defendant.

The judge who tried the cause had charged the jury to take into their consideration how far the indiscretion of the plaintiff might operate in diminution of damages.

Cartwright obtained a rule *nisi* to set aside the verdict and grant a new trial in this cause on grounds:

1st. That the verdict was contrary to law and evidence.

2nd. That it was contrary to the judge's charge.

3rd. That the damages were excessive.

As to the first ground, he contended that plaintiff, by having consented to his daughter being frequently alone with defendant at a time and in the situation detailed in evidence, had become, in fact, a *particeps criminis*, and could not be entitled to damages, consent being laid down to bar an action for criminal conversation.

That should the court permit damages to follow conduct of this sort, it would soon be flooded with these actions.

That parents of loose morals, looking forward to the remuneration, would be careless of their daughters' virtue, and would even use means to entrap inexperienced young men.

As to the second point, that the verdict was contrary to the judge's charge, inasmuch as the jury had not at all considered the great indiscretion, if not criminality, of the plaintiff as a ground of taking away his title to damages altogether, or at least of giving their verdict for a very small sum.

As to the third point, that it was evident that under the circumstances the damages were excessive.

That £250 were not so easily raised as £5000 were in England.

That the evidence of Impey had not been impeached, and should, at the least, have induced an unbiassed jury to have given very small damages.

The counsel referred to the cases below. (*a*)

Macaulay shewed cause.—He contended that this case resolved itself into one of excessive damages, for that there was no pretence for saying it was either contrary to evidence or the judge's charge. The plaintiff had been proved to be of respectable character as well as his family (except in this instance ;) that the defendant was his friend and neighbour, and the school-fellow of his daughter ; that he visited the house as a suitor ; that his own circumstances as well as those of the young man were such as to induce a reasonable expectation in the family and among their friends and neighbours, that a marriage would take place between the defendant and his daughter, and the plaintiff in consequence of this

(*a*) Peakes N. P. cases; Jones v. Sparrow, 5 J. R. 257; Bedstead v. Wyllie, K. B. reports U. C.

expectation admitted the defendant to such freedoms in his house and family as are usually permitted under such circumstances.

The young woman had given evidence of his courtship, and when asked if she ever had dispensed her favours to others than the defendant, said she never had.

The defence attempted to be set up through the means of the witness Impey, was that she was not so immaculate as she pretended to be; that this man's evidence was fairly opposed to the young woman's, and the jury were drawn to its consideration by the plaintiff's counsel.

That the jury did compare them, and either considered that Impey's evidence was not entitled to credit, or that it did not extenuate the base conduct of the defendant.

That it was undoubtedly the province of the jury to dispose of conflicting evidence, and they had done so. (*a*) They, too, were the proper judges of the amount of damages, as laid down throughout the books, and by Lord *Camden* particularly.

That this verdict should also be supported on the ground of punishing the defendant. (*b*)

That the case of Bedstead v. Wyllie, determined in this court, could not be compared to the present, nor could any argument be drawn from it in favour of granting a new trial in the present case.

(*a*) 4 M. & S. 192. (*b*) 3 Wils. 18.

In that there had been a violation of all decency on the part of the mother, and the most criminal neglect.

That the general principle to be extracted from the cases (*b*) was, that where facts were properly brought before a jury, they were the proper judges, and their decisions were not to be set aside unless the damages were outrageous and excessive.

That the custom of allowing young persons to see each other in bed rooms and alone, and at late hours, though not agreeable to more refined notions, was predicated upon the confidence which the inhabitants of the country placed in each other, and the few instances in which that confidence had been violated shewed that it had not often been misplaced.

That in this respect something must be allowed to the situation of the young yeomanry of the country, who were labouring in the field during the day, and had little opportunity of being introduced to each other but at night.

That it was natural for parents to wish to see their daughters settled in marriage, and with this view the plaintiff had allowed the defendant no other liberties than are usual; that perhaps slight indiscretion might be imputed by some persons to the plaintiff, but on the other hand the blackest ingratitude marked the conduct of the defendant.

That he has abused the plaintiff's confidence and ought to suffer for it.

(*b*) 11 East 22; 1 Burrow, 609; 2 T. R. 166.

That there is no pretence for considering this verdict as being contrary to the judge's charge; it was clear and distinct; the indiscretion (if any) of the plaintiff was drawn to their consideration, and they were directed to consider what weight it should have in mitigation of damages; that they have done so; have considered all the facts of the case and the characters of the parties and witnesses, and have found a verdict for £250, a sum neither outrageous or excessive, or indicating passion or partiality.

Cartwright, contra, contended this not to be merely a case of conflicting testimony; that the girl had herself acknowledged a connexion with the witness, Impey; that the doctrine laid down by Lord *Mansfield* (*a*) went to say, "that if justice had not been done a new trial ought to be granted." That the case before the court was a strong one.

That a custom which allowed young persons to remain together for whole nights in bed-rooms without any witnesses of their conduct, was immoral in the extreme and should be abolished.

That the jury must, in this case, have been influenced by undue motives.

That great misconduct, more indiscretion is to be imputed to the plaintiff than to the young man, who, perhaps, had been many times tempted before he gave way to his passions.

That there was no doubt of the power of the court to interfere was clearly shewn by the case of Jones

(*a*) Bright v. Lyon, 1 Burrow.

v. Sparrow, (*a*) where they interfered in a case of tort of only £40 damages.

That the case of Duberley v. Gunning (*b*) had been overturned by more modern decisions, and it was to be observed that in that case the court were not unanimous.

That the case of Smith v. Book, formerly moved in this court, was quite in point with the present. There, though there was no imputation against the character of either the parent or the young woman, the court granted a new trial on account of the mother's indiscretion in permitting the defendant to remain in her daughter's room at night; that the court would in this case, as in that, mark this custom with their animadversion.

That upon grounds of public policy and morality this verdict should be set aside, for what could be more contrary to them than to allow parents to be rewarded with £300 or £400 for their indiscreet carelessness of their daughters' virtue.

Macaulay, in reply, stated it to be true that the young woman had been proved by Impey's evidence to have been connected with him, but it was after the seduction by the defendant, and therefore did not in the least take away the plaintiff's title to damages.

Suppose a case of two libertines supporting each other in their base practices, by such conduct as the defendant and his witness Impey had exhibited.

(*a*) 5 T. R. 257; 1 T. R. 277. (*b*) 6 East 256.

That the jury perhaps thought it might be the case here.

That they well knew all the circumstances of the bed-rooms, and the visits of the defendant; they knew the custom which prevailed in the country, but considered as furnishing no ground to encourage vice and the defendant's breach of confidence.

That nothing was withheld from the jury; nothing obtruded upon them which should not have been.

That having, with a full view of the case, given damages neither outrageous or excessive, their verdict he considered ought to stand.

CAMPBELL, C. J.—I have given great consideration to the cases and to the authorities to which we are referred by the counsel, in some of which the decisions seem to be at variance with the clear principles of law as recognized, and indeed expressly and distinctly laid down. In the case of Duberley v. Gunning, Lord *Kenyon*, as well as all the other judges of the court, were decidedly of opinion, that £5,000 damages, under all the circumstances of that case, were beyond measure excessive; and yet the court, with the exception of Mr. Justice *Buller*, refused a new trial; his lordship declaring that he thought the damages a great deal too much, and that he would have been satisfied with merely nominal damages, but that he had not courage to interfere with the verdict. This is a doctrine to which I cannot subscribe even in deference to so high authority.

The learned counsel in support of the rule in that

case contended, that if the injustice of the verdict be once admitted and established, the granting a new trial is no longer matter of discretion but of duty in the court. I entirely concur in that opinion, and I am warranted in that conclusion by the authority of Mr. Justice *Buller* in that same case, and by that of Lord *Ellenborough* in the case of Chambers v. Caulfield, where his lordship, in delivering the opinion of the whole court, says, "That if it had appeared from the amount of damages as compared with the facts of the case laid before the jury, that the jury must have acted under the influence of either undue motives, or of gross error, or of misconception of the subject, the court would have thought it their duty to submit the question to the consideration of a second jury." And Lord *Kenyon*, in Duberley's case, expressly states, and indeed all the authorities agree, that the granting a new trial is by no means encroaching upon the jurisdiction of the jury, nor drawing the question to the examination of a different tribunal from that to which the constitution has referred it, but only requiring the same jurisdiction to reconsider that opinion which appears to be erroneous, and without a general power in the court to do so, his lordship adds, injustice would be done in many cases. And I take it upon me to say, that to prevent such injustice is in all cases the particular province and duty of the court. Under this seeming discrepancy between some of the decisions, and the established principles of law, I confess I have paid more attention to the general reasoning and principles of law than to particular decisions. It must be observed, however, that the actions in which those decisions took place, although in many respects similar to the case before

us, are not entirely so; those were actions brought by husbands for criminal conversation with their wives; this is an action brought by a father for the seduction of his daughter, and the consequent loss of her service. The general reasoning and principles of law, as regards the right of action, the quantum of damages, and the grounds upon which a new trial ought to be granted or refused, apply in some, but not in all respects alike to both.

In both cases the governing principles are the degree of care and vigilance, or of indiscreet negligence or criminal connivance, which may appear in evidence on the part of a husband or parent, and which, according to its degree, will have the effect of destroying the right of action altogether, or of regulating the quantum of compensation to which the plaintiff may be entitled.

When the seduction of a daughter is the ground of action, I think those considerations apply much more strongly than in a case of *crim. con.* I hold that it behoves a parent suing for damages in this sort of action, to shew that he has used a reasonable degree of parental care and watchfulness over his daughter's virtue and propriety of conduct; I mean to say a much greater degree of care and circumspection than would be required of a husband over a wife's conduct; for besides the ordinary restraints on female conduct applicable to the sex in general, a wife is under the additional restraint imposed by the moral and religious obligations of her marriage vow, with all the conjugal ties and duties arising from and incident to the married state; her prudence and experi-

ence are more to be relied upon, and her situation exempts her from those excitements and temptations to which a young unmarried inexperienced female is peculiarly exposed, especially when approached, as they frequently are, by seducers under the mask of honourable addresses. I consider it, therefore, the indispensable duty of a parent to use all possible care and vigilance, and, if necessary, to exercise his authority to prevent a daughter from being exposed to such temptation, much less to be left alone in bedrooms, or in any other rooms or places at unseasonable hours, and for whole nights with an individual of the other sex. A parent knowingly allowing such opportunities, betrays not only a foolish and ridiculous confidence and want of common prudence and circumspection, but also such a degree of culpable negligence as in effect amounts to criminal connivance, and, therefore, renders his right of action extremely doubtful; but at all events diminishes his claim to damages in an action of this kind for an injury, which has been the natural consequence of his entire neglect of a most sacred duty as a parent, and the dictates of ordinary prudence as a man of common sense.

As to the necessity which the counsel for the plaintiff has urged, of young persons being allowed to meet at late hours; if it is meant to the extent to which that indulgence has been carried in the case before us, I deny the existence of any such necessity —the parties have been intimately acquainted from infancy; they have been brought up in the same neighbourhood, and have had daily opportunities of forming a thorough estimate of the good and bad

qualities of each other; and, in short, of all those circumstances, the knowledge of which is usually considered necessary to enable young persons and their respective parents to decide on the propriety of the intended match, nothing was wanting for all the purposes of honourable courtships, but the usual proposal of marriage. It does not appear that the proposal was ever made, either to the young woman or to her father, the plaintiff. The absence of such proposal for so unreasonable a length of time, and such continuance of intimate intercourse, and nightly visits, instead of inducing confidence, should have excited suspicion and distrust, and should have called forth the peremptory commands of the father to desist from all such unseasonable interviews.

I do not by any means excuse the criminal conduct of the defendant, and if the sole question were, how much ought he to pay, I should not perhaps have thought the verdict too much; but the principal question is, how much is the plaintiff entitled to claim, and that consideration must entirely be governed by his own conduct as it appeared in evidence. Neither do I mean to excuse the easy virtue of the young woman; but if she were the plaintiff, and could have sued for damages for the irreparable injury she has sustained, I might perhaps allow to her inexperience and weakness that which I cannot concede to the criminal neglect of her parent. It is an established maxim with me, and in which I believe I am warranted by law, that no man has a right to sue for compensation in damages for any loss or inconvenience which has arisen from his own fault or criminal neglect of duty. After mature considera-

tion, therefore, of this case, with all its attendant facts and circumstances as detailed in evidence, and also of the relative situation of the parties, I am of opinion the damages given are excessive, and that a new trial should be granted. In doing so, I do not consider that the province of the jury is at all interfered with, it is only re-committing the question to the consideration of the same tribunal to rectify a palpable mistake or misconception of the former jury of the grounds upon which their estimate of damages should have been made, and this I conceive it is the duty of the court to do in all cases, as I have already sufficiently shewn from indisputable authority.

SHERWOOD, J.—In this cause the defendant has applied to the court for a new trial on several grounds stated in the affidavit accompanying his motion, one of which is on the account of excessive damages. As this is the only ground, in my opinion, worthy of consideration, I shall confine my remarks to it alone, without touching on the others. That the court have the power to grant new trials in all civil actions between subject and subject, where the circumstances of the case and the advancement of public justice require such a proceeding, is already so settled to be law, that I do not think it necessary to cite cases for the support of the proposition. The court of King's Bench in England have refused to disturb verdicts apparently too great in actions for criminal conversation, because they considered the facts and circumstances of those cases as peculiarly within the province of the jury to determine, and respecting which the court could not well form an opinion, but they uniformly recognised the principle of their

having an undoubted right of granting new trials even in the same cases. In Duberley v. Gunning, reported in fourth of Dunford and East, which was also an action for *crim. con.*, the court refused to grant a new trial for excessive damages for reasons already mentioned, but they were not unanimous in that refusal; Mr. Justice *Buller* was dissentient, and it appears to me that his arguments were stronger and more conclusive than those of the other judges. The present cause, it is true, is an action of tort, but it is not precisely of the same description as that for criminal conversation; it certainly differs in its nature from that in the same degree that the duty of a father differs from the duty of a husband. Here the court are not called upon to ascertain the nice bounds between fashionable ease or familiarity of manner, and licentious or marked attention to a married woman, for in this case one gross feature of immorality enables the court without difficulty to determine that the damages have not been properly measured. I think the plaintiff here was guilty of criminal negligence in his duty of a parent, and for this reason is entitled to less damages than he would have been if he had performed his part well. I also think the jury must have entirely misconceived that part of the testimony which particularly relates to the want of prudence and proper attention on the part of the plaintiff as the father of a family; it was distinctly in evidence at the trial, that the plaintiff allowed the young man, the defendant, to remain whole nights with his daughter in her bed-room, and that he, the plaintiff, knew of the daughter being there. Such conduct leads directly to crime, and the father who connives at it, or who neglects to interpose his authority for its im-

mediate prevention, must be less deserving of commiseration than the virtuous and discreet parent. What makes the conduct of the plaintiff still more inexcusable is, that it does not appear from the report of the evidence that any proposal of marriage was ever made by the defendant to the daughter of the plaintiff, or any intimation to the plaintiff of the intention of the defendant to visit the daughter as an honourable suitor. Had the last fact clearly appeared, the plaintiff's want of care would, in a great measure, have been excused, and the verdict would have probably remained as it is. This fact, however, cannot possibly be inferred from the evidence given at the trial, because the young woman herself does not pretend that any proposal of marriage was ever made to herself or father, and if any had been made, she, of all others, must have been inclined to mention it.

It is of the greatest importance to society, that females should be brought up in habits of virtuous and chaste demeanor ; for such habits will always have a decisive influence in correcting any licentious deportment in the other sex. I do not justify the conduct of the defendant in this cause. I think it was criminal and deserving of punishment ; but as the plaintiff has been negligent in his duty, his claim to damages must be lessened in my opinion ; he was not warranted in presuming every thing correct on the part of the young man who had visited his daughter with addresses for such a length of time, without any declaration of his ultimate intention. To give such a man damages to the extent of what a prudent parent would deserve, would be to break down the barriers between right and wrong, and to set an example most pernicious in its consequences.

Upon mature consideration of all the circumstances of this case, I think the opinion of a second jury should be taken.

Rule absolute.

McNALLY v. STEPHENS.

This court refused to set aside upon motion a *ca. sa.* which had been issued upon judgment more than a year old—no *sci. fa.* having issued to revive it.

Small obtained a rule *nisi* to set aside the writ of *capias ad satisfaciendum* issued in this cause, and to discharge the defendant out of custody, the same having issued two years after the judgment was signed —no previous writ of execution or *scire facias* having issued.

Robinson, Attorney-General, shewed cause.—He contended that although this was an irregularity, it was not to be remedied by setting aside the execution or discharging the defendant, but that he must proceed by writ of error or action for false imprisonment.

That the case in Salkeld went to this point. (*a*) There the execution issued after the year and day; and yet in an action against the sheriff for an escape he was held liable. He contended that the sheriff would not have been held liable if the defendant could at any time be discharged upon a summary application to the court. That it would be otherwise where the writ was void on the face of it, as where it passed over a whole term.

(*a*) Shirley v. Wright, 1 Salk. 273.

That the case of Parsons v. Lloyd (*a*) went to shew that false imprisonment was the proper remedy.

The counsel also cited the cases below. (*b*)

Small, contra, contended, that this writ was not merely voidable but actually void.

That the authorities cited related only to the liability or otherwise of the sheriff.

That the defendant could not bring a writ of error upon this writ, for that both in that respect and as to an action for false imprisonment, it remained good until it was set aside.

That the reason given for a *scire facias* after the year and day is, that a defendant may have an opportunity to plead such matter as may have arisen in avoidance of the judgment. (*c*)

That here, even if his client had a release, he could not plead it. His only remedy is to set aside the proceedings.

CAMPBELL, C. J.—This writ has, without doubt, been irregularly issued. The question is whether it is merely void, or whether the irregularity is only to be taken advantage of by writ of error, or in an action for false imprisonment.

It is laid down in Leving, that this irregularity is to be remedied by writ of error, and it is said in Archbold, that this irregularity is not such an one as to render the writ void, but that the party is left

(*a*) 2 Black 846. (*b*) 3 Wells 341 —— Com. Dig. —— (*c*) Tidd.

to other remedy. It appears that the court have not even a discretion, as the writ is laid down only to be voidable.

Per Curiam—Application refused.

DORMAN v. RAWSON.

The *ca. sa.* lodged in the sheriff's office to charge the bail, is not a charging in execution.

Robinson, Attorney-General, moved that the defendant be discharged by *supersedeas*, he not having been charged in execution within two terms after he had been surrendered in discharge of his bail, agreeable to the rule of Hilary Term, 26th Geo. III.

Macaulay contended that the *ca. sa.* which had been lodged in the sheriff's office previous to the defendant's surrender should be considered as charging the defendant in execution.

Robinson, Attorney-General, observed upon the impossibility of considering a *ca. sa.* which had been returned *non est inventus* as a charge in execution.

Supersedeas granted.

NEVILS v. WILLCOCKS.

In a case where justice has been done between the parties, the court refused to grant a new trial upon the ground that it had been agreed between the contending parties that a third person should have been applied to, to settle the subject matter of the action, which third person being under no legal liability to do so.

An action of *assumpsit* tried at the assizes for the London district, and a verdict for the plaintiff of £40.

The document upon which the plaintiff declared, with its endorsements, was as follows: (the common counts were also contained in the declaration:)

"Left in my hands this 23rd day of June, 1818, a note of hand against I. Kilbourn for £10; also an affidavit against the estate of Colonel Bostwick for £30.

"(Signed,) INO. TINBROECK."

"Please to settle the within receipt with Justus Willcocks or bearer.

"Talbot Road, Nov. 9th, 1819.

"Mr. JOHN TINBROECK.

"(Signed,) THOMAS FRANCIS."

"Justus Willcocks has received payment from James Nevills for the sum specified on the within receipt. Provincial currency.

"(Signed,) JUSTUS WILLCOCKS."

"July 24th, 1821.

"Witness, JOHN CONNELL."

This document was proved at the trial, and that sundry notes of hand had been given by Nevills to Willcocks, as the consideration for its transfer to him. It was also proved that there had at the transfer been an agreement between the plaintiff and defendant, that the former should apply to Francis, the previous holder of the document, for its amount; but no evidence was given of such application. The plaintiff recovered his verdict upon the count for money had and received.

Macaulay had obtained a rule *nisi* to set aside the verdict, and for a new trial on the ground:

1st.—That there was no evidence given at the trial which could entitle the plaintiff to recover upon the count for money had and received, or upon the general counts; that the notes given as the consideration were for money, or that any of them had been paid.

2ndly.—That the plaintiff ought to have applied to Francis, the former holder of the document, for the amount, previous to an application to the defendant, that being a condition precedent.

R. Baldwin shewed cause.—He contended that the instrument in question not being negotiable, but a mere chose in action, the application to Francis could only be considered as a matter of courtesy, but by no means a necessary condition precedent. The application would be vain and nugatory, and such as the law would not compel, as Francis was not liable in law to pay the money to the plaintiff; that it might be considered in the same light as an impossible condition in a bond, which was void.

That the policy of the law having said that choses in action are not assignable, a condition which purported to make one so, might be considered as illegal and therefore void, (*a*) for that the same reasoning applied to conditions by parol as to those by deed.

Macaulay, contra, contended the condition not to be one which could be considered as impossible or

(*a*) Bac. Abr. Tit. Vendor.

illegal; it was not that the plaintiff should sue Francis, but that he should try to get the money from him, which might be done by application.

That courts of law as well as equity will take notice of choses in an action; therefore no illegality or impossibility can be inferred from an agreement in that respect.

That if plaintiff was bound to apply to Francis it was a condition precedent, and he ought not to recover without doing so.

The counsel was not satisfied that it was a mere chose in action, but that it partook of the nature of a bill of exchange, the essentials of which it had; and, if so, the plaintiff should have shewn an application both to the drawer and endorser of this instrument.

That the whole of the evidence was defective. There was none that would entitle the plaintiff to recover on the money counts; none that the notes stated as a consideration were for money, or that they were ever paid.

That the matter was a special contract, which should have been stated and proved.

R. Baldwin, in reply, contended that this instrument could not be considered as a bill of exchange, which could only be for a sum certain; therefore, any application to any of the parties through whose hands it had passed, would in a legal point of view be absurd.

That as no advantage would be gained to the defendant by a new trial in this case, and that as no injustice had been done, the court would discharge the rule.

CAMPBELL, C. J.—There are some objections which might weigh in this case; but as justice has been done, and it appears that the defendant would not gain any advantage by a new trial, and as the application to Francis would be only a voluntary request, the court think that the verdict should stand. If the demand upon Francis was one which could be enforced by law, the court would have been of a different opinion.

Per Curiam.—Rule discharged.

DOE *ex. dem.* OF BURGER, v. ———.

Robert Baldwin stated to the court that this action of ejectment had been commenced in the vacation preceding a nonissuable term, agreeable to a modern rule of the Court of King's Bench in England, and applied to the court as to the adoption of that rule in this court.

The CHIEF JUSTICE observed that the court considered that all rules of the English practice were adopted up to the date of the rule of this court of Michaelmas Term, 4 Geo. IV.

NAGLE v. KILTS.

A circular flourish with the word (seal) inscribed, is not a legal seal.

This was a case of debt upon bond, tried at the assizes for the London District. The instrument pro-

duced in evidence was not executed in the usual manner by having a seal of wax or wafer, covered with paper, but had a circular flourish with the word "seal" written within it in the following manner, (seal); a verdict was taken for the plaintiff, subject to the opinion of the court as to the validity of such a substitute for the usual form of sealing.

Washburn had obtained a rule *nisi* to set aside the verdict and enter a nonsuit upon the cases in the margin. (*a*)

Robert Baldwin shewed cause against the nonsuit. —He stated that seals were at first used to authenticate contracts from the parties not being able to write; but submitted that writing being in common use, a seal like the one in question contained all the advantage that one of wax or paper could.

That it was in fact better, as not being liable to fall off or be taken away.

That there was a material distinction between a seal like the present and an [L.S.], the latter not indicating the parties' intention that it should be considered as a seal, whereas the form under consideration evidenced that intention perfectly.

That the court should support this mode of sealing, on the ground of its being a very common usage of those parts of this province where a rigid adherence to forms could not be expected for want of professional advice.

(*a*) 3 Coke, 169; Lightfoot v. Butler, an Exchequer case; 2 Leonard, 21; 1 Bos. & Pall, 360.

That the notarial seals of the lower province being merely a stamp, without any adhesive substance, afforded a strong presumption that such seals were in use in England. That the decision of Mr. Kent, which had been referred to, was not law in this province, and that there was no decision which went the length of saying that the form of seal under consideration was invalid. That the case in Bosanquet and Puller did not go directly to the point, but as to the propriety of admitting evidence of a colonial custom. That there being no authorities to decide in the present case, it must rest upon its own foundation.

That the dictum of my Lord *Coke*, which requires wax or some adhesive substance in the formation of a seal requires an impression, and if adhered to strictly would destroy the validity of many seals which have never, in modern times at least, been doubted to be good.

Coke requires, too, a strict adherence to the form of indenting deeds, which has also been dispensed with; courts in modern times having laid down that the least perceptible irregularity or inequality in the edges of the paper may constitute the instrument an indenture.

That there being nothing intrinsically more solemn in waxing than indenting, there should be no more occasion for a rigid observance in the one case than in the other.

Per Curiam.—Rule absolute.

HILARY TERM, 6 GEO. IV., 1825.

Present:

THE HONOURABLE CHIEF JUSTICE CAMPBELL.
MR. JUSTICE SHERWOOD.

SMITH v. ROLPH, ONE, &c.

An attorney in this province is privileged to sue and be sued at York.

Macaulay moved to change the venue in this action (trover) from the Home to the London District, upon the usual affidavit. He contended, that although in England attorneys might lay their venue at Westminster in all transitory actions, yet as there were district offices in this country, where they might and usually did file their proceedings, they could not be considered as being in attendance upon the court at York, and that, therefore, they were not entitled to the same privilege with attorneys in England.

Robert Baldwin, contra, contended, that the circumstance of the district office could not take away the attorney's privilege—of which opinion was the court.

Per Curiam.—Application refused.

BROWN v. HUDSON.

The judge's private seal no evidence of the proceedings of a court of justice.

The defendant had been discharged under an insolvent debtors' act by the judge of Ontario county,

in the state of New York. He was afterwards arrested in this province for the same cause of action.

Washburn moved to discharge the defendant and enter an *exonoretur* upon the bail piece. In support of his motion he produced a certificate under the private seal of the judge, that the defendant had been discharged under an insolvent debtors' act of the state of New York.

Sed per Curiam.—A private seal is not evidence of the transactions of a court of justice, and a certificate under the seal of the governor of the state should also be produced to shew that the person represented to be a judge fills that character.

Per Curiam.—Application refused.

McLeod v. Bellars.

A *capias* cannot issue upon a verdict in trespass without a judge's order.

Robert Baldwin had obtained a rule *nisi* to set aside a bailable *capias ad respondendum*, upon which the defendant had been arrested upon a verdict obtained in an action of trespass, and which had been issued without a judge's order.

Per Curiam.—Rule absolute.

Moore v. Malcolm.

Case and not trespass is the proper remedy against a sheriff for selling goods under a *fi. fa.* before the eight days are expired.

Declaration in trespass for taking the plaintiff's goods.

Pleas.—1st. General issue.

2nd. Justification under a *fieri facias* directed to the sheriff of the London district.

Replication.—That defendant sold the goods without giving the eight days' notice required by the provincial statute. (*a*)

Rejoinder.—That notice was given.

Robert Baldwin had obtained a rule to shew cause why the judgment should not be arrested, on the ground that the action should have been case and not trespass; the cause of action being a mere nonfeasance, which could not be the subject of trespass. The counsel cited the six carpenters' case as establishing this doctrine. (*b*)

Macaulay shewed cause.—He allowed that by virtue of the *fieri facias*, the sheriff, his bailiff or deputy were justified in seizing the goods; but contended, that if he sold them without giving the notice required by the statute, he became a trespasser by relation; for every interference with another person's property not warranted by law was a trespass.

That the sale could only be justified by an observance of the forms required by law, for under a justification a defendant must shew that he has strictly pursued the authority given him by the law.

That the language of the statute was clearly prohibitory. He shall not proceed to sell. That had

(*a*) 49 Geo. III., c. 4, s. 15. (*b*) Reports M. T. 8th, Jac. 1st.

the words been that "he shall give eight days' notice before he sells," the neglecting to do so might have been argued to be a nonfeasance only.

That the defendant is not charged with a trespass, because he has not given notice of sale; but because he has sold the plaintiff's property, contrary to the express prohibition of the law.

That the case is just the same as if the sheriff had seized and sold immediately. If he was justified in the one case he was in the other; both were equally contrary to law.

That the principle in the case of the six carpenters, relied upon by the counsel for the defendant, did not militate against, but supported his arguments. It was that a mere nonfeasance or not doing, could not become the ground of an action of trespass. The not paying for the wine was a mere nonfeasance, and the cases referred to were cases of nonfeasance only.

That the question in the present case is, whether the statute is conditional or prohibitory, or only directory.

That if the law says that the sheriff shall not sell until he has done some previous act, it is clearly conditional and prohibitory.

That the sheriff was a trespasser *ab initio*, having abused an authority in law, for that the law in that case makes the party a trespasser *ab initio* by relation to the first taking.

That the present case was analagous to that of distress by the common law, where if the distrainer abuses a distress, he becomes a trespasser *ab initio*.

That the officer having in this case committed an active abuse of his authority by selling contrary to law, has become a trespasser *ab initio*. The counsel cited the authorities below. (*a*)

Robert Baldwin contended, that the question in this case was simply whether a subsequent omission made the sheriff a trespasser in the outset.

That the construction attempted to be placed upon the provincial statute was too subtle.

That to maintain trespass there must have been an interference with a property to which one has no right; but that in this case the sheriff had a property in the goods at the time of sale, and, therefore, could not be a trespasser, for no person can trespass upon his own property, though that property may be only a special one.

That the application of the doctrine of distress by the common law to this case is erroneous, the principles are different; a party need not distrain, and therefore if he abuses a distress, he is made a trespasser by relation; but sheriffs must execute process, and therefore are exempted from actions of trespass by relation.

That as it is not contended that the officer could, in this case, have been a trespasser by the common

(*a*) 4 Mod. 391; Hammonds, N. P. 161.

law, he cannot by the statute, which position is well supported by Lord *Ellenborough's* construction of the 2 Geo. II., c. 19. Trespass does not lie, his lordship says, for subsequent omissions in the conduct of a distress, if the original taking was lawful. (*a*)

That as it is not contended that the plaintiff has no other remedy, the sheriff should upon grounds of policy be protected from actions of trespass by relation.

That the doctrine respecting abuse of authorities in law does not apply in this case. To be subject to trespass by relation for such abuse, a defendant must have committed a positive, and not a negative act of irregularity, which the counsel contended was not the case in the present instance.

CHIEF JUSTICE.—During the argument of this case, I felt some hesitation upon the particular expression of the statute, but taking it altogether, I consider that this action should have been case and not trespass.

Per Curiam.—Rule made absolute.

NICKALL v. CRAWFORD.

An alias *fi. fa.* may issue against lands returnable at such a distance of time as to allow the sheriff to advertise, &c.

Washburn stated to the court, that in this case a writ of *fieri facias* against the lands and tenements of the defendant, had been issued and was returnable about a year ago, and proceedings stayed thereon by

(*a*) Selwyn's N. P., 1231.

agreement between plaintiff and the defendant. The counsel applied for an order for an alias writ of *fieri facias* returnable in Easter Term next.

The court gave leave to the plaintiff to issue such writ returnable in Trinity Term next, observing that that would give sufficient time to give the notice of sale required by the provincial statute.

Dorman v. Rawson.

A *fieri facias* may issue against a defendant's goods, although he may be discharged from prison, for not having been regularly charged in execution.

The defendant had been surrendered in discharge of his bail, and had last term been discharged out of custody upon the ground that the *capias ad satisfaciendum* which had issued to charge him in execution had not been issued within two terms after his surrender. The plaintiff afterwards issued a *fieri facias* upon the same judgment.

Robinson, Attorney-General, in the former part of the term obtained a rule *nisi* to set aside this writ of *fieri facias*, upon the ground that the defendant having been in execution under a *capias ad satisfaciendum*, the plaintiff was not entitled to another execution upon the same judgment, unless the first had been rendered ineffectual by the death or escape of a defendant. (*a*)

Macaulay shewed cause.—He contended that the defendant should not be allowed to say at one time,

(*a*) See Tanner v. Hague, 7 T. R. 420; Clarke v. Clement and English, 6 T. R. 525; Cohen v. Cunningham, 8 T. R. 123; Line v. Lowe, 7 East 330.

that the writ of *capias ad satisfaciendum* was a nullity, and thereupon procure his discharge, and at another time, that it was a good and effectual writ, viz., when he wished to prevent the plaintiff from obtaining the benefit of his judgment by an execution against the defendant's property.

That the defendant in this case stands as if no execution had been issued against him.

That no case can be found to shew, that a *fieri facias* may not issue after a *capias ad satisfaciendum* has been set aside by the court as irregular, but only in cases where the defendant had been released, or the nature of the execution had been attempted to be changed by the plaintiff's own act. None to apply the rule to an execution, which had not been a legal satisfaction to the plaintiff.

That the remedy by action on the judgment which had been mentioned, as the proper proceeding by the counsel on the other side, is much discountenanced by the law, as productive of no additional benefit to a plaintiff, and as being unnecessarily expensive to a defendant, the law always countenancing the quickest and cheapest remedy.

That the plaintiff's judgment not having been satisfied, he was entitled to his remedy, as may be clearly collected from the case of Topping v. Ryan. (*a*)

That the case of Lime v. Lowe, cited on the other side, only went to shew that a defendant could not

(*a*) 1 T. R. 273.

be arrested after he had been released for want of having been charged in execution in proper time, and was by fair inference in favour of the plaintiff.

Robinson, Attorney-General, contra.—In this case the defendant was actually in execution by a writ issued at the suit of the plaintiff, and which writ the sheriff was bound to obey, who would accordingly have detained him until removed by *habeas corpus*, or discharged by the court; and he was in fact in actual custody for several months.

The case of Topping v. Ryan does not apply; there the defendant attempted, by a plea in bar, to shew that the plaintiff could not bring an action upon his judgment, which is not here contended.

Macaulay, in reply, contended, that the defendant was in custody upon his surrender, and would have continued so, whether the *capias ad satisfaciendum* had issued against him or not, until discharged as he was by the court. That writ the court have pronounced ineffectual.

The plaintiff, therefore, has not had his remedy, and is still entitled to it; that Mr. Justice *Buller's* dictum in Topping v. Ryan clearly shews that the plaintiff is still entitled to his remedy, to all intents and purposes, except as to the arrest of the defendant's person.

The intention of the law is, first to protect defendants from being harrassed by a second arrest, and secondly to give plaintiffs those remedies for their debts which are next in degree.

Per Curiam.—Rule discharged.

DALTON v. BOTTS.

An item in an account stated, being a sum charged for the price of a lot of land, does not make it incumbent on a plaintiff to prove the agreement respecting such land to have been made in writing.

This was an action of assumpsit upon an account stated, tried at the assizes for the Midland district, and a verdict for the plaintiff.

The account stated, which was proved at the trial to have been acknowledged by the defendant, contained, among other items, a charge of £50 as being the balance of a sum due upon the purchase of a lot of land.

Robinson, Attorney-General, moved for and obtained a rule *nisi* to set aside the verdict, on the ground that such a charge should not have been proved without proving also, that the agreement for the purchase of such land had been made in writing agreeable to the 4th section of the Statute of Frauds.

Macaulay shewed cause.—He contended that the object of the statute being to preserve evidence of executory contracts by requiring them to be in writing, that it is only when you want to support such contracts that the statute operates, but that it is well known to be otherwise when a contract has been executed by either party.

That it is equally clear that when a balance of account is struck and acknowledged, that there is no occasion to go into particular items, whether they are such as should have been proved by parol or written evidence, for an account stated and acknowledged is an agreement by the parties that all the articles are true, and is in this case conclusive.

That the same law would hold if one of the items of an account had been a charge for the payment of a debt due to a third person, for it is upon the implied promise to pay an acknowledged account that the action is brought, and not upon particular items.

That the case in East was in point where an agreement for the purchase of things, savouring of the realty, was considered as taken out of the statute by a subsequent acknowledgment of the debt, which was held sufficient in an action upon an account stated to support the demand.

That the case in Bosanquet and Puller was also in point, where it was held that a special agreement executed by appraisement (which is analogous to an account stated) need not be proved, the amount due having been ascertained by such appraisement, and that it is unnecessary to state a special agreement which has been executed where the action arises out of something collateral to it.

Robinson, Attorney-General, contra, contended, that the question in this case was, whether the parties themselves could dispense with the requisites of the Statute of Frauds.

That neither where a party is to be made liable for the debt of another, or a sale of lands is intended, can any subsequent agreement or account stated dispense with the necessity of shewing an original charge in writing.

That where the statute says you can bring no action for the sale of lands, this provision must affect

the buyer as well as the seller; but the counsel on the other side attempts to make it apply to the buyer only.

The very charge in his declaration, as well as in his account stated, is for land, and includes that kind of uncertainty and floating charge which the statute applies to.

That the case in East does not apply. It was reduced to a charge for the price of trees after they had been felled and taken away by the defendant, supported by evidence of his acknowledgment of the price.

That the case respecting the appraisement is as little in point; the value of certain crops were appraised in the presence of both parties, and the defendant refused to pay, upon which *indebitatus assumpsit* was brought for the value, and held good by the court, who considered the case as not within the statute, the original special agreement being mere inducement. It was in fact a mere action for goods sold.

Had no appraisement taken place, Mr. Justice *Buller* says that the decision would have been otherwise. Here, if a transfer and conveyance had been proved to have been made to Botts, the case might have been altered, but no such evidence was given. It rests merely upon the acknowledgment of an account stated.

That if an admission could take a case out of the statute it might constantly be evaded—such evidence might readily be procured.

That it was considered that the courts had gone a great way in allowing the note of an auctioneer to be evidence of a sale; but in this case there was nothing proved in the shape of a note or memorandum.

That the case in Selwin was much the same with that in East. It was treated by the court as a mere action of assumpsit to recover the price of a quantity of potatoes, not, as in the present case, an action for the price of an estate in fee simple.

That the fair inference to be drawn from all the cases is, that the statute must be pursued where an action is brought to recover the purchase money of a fee simple.

Macaulay, in reply, agreed that the parties could not by their own agreement dispense with the provisions of the Statute of Frauds; but contended that in the cases referred to, the courts consider whether the matter before them is within the statute or not; that they have determined in the negative, and that this case is analogous.

That in this case as in that of Bosanquet and Puller, and in the others cited, if the go-by had not been given to the statute by the subsequent arrangements, the original agreements would have been subject to its provisions.

That an account stated and acknowledged upon a balance due for land, in no way differs from a note given for the same consideration, of the validity of which there can be no doubt, though a note of hand is no note in writing under the Statute of Frauds.

That it is clear from Lord *Kenyon's* dictum in East, that it matters not what the items of an account stated and settled consist of.

That there being no case to shew that an action like the present cannot be maintained, is a strong argument in the plaintiff's favour.

The court were of opinion that this case was not within the statute.

Rule discharged.

BLEEKER v. MYERS, AND MYERS' EXECUTORS, &c.

In an action for breach of covenant for quiet enjoyment, freedom from incumbrances, &c., it is sufficient for the declaration to state, that one A. B. was seised before the conveyance to plaintiff, and that plaintiff was obliged to pay him £800 to obtain possession, without stating eviction by A. B., a plea stating that defeudants, executors, as aforesaid, submitted to arbitration, does not imply that they submitted in their character as executors.

COVENANT.—The first count of the declaration stated, that the testator, by a certain deed poll, did grant, bargain, sell, alien, transfer and for ever confirm, &c., the parcel of land, &c., to the plaintiff, his heirs, and assigns, &c., and did thereby impliedly covenant:

1st.—That the grantor was seised in fee, &c.

2ndly.—That he had full power and lawful authority to grant, &c.

3rdly.—That the grantee, (plaintiff,) his heirs and assigns, for ever, should enjoy free from all incumbrances whatsoever. The declaration made profert of the deed, alleged entry of the grantee, and assigned as breaches on this count:

1st.—That the defendant (the grantor) was not seised, &c.

2ndly.—That he had not full power to convey, &c.

3rdly.—That the plaintiff did not enjoy free from incumbrances; for that one Deforest was before, &c., seised, &c., and claimed possession, &c., or the payment of £300, which, to procure possession, the plaintiff paid, therefore covenants broken.

The second count set forth the like covenants not implied as in the first, but as absolute covenants, profert of deed; entry of plaintiff; the like breaches; without any averment of title in another; eviction or disturbance.

The third count similar to the second.

The fourth count similar to the second and third, and averring title in Deforest, his demand of possession or payment of £300, and the payment thereof by plaintiff to preserve possession, &c.

Plea.—1st. *Non est factum.*

2ndly.—That defendant was seised and had full power to convey, &c., protesting that he did not covenant.

3rdly.—That after the date of the deed of the alleged covenants and the alleged breaches thereof, and after the death of the testator, and before the commencement of the suit, &c., the plaintiff of the one part, and defendants, executors, as aforesaid, of the

other part, submitted themselves by mutual bonds of arbitration, conditioned well and truly to stand to, &c., the award of P. W. and T. N., arbitrators, &c., named, &c., to arbitrate, &c., of and concerning all, and all manner of actions, cause and causes of action, and actions, &c., which at any time or times theretofore were, had been moved, &c., by or between the said parties; the award to be made under hand and seal at a limited time. That within that time said arbitrators did, under their hands and seals, make their award of and concerning the matters submitted to them, viz., that all actions, &c., touching the said premises, should cease and be no further prosecuted, and that each of the said parties should pay their own costs, and that defendants should pay to the plaintiff, within twelve months, £92 14s. 5d., and thereupon plaintiff and defendants should in due form of law execute each to the other releases sufficient in law for the releasing by each to the other, of all actions, &c., to the day of submission, averring that within the said twelve months the defendants performed all matters and things awarded on their part to be performed, and paid the said sum of £92 14s. 5d., to the plaintiff, and he accepted, and received of and from them the said sum in full contentment and satisfaction of the said award, and of the matters submitted as aforesaid, in and by said bonds of arbitration.

The plaintiff took issue upon the first and second pleas.

Demurrer to the third assigning for causes:

1st.—Want of profert of the arbitration bond.

2ndly.—That it is not shewn whether the bond was destroyed or in existence.

3rdly.—That it was so pleaded that the plaintiff could not have oyer.

4thly.—General uncertainty.

Joinder.

Macaulay, in support of the demurrer, contended, that the plea was bad, inasmuch as the defendants are not therein stated to have entered into the arbitration in their character as executors, the language therein used being descriptive only; it merely stating that defendants, executors, as aforesaid, submitted themselves, leaving out the monosyllable "as" between the words defendants and executors. (*a*)

This position was not only supported by the case of Hendrill v. Roberts, but also by the rule, that if a party sues out process generally, he may declare as executor, but that if he issues it as executor, he cannot declare in his private character, for in the former case he narrows, but in the latter he enlarges his demand. (*b*)

2ndly.—That the plea is bad, as it does not set out that the subject matter of the dispute was ever submitted; for if a party in pleading arbitrament, does not shew that the subject matter was submitted, he gives the go-by to the very gist of the plea; that this appears from the form of that plea given in Chitty

(*a*) Hendrill v. Roberts, 5 East 150; 2 Bos. & Pull. 424. (*b*) 1 B. & P. 383.

and other pleaders, as well as from the reason of the thing.

That had an averment of the subject matter being arbitrated appeared in the plea, it might have cured the omission relied upon in the first objection; but that without the averment the plea was clearly bad on both grounds.

Baldwin, contra, premised that his argument would resolve itself into two branches; for that if he could either shew that the defendant's plea was good, or that the plaintiff's declaration was insufficient, judgment must be for the defendant. (*a*)

First, as to the declaration, he contended that the instrument set forth conveys no estate whatever, and when the estate fails the covenants appendant to the estate fail also, for the words did grant, bargain, sell, and for ever confirm, did not of themselves make a deed of bargain and sale. To constitute a bargain and sale, a deed must be made by indenture, and enrolled, (*b*) and in this province registry is required, as a substitute for enrolment, (*c*) so that the instrument set forth instead of being an indenture registered, is a deed poll not registered, and therefore bad, and the defendant's covenants consequently fail.

The counsel cited the cases below. (*d*)

That the declaration sets out no feoffment, for it does not appear that any livery of seisin was had.

(*a*) 1 Chitty, 662. (*b*) Stat. Hen. VIII. (*c*) Prov. Stat. 37 Geo. III., c. 8. (*d*) Northcote v. Northcote, 1 Seth. 199; Capenhurst v. Capenhurst, Lord Ray. 388; 1 Saunders, 252, N. 3; Touchstone, 204, 15.

Perhaps it may be sufficient in pleading a feoffment to state that A. B. enfeoffed C. D., without setting out a deed; but here a deed is actually set forth without stating any livery, without which feoffment cannot be; nor does any thing appear in the deed as set out upon oyer to presume livery, nor has it the operative word *dedi;* so that this instrument is not a bargain and sale, feoffment, fine, recovery, lease and release, or in fact any species of conveyance acknowledged by the law, and not being a conveyance of real estate the real covenants fail.

That the deed set out upon oyer (be it what it may) does not contain the covenants alleged in the declaration; nor is this aided by setting forth those covenants, as implied in the words "grant, bargain, sell, &c," for there are no precedents of such pleading to be found; the words *dedi concessi et dimissi* in leases for years, imply a covenant for quiet enjoyment, but not in deeds in fee. (*a*)

That even if there were a warranty in this deed, no action of covenant would lie, for such does not lie upon a warranty, either in deed or in law; the remedy being by *warrantia chartæ* and voucher, and moreover a warranty is void if the estate be void, and there must be the word *dedi* to make a warranty; the word *concessi* only does not, and *dedi* is not in this deed. (*b*)

That a feoffment implies a warranty during the life of the feoffer only, by the statute *de Bigamis.* The feoffment at common law only raises an implied war-

(*a*) 3 Com. Dig. A. 4, Tit. Covenant. (*b*) 2 Bac. Abr. 67; 7 Bac. Abr. 229, 231; Nokes' case, 4 Coke; Touchstone, 181, N. 8.

ranty, which feoffment was not by deed; a feoffment by deed implies a warranty during the life of the feoffer, but such deed must operate by the word *dedi*. Here there is no *dedi* in the deed, so as to imply warranty even during the life of the feoffer, and the action, too, is against executors for a breach during the life of the testator.

That the covenant for enjoyment free from all incumbrances whatsoever, is so large that the court will not imply it, and even if such a covenant was expressed, the court would seek for matter to restrain it. (*a*)

That neither title in any other, nor eviction or disturbance is alleged in the second and third counts; and in the first and fourth counts, where the covenant for enjoyment free from incumbrances is alleged, the breaches are not sufficiently charged, as not shewing an eviction or disturbance, the compromise with Deforest, the stranger, not being sufficient.

That general covenants must be restrained by special; eviction must be alleged and proved, or some entry or actual disturbance must be shewn. (*b*)

That this action does not lie against executors, for covenant real determines with the estate.

In support of the plea, he contended that the cases cited on the other side were not in point; that that of Henshall v. Roberts and others was solely on the point of misjoinder of counts by the plaintiff; that in

(*a*) Saunders, 178, A. N. 8. (*b*) 2 Bos. & Pull. 13; 2 Saunders, 181, 6.

the present case, the point in question was the applicability of the bar as pleaded; there is no misjoinder. It is simply and essentially one matter, viz., payment of £94 16s. 4d., in discharge and satisfaction.

That whether the defendants plead this payment, as made by them as executors, or not, is of no moment; that it is a good plea in their own right, as well as in their capacity of executors, in any action of the plaintiff, who with them, as appears by the plea, submitted all matters in the completest manner.

That if all matters in difference are submitted, it extends to a demand as executors. (*a*)

That the court will intend that all matters were in the consideration of the arbitrators, and that if the facts were otherwise, the plaintiff should have shewn it, and have joined issue upon the facts. The counsel also cited the case below as in favour of the plea. (*b*)

Macaulay, contra, after premising that nothing had been advanced by the counsel on the other side, which could at all support the defendant's plea, in the face of the authorities cited to shew that it was defective, contended in support of the declaration:

That the covenants set out were express, but if they were not so, the words grant, bargain, and sell contained an implied covenant. (*c*)

That no words could make a covenant stronger than that of the habendum, as set out upon oyer, "to

(*a*) Com. Dig. Arbitration, D. 4; Strange, 1144; Croke, James, 447. (*b*) Smith v. Johnson, 15 East, 213. (*c*) 15 East, 530; 1 Salk. 137; 2 B. & P. 13 to 28, and notes.

hold free from incumbrances to him and his heirs for ever; they were an express covenant in themselves, no form of words being necessary to constitute a covenant; it may be effected by a recital or a condition; and a covenant may be considered as a condition. (*a*)

That the counsel on the other side was mistaken in contending that the covenants declared upon were void for want of registering the deed; for,

That there was a material distinction between covenants that went to the title itself, and those which were collateral to or dependent upon it; or those to which title was a condition precedent; as in case of a title for quiet enjoyment, upon which covenant would perhaps not lie without a title to support and precede it, or the covenant for payment of rent which depended upon a precedent title; that the law as laid down by Mr. Justice *Buller*, viz., that if the principal thing fails, that which is dependent on it fails also, applies to the case of rent, &c., but not to covenants for title; to suppose which to be void, because the title was bad, would be a great absurdity; they being entered into for the express purpose of guarding against defects in title. (*b*)

That it would be as unreasonable to require a person to register a deed which conveyed no title, as it would be to require a lessee to make an entry and so commit a trespass before he could sue his lessor for demising to him an estate, over which he had no power, as laid down in Holden v. Taylor. (*c*)

(*a*) Mellorie's Entries, 2 vol. 92. (*b*) Owen 136, 4 T. R. 617; Chambers, 440. (*c*) Hobbes 12; Chitty.

That there is no occasion to state livery in pleading as laid down in Chitty.

That there having been an entry in fact was a sufficient livery at common law; for livery need not be by the ceremonies formerly in use, as delivery of a twig, &c.

That the deed declared upon might well be taken to be a feoffment, (supposing the objection to want of indenting to be of any weight,) for that, although the proper and usual words are "give, grant and enfeoff," any others of equal import will do, as "grant, bargain, sell, &c," as in the present case, as laid down in Cruise, (*a*) where a bargain and sale considered void as such for want of enrolment, was held to be a feoffment.

That the law which required an estate to support a warranty, alluded to by the defendant's counsel, did not apply to covenants for title.

That eviction, by process of law, was not necessary to be shewn (as had been urged by defendant's counsel) in an action of covenant for a good title, or upon a covenant for freedom from incumbrances, appeared from the case in the term reports, (*b*) where it was held that in assigning a breach of covenant for quiet enjoyment, it is sufficient to allege that at the time of demise to the plaintiff, one B. had lawful right and title to the premises, and evicted plaintiff, without shewing what title B. had, or that he evicted plaintiff by legal process. And in another case in the same reports, where it is held, that A. B. lawfully claiming title under defendant entered, &c.

(*a*) Cruise 55, 6. (*b*) 4 T. R. 617; 8 T. R. 278.

That this position was further established in the case of Sherwood v. Johns, in this court, (*a*) where a plea of non-eviction was, upon demurrer, held bad, in an action upon a covenant that the plaintiff should hold free from incumbrances.

That in the present case the title was not merely incumbered, but actually bad, which made it a stronger case.

That these cases went also to shew that the title set out in Deforest, was sufficient to support an action against defendants, for that plaintiff did not enjoy free from incumbrances.

That as to the last objection, that this action would not lie against executors, the only cases where that rule prevails, is where the covenant is not broken in the testator's life-time; but that the action undoubtedly lies where it is.

The counsel for the defendant would have replied to the arguments adduced in support of the declaration, but was not allowed to do so by the court.

Chief Justice.—I consider that the counts upon the implied covenants, if objectionable, may be considered as surplusage.

That the words of the deed are in themselves sufficient to raise the actual covenant set forth. It is clear that the land was to be conveyed "free of all incumbrances."

(*a*) 307

I consider also that the plea is bad, as not stating the submission to be made by the defendants in their character as executors.

SHERWOOD, J.—The defendant having raised objections to the plaintiff's declaration, the question to be first determined, is whether any of the counts in the declaration are sufficient to support the action; for it is a general rule in law, that judgment shall be against the party whose first pleading is bad in substance. I shall give no opinion on the implied covenant insisted on by the plaintiff's counsel, because the declaration contains an express covenant that the testator had a right to sell.

The fourth count sets out an express covenant for the validity of the title in my opinion. There are no set form of words necessary to constitute a covenant. If the intention of the parties clearly appears in the deed, it should be carried into effect, in whatever part of the instrument it may be found. The words "grant, &c," coupled with those in the habendum, "to have and to hold, &c," amount clearly to an assumption or agreement that the plaintiff was to hold the estate free from incumbrances. It could be taken by the parties in no other view.

With respect to the plea, if it is bad in part, it is bad altogether; pleadings are to be taken most strongly against the party pleading. It appears to me that it does not contain sufficient certainty, which at least should be to a common intent; the words leave it doubtful whether the defendants submitted to arbitrament in their character of executors, or in their own

right, for the word executors may be considered as descriptive of the persons only.

The plea states that the defendants, "executors as aforesaid," (referring evidently to the description in the introductory part of the plea,) submitted to arbitration all matters in dispute between themselves and the plaintiff. It should have stated distinctly, that they submitted to arbitration all matters in dispute between themselves, as executors, if the fact was so, for the court cannot intend the fact in favour of the plea. The payment stated to have been made is not set out with such certainty as to cause a presumption that the money was paid to them in their capacity of executors. The same phraseology is used in this part of the plea, and, of course, leaves the same doubt. Upon the whole, I think the plea is not sufficiently certain in the particular already stated.

As to the objection that this action of covenant could not lie against executors, I consider it sufficiently answered by the covenant not having been broken during the life of the testator.

Per Curiam.—Judgment for the plaintiff.

EASTER TERM, 7 GEO. IV., 1826.

Present:

THE HONOURABLE CHIEF JUSTICE CAMPBELL.
MR. JUSTICE SHERWOOD.

CAMERON AND WIFE v. McLEAN.

Where the plaintiff's attorney consented to a nonsuit, under an apprehension that he would be allowed to move for a new trial, the court granted the same, although his consent had not been coupled with the leave of the judge at *nisi prius* to move.

This was an action for a libel, and the plaintiff had been nonsuited at the assizes under the following circumstances: the libel upon which the action was brought had not been read to the jury, and the late Chief Justice, who tried the cause, stated it as a fatal omission and offered the plaintiff a nonsuit. The plaintiffs' counsel refused it; but upon the Chief Justice proceeding to charge the jury to find a verdict for the defendant, the plaintiffs' attorney consented to take the nonsuit.

Macaulay, in a former term, had obtained a rule *nisi* to set aside the nonsuit and grant a new trial, on the ground that the defendant understood he should have liberty to apply for a new trial, and that in a conversation with the plaintiffs' counsel it was so understood; and that the plaintiffs' attorney believed it was with the understanding of the defendant's counsel also.

Robinson, Attorney-General, shewing cause, relied upon the strict practice, contending that there were

no cases in which the party having consented to a nonsuit was at liberty to move to set it aside.

The court considering that the case had not been fairly brought before a jury; that the parties' counsel had originally refused the nonsuit, and that it had been acceded to under a misapprehension of the plaintiffs' attorney, made the

Rule absolute.

KING v. ROBINS.

A witness to a cognovit having left the province, leave was given to enter judgment.

Robert Baldwin moved for leave to enter up judgment upon a cognovit, upon an affidavit stating that the witness attesting the execution had gone to England.

Application granted.

THE KING v. JOHN MCDONEL.

A copy of an indictment for high treason may be had by consent of the Attorney-General.

Small applied for an order from the court for a copy of an indictment for high treason, which, upon the *Attorney-General's* consenting, was ordered by the court.

MORRIS v. RANDALL.

The court refused to order a plaintiff to pay to a defendant's executors the costs of not going to trial, pursuant to notice.

In this case an application had been made during the life of the defendant, since deceased, for costs for

not having proceeded to trial agreeable to notice which had been ordered—such costs not having been paid during the life of defendant.

Robert Baldwin moved, on behalf of the executors, for an order upon the plaintiff to pay these costs to them, or for an attachment against the plaintiff for their non-payment.

The court, observing that the attachment for non-payment of costs, for not going to trial pursuant to notice, was more in the nature of a civil process than a punishment for a contempt to the court, and that the cause was at an end by the death of one of the parties, which would preclude an application in any cause pending in the court,

Refused the application.

THE KING v. THE WELLAND CANAL COMPANY.

Whereby a clause of a prior statute, the two directors having the smallest number of votes of the five chosen in a former election, are declared to be ineligible at any subsequent election, and by a subsequent statute, the number of directors was fixed at seven, and that statute named the persons who were to constitute the board until the next election. The court *held*, that two of the board having vacated their seats by non-residence, rendered it unnecessary for two of the remaining five to vacate their seats as having the smallest number of votes at the subsequent election.

This was an application to the court for a rule *nisi*, for a mandamus to the president and directors of the company, to admit to the office of directors for the present year, James Gordon and James Crooks, Esquires, they being two stockholders duly qualified to be elected directors in the room of two of the present directors who had the fewest number of votes

at the last election for the said company, held at St. Catharines, on the 3rd of April last; the two of the present directors having the smallest number of votes at said election, being by law ineligible, and the said James Crooks and James Gordon having the next greatest number of votes.

By the 29th section of the act for incorporating the Welland Canal Company, its affairs are to be managed by five directors, including the president, who are to hold their offices for one year—such directors to be stockholders and inhabitants of the province, and to be elected on the 1st Monday in April in every year—the election to be by ballot, and the five persons who should have the greatest number of votes to be directors. The same section further enacts that two of the directors which should be chosen at the preceding year, excepting the president, shall be ineligible to the office of director for one year after the expiration of the time for which they shall be chosen directors; and in case a greater number than three of the directors, exclusive of the president, who served for the last year, shall appear to be elected, then the election of such person or persons above the said number and who shall have the fewest votes, shall be considered void, and such other of the stockholders as shall be eligible and shall have the next greatest number of votes shall be considered as elected in the room of such last described person or persons, who are hereby declared ineligible, and the president for the time being shall always be considered as eligible to the office of director, but stockholders not residing within the province shall be ineligible. If any director absents himself from the

province, and ceases to be an inhabitant thereof for the space of six months, his office shall be considered as vacant—vacancies happening between the days of election to be filled up by directors.

By a subsequent statute (*a*) passed the 13th April, 1825, so much of the last clause as requires the election of five directors, is repealed; and it is enacted, that the company should elect in like manner and times, as in the former act, seven directors, one of whom to be president. By the 13th clause, the Honourable James Irvine and Simon McGilvray, Esquire, in addition to the five directors already elected under the first statute, are to constitute the directors of the said company until the next general election.

The affidavit to ground the application, stated that Messrs. Dunn, Merritt, Boulton, Keefer, and Allan were directors chosen in pursuance of the first statute in the year 1825.

That on the 3rd of April last—the last meeting of the stockholders for the purpose of electing directors, Messrs. Dunn, Allan, Boulton, Robinson, Keefer, Clark, and Merritt, were elected—the applicants, Crooks and Gordon, having the next number of votes; and on the part of the applicants, it was now contended by *Washburn* and *Dixon*, that two of those directors who had been chosen last year were ineligible, and should be withdrawn from the list, and that the applicants having the next number of votes, should be considered as duly elected; for that Messrs. Irvine and McGilvray having been appointed by the

(*a*) 6 Geo. IV., c. 2, s. 6.

last statute, and not having in fact ever been elected, did not come under the words of the statute, which are, that two of the directors which shall be chosen at the preceding year shall be ineligible at the subsequent election; and, therefore, that their having withdrawn or having been omitted in the number of directors in consequence of their not being residents in this province, did not satisfy the words of the statute, which are that two of the directors which shall be chosen at the preceding year shall be ineligible at the subsequent election.

Robinson, Attorney-General, contra, contended that that part of the first act which declares that any number of persons, more than three, who were directors in the former year, should be ineligible, and their election void, must be considered as virtually repealed by the subsequent statute, which appoints seven directors instead of five, and that the law as it now stands must be taken to be that five of the former directors may be re-elected.

That the secession of Messrs. Irvine and McGilvray are sufficient to satisfy the statute, for that no argument can be drawn from the distinction attempted to be made between their appointment and that of the other directors; they were all appointed directors by the last act as much as Messrs. Irvine and McGilvray.

CHIEF JUSTICE.—I cannot accord to the distinction which has been taken between the persons chosen at the first election, and the two gentlemen added by the second act; and as nothing I consider has been

shewn to convince me that the directors chosen at the last meeting of the stockholders are ineligible, I do not consider the court as called upon to interfere with the election.

Per Curiam.—Application refused.

Welby v. Beard.

Officer employed in executing the process of the court discharged from arrest.

In the case the defendant having been employed to execute a bench warrant issued from this court, was, while in the performance of that duty, arrested at the suit of the plaintiff, in the Midland District. Upon the application of counsel, ———, the court directed the arrest to be set aside.

Wright v. Landell.

Judgment roll amended by adding costs.

Macaulay moved upon an affidavit stating the error, that the judgment roll in this cause (and which had been completed last term) might be amended by adding the costs, which had been omitted by mistake.

The court observing that such an application might, perhaps, have been entertained, if made in the same term in which the judgment had been entered, refused the application.

WHITE v. HUTCHINSON.

New *nisi prius* record made up, the original having been destroyed by fire.

Small moved that the plaintiff be permitted to make up a new *nisi prius* record upon an affidavit, stating the former one to have been consumed with fire. (*a*)

Application granted.

MOFFATT AND ANOTHER v. LOUCKS.

A person who assigns his property to trustees for the benefit of his creditors considered as a competent witness to a bond given to those trustees by one of his debtors, and an [L.S.] need not be inserted to a deed set out upon oyer.

This was an action of debt upon bond tried at the assizes, and a verdict for the plaintiff.

The *Chief Justice*, who tried the cause, reported, that Davies and Company, merchants, at Montreal, had assigned their property to the plaintiffs, for the benefit of their creditors, and that the defendant had given his bond to the plaintiffs for the amount of the debt due to Davies and Company.

That Davies, the only witness to this bond, being absent at the trial, his hand writing had been proved, and upon such evidence a verdict had been found for the amount of the bond, subject to the opinion of the court upon the inadmissibility of Davies as a witness, upon the ground of his being interested in the recovery of its amount.

The defendant's counsel had also objected that there was no (L. S.) or other mark indicative of a seal to the bond, as set out upon oyer.

(*a*) 2 Strange, 1264; Archibold, 243.

Robinson, Attorney-General, in support of the verdict, contended that an (L. S.) or other such mark was perfectly unnecessary. He observed, that it was only of late that it had become usual in practice to insert the names of witnesses; that all that is required to be given upon oyer is the contents of the instrument.

That if a defendant has any doubt as to the instrument being sealed, he may satisfy himself by inspection.

That the instrument is stated to be under seal in the pleadings previous to the oyer, which is a sufficient notice to the party that it is so sealed.

As to the second point, he contended, that no interest having been proved in Davies, the witness, no objection to his competency could be taken.

That in point of fact his interest was as much destroyed by the assignment, as that of a bankrupt by the commission; although the bankrupt, being interested in having a dividend to a certain amount, is obliged to release that expectation to make him competent.

That in this case, Davies having assigned his property without reservation to the plaintiffs, and a bond having been given to them by the defendants to secure the original debt, which was upon simple contract, it had merged in the bond, and the present demand could be sued for by the plaintiffs, and by them only, they only having the legal interest.

That the only instrument from which it might have been inferred that Davies had any future interest, proved the contrary, as it shewed that the debts due by him and his firm were equal to the property transferred.

He observed, that had it been necessary to use Davies' testimony, to prove the particulars of the original debt, a question might with more propriety have been made as to his competency, but as it was merely used to prove the execution of the bond, and partial payments thereon, there could be no doubt upon the subject.

Washburn, contra, contended, that Davies being the person legally entitled to sue for this demand, at the time the bond was given, could not be considered as disinterested at the time he became a witness, and was therefore incompetent.

That there was nothing in the case from which to presume that Davies had released his interest in any surplus which might arise, in which case he was clearly interested and incompetent.

CHIEF JUSTICE.—As to the first point in this case, I consider that there is nothing in it to induce the court to set aside the verdict. The statement in the declaration that the instrument is under seal, coupled with the copy of its contents given upon oyer, is sufficient to shew the defendant the nature and purport of the instrument. If he had any doubt of the truth of the statement in the declaration, he might have examined the deed itself.

As to the second objection, I consider that Davies' interest, if any, was too remote to affect his competency, and that the plaintiffs being the only persons who can sue at law upon this instrument, the verdict must stand.

Per Curiam.—Rule discharged.

SMITH v. SUMNER AND NEVILS.

Semble, that a rule to plead is necessary where bail is filed according to the statute.

Small moved for a rule *nisi* to set aside the proceedings in this cause, upon an affidavit stating that no common bail piece had been filed according to the statute; that no affidavit of service of the process had been filed, and that no rule to plead had been given —which latter he contended to be necessary in cases where, as in the present, judgment is signed by default, and this, from the words of the act—which are in case of the plaintiff's filing common bail for the defendant—that he is to proceed thereon as if such defendant had put in and perfected bail in the action.

Although a determination of the latter point was unnecessary, the two first objections being sufficient to set aside the proceedings, the court intimated an opinion that the position of the counsel was correct.

Rule absolute.

RADCLIFFE v. SMALL, ONE, &C.

The court will not issue an attachment against an attorney to compel him to pay over money to his client which he had in fact forwarded, but which had been lost by accident.

Robert Baldwin moved for the order of the court upon Mr. Small, to pay Mr. Radcliffe a sum of money recovered for him under the following circumstances:

Mr. Radcliffe had directed him to forward the money by return of boat, the steam-boat which had brought the order. Mr. Small had enclosed the amount in a letter directed to Mr. Radcliffe, at Niagara, and given it to a passenger in the boat, a respectable person, who left it at a tavern at Niagara, in charge of the landlord, in whose tavern it was lost or stolen.

Mr. Baldwin contended, that the order to send money by return of boat, must be intended to mean by the persons having charge of the boat and not by a passenger, and that, therefore, the court would order Mr. Small to re-pay the money.

The court, considering the case did not call for summary interference,

Refused the application.

BEARDSLEY v. CLENCH.

Whether an attorney suing as an unprivileged person is entitled to charge fees.

The plaintiff in this case was an attorney of this court, and had sued the defendant in person, but without describing himself as an attorney or officer of the court.

At the taxation of costs upon the judgment which he had obtained in the suit, the clerk of the Crown had allowed him to charge his fees as an attorney.

Small moved for an order upon the clerk of the Crown to re-tax the costs, contending that Mr.

Beardsley, not having sued as a privileged person, was not entitled to charge fees.

Application granted.

BROCK v. MCLEAN, ESQUIRE, SHERIFF.

A plea to an action for an escape, setting out "that the *ca. sa.* was not endorsed with the sum set out in the declaration," *held* bad upon special demurrer.

This was an action against the defendant as sheriff of the Midland District for an escape.

The declaration set out the judgment—the *capias ad satisfaciendum;* the caption and escape; also that the writ was duly endorsed for bail for £119 13s. 9¾d.

Plea.—1st. General issue.

2ndly.—That the *ca. sa.* was not so endorsed with such sum, in manner and form as set forth in the declaration.

General demurrer—joinder.

Macaulay, in support of the demurrer, contended, that the plea was no answer to the declaration; that it admitted the very gist of the action, the judgment caption and *ca. sa.* and escape.

That the endorsement was immaterial as to effecting the efficacy of the writ, and was only required by statute for a particular purpose.

That even if it were material, a misstatement of its amount in the declaration could only be taken

advantage of at the trial by the production of the writ, when the variance between it and the declaration would appear.

That this plea could not be sustained ; for a plea in bar must go to the whole action—must shew that plaintiff has no right to recover; that a plea to a mere variance had never been heard of, unless where a specialty is the ground of action, and the oyer set out varies from the instrument. (*a*)

Robinson, Attorney-General, contra, contended, that this plea contained a direct negative of a point material to the action; that the averment of an endorsement to levy being necessary, was to be collected from all the forms of pleading in this action given in Chitty and other pleaders, who would not have set out such an averment if they had not considered it so, for it is their constant direction to avoid inserting unnecessary averments.

That the endorsement being a proceeding positively directed by the legislature, cannot be dispensed with.

In a case in East (*b*) it is admitted, that the payment of the sum endorsed upon the writ is a satisfaction, and, therefore, it ought to be endorsed, that the defendant may have the benefit of it.

That supposing the defendant had in pleading singled out a particular fact, which amounts to the general issue, and which it is admitted may be incorrect, still it can only be taken advantage of upon special demurrer. (*c*)

(*a*) Chitty, Title Abatement, 465; Sethold, 565; 2 Wilson, 394, 5. (*b*) 14 East, 468. (*c*) Com. Dig. E. 14.

That by demurring generally the plaintiff has admitted the writ was not endorsed, which is admitting that a material fact is wanting to enable him to recover.

That it was not to be contended that nothing could be pleaded in bar which did not go to the escape, for *nul tiel* record might be pleaded, or any other matter which would excuse the sheriff.

That it is impossible that the plaintiff could, at the trial, be allowed to shew an endorsement, which he has acknowledged the want of by a general demurrer, and, therefore, to allow the parties to go to trial would be nugatory.

That the endorsement was a fact which could not be dispensed with, and, even if it were otherwise, it has become so by having been set out in the declaration.

That having become material, he must prove it or fail at *nisi prius*.

That as the not proving it would be fatal, and it being a fact material and traversable, and the want of such fact being admitted by the general demurrer, it is impossible that the plaintiff can have judgment upon this record.

Macaulay, in reply, insisted that the defendant's counsel had not shewn that any matter could be pleaded in bar which did not put an end to the action.

That the case of Moore v. Malcolm, argued in this

court, where it was determined, that although the sheriff had neglected the positive directions of an act of parliament, such neglect did not subject him to an action of trespass, or annul his proceedings under a *fi. fa.*, was in favour of the plaintiff.

That, if setting out the endorsement was material, it can only be taken advantage of at the trial as a variance, and, if immaterial, it may be struck out, and if so it need not be proved.

That the plea of *nul tiel* record, which had been instanced as a proper plea in this action, is a complete bar to the suit, and not at all resembling the present.

That the argument which had been drawn from the admission of the want of endorsement by the general demurrer, could have no weight, as the pleadings upon demurrer were not attended to at *nisi prius*.

That the plea being substantially bad, may be taken advantage of on general demurrer.

CHIEF JUSTICE.—This is an action against the sheriff of the Midland District, for the escape of a person charged in execution upon a *ca. sa.* returned *cepi corpus*. The declaration states the judgment in the original action, and that a writ of *ca. sa.* was taken out thereupon by the plaintiff, against the original defendant, John White, who was taken thereupon; that before delivery of the *ca. sa.* to the sheriff, the sum of £119 13s. 9¾d., for which he was to detain him in custody, was duly endorsed on the writ

pursuant to the statute. To which the sheriff pleads: 1st. The general issue, and 2udly, in bar to the action, that the *ca. sa.* was not so endorsed with such sum in manner and form as set forth in the declaration, but without specially denying all the material allegations in the declaration, or the delivery to him of the writ of *ca. sa.*, or the having the defendant in custody upon it or the escape—to this plea the plaintiff demurs, as not being a sufficient plea in bar, or denying the material cause of action—and I am of opinion the demurrer is right, the fact of the escape being the gist of the action, and not the sum endorsed, which I conceive as to this purpose to be quite immaterial; at common law, the writ itself without any endorsement is binding on the sheriff to keep the defendant in custody, unless for defects appearing on the face of it. It is true, the statute 3 Geo. I., c. 15, positively requires the plaintiff to endorse the sum he means to levy, but that is for no other purpose than to direct the sheriff in charging his poundage, and is immaterial in all other respects; and if the *ca. sa.* is otherwise unobjectionable, and the facts of the arrest and subsequent escape are sufficiently set forth and supported, a wrong endorsement, or the want of any endorsement will not vitiate the writ, and therefore is no bar to the action. This I think may be collected from various authorities, and, amongst others, from those of Lord *Holt*, and Mr. Justice *Eyre*, in the case of Waites v. Briggs, 2d Setheld, 565.

Sherwood, J.—The statute of Geo. I. recited, that poundage in many instances amounted to more than the debt, and for the sole purpose of preventing that

injustice, it was enacted that the amount of the levy should be endorsed. Such endorsement, however, does not affect the authority of the sheriff to arrest the defendant, but he derives his right to do so from the writ itself. I therefore concur in opinion with the Chief Justice.

Judgment for the plaintiff.

SAWYER v. MANAHAN.

Whether a foreigner forwarding prohibited goods to a place in the United States so situated as to furnish a strong presumption that they would be smuggled, can maintain an action for the price of such goods.

This was an action by the plaintiff as payee, against the defendant as the drawer of a bill of exchange, tried at the assizes for the Midland District, and a verdict for the plaintiff for £400.

The principal ground of defence set up at the trial was, that the note was void, having been given for a smuggling transaction.

The facts adduced in support of which were, that the defendant being a British subject, resident at Kingston, had there, by means of an agent, contracted with the plaintiff, an American subject, for the purchase of sixty chests of tea (same being a prohibited article) contained in a warehouse at Gravelly Point —a small village on Lake Ontario, in the United States, and opposite to Kingston, a commercial town situate upon the banks of lake Ontario in this country.

There was no direct evidence that the defendant assisted in smuggling the goods, or even knew that

they were smuggled into this country; the defendant's case resting upon the strong presumption, that the contract being made in this country for the purchase of prohibited goods, warehoused directly opposite to the place where the contract was made, in a small village at which, and its environs, there could be no demand for them, they must necessarily have been purchased for the purpose of smuggling them with the knowledge of the plaintiff.

The defendant also placed considerable reliance upon the statement of Russel, the plaintiff's agent in the transaction, who deposed at the trial that he had no doubt but that the tea was intended to be smuggled. The Chief Justice, who tried the cause, expressed a doubt at the trial whether the circumstance of the contract being made in this country with a British subject, might not, with the other facts in the case, distinguish this from that of Holman v. Johnson, (*a*) as in that case the contract of sale had been made as well as completed abroad; but he charged the jury that he considered the mere knowledge of the plaintiff, a foreigner, and residing abroad, that the tea was intended to be smuggled, unless he gave some assistance in the smuggling, was not sufficient to take away his right of action.

Robinson, Attorney-General, had moved for and obtained a rule to shew cause why the verdict should not be set aside and a new trial granted on the ground of misdirection, and that it was contrary to evidence.

Macaulay now shewed cause.—He contended that

(*a*) Cowper, 341.

this case came within the law as contained in the case of Holman v. Johnson, (*a*) in Cowper, viz., that the mere sale of prohibited goods abroad to a British subject, did not contaminate the contract, although the seller knew that they were to be smuggled into England.

That selling the tea at Kingston did not alter the case, as it was not contrary to any law in Upper Canada so to do, not even if plaintiff knew it was to be smuggled, unless he gave assistance to the smuggling; that the contract was completed by delivery at Gravelly Point, and the plaintiff had nothing further to do in the transaction; that Russel's supposition that the tea was to be smuggled, did not alter the case, nor were the presumptions derived from the local situation or size of the village of Gravelly Point to be at all taken into consideration, for that nothing but assisting the smuggling could bar the plaintiff of his right of action.

Robinson, Attorney-General, contra, after premising the importance of the question, and urging the necessity of preventing foreigners from coming to this country for the purpose of vending prohibited goods, and afterwards sheltering themselves from risk because no direct proof could be adduced of their actually assisting in the importation of the prohibited article, and observing that the case in Taunton was against authorities—

He contended that this case was very different from that of Holman v. Johnson. There the parties

(*a*) Cowper, 341; 5 Taunton, 181.

were both resident in a foreign country at the time of the contract made, and the circumstance of both being foreigners was considered as material by the court—it was legal in its inception and completion. But that in this case, instead of its being a contract legally entered into abroad, it was one illegally entered into at home—a contract for the sale of prohibited articles, with the intention of smuggling them into this country.

That the pretence of the plaintiff being a foreigner cannot avail him, for, at the time of the contract made, he was in this country, for although foreigners making contracts in their own country are not obliged to take notice of the laws of this, yet, when here, they are bound to do so, being for the time subjects to this government.

That as in the different smuggling cases reported in the books, facts are adduced to prove the scienter and invalidate the contracts, so the facts in this case furnish a full and strong presumption against the plaintiff. The contract made at Kingston with a British subject—the goods totally prohibited (not merely subjected to duty) by the laws of this country, were housed at Gravelly Point on the foreign frontier, a small village where it was in the greatest degree improbable that such a quantity of the article could either be consumed or sold, except in this country where it was prohibited—the evidence of Russel, the agent, that he had no doubt but that the goods were purchased with the intention of smuggling, and not a shadow of proof to rebut these violent presumptions, which could readily have been

had if the circumstances of the eventual disposal of this tea had warranted it.

He contended that these circumstances were as strong to taint the transaction as those of the anchors and slings in Clugas v. Pampelona, (*a*) or the packing of the lace in Weymell v. Read. (*b*) In that case the plaintiff's counsel admitted, that if he had been a British subject he could not have recovered; and, in the present case, the plaintiff having been in Kingston at the time he made the contract, must at the time be considered as such.

That the fact of the goods being an article prohibited (and not merely subject to duties) coupled with the fact of the plaintiff's coming to this country for the purpose of selling them, distinguished this case materially from that of Holman and Johnson; and that the facts should fairly upon grounds of public policy (upon which the decision of these cases must frequently turn) be considered as aiding and assisting in the smuggling.

The counsel cited the case of Wilson v. Saunders, (*c*) as shewing that strong presumptions are sufficient to shew an illegal intention without direct proof.

Macaulay, in reply, contended, that no principle could be extracted from all the cases which could invalidate the plaintiff's right of action.

That in all of them it appeared that the plaintiff knew the goods were to be smuggled; that they in

(*a*) 4 T. R. 466. (*b*) 5 T. R. 599. (*c*) 1 B. & P. 267.

some shape assisted; and that they were actually run. But for any thing that had appeared in this case, the goods might be still at Gravelly Point.

That the case last cited did not apply, for there an act had been done in pursuance of the intention to re-land the goods in England, viz., putting them on board a cutter, which was only licensed to sail between certain points of the English coast.

That this matter was analogous to the charge of treason, which could not be proved but by some overt act.

Per Curiam.—Rule absolute.

Blacklock v. McMartin.

Semble, that a returning officer, whose conduct has been impeached, is not entitled to his expenses as a witness before a committee of the House of Commons, although he was summoned to attend by the Speaker's warrant, in the same manner as other witnesses.

This was an action of assumpsit brought for the expenses of the plaintiff, as a witness attending a committee of the house sitting upon a contested election.

The plaintiff was returning officer. Misconduct had been imputed to him in that office, and he had been summoned in the same manner with other witnesses, viz., by the Speaker's warrant. His return had been set aside, but no vote of censure had been passed upon him by the house. The cause was tried at the assizes, and a verdict for the plaintiff, for the amount allowed to witnesses in the courts of law,

subject to the opinion of the court, whether the plaintiff, under the circumstances of the case, had a right of action.

Robinson, Attorney-General, for the plaintiff, contended, that although in criminal cases witnesses had no right of action for their expenses, yet that the present was more analogous to a civil proceeding, the party requiring the testimony was not only contending for a valuable and honourable privilege, but would also, if he succeeded, be entitled to parliamentary wages.

That it could not be supposed that a witness, who was poor and unable to pay his expenses, must either beg his way to York or subject himself to punishment by the house.

That the Grenville act allowing costs must extend to the expenses of witnesses.

That there was nothing in the particular case which could deprive this plaintiff of his right to costs; as returning officer he need not have attended at York without the subpœna. He has performed the service required of him, and is entitled to a reasonable compensation.

Macaulay, contra, contended, that witnesses before committees of the house were not entitled to an action for their expenses under any existing provisions, but, that even if they were, that the case of the plaintiff was very different—his conduct as returning officer being impeached by the petition to the house he was bound to attend.

That there is no precedent of this action to be found, though none more likely to happen, which furnished a strong presumption against it.

That the provision of the statute of Elizabeth, which requires a tender of expenses to persons subpœnaed, applies to witnesses incourts of record only.

That inability, whether proceeding from sickness or poverty, would no doubt be considered as an excuse in this case, as may be inferred from the case of Battye v. Gresley and others, (*a*) which arose out of a case before commissioners of bankrupt. It was there held, that there was no occasion to tender the witness his expenses, and that poverty might be an excuse for non-attendance.

That the case in East, in the matter of Price, a prisoner, went a considerable length to shew that a person subpœnaed before a committee of the house, was not entitled to an action for his expenses, or it would have been unnecessary for the court to have required the undertaking of the party requiring his attendance to pay them. (*b*)

That the defendant having petitioned on the ground of public interest, makes this case more analogous to a criminal than to a civil proceeding, in the former of which witnesses have no right of action for their expenses.

Robinson, Attorney-General, in reply, insisted that as no misconduct was imputed to plaintiff, as return-

(*a*) 8 East, 318. (*b*) 4 East, 587.

ing officer, further than is usual in all election petitions, his case was the same as that of other witnesses.

That the want of precedent was a very slight objection, such as would apply to any other witness, for that in his experience he did not recollect this sort of action ever having been brought.

That it is not by the statute of Elizabeth, (*a*) but by common law, that a witness is entitled to his expenses, that statute only requiring a tender of expenses, and in default thereof, exempting the witness from the penalties of non-attendance imposed by the act.

That the Grenville act could only intend to give parties the means of obtaining evidence, not that they should be at liberty to summon all the people of the country without paying them for their attendance.

That the case in the matter of Price, is no precedent against this action, but that the principle of it, namely, that a witness ought to have his expenses, applies.

That parties being allowed their expenses under the Grenville act, they must be entitled to the expenses of their witnesses as well as any other, and they would be taxed to them by the clerk of the Crown in Chancery, upon a presumption that they must have been paid.

CHIEF JUSTICE.—The present motion is on a point reserved at *nisi prius*, and the question is, whether a witness summoned by Speaker's warrant to attend

(*a*) 5 Eliz. c. 9, s. 12.

a committee of the House of Assembly, has a right of action against the petitioning candidate, at whose instance he is summoned, for his expenses, such witness being the returning officer whose conduct at the election is the subject of complaint, and whose return is set aside by such committee, and a new election ordered.

From the facts in evidence on the Chief Justice's notes of the trial of this case, it appears to me that the case now before us is widely different from the broad question, as to the right of action an ordinary witness might have when so summoned at the instance of a petitioning candidate to set aside an election. Upon that general question we are not now called upon for any opinion. In the present instance there can be no difficulty. The plaintiff is the very person whose conduct, as returning officer, is complained of by the defendant in his petition to the House of Assembly, who, on such complaint, are bound to order an investigation in the way the law directs, and the Speaker's warrant is the ordinary process to compel the attendance of the returning officer, as well as of all other witnesses required for the full investigation of the complaint. The petitioning candidate (defendant in this action) has established his ground of complaint against the officer (the present plaintiff) before the proper tribunal appointed by law to try it; I therefore cannot see upon what principle the present plaintiff, under all these circumstances, can have any right of action; if indeed the petitioning candidate had failed in his complaint, and that the officer's return had been confirmed, the case might have been different.

Per Curiam.—New trial without costs.

PAYNE v. McLEAN.

This court refused to set aside a verdict against the sheriff, in an action for an escape, upon the ground that the coroner's jury who tried the cause was the same with that returned by the sheriff; that the plaintiff had produced the original *ca. sa.* instead of a copy, or that the judgment against the party escaping had been obtained without consideration.

This was an action for an escape, tried at the assizes for the Midland District, and a verdict for the plaintiff.

Robinson, Attorney-General, had obtained a rule *nisi* to set aside the verdict and enter a nonsuit, or grant a new trial upon the grounds—

First.—That the jury returned by the coroner was the same as that returned by the sheriff in his general pannel.

Secondly.—That the plaintiff to prove the *capias ad satisfaciendum* upon which the party escaping had been arrested, had produced the writ itself and not an exemplified copy.

Thirdly.—That the judgment which had been obtained against the party escaping was without consideration.

Macaulay shewed cause.—After premising that it had formerly been the practice in this country, as it still is in England, to issue a writ of *venire facias* to the sheriff in each particular cause, but that a provincial statute (*a*) now authorised the sheriff to return a general pannel for the assizes, but that where the sheriff was party to the suit, a *venire* went to the coroner.

He contended, that, however the plaintiff might have objected to this jury, there could be no pretence

(*a*) 36 Geo. III., c. 2.

for the sheriff to overturn this verdict, because the persons composing the jury who gave it had been chosen or summoned by himself for other causes, for there was no authority to shew that a sheriff, being a defendant, might not summon the jury if the adverse party thought proper.

He admitted that a good cause of challenge was a ground for a new trial; but as the sheriff had objected to the jury at the trial, and his objections had been overruled, this must be taken to be a good jury; that the principle upon which challenges were made was, that there existed reasonable grounds to suspect that the jury summoned were unfavourable to the party objecting to them, which it was absurd to suppose in this case.

That it could be no objection that the same jury has been returned by a coroner as has been returned by a sheriff; for he may even return one which has been returned by the sheriff and quashed. He cited the authorities below. (*a*)

As to the second ground of objection, he observed, that it was not easy to conceive that the mere filing of a paper made it a record, or that the original should not be as good evidence as a copy.

That the reason for using copies is, that the originals cannot, after filing, be had, and, therefore, when that has been done, a copy must be received in evidence; but, until filed, the original is good, as laid down in Selwyn and other authorities. (*b*)

(*a*) Impey's Sheriff, 242; Tidd, 999, 610; 2 Com. Dig. 344; Co. Litt. 156; Sellon, 460; 3 Bac. Abr. 732, 738. (*b*) Selwyn, N. P. 650; Buller's *nisi prius*, 66; Cowper, 18, 65; Phillips, 280; 3 Campbell, 397.

As to the third objection, he contended that a sheriff could not justify an escape on account of defects in the judgment, however competent it might be to the party against whom it had been obtained to set it aside on account of fraud or error.

That if the writ justifies the arrest he is liable for the escape, unless he can shew that the judgment was altogether void, as having been obtained *coram non judice*, but that neither error in the judgment or process excuses the sheriff. (*a*)

Robinson, Attorney-General, contra, contended, that it was against reason to suppose that when a writ is specially directed to the coroner, requiring him to summon a jury in a case where the sheriff is a party, that he could legally summon the identical jury which has been summoned by the sheriff.

That the sheriff had properly objected to this jury at the trial, as it was his interest that the cause should be tried by a jury who were competent to give a verdict that could not be set aside by the plaintiff.

That the sheriff having made this objection at the assizes, and having been overruled, he was entitled to make it now; for what is a good ground of challenge, is a sufficient reason for granting a new trial, as had been admitted on the other side.

As to the second objection, that it is laid down in Turner v. Eyles, (*b*) that although the writ be good

(*a*) 1 Wilson, 255; Selwyn, 645; 3 Starkie, 1278; Croke, Eliz. 188; Lord Raymond, 775. (*b*) 3 B. & P. 456.

for some purposes, yet, when an action is brought, the writ must be filed and the record perfected.

That although in the case of Wigley v. Jones, (*a*) the court considered the production of the writ itself as sufficient, yet that opinion of the court arose from the distinction which had been taken between mesne process and execution; and, therefore, that case did not apply in, or rather was favourable to the present, which was of a *capias ad satisfaciendum*.

The facts of the case as given in evidence at *nisi prius*, the counsel contended, inferred fraud; the action upon which the person escaping had been arrested, having been founded upon an accommodation acceptance, or promissory note, which he had signed but had never paid.

Macaulay, in reply, allowed that if any case could be found where a party had overturned a verdict where the jury were suspected of partiality to himself, such a case would apply; but no such was ever supposed to exist.

That no suspicion having been imputed either to the jury or the coroner, the verdict must be established.

That the cases where an exemplified record has been required, are where a defendant in execution has been removed by writ of *habeas corpus* and committed by a judge, and there the commitment being stated to be of record, must be shewn to be so.

(*a*) 5 East, 504.

That fraud or want of consideration can be no answer to this action, unless it could be shewn that there had been a conspiracy between the plaintiff and defendant in the original action to defraud the sheriff.

That as to want of consideration for the judgment, though it was by no means necessary to be shewn, yet that the plaintiff in this action, having been actually arrested upon the note which he had signed at the request of the party escaping, he had given a sufficient consideration.

CHIEF JUSTICE.—As to the first ground of objection taken to this verdict, I consider that it cannot be made by the plaintiff to a jury chosen, in fact, by himself.

The coroner has some how or other, it does not appear how, summoned the same jury for the trial of this cause which the sheriff had summoned for the general business of the assize; but it is not alleged that this was done from any motives of collusion or partiality. The objection, too, I consider, if it had been founded in reasons arising from such improper motives, should have been made to the poll and not to the array.

As to the second objection—admitting the *ca. sa.* itself to have been returned *cepi corpus*, as the caption and subsequent escape are the gist of the action —I do not consider that the exception taken to the production of the original writ, instead of an exemplified copy, is sufficient to affect the verdict.

As to the objection on the ground of fraud or want

of consideration for the original action, it appears that the plaintiff in the present suit gave an accommodation note, acceptance, or endorsement to Whitaker, who escaped.

That he became liable to the payment of this document, and did actually suffer imprisonment in consequence of its non-payment; and, moreover, I consider that any objection made by the sheriff on the ground of fraud, should be a fraud affecting himself; a collusion to confess a judgment, the escape from imprisonment, and to saddle the sheriff with the debt, which are not alleged in this case.

SHERWOOD, J.—As to the second ground of objection, the cases cited to shew that an exemplification of the writ of execution, and not the original, should be produced do not apply. In the case cited of Turner v. Eyles, the defendant had been brought up by *habeas corpus* to be charged in execution, and being thereupon committed by a judge of the court, it was insisted and allowed that the *committitur* should have appeared of record as an act of the court.

That of Wigley v. Jones was one of mesne process —there the filing and entering the *committitur* were considered unnecessary; but in neither of the cases was the question raised as to the propriety of giving the original *capias ad satisfaciendum* in evidence upon a trial for an escape. I consider that the original was properly received as evidence in this case, because it was never returned into the clerk's office, and I concur with the Chief Justice upon the other points.

Rule discharged.

RICHARDSON v. NORTHROPE.

An arrest set aside, the affidavit to hold to bail not setting forth the deponent's name in words at length.

Macaulay moved for and obtained a rule *nisi* to set aside the arrest and cancel the bail bond in this case on the following grounds:

First.—That the affidavit was not entitled in any court or in any cause.

Secondly.—That no proper venue was mentioned in the *jurat;* it being only stated to be sworn at Niagara, which might be in the state of New York.

Thirdly.—That it did not state of what court the person who administered the affidavit was a commissioner.

Fourthly.—That the deponent's name was not inserted in words at length, but with the initial only of a second christian name, which omission he contended was fatal, as clearly to be deduced from the case of Reynolds v. Starkin; (*a*) observing, that in that case the christian name had been taken from the signature to the promissory note upon which the action was brought.

Washburn shewed cause.—He contended that the affidavit was sufficiently entitled in a court by its being headed with the letters B. R.; that the amount of the sum sworn to shewed that it must have been in the King's Bench.

That to title the cause was not only unnecessary

(*a*) 4 B. & A. 539.

but improper, no cause existing at the time of affidavit made.

That "sworn before me a commissioner, &c," was sufficient, if in fact the party were a commissioner.(*a*)

That Niagara was a sufficient venue, that place being recognised as a division of this country by the statute providing for its police and other statutes.

As to the last objection that it did not appear but that the deponent had been christened in the manner in which he has sworn, viz., John W. Richardson, nor but that the W. might be a mere fanciful addition to his name, or to distinguish him from other persons of the name of John Richardson.

He contended that the case of Hughes v. Sutton (*b*) where a wrong surname in the affidavit had been rejected as surplusage, would either induce the court to reject the W. in this case, or to consider it as immaterial.

Macaulay, in reply, contended, that as this was not such an affidavit as an indictment for perjury could be framed upon it, must be insufficient.

CAMPBELL, C. J.—This is a rule to shew cause why the arrest should not be set aside for irregularity, and the bail bond given up to be cancelled, upon three grounds: first, that the affidavit is not entitled in any court; secondly, that it is not stated to be made before a commissioner of this court; and

(*a*) Kennett and Avon Canal v. Jones, 7 T. R. 451. (*b*) 3 M. & S. 178.

thirdly, that the plaintiff's christian name is not stated in full.

As to the first ground it is now distinctly settled, that affidavits to hold to bail shall not be entitled of any court, or with names of the parties; and in the case of R. King *quitam* v. Cole, (*a*) defendant was discharged upon common bail, because the affidavit was entitled.

With respect to the second ground, the case of The Avon Canal Company v. Jones, (*b*) and that of The King v. Hare, seem to be completely at variance. As to the necessity of stating the commissioner to be of this court, it being expressly required in the latter case, whereas in the former it is considered sufficient to state the affidavit to be sworn before A. B., commissioner, and provided he was in fact a commissioner of the court, because it may be so alleged in an indictment for perjury; and I am inclined to favour that opinion notwithstanding the other is a later case. But it is not necessary at present to give any decision on that point, inasmuch as I think the rule must be made absolute on the fourth ground, viz., that the deponent's name is not inserted at full length.

In the case of Weeks v. Groneman, 2, Wilson and Cook v. Dobree, 1, Henry Blackstone, it is said, that great strictness is required with respect to the jurats of affidavits to hold to bail; the names of all the deponents must be written; nor can any affidavit be read that has any erasure or interlineation, or any

(*a*) 6 T. R. 640. (*b*) 7 T. R. 13 East.

clerical error in a part material, however trifling; and clearly a clerical error, such as in indebted instead of is indebted, because in all such cases perjury connot be assigned; nor will any explanatory or supplementary affidavit be admitted because the first was no affidavit at all, and the arrest upon it was unlawful. And the court cannot make that lawful which the law says is not; although the court will admit of explanatory affidavits for small defects in a part immaterial; but never where the first affidavit amounts to none at all, as not being sufficient to support a charge of perjury; I am therefore of opinion, that this rule must be made absolute with costs, on the ground that the christian name of the plaintiff is not stated in full.

Rule absolute.

TRINITY TERM, 7 GEO. IV., 1826.

Present:

THE HONOURABLE CHIEF JUSTICE CAMPBELL.
MR. JUSTICE SHERWOOD.

ALLAN v. BROWN.

Where a cause has been referred by this court to arbitration, notice of the time of sitting of the arbitrators must be given to the attorney in the cause.

Macaulay had obtained a rule *nisi* to set aside an award made under a rule of reference of this court, upon the ground that the notice or appointment to attend the arbitrators had been served upon the party himself and not upon his attorney.

Robert Baldwin, in shewing cause, contended, that a proceeding before arbitrators was a proceeding dehors the suit, and that, therefore, notice to the party himself was sufficient, particularly as his attorney had left the district.

Macaulay, contra, observed, that if the attorney had left the district, the appointment might have been left at his office.

The court observed that the retainer to the attorney was not changed by the reference of the cause to arbitration.

Per Curiam.—Rule absolute.

Emery v. Miller.

Semble, that where heavy damages are given in an action of covenant for good title, and it appears that the plaintiff knew the state of defendant's title, the court will grant a new trial, and that excessive damages may be considered as given contrary to evidence.

This was an action for breach of covenant, tried before the late Chief Justice at the assizes for the Eastern District.

The covenants upon which the breach was assigned were, that defendant was seised in fee, and had good right to convey. Breaches, that she was not seised in fee, and had not good right to convey.

The substance of the evidence given at the trial (exclusive of the proof of the deed) was, that the defendant being a tenant for life only, and the executrix of one Miller, deceased, had given a deed of bargain and sale to the plaintiff, containing the covenants upon which the breaches were assigned.

Miller's estate was indebted to one Sheek, and Sheek was indebted to Emery, and the amount of the purchase money, £50, was to go in discharge of Sheek's debt to Emery; and Miller's estate would at the same time be discharged of its debt to Sheek.

That at the time of the execution of the deed, both plaintiff and defendant being present, the plaintiff had expressed her doubts as to the propriety of her giving a deed, but that Sheek, who was an attorney, had said she might do it.

It appeared further, that the plaintiff had required and taken an indemnity from Sheek, and had after

his purchase built a house, and made some improvements upon the premises.

The Chief Justice had charged the jury that under the circumstances he considered very low damages as proper. They found a verdict for the plaintiff with £125.

Robinson, Attorney-General, had obtained a rule *nisi* to set aside the verdict, as being against law and evidence.

Macaulay shewed cause.—He insisted that there being no evidence of fraud or conspiracy on the part of the plaintiff, that there was no pretence for a new trial on that ground; that even if there had been any evidence of that tendency, the jury were the proper tribunal to determine that fact, which they had done by their verdict.

That if defendant had intended to covenant against her own acts only, she should have done so, but that having covenanted generally, no evidence could be received upon the plea of *non est factum*, to vary or avoid the covenant, short of actual fraud or conspiracy.

SHERWOOD, J., observed, that such evidence might be given in case of a latent ambiguity.

The counsel admitted that courts of equity were sometimes applied to, to restrain suits by expounding covenants in marriage settlements according to the intentions of parties, but that even those courts would not destroy covenants by parol testimony.

That the only way to avoid or restrain the effect of a covenant in a court of law, was by special pleading, unless in the case of fraud, duress or misreading.

The counsel cited the case of Hesse v. Stevenson, (*a*) as going very fully into the doctrine of the construction of covenants, and as shewing clearly that matter dehors, the deed itself could not be taken into consideration to vary or alter its covenants, it having been determined in that case, that the inceptive words of a covenant being "that the grantor had good right to convey, &c.," were not restrained by the subsequent words, "and that he had not by any means, directly or indirectly, forfeited any right or authority he ever had over it," although from the nature of the transaction it might have been inferred, that he only meant to covenant for his own acts. He also cited the cases below. (*b*)

The counsel further urged that to grant a new trial would be nugatory, as no evidence short of that which would avoid the deed altogether, could be given upon the plea of *non est factum*, and that the record could not be altered by inserting a new plea after verdict.

Attorney-General, contra, observed, that as to the last position of the counsel on the other side, there were cases to shew that a plea might be altered after a new trial granted, but that there was no occasion for such a proceeding in this case, the plea of *non est factum*, being sufficient to admit the evidence required to destroy the plaintiff's action.

(*a*) 3 B. & P. (*b*) 1 Chitty, 478; 1 East, 619; 4 M. & S. 339; Moore, 158; Com. Dig. Pleader; 11 East, 613; 2 B. & P. 26.

As to the transaction itself, it was evidently dishonest and fraudulent.

That the plaintiff had shewn that he was cognisant of the defect in the title, by taking Sheek's indemnity.

That the evidence would have well warranted the judge, who tried the cause, in stating that the plaintiff had no right to any damages, for it went clearly to shew that an ignorant woman had been persuaded to give a title which the plaintiff himself had considered as bad, and that he had immediately turned round and got a large verdict against her, which was mere plundering.

That it must not be inferred, because courts of equity are so often called upon, that courts of law have not equally the power of relieving against fraud, suppression of truth or false assumption, and that upon the plea of *non est factum*, for a defendant may well say in such cases, that the deed executed under such circumstances is not his—not his solemn act—not fairly obtained.

The counsel cited the cases below (*a*) as analogous to the present, and as shewing that the circumstances of this case were sufficient to infer fraud, and that in cases of fraud there was no distinction between law and equity.

He further contended, that the general covenant for good title, &c., upon which this action was brought, should be restrained by the subsequent covenant, for

(*a*) 3 P. W. 315; 2 Atkyns, Thomson v. Evans, and Lord Kame's Principles of Equity.

quiet enjoyment in which the defendant only covenants, for the acts of herself and her heirs, and cited the case of Browning v. Wright, (*a*) where the general words, "that defendant had good right to convey, &c.," were held to be restrained by the preceding warranty against himself and his heirs only, and that the general construction of the instrument there in question required that the restrictive words, in other covenants, should be applied to those general words. He considered this case as analogous to the old one in the year books of the warranty of a horse, wherein it had been determined that no action could be brought upon the warranty, for defects which were as obvious to the buyer as to the seller, and that in this respect there was no distinction between warranties under seal and others.

That there was a difference between altering or varying the effect of a deed, and impugning the manner of obtaining it, or rendering it invalid on account of fraud.

That in the present case there was no pretence for the plaintiff recovering damages, and that it was competent under the general issue to give evidence to invalidate a deed or covenant improperly and unfairly obtained, and which ought not to stand.

That the covenants in question should be construed as against the acts only of the defendant and her heirs.

That this was at least a case for nominal damages

(*a*) 2 B. & P. 23.

only; it could merely be a loss without injury, and one in which the maxim of *volenti non fit injuria* strongly applied.

Macaulay, in reply, contended, that unless Sheek and Emery could be found guilty upon an indictment for a conspiracy, the evidence was not sufficient to set aside the verdict.

That the case entirely turning upon the weight of evidence, was not one for a new trial.

That the covenant gave a clear right to damages, and that the plaintiff having built upon, and improved the land, had probably given the jury the grounds for ascertaining the quantum.

That they would have been justified in finding to the amount of £500; but that it was unnecessary to enter into the consideration of the damages, as their excess did not enter into the defendant's motion.

That the cases cited on the other side were in equity; that this being a court of law, would confine itself to legal decisions only; that to invalidate the deed altogether would be impossible, as being clearly good to give a life estate.

The CHIEF JUSTICE observed, that although excessive damages did not form a part of the defendant's motion, and therefore might not be considered as the immediate ground of granting a new trial, yet they might be considered as given contrary to evidence, and that the case might be better understood by another jury.

Per Curiam.—Rule absolute for a new trial.

GRANT ET AL. v. FANNING.

It is necessary in a declaration in trespass for mesne profits to state that the land was the land of plaintiffs, such omission is not cured by stating his expulsion.

Trespass for mesne profits.

Declaration stated, that defendant, on the 3rd day of April, 1824, with force and arms, &c., broke and entered the township of Wolfe Island, with the rights, members and appurtenances thereto belonging, situate, lying and being in the Midland District aforesaid, and ejected, expelled, put out, and removed said plaintiffs from their possession and occupation thereof, and kept, and continued them expelled and removed for a long space of time, to wit, from the day and year, &c., until the 18th day of June, 1825, and during that time took and had, and received to the use of him, the said defendant, all the issues and profits of the said township, with the appurtenances of great value, to wit, of the yearly value of £50, whereby the said plaintiffs, during all the time aforesaid, not only lost the issues and profits of the said township, with the appurtenances, but were deprived of the use and means of cultivating the same, and were forced and obliged to, and did necessarily lay out and expend divers large sums of money, amounting in the whole to a large sum, to wit, £25, in and about recovering of the possession of the said township, with the appurtenances, to wit, at Kingston, in the Midland District aforesaid, and the said defendant, during the said time, felled, cut down, prostrated, and destroyed the trees and pollards, to wit, 500 oak trees, &c., of said plaintiffs, of great value, to wit, of the value of £50, there growing and being in and upon said township, and took and carried

away the same, and converted and disposed thereof to his own use—*et alia enormia*—to plaintiffs' damage of £100.

Demurrer, assigning for causes:

First.—That the premises which the said defendant is in the said declaration alleged to have broken and entered, are not in the said declaration alleged or described to be the close or property of the plaintiffs.

Secondly.—That the said premises are in the said declaration only mentioned generally as the township of Wolfe Island, with the rights, members and appurtenances thereto belonging, but no lot, close, tract or parcel of land in said township, is described or referred to as the place alleged to be broken and entered, by the said defendant, and such an allegation of a trespass on land committed somewhere in a whole township, is not sufficiently definite to enable or require the defendant to answer the charge.

Thirdly.—That the felling, &c., the trees and pollards of plaintiffs, growing and being, in and upon said township, above supposed in the declaration to have been done by defendant during the time of the said trespass, are laid only as incidental to and aggravating circumstances of the said main trespass, and as that is insufficient, and fails, must fail with it.

Fourthly.—That the said supposed felling, &c., the said trees and pollards, if laid, not as consequential, but as independent trespasses, are not in the said

declaration alleged to have been committed with force and arms, or against the peace, and, therefore, are not sufficient in law to require him to answer thereto.

Fifthly.—That the said supposed breaking and entering are not in the said declaration alleged to have been committed by said defendant against the peace.

Sixthly.—That said declaration is in other respects informal and insufficient.

Joinder.

Macaulay, in support of the demurrer, argued:

That the plaintiff could not take any advantage of the observation of Chitty, "that the declaration for mesne profits should describe the premises in the same manner in which they were described in the declaration in ejectment," for that he can only be intended to mean that they are to be so described, if their description in the original declaration was correct.

That the want of the statement in the declaration, that the premises trespassed upon were the close or property of plaintiff, is fatal, and is not cured by the subsequent charge of expelling the plaintiffs from their possession and occupation, for such expulsion is a collateral injury and not the principal trespass, which must itself be correctly stated and proved.

That the action for mesne profits is emphatically an action of trespass, and subject to its rules; that the title might even come in question where the judgment in ejectment was upon a default.

The counsel cited the authorities below, in support of the above positions. (*a*)

As to the second objection, that a township, although an organized part of the country, as a civil division, was not one in which a trespass could be alleged without further description, and that, therefore, the *locus in quo* was not sufficiently described, and was good cause of demurrer. (*b*)

That the charge in the declaration of cutting down the plaintiff's trees, was laid as mere matter of aggravation, and could not cure the defective statement of the principal trespass, which failing, that must fail also.

Robinson, Attorney-General, contra, admitted the declaration not to be according to the usual forms, as not stating the property trespassed upon to be the property of plaintiffs, but contended that the certainty required in pleading might be inferred from the subsequent parts of the declaration, and that the subsequent statement of the plaintiffs' expulsion from their possession, was sufficient for that purpose, which was also strengthened by the allegation of the taking away and converting the trees of plaintiffs.

That the defendant's counsel had affected to consider a township as an insufficient description of the *locus in quo*, but he contended it to be as sufficient as lot, or any other general term; that the number of acres need not be mentioned, as no possession was required, he cited the authorities below. (*c*)

(*a*) 3 T. R. 292; 2 T. R. 165; 1 Chitty, 607; 2 Camp. 175; Com. Dig. Pleader, Salkeld, 640; 3 T. R. 592. (*b*) Adams, 240. (*c*) Raymond, 238; 13 East, 407; 3 Com. Dig.

Macaulay, in reply, contended, that the number of acres should, in this action, be stated with the same certainty as in the declaration in ejectment, to the intent that the quantity of the land may appear; (*a*) and observed, that the case in East was a case after verdict, and that in Lord Raymond against the plaintiff.

The court were of opinion in favour of the demurrer, but gave the plaintiff leave to amend.

Brown v. Hudson.

A foreign law, authorising the discharge of an insolvent debtor, must be directly proved, and the court will not listen to an application for the discharge of such person after he has allowed judgment to go by default and is in execution.

The defendant had been held to bail in the year 1823, and had several terms back made an unsuccessful application similar to the present, which had been refused on the ground of the insufficiency of the documents produced—he had let judgment go by default, and was now in execution.

Washburn had, in a former part of the term, obtained a rule *nisi* to discharge him from the custody of the sheriff of the District of Niagara, upon filing common bail, he having been discharged from imprisonment for the debt for which he was in execution by the insolvent laws of the state of New York. The counsel, in support of the present application, produced the following documents:

Defendant's affidavit of the facts.

(*a*) Adams.

His discharge, under the hand and seal of Nathaniel Howell, Esquire, judge of Ontario county, in the state of New York, dated the 3rd day of July, 1821.

The certificate of the Secretary of State of New York, that Mr. Howell was first judge of Ontario county, and that he was authorised to grant discharges by virtue of an act of insolvency of the legislature, passed April 7th, 1819.

The certificate by the governor, under the great seal of the state of New York, that Mr. Yates, who certified Mr. Howell's authority, was Secretary of the State.

Robert Baldwin shewed cause, he contended, first, that this application being in the nature of one to discharge proceedings for irregularity, was clearly too late, as tending to involve a plaintiff in all the costs of prosecuting a suit to judgment and execution; whereas if the application had been made upon the arrest, and it had appeared that the defendant was entitled to his discharge, the plaintiff might have discontinued the action.

Secondly.—That a defendant could only avail himself of a discharge under a foreign statute of insolvency by plea, which would put it in the plaintiffs' power to reply fraud or a subsequent promise, which he could not be prepared to do upon the return of a four-day rule.

Thirdly.—That the insolvent law of the foreign state, as well as that the defendant was fairly the

object of it, should be proved to the court, which had not been done in the present case.

Washburn, contra, considered that although the application had been delayed from the difficulty in obtaining the proper documents, that it was not too late, and he contended that the proper mode for the defendant to take advantage of his foreign discharge was by motion, for that the plaintiff might be entitled to proceed to judgment although he could not arrest the person of his debtor.

The CHIEF JUSTICE considered that the application came too late, and that had it been made in time the foreign law should have been proved.

Per Curiam.—Application refused.

ANDRUSS v. PAGE.

A writ of *fieri facias* may be amended so as to have relation to the day of the entry of the judgment.

Macaulay moved to amend the writ of *fieri facias*, issued against the lands and tenements of the defendant, by making it relate to the day of the entry of the judgment.

Application granted.

HOLME v. ALLAN AND GRAY.

One partner cannot sign a cognovit in the name of a firm without a special authority, and a judgment entered upon such will be set aside with costs.

Macaulay had obtained a rule *nisi* to set aside a judgment and execution, entered up and issued upon

a cognovit actionem which had been given by the defendant Allan, in the name of the firm, without his having received any special authority for that purpose—the instrument was signed "Allan & Co."

Robert Baldwin, for the plaintiff, admitted the judgment to be irregular, but pressed the court to lay the defendants under terms of bringing no action against the plaintiff, observing, that if the defendant Allan had given the cognovit in his own name only, the partnership goods would have been equally liable to be seized under a *fieri facias*, and that, therefore, the defendant Gray had, in fact, sustained no injury.

He further contended, that no mention having been made of costs in the rule *nisi*, that it should, if made absolute, be without costs.

Robinson, Attorney-General, and *Macaulay*, in reply, observed, that in a case of a mere slip or inadvertency, the courts in setting aside a proceeding would sometimes restrain a defendant from bringing an action; but that it was otherwise in cases of gross irregularity like the present, where the court, in fact, had no discretion. That there was no doubt as to the defendant's right to costs, where the proceedings were so grossly irregular as the present went.

The CHIEF JUSTICE observed, that he considered the costs upon motions as always in the discretion of the court.

Per Curiam.—Rule absolute with costs.

Doe dem. Dunlop v. Roe.

Where it was sworn that the declaration in ejectment was served upon the tenant in possession, the court refused to set it aside upon an affidavit stating it to have been served upon a servant or stranger upon the premises.

Robert Baldwin moved to set aside the declaration in ejectment in this cause, upon an affidavit stating, that it had only been served upon a servant or some stranger upon the premises, and that there had been no subsequent acknowledgment of its receipt by the tenant in possession.

The Chief Justice observed, that the sheriff had sworn positively to a service upon the tenant in possession.

Per Curiam.—Application refused.

McKoane v. Fothergill, Esq.

(*Having privilege of parliament.*)

The court gave leave to issue an original summons to warrant the testatum issued against a member, after motion to set the proceedings aside for irregularity.

Washburn had obtained a rule to shew cause why the writ of summons issued in this cause to the sheriff of the District of Newcastle, should not be set aside for irregularity with costs, the venue in the bill filed being in the Home District, and the writ, to the sheriff of Newcastle, being an original instead of a testatum, and no original having actually issued in the first instance to the Home District.

Robert Baldwin now produced in court a roll with the original bill, a summons to the sheriff of the Home District returnable on the last of Easter Term

last, with a return thereto, and the award of a testatum, to the sheriff of Newcastle, returnable on the first of this term regularly entered on it, and also produced an original summons with the sheriff's return thereto taken out since the obtaining the above rule, but tested on the first and returnable on the last of Easter Term, and moved to amend the writ to the sheriff of Newcastle by inserting the testatum clause in it.

Washburn opposed the application, and insisted that the amendment ought to have been made before he had moved to set aside the writ for irregularity, but that at all events the amendment could only be granted upon payment of costs.

Baldwin, in reply, stated, that as to his being in full time with his application there could not be a doubt, and that the question as to costs was quite as clearly in his favour. He cited the cases below. (*a*)

The court said that the case in 6 T. R. was sufficiently satisfactory, and gave leave to amend without costs.

The rule for setting aside the writ for irregularity obtained by Washburn, was subsequently discharged, the grounds of it failing.

Per Curiam.—Application granted.

(*a*) 2 Archbold, 95; 4 East, 192; Tidd, 117, 1037; 3 T. K. 388; Salk, 589; Tidd, 145, 6; 5 T. R. 577; 6 T. R. 440, 1.

MICHAELMAS TERM, 7 GEO. IV., 1826.

Present:

THE HONOURABLE CHIEF JUSTICE CAMPBELL.
MR. JUSTICE SHERWOOD.

DOE EX. DEM. SHELDON V. ARMSTRONG.

A power of attorney and contract of sale passed before a notary in Lower Canada (an instrument not under seal) is not sufficient to authorise a conveyance of lands in this province.

This cause was tried at the assizes for the Eastern District, and a verdict for the defendant.

The plaintiff's lessor claimed the premises in question, under a grant from the Crown.

The defendant claimed title under a deed executed in this province by virtue of a power of attorney and contract of sale, not under the seal of the party, but acknowledged before a notary in Lower Canada, agreeable to the forms used in that province, which instrument was followed by a deed regularly executed here in pursuance of the power.

The defendant also relied upon the want of notice to quit, or demand of possession.

Macaulay shewed cause, he contended, that although it might be necessary that a deed conveying land should be under seal, yet that it did not follow that an authority to execute such deed must also be under

seal, for that the Statute of Frauds did not prevent a person from giving an authority by parol to execute a deed under seal.

That the instrument executed in Lower Canada being in itself a sale, and possession having followed under it, was sufficient to pass the land by way of feoffment, for that a feoffment might be without seal, and the deed of sale delivered before the notary was a sufficient delivery of a symbol; and that those deeds only required seals which take effect under the statute.

That the power having been executed in Lower Canada, agreeable to the laws of that country, made it a valid authority here, in the same manner that an (L.S.) has been considered as a binding and valid seal, when proved to be the usage of a foreign colony.

As to the point of notice, he contended that it was necessary before action brought, the defendant having been in possession under a contract.

Robinson, Attorney-General, contra, observed, that the positions attempted to be established by the defendant's counsel, were such as would, if it were possible to admit them, destroy all the settled and acknowledged practice of conveyances under the English law.

That the plaintiff in this case sought to recover under a deed which was clearly void, as having been executed under a void authority.

That as to transfers of land being valid without

writing, it had been long settled that none could be so except leases for a less time than three years, the provision for which, in the Statute of Frauds, shews that no others can be valid without, and has no reference to the present question, viz., of the valid execution of a deed requiring a seal.

That it is so clearly established that a power to execute a deed requiring a seal must itself be sealed, that it was never attempted to be questioned. (*a*)

CHIEF JUSTICE.—This was an action of ejectment in which a verdict was taken for defendant subject to the opinion of this court on points reserved; on which we are of opinion, that the tenant being in lawful possession under a contract for the purchase of the premises he was entitled to six months' notice, or at all events to a notice to quit and demand of possession anterior to the demise laid in the declaration, as determined in the case of Lewis v. Beard, 13 East, and Birch v. Wright, 1 T. R. We are also of opinion, on the only other material point, that a power of attorney, without seal, (although made in a foreign jurisdiction where seals are not used to such instruments,) is not sufficient to authorise a deed under seal, for the conveyance of land in this province; but, instead of a verdict for defendant, we think this should have been a nonsuit.

SHERWOOD, J.—The letter of attorney, under which the conveyance of the premises mentioned in the declaration in this cause was effected, and by which the plaintiff claims, is not an instrument under seal,

(1) 1 Coke, 52.

and therefore by the laws of England invalid for the purpose of transferring real property. The letter of attorney appears, upon the face of it, to have been executed in Lower Canada, and the plaintiff alleges it is a good and operative instrument to authorise the conveying of lands by the laws of the colony where it was made, and under such circumstances ought to be equally efficacious in this province. I have always understood the principle of the *lex loci* to relate to such transactions only, respecting which transitory suits are instituted, but not to any thing which must necessarily form the whole or any part of the grounds of a local action.

The deeds under which the plaintiff claims relate wholly to lands in Upper Canada, the titles to which are governed by the laws of England alone, and according to these laws the power of attorney in question is decidedly bad.

To allow the *lex loci* to prevail in transitory actions of foreign origin, and particularly in commercial concerns, tends to the advancement of justice, but the same principle extended indiscriminately to local actions, would soon have the effect to change our whole system of common assurances to lands in this province, and to substitute, in many instances, the laws of a foreign country, for the determination of important rights, however incongruous to our own institutions.

It appears to me that the deed to the plaintiff's lessor is illegal, and consequently void.

Supposing then the defendant to have no title in

fee to the premises, the next question is, whether it was incumbent on the lessor of the plaintiff to demand possession anterior to the day of the demise laid in the declaration. I think the defendant was tenant at will, and as such was entitled to a demand of possession before the day of the demise, conformably to the authority in the case of Wright *ex dem.* Lewis and others v. Beard.

Discharged rule.

ORSER v. MCMICHÆL ET AL.

Where it is intended in trespass to justify, that the *locus in quo* was a highway, the averment must be direct, not left to inference; and a justification in a second plea, for entering such of the closes as are not included in the limits of the highway alluded to in the first will also be insufficient; and a plea proposing to justify the cutting down trees on the adjacent land to repair the highway, must mention the number and description of the trees cut down.

To an action of trespass for breaking and entering the plaintiff's close and cutting down and converting his trees, the defendant pleaded,

First.—The general issue, not guilty.

Secondly.—That as to so much of the "said supposed closes of plaintiff in the several counts of the declaration mentioned, as is included and contained within the limits of a tract of ground called a road, leading from a place known by the name of Abbott's Inn, in a straight direction to a certain other place known by the name of John Knapp's, being in front of the dwelling-house of the late John Knapp, and as to the breaking, &c., the said tract of ground called a road, and the felling, &c., the trees growing thereon, *actio non*, because at the time of the said sup-

posed trespasses the said tract of ground, called a road, was a common and public highway duly established according to law, and was ordered and directed by the justices, &c., to be opened, &c., and pursuant to the order of the said justices, and under the direction of the overseers of the said highway, the defendant, with others liable to perform statute labour, entered, &c., and felled, &c., the trees growing and being thereon for the cause assigned, &c.

Thirdly.—"As to the residue of the supposed closes of plaintiff not included and contained within the limits of the public highway in second plea mentioned, and as to the breaking, &c., and felling, &c., the trees and pollards growing thereon, *actio non*, because at the time of the said supposed trespasses there was a causeway and bridge required to be built and repaired upon the said highway, and the said residue of the said closes was then and there uninclosed and unimproved land, and the said trees, &c., were most convenient and best adapted to building and repairing such causeway and bridge, whereupon Isaac Knight, the overseer, &c., directed defendants, being the labourers, &c., to cut and make use of said trees for such purpose, whereupon they entered, &c., doing no unnecessary damage, &c.

Fourthly.—"*Actio non*, because after the said supposed trespasses were committed, and after plaintiff had demanded of defendant that he should settle with plaintiff for the damage done to him thereby, and before, &c., to wit, &c., defendants and plaintiff mutually settled all demands between them to that date, and in the said settlement defendants then and

there paid to plaintiff a sum of the lawful money of Upper Canada, in full satisfaction of all demands on the part of plaintiff against defendants to that date, and thereupon defendants and plaintiff executed and delivered to each other mutual receipts."

The plaintiff joined issue upon the first plea, and demurred to the other three, assigning for causes:

To the second.—"That it is not alleged or averred in the said second plea, that the closes in the declaration mentioned were, or that any part of them were a public highway or road, nor hath defendant, in his said plea, set forth the supposed order of the court of quarter sessions in his said plea mentioned, nor the date thereof, nor averred that the supposed order at the time of committing the trespass, &c., was, or remained of record in said court, &c.

To the third.—"That it is not alleged or averred in the same, that the closes in the declaration mentioned, or any part of them, were a public highway, or hath it set forth or averred the number of trees, or the description thereof, cut to repair the supposed bridge, &c."

To the fourth, that it does not set forth the amount of the sum paid to plaintiff, on the supposed settlement of all demands, &c., and that it does not set forth that the supposed sum paid to plaintiff was in satisfaction of the trespasses, &c. Joinders.

Robinson, Attorney-General, in support of the demurrer, observed, that although the defendants might,

perhaps, under the provincial statute, have pleaded the general issue alone, and given the facts of justification in evidence, yet that having pleaded specially, he must be confined to the regular forms of pleading.

That there was no sufficient averment in the pleas that the *locus in quo* was a highway; that such facts should have been averred directly and positively, and not left to inference; that the date of the order of sessions should have been set out, as well as the quantity of the trespass justified in the third plea, by setting out the number of trees cut down; that the third plea justified the trespass on the plaintiff's close, by setting out a trespass on the highway; that the fourth plea is defective in not averring the amount of the sum paid, and that it was accepted in satisfaction of the trespasses.

Macaulay, contra, contended, that the averment that the *locus in quo* was a highway was sufficient, as it must necessarily be inferred that it was part of lot number eighteen.

That the two pleas taken together formed a full answer to the declaration. The second justified the supposed trespass in the highway, and the third the remainder of the trespass. That the date of the order of sessions was not substance, and that the whole statement respecting it might be in fact struck out; that the statement of the trees cut down being only matter of aggravation, a justification of the principal trespass was sufficient, and that the number of trees being set out in the declaration rendered it unnecessary to enumerate them in the plea.

That though no sum was mentioned in the fourth plea, yet a sum being stated to be paid in satisfaction was sufficient.

SHERWOOD, J., delivering the opinion of the court, observed, there is no averment in the second plea in this cause, that any part of the premises mentioned in the declaration is a highway. I therefore think the plea void for uncertainty.

The third plea proposes to justify the entry of the defendant on the residue of the closes, not within the limits of the highway alluded to in the second plea. As no part of the premises mentioned in the declaration is stated to be a highway in the second plea, it is impossible by the third plea to determine on what part of the premises the defendant intends to justify an entry. It is quite evident he does not mean to justify an entry on the whole premises, but he does not, with sufficient certainty, set out the portion he intends to exclude.

If the demurrer to the third plea were general, the court might make an intendment in its favour, but an intendment cannot supply the want of certainty in a plea, when the objection is alleged as a cause for special demurrer.

Per Curiam.—Judgment for plaintiff.

MALCOLM v. RAPELJE, SHERIFF OF THE LONDON DISTRICT.

In an action on the case against a sheriff for not giving notice of the sale of effects taken in execution at the most public place in the township, held not necessary to set out the name of such place. A statement that defendant sold the goods without legal notice, and that he sold them for less than their real value, not considered as distinct and independent grounds of action.

This was an action on the case against the defendant, for selling the plaintiff's goods taken under an execution, without giving the notice required by the provincial statute.

The declaration set out the *fi. fa.*, and its delivery to the defendant in the usual form, and then stated that defendant, of his own wrong, sold the said goods and chattels without giving public notice in writing of the sale thereof, or of the time and place when and where the same were to be exposed to sale, at the most public place in the township where the said goods and chattels were seized and taken in execution, to wit, at the township of Oakland, eight days previous to such sale, but wholly neglected and refused so to do, contrary to the statute in that behalf, and also then and there, wrongfully and injuriously, sold and disposed of the said goods and chattels for much less sum of money, to wit, the sum of two hundred pounds less than the same were really worth, &c.

The second count, similar to the first, but stating the unlawful sale to have been made by the deputy.

To this declaration the defendant demurred specially, assigning for causes, first, that it does not aver any place certain as the most public place in the said township of Oakland; and then deny that the notice

was given at that place. Secondly, for uncertainty, as not shewing whether plaintiff therein complains that defendant did not give eight days' previous notice, at the most public place in the said township of Oakland, of the sale of the said goods and chattels, or that defendant sold the said goods, &c., at a place not the most public in the said township of Oakland, or that plaintiff complains of both, and that no issue can be taken on the same. Thirdly, for duplicity in joining two distinct matters and causes of action, and attempting to put two distinct causes of action in issue, to wit, whether defendant sold the goods, &c., without giving public notice of the sale thereof, or of the time and place when and where the same were to be exposed to sale at the most public place in the township of Oakland, eight days previous to such sale or not, and also whether defendant sold said goods and chattels for a much less sum of money than the same were really worth, and for which he ought to have sold them. Joinder.

Baldwin, in support of the demurrer, observed, that the plaintiff should have pointed out some place as the most public, where the defendant should have advertised the goods for sale, in order to give him an opportunity of shewing that they were advertised there, or of pleading that some other place was more public, and that he had advertised them there.

That it was no answer to this objection to say, that the statute had not named the place, which could not be, as that which was the most public place at the making of the statute might shortly cease to be so.

That at any rate some place should be named,

although it might not in point of fact be the most public, for that in pleading a place must be mentioned where every material fact took place.

That the charge throughout this declaration is in the disjunctive, contrary to the general rules of pleading.

Macaulay, contra, observed, that this being an action upon the case, the defendant, by pleading the general issue, would have thrown upon the plaintiff the onus of proving the defendant's non-compliance with the statute, which might have been answered by contrary evidence, but that it could not be incumbent upon the plaintiff to assign a place to a negative.

That where a circumstance must be reasonably considered as more in the knowledge of the defendant than in that of the plaintiff, the defendant must plead it, or rely upon the general issue.

That as to the objection to two causes of action being included in the same count, it was the same in trover, where several articles were mentioned, or in the action against a sheriff for an escape and false return, in either of which cases there might be a separate action.

He observed further, that in the present case, the selling the goods at an under value was rather consequential, and matter of aggravation, than a principal cause of action.

SHERWOOD, J., delivering the opinion of the court. —The plaintiff states, in the first count of the decla-

ration, that the defendant, as sheriff of the District of London, seized his goods and chattles by virtue of a writ of *fi. fa.*, and caused them to be sold, without giving any notice of such sale at the most public place in the township where the effects were taken in execution.

The defendant has demurred to this count, and assigned for special cause, among others, the want of a specification in the declaration of the plaintiff of the most public place in the township.

In the course of the argument on the demurrer and in support of it, the defendant alleged the impossibility of traversing so indefinite an averment as the plaintiff has made respecting the want of notice of sale; if there were any necessity of a traverse to this part of the declaration, the objection would have a great deal of weight, but as the plea of not guilty in case puts the plaintiff upon proof of the whole charge, it is competent for the defendant to adduce evidence of one place being more public than another, and then the jury would determine the question. Actions of trespass, and actions on the case, are essentially different; the former is an action *stricti juris*, but the latter is founded in the justice and conscience of the plaintiff's case, and in its nature and effect is similar to a bill in equity, therefore the defendant, by pleading the general issue in this action, would secure to himself all the advantages which the law allows under any mode of pleading.

I also think the fact of the most public place is a matter lying more in the knowledge of the defendant

than of the plaintiff, and the defendant, as sheriff, was bound to ascertain, and to put up such a number of notices as would remove all doubts upon the subject.

Another cause of demurrer assigned by the defendant is, that the declaration is objectionable from duplicity. He also states that the plaintiff has set out two facts, either of which, independently of the other, does of itself establish a sufficient ground of action, that is to say, that the defendant sold the goods without giving legal notice, and that he sold them for less than their real value.

It appears to me that the latter allegation was not intended by the plaintiff as a substantive and independent cause of action, and in fact is not such, even if he did intend it. It clearly has no other effect in this declaration than to aggravate the legal cause of complaint, the selling of the plaintiff's goods without giving notice of sale.

There was nothing more probable than the fact of the goods selling for less than their value, when no steps were taken by the sheriff to insure the attendance of purchasers, and therefore it seems to me almost a natural consequence of such dereliction of duty. This averment in truth answers as nearly as possible to the *per quod* in an action of trespass, and in this particular case, seems to exhibit the probable injury arising from the want of notice in a more extended view.

I am of opinion, therefore, that the plaintiff should have judgment on the demurrer.

Per Curiam.—Judgment for plaintiff.

BIDWELL, ADMINISTRATOR OF WASHBURN, v. STANTON.

Where the payee of a note endorsed the same to A. upon an usurious consideration, and A. afterwards failed in an action against the drawer upon the ground of usury, such payee may nevertheless recover against the drawer; and it seems that the ground of the failure in the former action may be proved by any person present at the trial, and it is not necessary to prove a re-endorsement by the usurer to the payee.

This was a case tried at the assizes for the Midland District.

The action was brought upon a promissory note drawn by the defendant, and payable to the plaintiff's intestate, who afterwards endorsed to one Whitney upon an usurious contract. Whitney brought his action against the present defendant but failed.

The record of the judgment in that suit was proved or admitted in the present action, which shewed that an action had been brought against the present defendant, and that there had been a judgment in his favour, but as the plea of usury did not appear upon the record, it did not shew the grounds of the judgment.

The plaintiff in this suit offered the evidence of the person who had been the defendant's counsel upon the former trial, to prove that the verdict passed in his favour upon the ground of usury in Whitney. This testimony was rejected upon the ground of the witness having been the defendant's counsel in the matter before the court.

Another witness was offered to prove what one Short had proved at the former trial, namely, that the defence set up was usury.

This testimony was also rejected upon the ground

that it was not the best evidence, Short being still living.

Upon this state of the evidence, and also upon the ground that the note should have been re-endorsed by Whitney, the judge at *nisi prius* nonsuited the plaintiff.

Macaulay, having obtained a rule *nisi* to set aside the nonsuit and for a new trial,

Robinson, Attorney-General, shewed cause, he contended that the evidence of the person who had been the defendant's counsel at the first trial, had been well rejected, inasmuch as it would be impossible for him to know whether his impressions had been received from what passed at the trial, or by confidential communications from his client.

He cited the authority below. (*a*)

That the second witness was rejected with equal propriety, as his testimony could only have been hearsay.

And that as it was necessary for the plaintiff in the present action to shew that the verdict against Whitney, in the former action, had proceeded upon the ground of usury, and as he had not done so, he was properly nonsuited.

Macaulay, contra, contended, that evidence should have been received from any bystander at the former trial of what had passed there.

(*a*) Currie v. Walker; Wilson v. Rartall, 4 T. R. 753.

That the endorsement to Whitney having been by the former judgment proved to have been somehow or other void, it should be considered as a nullity. That Bidwell, the plaintiff, then takes the note as administrator and is entitled to recover. The usurious transaction being nothing to Stanton, who gave the note, as it is to be presumed, upon a good consideration.

That it would be absurd to suppose that a note, good in its original concoction, could be vitiated quoad the original parties upon the ground of usury between a subsequent endorser and endorsee.

Robinson, Attorney-General, in reply, contended, that Washburn, being a *particeps criminis*, could not have recovered, and that the present plaintiff, his administrator, was subject to the same objection. That the reason given by the late Chief Justice, at the trial, was very strong, viz., that Washburn, the intestate, having received consideration for his endorsement to Whitney, could not in justice have received the amount from Stanton, which would be giving him double pay upon one note, he not being liable to refund to Whitney what he had received from him.

The counsel further observed, that although there was a judgment in favour of the present defendant at the suit of Whitney, it might hereafter be reversed, which might render him again liable.

SHERWOOD, J., pronouncing the judgment of the court.—I think it was unnecessary at the trial of this cause to prove the fact of the usury in the transaction between Washburn and Whitney.

A copy of the judgment in the case of Whitney v. Stanton was admitted without objection on the part of the defendant, as testimony between the parties in the present suit, and they had a right to make such admission between themselves, if allowed to do so by the court.

Evidence of the grounds of defence in that action was all that was requisite in this case to shew the illegality of the endorsement from Washburn to Whitney.

It appears to me, that any person present at the trial of that cause, who heard the whole of the evidence, was competent to prove that the only defence set up was usury between the endorser and the endorsee of the note. Such proof connected with the judgment, so admitted by the parties, would have been presumptive evidence of the invalidity of the endorsement on the note from Washburn to Whitney, and would have been sufficient for the plaintiff until rebutted on the part of the defendant by stronger testimony. It would have shewn that the whole question respecting the usury had already passed in *rem judicatam*, and was completely set at rest.

I cannot agree in opinion with the learned judge who tried this cause, that if the endorsement from Washburn to Whitney was usurious, it became necessary for the administrator of Washburn to obtain a transfer of the note from Whitney before he could support an action upon it; the endorsement to Whitney, being usurious, was absolutely null and void, and after a legal decision on this point, the note must

be considered as never transferred from Washburn to Whitney; such transfer and endorsement cannot be illegal at one period and legal at another.

In my opinion the plaintiff is clearly entitled to a new trial.

Per Curiam.—Rule absolute.

Shuck v. Cranston.

A prisoner insolvent applying for his weekly allowance, is sufficiently described in the affidavit, as a prisoner in execution in the gaol of the Midland District, at the suit of the plaintiff.

Cartwright moved for an order of court for the prisoner's weekly allowance. The affidavit described the deponent as a prisoner in execution, in the gaol of the Midland District, at the suit of the plaintiff, without giving him any other residence or addition.

Washburn opposed the application on the ground of insufficiency of the affidavit, but the court ruled it to be sufficient.

Application granted.

Haren v. Lyon.

It seems that where a party purchases the goods of another at public sale, a notice given by the owner at such sale dispenses with the necessity of a demand and refusal to maintain trover, and a new trial will not be granted upon the ground of fresh evidence, it not appearing that it could not have been produced at the former trial. Fraud cannot be presumed contrary to a verdict.

This was an action of trover tried at the assizes, and a verdict for the plaintiff for £17, under the following circumstances:

A Mr. Steel died intestate, leaving Mrs. Steel, his widow, in possession of his effects.

The plaintiff had been servant to Steel, and continued in the service of Mrs. Steel after his decease, and a sum having accrued due to him for wages, she gave him a yoke of oxen (as was stated by plaintiff's witnesses) in payment or satisfaction of his demand, but Mrs. Steel herself stated in evidence, that they were only put into the plaintiff's possession to protect them from the claims of the deceased Mr. Steel's creditors.

The plaintiff continued, however, in the possession or superintendence of them, (for the testimony as to the nature of his possession was contradictory, one witness attesting that they were delivered to him in payment of his debt, and another that he had told him that he considered them as in his, plaintiff's, possession, only for the benefit of Mrs. Steel,) until they were sold at public auction with other effects belonging to the deceased Mr. Steel.

The defendant became the purchaser of the oxen, took them into his possession, and the plaintiff, in consequence, brought the present action.

No demand was proved to have been made by the plaintiff previous to action brought, but notice had been given at the sale, that he had a claim upon them.

Robinson, Attorney-General, having obtained a rule *nisi* to enter a nonsuit, or grant a new trial on the grounds:

First.—That Mrs. Steel had no power to sell, and her sale was fraudulent.

Secondly.—That fresh evidence had been discovered since the trial.

Thirdly.—That no demand had been made before action brought.

Fourthly.—That the verdict was contrary to evidence.

Macaulay shewed cause.—As to the first ground, he contended that Mrs. Steel, having continued in the possession and management of her husband's effects, (*a*) must be considered as an executor *de son tort*, and so any payment made by her was valid; that the evidence of the delivery by Mrs. Steel to plaintiff being fraudulent, was contradicted by other testimony, and the jury, who were the judges of facts, had determined them in the plaintiff's favour; that they considered, no doubt, that as there was a *bona fide* debt due to plaintiff, it was most probable that the oxen were delivered to him in its satisfaction; that even assuming the sale to the plaintiff to have been made for the purposes stated by Mrs. Steel, it was good as between the parties, and could only be void as against creditors, in which situation it does not appear that the defendant stood; he should have shewn a judgment in his favour.

Assuming, also, that Mrs. Steel had, in some sort, continued in possession of the cattle, which had been represented by the defendant's counsel as an evidence

(*a*) Mountford v. Gibson, 4 East, 441.

of fraud, he contended it could only be so as against creditors, and that the delivery proved was agreeable to the cases in East. (*a*)

These arguments, he contended, also answered the objection to the verdict being contrary to evidence, the judges of facts, namely, the jury, having weighed the contradictory testimony, and determined in the plaintiff's favour.

As to the ground for a new trial, viz., the finding of fresh evidence, he contended that the affidavit of the defendant was insufficient, as merely stating that he had discovered fresh evidence, without stating its nature, for that it did not appear thereby, but that the evidence discovered was some omission of the witnesses already examined, which was no ground for such application, as laid down in Tidd.

As to the third objection to the verdict, namely, want of demand before action brought, he contended that the plaintiff's possession being found by the jury, was an answer to it, particularly as his claim to the oxen was known at the second sale.

He observed that the smallness of the damages, coupled with the fact of the plaintiff's being a *bona fide* creditor, would materially influence the court in their deciding against this application.

Robinson, Attorney-General, contra, contended, that no inference was to be drawn from the cases cited on the other side, that Mrs. Steel had any

(*a*) Rugg v. Minety, 11 East, 209; Whitehouse v. Frost, 12 East, 613.

power to deliver the oxen in question to the plaintiff, but the contrary; that they were cases where the executor *de son tort* had been in a regular course of administration, but did not apply to, or indeed completely rebutted, a case like the present, where the wrongful act was the only ground of considering the party executor.

That Mrs. Steel, not having been in a capacity to maintain trover for any of her husband's property, was not in a situation to transfer any part of it to another.

That Mrs. Steel continuing in possession (for Haren merely managed the oxen for her benefit) was an evidence of fraud, as laid down in the term reports, where it is determined that a creditor taking an absolute bill of sale, but allowing the debtor to continue in possession, avoided the sale. (*a*)

In the case cited there was no evidence of fraud, but a mere stipulation that the goods were to remain in the debtor's possession for a limited time.

He contended further, that there was no evidence of such a delivery as the Statute of Frauds contemplated. That statute requires, that in sales of goods above ten pounds value there shall be an actual proveable delivery, which is not pretended in this case, and the necessity for which no existing debt between the parties can dispense with.

That the positive testimony of Mrs. Steel should have outweighed the mere suppositions of the other witnesses.

(*a*) Edwards v. Harben, 2 T. R. 387.

That as the defendant had not taken the oxen from the plaintiff, but had bought them at a public sale, a demand was necessary before action brought, for no case exists to shew that a mere possession, without a tortious taking, dispensed with a previous demand.

CHIEF JUSTICE.—To intermeddle with the goods of an intestate, without taking letters of administration, constitutes an executorship *de son tort*, as if he use them or sell them, or pay or receive debts, or milk the cows of the intestate, or distribute the goods to the poor, or if he only take a dog of the intestate, or any part of his goods, or if a wife take more for her paraphernalia than is suitable to her degree, as laid down in 5 Coke, 30; Dyer, 166; Croke Eliz. 114, 120, 472, Salk. 313; but the mere intermeddling with the goods of intestates, from the necessity of the case or for their preservation from injury, without using or applying them to the benefit of the party, will not constitute an executor *de son tort*.

Except in some particular cases, the courts know no limitation, but grant or refuse new trials as it may tend to the advancement of justice, as laid down by Lord *Kenyon* in the term reports. (*a*) If there be contrariety of evidence on both sides, the court will never grant a new trial notwithstanding the judge be of opinion that the weight of evidence was against the verdict as laid down in Wilson; and although a verdict be against evidence, the court will not grant a new trial if the action be frivolous or vexatious, and the real damage small, as laid down in Burrow; and new trials are never granted upon motion of a

(*a*) 1 Wills. 98; 1 T. R. 84; 2 T. R. 113.

party, where it appears he might have produced and given the material evidence at the trial, the omission of which is urged as a ground for a new trial, because it would tend to introduce perjury, and there would never be an end to causes if once a door was opened to such applications. (*a*)

SHERWOOD, J.—The widow, Steel, who sold the goods in question to the plaintiff, had the possession of them for a long time after the death of her husband, and made use of them on all occasions as her own property. To the rest of the world she appeared to be the owner; no executor or administrator was ever appointed. Such possession, under such circumstances, makes the possessor executor *de son tort*, according to the authority in 3 Bacon, Abr. 21; also in 1 Com. Dig. 365. I think the present case is not within the 17th section of the Statute of Frauds, as it was in evidence that the goods were delivered at the time the sale was made. The other objection is that the sale was fraudulent; contradictory testimony was given on this point at the trial, and the jury who are the constitutional judges of the facts and the credibility of the witnesses, on both sides, have found by the verdict that no fraud existed, and I think no presumption can be admitted against such finding.

Per Curiam.—Rule discharged.

(*a*) Salk. 647; Stra. 691.

DOE EX DEM. ROBERTSON v. METCALF.

Where judgment is obtained against the casual ejector in consequence of the tenant in possession having neglected to give notice to his landlord, this court will set the judgment and writ of possession aside, and compel the tenant to pay costs.

Robinson, Attorney-General, had obtained a rule *nisi* to set aside the judgment and writ of possession issued and executed thereon, and that it be referred to the master to tax the lessor of the plaintiff his costs occasioned by the judgment and taking possession, together with the costs of the application, which costs, when taxed, should be paid by the tenant in possession, Metcalf.

This application was made on the part of Williams, the landlord of the premises in question, on the ground that the tenant in possession had not given him any notice of the declaration served, and upon an affidavit of merits.

Macaulay shewed cause.—He contended that on the authority of the cases the landlord was not entitled to the summary interference of the court, but must resort to his tenant under the statute, and, if he had merits, might bring an ejectment in his turn.

He relied upon the cases below. (*a*)

Robinson, Attorney-General, contra, observed, that the case in 3 Taunton did not apply.

That the decisions in the King's Bench in England were in favour of the landlord, and were much more reasonable.

That by admitting him to the trial of his cause,

(*a*) 3 Taunton, 506; 4 Taunton, 820; Strange, 1242.

they would only do that at once which might be done by a circuitious process, to force him to which would be a hardship; he urged the great inconvenience of allowing landlords to be divested of their estates by the probable collusion of tenants, or even casual occupants, which was frequently extremely difficult to be proved.

Chief Justice.—The point in this case is whether judgment by default, and a writ of possession executed thereon, obtained in consequence of the tenant in possession not having given notice to his landlord of the declaration in ejectment, by which means the landlord was deprived of an opportunity of defending his title, shall be set aside. The decisions in the King's Bench and Common Pleas are clearly at variance on this point; the case reported in the 4th Taunton holds, that where the judgment is perfectly regular, and no collusion between the plaintiff and tenant, it must stand, notwithstanding the injury accruing to the landlord for want of such notice, who must look to his tenant for remedy; on the ground that the court could not interfere with the rights of a plaintiff not in fault, and who was perfectly regular in his proceedings.

This doctrine is seemingly so reasonable that we could not avoid being forceably struck with it, and especially when we found that it was not at all interfered with (as was at first supposed) by the decision in the case of the Grovers' Company v. Roe, in the 5th Taunton, which turned upon a suggestion of collusion between plaintiff and tenant; but the doctrine laid down by the Court of King's Bench in Troughton's

case, 4th Burrow, is entirely different on this point, and is perhaps, when closely examined, better adapted to the ends of justice in actions of this nature, and goes on the principle that it is better that a plaintiff, however regular, should be delayed in his remedy, than that a landlord should be dispossessed of his estate, without an opportunity of defence, by the treachery or other default of his own tenant, and which tenant perhaps (as we know to be extremely probable in nine cases in ten in this country) may not be of sufficient responsibility to answer so important an injury to the landlord.

But be the preference due to the opposite doctrines as it may, we are specially bound by the practice of the King's Bench, unless where it may operate palpable injustice, which we conceive it does not in the present case.

We will, therefore, pursue the course adopted in the case of Troughton, and therefore direct that the present rule be enlarged, that the plaintiff's costs be taxed by the master, and that an order be served on the tenant to shew cause why he should not pay those costs.

SHERWOOD, J.—This is an application to the court on the part of the landlord for leave to enter into the common consent rule and defend the action under the 11 Geo. II., c. 19. It appears that judgment, by default, has been entered against the casual ejector, and that the tenant in possession gave no notice of the action to his landlord. The lessor of the plaintiff contends, that as no collusion appears between him-

self and the tenant in possession, the landlord cannot be permitted to defend after judgment by default has been regularly entered; Goodtitle v. Badtitle, 4 Taunton, 820, and the Grovers' Company v. Roe, 5 Taunton, 205, are cited in support of the plaintiff's position. These cases do certainly establish the practice in the Court of Common Pleas to be as stated by the plaintiff.

It appears, however, from the cases, Troughton v. Roe, 4 Burrow, 1996, and Jones v. Edwards, 2 Strange, 1242, that the Court of King's Bench in England puts a more liberal construction on the statute. The doctrine of these cases is, that the rule which requires service on the tenant in possession was made with a view that the tenant should give notice to his landlord; and if the intention of the rule is not substantially complied with, the court will interfere and set the matter right.

I approve of this practice in preference to that of the Court of Common Pleas, and think the landlord in the present case should be allowed to defend the action, for if the possession is changed his situation will be much worse, and the question relative to the title will still be undetermined.

Per Curiam.—Rule absolute.

EVERINGHAM v. ROBINETT.

A supplementary affidavit allowed to be filed after judgment entered upon cognovit, stating that it had been taken as prescribed by the rule of this court.

Judgment had been entered upon a *cognovit actionem* in this cause; but the person who attested the

execution of the instrument had omitted to swear that it had been taken through the intervention of an attorney, agreeable to the order of court.

Robert Baldwin applied for leave to file a supplementary affidavit of that fact.

Application granted.

CAMERON AND WIFE v. MCLEAN.

In an action for libel, wherein the plaintiff recovered only twenty shillings damages, the judge who tried the cause refused to certify.

This was an action for a libel in which the plaintiffs recovered twenty shillings damages only.

George Jarvis applied for a certificate of the judge who tried the cause, to restrain the plaintiffs' costs to the amount of damages recovered, under the 43 Elizabeth, c. 6.

Macaulay, contra, observed, that there being no inferior jurisdiction in this country to which the plaintiff could have preferred his complaint, it would be unreasonable to deprive him of his costs.

Application refused.

CAMPBELL v. BERRIE, ONE, &C.

A rule to plead where necessary may be given at any time in vacation.

The bill was filed against the defendant in Easter vacation, as of the preceding term, with notice to plead in the first four days of Trinity, but no rule to

plead was given until Trinity vacation, and not within the first four days after the term.

The plaintiff signed interlocutory judgment and assessed his damages in Trinity vacation after the expiration of the rule to plead.

Macaulay moved for a rule *nisi* to set aside the interlocutory judgment and proceedings thereon as irregular, and cited the authorities below. (*a*)

Robert Baldwin, contra, contended, that the sixth order or rule of this court authorised the practice pursued by the plaintiff, the rule to plead being one of the class of rules therein mentioned, as authorised to be taken out in vacation as well as term.

Per Curiam.—Application refused.

Andrus v. Burwell.

Semble, that if in an action upon the case for not manufacturing four hundred bushels of wheat into flour the plaintiff recovers damages equal to the value of the wheat delivered to the defendant, he cannot bring an action for goods sold for a part of the wheat which had in point of fact been re-delivered to the plaintiff, and that such re-delivery should have been given in evidence in mitigation of damages; and that an action upon the common counts could not at any rate be sustained in such case.

This was an action of assumpsit for goods sold and delivered, tried at the last assizes for the Gore District, with a verdict for the defendant—the following were the circumstances: about two years ago the present defendant had delivered to the present plaintiff four hundred bushels of wheat to manufacture into flour; one hundred and twenty-six bushels had

(*a*) Impey, 203, 4, 5; 1 Sellon, 300; 1 Archbold's, 131; Tidd, 490, 3.

been re-delivered as unfit for manufacture. An action upon the case was shortly afterwards brought by the present defendant against the present plaintiff, for not manufacturing the flour agreeable to contract, and he recovered a general verdict for a sum equal to the value of the wheat originally delivered.

At the trial of the present cause the judge directed a verdict for the present defendant, observing that the re-delivery of the 126 bushels should have been given in evidence in mitigation of damages at the former trial, and that he considered also that the plaintiff could not, upon a common count for goods sold and delivered, recover the value of wheat belonging originally to the defendant, and returned to him in consequence of its bad quality.

Robert Baldwin now moved for a rule *nisi* to set aside the verdict on the ground of misdirection.

He contended that the defendant having recovered in the former action the full consideration for the non-delivery of four hundred bushels of wheat, the whole quantity delivered by him for grinding, although he had in fact received back 126 bushels, the plaintiff was in this action entitled to recover the value of the wheat re-delivered, as that could not have been taken into the consideration of the jury.

He observed, that it could not have been pleaded as a set-off to the former action, which being a special action upon the case the damages were entire, and that the defendant, by that action, having disaffirmed the receiving the returned wheat as a part perform-

ance of the grinding contract, it was but common justice that the present plaintiff should be allowed to recover it in some shape, and he contended that the count for goods sold was sufficient to sustain the action.

The *Solicitor-General*, contra, insisted that the judgment in the former action was a bar to the present; for that it appearing by the record that the plaintiff in the former action sought to recover the value of four hundred bushels of wheat not manufactured according to contract, the present plaintiff cannot now turn round and recover back the value of a part of the same flour.

That it was impossible now to ascertain the grounds of the former verdict. They may have credited the defendant in that action with the amount of the wheat now sought to be recovered, and mulcted him for the breach of his contract in an equal or greater amount.

That the subject of the present action was a part of the *res gestæ* in the former, and could not be separated from it.

He also contended that it was absurd to suppose that a person could, in an action for goods sold, recover against another for his own goods re-delivered.

Per Curiam.—Application refused.

HAWLEY v. HAM.

A nonsuit cannot be moved for in bank unless it has been moved for at *nisi prius*, and the point reserved by the judge with the plaintiff's consent. A recognition by a party that A. is his wife, is sufficient to charge him with necessaries, although they do not cohabit, having in fact separated, and although she may not *stricti juris* be his wife.

This was an action for the maintenance of the defendant's wife, tried at the assizes for the Midland District, and a verdict for the plaintiff for £2 10s.

It appeared in evidence that the defendant had been married for several years to the daughter of the plaintiff; the ceremony had been performed by a sectarian minister under the provincial statute.

The defendant and his wife separated some time after his marriage, and she had returned to her father's house and continued to reside there until the commencement of the present action, shortly previous to which overtures had been made by her friends for a re-union, upon which the defendant wrote to the plaintiff authorising his wife to remain with him for a month longer, to give the defendant an opportunity of considering and replying to the proposition, which he, however, afterwards negatived. A nonsuit had been moved for at the trial upon the ground that the minister who had performed the marriage ceremony had no sufficient authority so to do, first, as not being one of the persons designated in the provincial statute, and secondly, as having married persons not belonging to his congregation. The judge who tried the cause refused the nonsuit and directed the jury to find a verdict for the plaintiff, at least to the amount of defendant's wife's board for the period mentioned in his letter.

Boulton moved for a rule *nisi* to enter a nonsuit or

grant a new trial, and proceeded to state the grounds taken at *nisi prius*.

Macaulay made a preliminary objection to that branch of the motion which related to a nonsuit, contending, that as no point had actually been reserved at the trial, such a motion could not be entertained in bank. That the only motion competent to the defendant to make was that for a new trial.

Boulton, Solicitor-General, contended as to this point, that the objection to the legality of the marriage having been made at the trial, it was competent to the defendant to move for a nonsuit upon that objection in bank, although the point had not been reserved, and he relied upon the dictum of Lord *Ellenborough* in Gould and another v. Robson and another, in which case (which was a motion for a new trial, although no point had been reserved) his lordship observed, "that in strictness the defendants were entitled to enter a nonsuit, the objection having been taken at the trial."

SHERWOOD, J.—The later case of Minchin v. Clement (*a*) goes to establish a contrary doctrine. In that case the defendant's counsel contended, as is now done, that the objection having been made at *nisi prius* a nonsuit might be moved, but his position was overruled by Lord *Ellenborough*. Macbeath v. Haldmiand (*b*) is also an authority to shew that a plaintiff cannot be nonsuited without his consent.

The *Solicitor-General* observed, that Lord *Ellenborough's* reasonings did not apply to the practice in

(*a*) 1 B. & A. 252. (*b*) 1 T. R. 176.

this country, as there was no court to which a bill of exceptions lay, therefore a nonsuit was more beneficial to plaintiff, as its propriety might be considered in a court of appeal.

That it was more beneficial to a defendant also, as it determined the law upon the case.

That the reason for requiring the grounds of a nonsuit to be stated at *nisi prius*, was to prevent a surprise upon the plaintiff in bank, and was equally answered by its being mentioned, as by its being formally moved.

Macaulay, in reply, insisted that as a plaintiff cannot be nonsuited without his consent, it follows that a motion cannot be made to nonsuit him in bank, unless he has consented to the reservation of points at *nisi prius*.

That the assumption by defendant's counsel, that there was no court of error in this country in which a bill of exceptions might be argued was probably incorrect.

That another objection to a nonsuit was, that in the event of its being granted, the plaintiff would pay costs; but if a new trial was granted he might avoid costs by discontinuing.

That there being a special act of parliament to authorise the court to pronounce nonsuits in certain cases, was a strong argument to shew that it could not be done in others.

The court, upon this preliminary point, determined with the plaintiff's counsel, viz., that a nonsuit could not be moved for in bank, unless it had been moved for at *nisi prius*, and the point reserved by the judge with the plaintiff's consent.

The *Solicitor-General* was proceeding to state the circumstances of the illegality of the marriage as the grounds for a new trial, but was directed to assume that as a fact, coupled with the circumstance of the defendant's recognition of plaintiff's daughter as his wife, by the letter produced in evidence at the trial.

He then contended, that the marriage being invalid, the woman's case, whose maintenance was sought to be recovered, must be considered in the same light with that of any other female cohabiting with a person, in which case the supposed husband was liable during the cohabitation only, but when that ceased it was the duty of persons giving credit to enquire whether there had been an actual marriage. The counsel drew an analogy between the present action and that against a tenant for not cultivating a farm in a husband-like manner, in which action actual tenancy, and not mere occupation, must be proved.

That in cases of a marriage *de jure*, the legal obligation to maintain the wife continued after what in common colloquy was called separation, but not so after a mere cohabitation was discontinued.

The counsel cited the authority below (*a*) as in

(*a*) 4 Campbell, N. P.

point, observing that none of the cases were founded upon an illegal marriage.

Macaulay observed, that in this case the plaintiff must establish a right, he must give sufficient evidence of the woman being the defendant's wife *de facto;* that that had been done or the plaintiff would have been nonsuited at the trial; that the judge considered so, and refused a nonsuit.

That it was a question of fact which the jury had decided.

That for the period of a month mentioned in the letter there had been clearly no separation, after that time the plaintiff was directed not to credit.

The *Attorney-General*, in reply, observed, that in reason, as well as in law, it was perfectly clear that if a man, after cohabiting with a woman, was to separate from her, but still hold her out as his wife, he would be liable for necessaries; but that after a period of eight or ten years has elapsed from the separation without such recognition, the question naturally arises, why he should be liable? and the answer is, that nothing but a strict legal obligation can make him so.

[C. J.—The general doctrine we admit, but can you apply it to the particular case?]

The counsel further observed, that as in the action for not cultivating in a husband-like manner, the plaintiff must declare against the defendant as tenant

and prove him such; so in this action, the plaintiff in his pleadings must state the woman to be the wife of defendant, and shew her to be so *de jure* or *de facto;* either legally married or cohabiting, or acknowledged as a wife—a mere statement in the declaration that she had once lived with the defendant would be as demurrable as the statement of a mere occupation would be in the former case.

CHIEF JUSTICE.—I consider that the facts of this case take it out of the general doctrine. The woman having been recognised by the defendant as his wife nearly to the time of bringing the action, renders him liable.

SHERWOOD, J.—In the case cited there was no recognition, but in the one before the court there was. I consider also that the parties having been actually married, though perhaps by a minister not strictly authorised to perform the ceremony, distinguishes this case from others; the case in Campbell shews that although parties do not cohabit, yet if the supposed husband does other acts to recognise the woman as his wife, he makes himself liable for her necessaries.

Per Curiam.—Application refused.

BROWN v. HUDSON.

Where the person of an insolvent debtor is discharged from arrest by a foreign authority, this court will not set aside an arrest made under the process of this court for the same cause of action, it not being bound to model or restrain its course of proceeding by that of other countries.

Robinson, Attorney-General, applied for a rule *nisi* to discharge the defendant from prison upon filing common bail, upon the ground that his person had

been discharged from imprisonment under an insolvent law of the state of New York.

The defendant had been arrested in this country upon a contract entered into with the plaintiff in the state of New York, had remained in prison, and after suffering judgment to pass by default and a *ca. sa.* to issue, made this application.

His counsel contended, that the general maxim applied, which establishes that no person is to be arrested twice for the same cause.

That the general principle as laid down by Lord *Mansfield* in Pedder v. McMaster, (*a*) "that a discharge from debt by a competent jurisdiction in a foreign country operated as a discharge in any other," and he contended that a partial discharge, as in the present case a discharge from imprisonment, was within the principle, and should be equally recognised.

That were this merely an application to set aside proceedings for irregularity, it might be contended that the defendant was too late in his application, but that it could never be too late to discharge a prisoner illegally confined.

That this case was analogous to that of a debtor, who, if once supersedeable, is always supersedeable. (*b*)

That the case of Sharpe v. Iffgrave (*c*) was in

(*a*) 8 T. R. 609. (*b*) Robertson v. Douglas, 1 T. R. 191. (*c*) 3 B. & P. 394.

point to shew that a debt might continue to exist without the defendant's continuing liable to arrest.

In answer to the objection which might be made to this application, on the ground that it had been made and decided by the court in a former term, he observed that the grounds of the application were different, inasmuch as it had not been formerly represented to the court, that the ground of action had arisen in the foreign jurisdiction.

Robert Baldwin opposed the application, contending that it was the same and no other than that which had formerly been made to the court, for that as the place of contract could not alter the merits of the defendant's application, so neither could it be considered as constituting other grounds.

That the case cited to shew that a prisoner once supersedeable was always so, did not apply, or was against the application, for if a prisoner pleaded, after being supersedeable, he lost his opportunity of discharge.

CHIEF JUSTICE.—I consider that there is a wide distinction to be taken between the case where a debt is extinguished, and where, as in the present case, the mode of its recovery only is modified by the laws of a foreign country.

In the latter case the plaintiff is left at liberty to recover his demand here, and that by the course of proceeding which is usual in this country.

SHERWOOD, J.—I consider that the doctrine laid down by Lord *Ellenborough* in the case of Imlay v.

Elleffsion, (*a*) is decisive upon that point, and therefore, that upon that ground this application must fail. I think it would fail too upon the ground of laches in the defendant. If he had made this application shortly after his arrest, the plaintiff would not have been put to the expense which he has, in proceeding to judgment and execution.

Per Curiam.—Application refused.

GREY v. HOLME.

Time may be granted to plead partnership in abatement, but will not be renewed upon the ground that it had been omitted to be filed upon the ground of overtures of accommodation.

Declaration served in Trinity vacation with the usual notice to plead in eight days. Defendant had obtained a judge's order for six weeks' time to plead (without terms) for the avowed purpose of pleading in abatement.

During the six weeks overtures were made by the plaintiff to settle the present and other suits, and it was agreed on both sides that there should be no proceedings while such overtures were pending; during the present term the time for pleading would expire.

Robert Baldwin applied for a further time sufficient to enable the defendant to procure an affidavit of the truth of his plea (which was partnership) from Niagara.

Macaulay opposed the application, observing that a month of the six weeks, granted by the judge's

(*a*) 2 E. R. 453.

order, had elapsed before any overtures as to a compromise had taken place, and suggested a doubt as to the regularity of granting time to plead in abatement.

SHERWOOD, J.—I consider that the time for pleading was properly granted, and at the time of granting it I supposed it acquiesced in.

Application refused.

THE KING v. THE JUSTICES OF THE DISTRICT OF NIAGARA UPON THE RELATION OF EDWARD MCBRIDE, ESQUIRE, M. P.

This court refused to issue a mandamus to justices of a district to order parliamentary wages to be paid to the representative of a town, under the provincial statute.

This was an application to the court for a rule to shew cause why these magistrates should not be directed by mandamus of this court to issue an order to the treasurer of the district, to pay Edward McBride, Esquire, his parliamentary wages as a member for the town of Niagara.

The question arose upon the provincial statute 43 Geo. III., c. 9, entitled, "An act the more conveniently to collect the compensation to the members of the House of Assembly for their attendance on their duty in parliament," &c. This statute enacts, "that after every prorogation and dissolution of the Assembly of this province, it shall and may be lawful for every member thereof, having attended, to receive from the Speaker of the House of Assembly a war-

rant under his hand and seal, signifying the time that such member hath attended his duty in the said Assembly; and every member possessed of such warrant shall and may ask, and demand of the justices of the peace for the district in which the county or riding represented by such member may be situate, in their general quarter sessions assembled, a sum not exceeding ten shillings per day for every day that such member shall have attended, &c., which sum it shall and may be lawful for the said justices to levy, by assessment to be made on every inhabitant and householder in the several parishes, townships, reputed townships or places within the county or riding represented by such member, in the same manner and form as by law any assessment may now or hereafter be levied for any public purpose in any district of this province, and for the said justices to issue their order upon the treasurer, &c."

Boulton, Solicitor-General, contended in favour of the application, that it was evidently the intention of this statute that every member thereof should receive his wages, for to what purpose was every member, as directed by the statute, to receive a warrant, if it was not with a view to receiving his wages.

If there could possibly be a doubt it was removed by reference to the words of the 33 George III., c. 3, the 30th clause of which states, "that whereas it was the ancient usage of that part of Great Britain called England for the several members representing the counties, cities and boroughs therein, to receive wages, &c.," evidently shewing that it was the intention of that act, that every member was intended;

and observed, that although this clause of that statute was repealed, yet being in *pari materia* it might well be called in aid to explain the latter statute.

He further contended, that if the difficulty arose in the mode of collection, that the words of the statute in question which directs the assessment to be made upon every inhabitant householder in the several parishes, townships, reputed townships, or places were sufficiently general to authorise an assessment upon the town which the member represented, and he considered that the amount might be levied in the same manner as sums were levied under the police act. He observed further, that it being evidently the intention of this statute to give every member wages, that it should receive the same liberal construction with the statute *circumspecte agite*, which, although it only mentions the Bishop of Norwich, has been held to extend to all bishops, and that to give this statute the effect intended, the towns sending members should be considered as included in the provision giving wages to counties and ridings.

Baldwin, same side, considered that the town members should be paid out of the district funds, for that if they were not this absurdity would follow, that the inhabitants of towns would be taxed for paying members who did not represent them, without having a reciprocal advantage.

That nothing could be more just than that the district at large should pay them, as they, in fact, represented the district at large as well as the particular town. He considered, however, that if the

general funds of the district should fail, these members might be paid by a levy under the police act in such towns as had a police.

CHIEF JUSTICE.—By the 43 George III., provision is only made for payment of wages to the members of the House of Assembly representing counties and ridings. At that time there were no towns in this province sending members, consequently those political divisions could not have been within the contemplation of the legislature at the time.

The 60 George III., c. 2, which authorises a representation for towns of a certain description and for a university, is altogether silent as to any provision for payment of parliamentary wages; and whether this omission was intended or not, I consider that a matter ought to be very clear to induce this court to give an extended construction to any act of the legislature, which has for its object the laying of any tax or assessment upon the subject.

SHERWOOD, J.—This application is made under the provincial statute 43 Geo. III., c. 11.

When that act was passed no representatives were sent from towns to the provincial parliament, and I think the phraseology of the statute is peculiarly applicable to counties and ridings, and cannot properly be construed to extend to towns. The provincial statute 1 Geo. IV., was made seventeen years afterwards to increase the representation of the commons of the province, and enacts that members shall be chosen not only for counties but also for towns and a university when duly established.

It appears to me that the legislature in 1803 intended to allow wages to such members only as were then sent to the House of Assembly, but did not intend at that period to provide wages for such members as might possibly be added to the representation at any future period. I think the allowance of members from towns was not even in contemplation when the statute 43 George III. was passed, and it did not actually take place till seventeen years afterwards.

No assessment or tax should be laid on the people without an express law to warrant the levy.

In all ambiguous cases where it is really doubtful whether the parliament intended a tax to be laid and collected for the use of individuals, this court will not enforce such a measure by granting a mandamus to the Court of General Quarter Sessions of the Peace, from legal inference, or mere intendment of law. I consider it a *casus omissus* to be supplied by an act of the legislature whenever its wisdom shall deem such a step advisable.

Application refused.

Brock v. McLean, Sheriff.

If a defendant moves a nonsuit and afterwards examines witnesses, the plaintiff is entitled to any benefit which he can obtain from their evidence in support of his case. An attorney (merely as such) is not authorised to discharge a defendant in execution, certainly not without receiving the debt, and the sheriff, so discharging a debtor upon his authority, will be liable as for an escape.

This was an action for an escape, brought against the sheriff of the Midland District, under the following circumstances:

Mr. Daniel Washburn, formerly an attorney of this court, became insolvent, and being about to leave this province, immediately previous to his departure instructed his clerk to discharge out of execution one White, a debtor, whom he had proceeded against at the suit of the plaintiff.

After his departure, his clerk, who had in fact conducted the proceedings in the cause, and signed the writ of execution, wrote an authority to the defendant, who accordingly discharged the debtor.

It appeared in evidence at the trial, that he, defendant, knew of Washburn's insolvency and departure.

Some of the formal circumstances necessary to support the plaintiff's case, not having been proved by his witnesses, the defendant's counsel upon that ground, and upon the ground that the authority of the plaintiff's attorney was a sufficient warrant for the sheriff to discharge a prisoner in execution, moved for a nonsuit, which, being refused by the judge who tried the cause, the defendant's counsel proceeded to examine his witnesses, and upon their cross-examination the formalities necessary to the support of the plaintiff's case were elicited, and a verdict was taken for the plaintiff, with liberty to the defendant to move.

Robinson, Attorney-General, now moved for a rule *nisi* to set aside the verdict and enter a nonsuit, or grant a new trial. He insisted as a preliminary point, that the plaintiff, having failed in the proof of his case by his own witnesses, could not, after a mo-

tion for a nonsuit, be allowed to do so by a cross-examination of those of the defendant, and that the case must now be considered as standing as it did at the time the motion for a nonsuit was made at *nisi prius;* in support of this position he relied upon Mr. Justice *Buller's* dictum as reported in Bosanquet and Puller, viz., "that on a motion for a nonsuit, the court is to consider itself in the situation of the judge at the time of the objection raised." (*a*)

Boulton, Solicitor-General, as to this preliminary point, contended, that Mr. Justice *Buller's* dictum was not to be construed to mean the time the defendant moved a nonsuit, unless he relied upon it, and declined giving evidence; but that if he did so, the plaintiff had a right to the benefit of any facts that might come out in the course of the examination of the defendant's witnesses.

The court agreed upon this point with the plaintiff's counsel, observing, "that the dictum was to be taken *sub modo*, that is, if the defendant relied upon his grounds for a nonsuit, by declining to examine witnesses upon his defence."

The defendant's counsel proceeded to the principal ground of his application, viz., that the verdict was against law and evidence.

He contended that by the general principles of law, the acts of the attorney were to be considered as the acts of the client; that it had been the constant practice in conformity to this principle, to discharge prisoners upon the authority of the attorney.

(*a*) Cox v. Kilchen, 1 B. & P. 339.

That it would be unreasonable to expect the sheriff to ascertain before a defendant's discharge, whether the plaintiff had received his debt, and it would indeed be impossible for him to do so, as he could require no legal proof of such a fact from the attorney, if he thought proper to assert it.

That a requisition of the sort would be equally hard upon defendants, many of whose plaintiffs lived out of this province, and who would frequently be kept in gaol an unnecessary length of time, if the attorney's discharge was not sufficient to exonerate the sheriff without payment of the money, which was not done in nine cases out of ten.

As to book authorities upon the subject, he observed that it was positively laid down in Rolle that the attorney might release a defendant in execution although he receives nothing; and although it is laid down in the same authority that he may acknowledge satisfaction on the record on receipt of the money, yet that mode of expression was not sufficient to overturn the other positive unconditional assertion, supported, as it has been, by the constant practice. He referred to the authorities below. (*a*)

Boulton, Solicitor-General, contra, contended, that as an attorney could not enter a *retraxit*, so neither could he discharge a defendant in execution; and for the same reason, viz., that he had no warrant to do either—his warrant being only to prosecute, and his authority ceasing with the judgment.

That the dictum of Mr. Justice Dodridge, as re-

(*a*) 1 Rolle, 291; 1 Rolle, 366, 7.

ported in Rolle, was much invalidated by the dissent of Coke, and was overruled by contrary decisions in the same reporter, and by the more modern authorities.

SHERWOOD, J.—The application for a new trial is always to the discretion of the court; and if the matter is not of sufficient importance, or if justice has been done, it is usual to refuse it.

From the turn which the argument has taken, it is now only necessary to consider the principal point, which may be reduced to the question, whether the attorney's general authority ceases upon judgment being obtained? This appears to me to be decided by the modern cases, and particularly by that of Tipping v. Johnson, (*a*) and a sort of special authority which he has of suing out execution, or receiving money, or doing other acts for the benefit of his client, do not interfere with this decision; but the discharging a prisoner in execution without payment of the debt, is not an act of this description. Should a case indeed arise in which the attorney asserted that he had in fact received the money, the court would probably consider that circumstance.

As to the hardship of this case upon the sheriff, it appears that it was known to him that the attorney had left the province without the intention of returning, and that his circumstances were insolvent. Upon the whole, it appears to me, that it is the plaintiff who would have reason to complain, if a new trial were granted in a case where his debtor had been discharged without any satisfaction.

(*a*) 2 B. & P. 357.

CHIEF JUSTICE.—I consider that in this case there is no ground to grant a rule *nisi*. An attorney being deeply insolvent and having departed the province, and the sheriff knowing this, discharges a defendant upon the authority of the absent attorney, and that even in defiance of the plaintiff—where, in this case, is the tangible person, if the sheriff is not? I consider that great injustice would arise by overturning this verdict.

Per Curiam.—Application refused.

CLENCH v. HENDRICKS.

The King's patent gives the patentee an estate sufficient to maintain trespass.

This was an action of trespass tried at the assizes for the Midland District, and a verdict for the plaintiff for £5.

The plaintiff gave his patent from the Crown as evidence of title, but gave no evidence of actual entry.

The act of trespass consisted in the defendant's having erected a shanty upon, and having cut and carried away timber from, the plaintiff's premises, a lot of wild land.

Bethune moved for a rule *nisi* to set aside the verdict as being against law and evidence. He contended that a grantee under the King's patent had no other title than that which a bargainee had under a deed of bargain and sale under the Statute of Uses,

who could not bring trespass without first making an actual entry.

Or than that of an heir upon whom the descent was cast, who could not, without entry, bring trespass against an abator.

He suggested that the dictum in Plowden, which lays down that the King's grants pass an estate without livery, left it to the grantee to perfect his title (for the purpose of bringing trespass) by actual entry.

He contended that he was supported in this position by the determination of this court in the case of Purdy *qui tam* v. Ryder, in which case the King's patent was not considered as a protection to the defendant against the operation of the statute of Henry VII., made to punish persons transferring estates of which they had not been in possession.

Boulton, Solicitor-General, same side, suggested that the defendant was in the situation of a disseisor, against whom an action real could not be brought without entry.

Cartwright, contra, observed, that there was a great distinction between the case cited and the present. In that case Purdy had been many years in adverse possession, under a contract from Ryder, who had sold the land in violation of his contract, and opposed this application on the ground of the great public inconvenience which would ensue from granting it, as it was a well known fact that a very large proportion of the grantees of the Crown never took possession of their estates by actual entry.

SHERWOOD, J.—It is objected by the defendant, that the King's patent does not give the grantee possession of an uncultivated lot of land mentioned therein. It is contended that such grant is in effect like a deed of bargain and sale, by which the bargainee can bring no action of trespass before entry; and, therefore, the patentee can bring no such action. There is no analogy in the cases, for the King's patent operates like a deed of feoffment with livery of seisin, and completely passes the estate, and the grantee is in actual possession by virtue of the patent—all the authorities are clear as to this point. The defendant in this case had no adverse possession, for the act of cutting down and carrying away the timber was an act of aggression only, without any claim to the possession or property of the land. There can be no occupancy or tenancy at sufferance against the King. Lit. 178; 1 Institute, 41 b.; 1 Institute, 57.

Per Curiam.—Application refused.

PERKINS v. SCOTT.

The court refused to set aside an assessment of damages upon the ground that the verdict was too low from a misapprehension of the jury.

George S. Boulton applied for a rule *nisi* to set aside the assessment of damages in this cause, the jury having given their verdict for too small a sum under a misapprehension.

The court considered the case of Jackson and Williamson as deciding the present case, and refused the application. (*a*)

Per Curiam.—Application refused.

(*a*) 2 T. R. 281.

BAYARD ET AL. v. PARTRIDGE.

Accord with satisfaction held a good plea to breach of covenant, and leave to withdraw the demurrer refused.

Declaration in covenant for non-payment of the purchase money of certain lands sold by the plaintiff to the defendant.

Plea.—First, *non est factum.*

Secondly.—*Actio non,* because the defendant, before the commencement of this suit, to wit, on, &c., at, &c., conveyed and delivered back to the said plaintiffs, and into their hands and possession, the lands contracted for, in the full satisfaction and discharge of the sums of money in plaintiffs' breach mentioned and of the damages thereof, and which said lot of land so conveyed and delivered back to them, the said plaintiffs, they then and there received of and from the defendant, in full satisfaction and discharge of the said several sums of money in the said breaches mentioned, and of the damages, &c.

The plaintiffs took issue upon the first plea, and demurred generally to the second.

Bethune, in support of the demurrer, contended, that a covenant to pay money could not be discharged without deed, and cited the authorities below. (*a*)

Robinson, Attorney-General, contra, admitted that a covenant, not broken, could not be discharged without deed, but contended that the damages arising from a breach of covenant might be satisfied by payment of money or any other thing; and that the

(*a*) 2 Institute, 212, b.; 6 Coke, 44; 2 Croke, 99; Croke, Eliz. 103, 357; Croke, James, 254.

agreement for such satisfaction might be by parol. That acceptance in satisfaction was a good plea; and that the above distinction was to be gathered from the cases he cited the authorities below. (*a*)

The court were of opinion that accord, with satisfaction, was a good plea to breach of covenant.

Judgment for the defendant.

Boulton, Solicitor-General, applied before judgment for leave to withdraw the demurrer, but was not allowed.

SHERWOOD, J., observing, that the plaintiff, by his demurrer, had admitted the facts stated in the plea, and could not now be permitted to deny them.

(*a*) 9 Coke, 79; 5 T. R. 141; Bac. Abr. Covt. 1 Morgan, 149, 326; 3 East, 252; 1 Saunders, 235.

HILARY TERM, 7 GEO. IV., 1827.

Present:

THE HONOURABLE CHIEF JUSTICE CAMPBELL.
MR. JUSTICE SHERWOOD.

MORAN v. MALOY AND ANOTHER.

The court will not grant an insolvent debtor an order for the payment of the arrears of his weekly allowance, which had accrued pending an unsuccessful application for his discharge.

Washburn applied for a rule to shew cause why the defendant Maloy should not be discharged out of the custody of the sheriff of the Midland District, for non-payment to him of thirty shillings, currency, being six weeks' allowance due to him as an insolvent debtor, which he had refused to receive pending an application to this court for his discharge from prison under a misconstruction on the part of said defendant of the law respecting the weekly allowance of insolvent debtors, or why plaintiff should not pay defendant all arrearages of said weekly allowance.

SHERWOOD, J., observed, that the defendant had made an experiment of which he must submit to the consequences.

Per Curiam.—Application refused.

STEWART v. CRAWFORD.

The court will not, upon a first motion, grant a rule absolute for an attachment for non-performance of an award although the party consents by his counsel.

Washburn moved for a rule *nisi* against the defendant for the non-performance of an award.

Stewart, (with a view to save costs,) on the part of the defendant, proposed that the attachment should go in the first instance, but his proposal was rejected by the court.

Application granted.

CROOKS v. STOCKINGS.

A party must furnish his opponent with copies of any affidavits which he intends to produce as the ground of discharging a rule *nisi*.

Stewart was proceeding to answer a rule *nisi* in this cause and to produce affidavits which had not been communicated to the other party.

SHERWOOD, J., observed, that the counsel intending to file affidavits should furnish the opposite party with a copy the day before argument.

BEEBE v. SECORD AND ANOTHER.

Counts in assumpsit cannot be joined in a declaration with counts in debt, and such misjoinder will not be cured by verdict.

The declaration commenced in the usual form in debt, demanding the aggregate of the several sums contained in the different counts. The first count was in debt upon an obligation in the usual form.

The second count was in the form generally used in assumpsit, for goods sold and delivered, money lent and advanced, paid, laid out, and expended, had and received, and concluded with the usual promise in assumpsit.

The third count was for interest in the same form and with the same conclusion.

The fourth, in like manner, upon an account stated; the breach alleged the non-payment of the £550 above demanded, and concluded to plaintiff's damage of ten pounds.

Plea to the first count, *non est factum*. To the others, *nil debit*—upon this declaration the parties went to trial, and there was a verdict for the plaintiff.

Boulton, Solicitor-General, having obtained a rule *nisi* to arrest the judgment for misjoinder,

Macaulay shewed cause.—He observed, that the criterion by which it was to be determined whether or not this judgment could stand was, whether there could be the same form of plea and the same judgment to these several counts.

He contended that *non est factum* having been pleaded to the first count upon the specialty, and *nil debit* to the counts upon the simple contracts, (which might be considered as counts in debt,) that one judgment, namely, that the plaintiff recover his debt, would well apply to all the counts, and therefore would be good; he contended that the promise to pay

at the end of the simple contract counts could not vitiate, it was merely expressing what would be otherwise implied, and that however bad the joining these counts might have been upon special demurrer, that the verdict must cure them. The counsel referred to the authorities below. (*a*)

Boulton, Solicitor-General, in reply, observed that the counts upon the simple contracts were in the regular assumpsit form, whereas the first count was in debt, which forms could not, agreeably to the rules of pleading, be joined together. The judgment upon the one count must be that the plaintiff recover his debt; upon the others that he recover his damages —different judgments altogether.

That the greatest confusion would arise if such inaccuracies could be tolerated by the courts; that the defendant having pleaded *nil debit* to the assumpsit counts, the plaintiff might have entered a *noli prosequi* upon the count in debt and have signed judgment for want of a plea.

The counsel cited the authority below. (*b*)

SHERWOOD, J.—The court cannot pronounce the same judgment upon all the counts in this declaration, some of the counts are in debt, and some in assumpsit—the judgment must be arrested.

Per Curiam.—Rule absolute.

(*a*) 1 Wilson, 258; 2 Wilson, 319; 1 T. R. 274; 1 H. B. 249; 1 B. & P. 58. (*b*) 6 Wilson, 321.

HENDERSON v. MCCORMICK.

Where four terms have elapsed after issue joined, a term's notice is necessary to be given before any subsequent proceeding, unless within the four terms a notice of intention to proceed has been given.

Notice of trial had been given in this cause, in the vacation of Trinity Term, 6 Geo. IV.; no further proceedings were had until last Trinity vacation, when fresh notice of trial was given, and a verdict taken for the plaintiff—the date of the last notice of trial was within a year of the date of the first.

Boulton, Solicitor-General, had obtained a rule to shew cause why this verdict should not be set aside on the ground of irregularity.

Macaulay shewed cause.—He suggested that proceedings (namely, a notice of trial) having been had within a year from the last proceeding, made it unnecessary for the plaintiff to give a term's notice, it being laid down in Impey, (*a*) that if notice be given "within the year from the day of the last proceeding, having no regard to the terms, it is sufficient," which is also conformable to what is laid down in Richards v. Harris. (*b*)

SHERWOOD, J.—It is contended by the defendant, that four terms having elapsed since any proceedings have been had, he was entitled to a term's notice of trial. By the plaintiff, that the second notice of trial having been given within a year from the former, it is sufficient.

Tidd lays down, that where there have been no proceedings for four terms, exclusive after issue

(*a*) 359. (*b*) 3 East, 1.

joined, a term's notice is requisite. Impey states the same in substance, but in a subsequent paragraph he says: "If notice be given within the year from the day of the last proceeding, having no regard to the terms, it is sufficient." I think that this seeming contradiction is reconciled by considering the latter paragraph in Impey, not as alluding to the whole term's notice, but to a notice of intention to proceed to be previously given within the four terms, and this is supported by the form of notice which we find in Tidd's appendix.

I consider, from all the authorities, that it is the settled practice that if notice to proceed be given within the four terms, that an ordinary notice of trial will be sufficient, but that in the present case, no such notice having been given, and four terms having elapsed without any proceeding, the defendant was entitled to a term's notice.

Per Curiam.—Rule absolute.

BYARD v. READ.

The defendant had been held to bail by an affidavit which stated the deponent's residence as at Canandaigua, state of New, (the word York being omitted,) and an order had been obtained for his discharge from arrest upon filing common bail, by an application to a judge at chambers.

Beardley applied (a term having elapsed since the obtaining the judge's order) to rescind such order,

contending that the affidavit was sufficient, and that it was not competent to a judge at chambers to order a discharge upon filing common bail.

He urged that our provincial statute, which required an affidavit of the defendant intending to leave the province without paying the plaintiff's debt, dispensed with the niceties required by the English practice.

Washburn was for the plaintiff.—The court observing, that the description of the deponent was insufficient, and that an application to the court to discharge an order of a judge at chambers should be made at the next term after such order had been obtained.

Per Curiam.—Application refused.

Laing v. Harvey and Powell.

Bailable process issued against two, the plaintiff allowed to proceed against one.

The plaintiff applied by *Macaulay* for leave to discontinue his action as to defendant, Harvey, and to proceed against Powell alone, upon an affidavit stating, "the plaintiff having issued bailable process under which the defendant Powell had been arrested, and that the other defendant, Harvey, had absconded from the province, and that if the plaintiff was not allowed to proceed against the defendant Powell alone, he would probably abscond." (*a*)

The counsel considered that he was entitled to his

(*a*) Vide 5 Durnford, East; 4 East, 568; 1 M. & S. 55; 2 B. & P. 49; Lewin v. Smith; 4 East, Tidd, 736, 421.

application, by analogy, to the practice of inserting four defendants in a common process and declaring in separate actions.

And also under the equity of the provincial statute for proceeding against one or more joint debtors, where the others had left the province.

Per Curiam.—Application granted.

BUTLER, EXECUTRIX OF JOHNSON BUTLER, v. THE HON. J. H. DUNN, RECEIVER-GENERAL.

The Receiver-General of this province is not considered as liable to actions at the suit of individuals for money placed in his hands by the executive to be distributed among them.

This was an action for money had and received, brought against the defendant, for a sum awarded to the plaintiff's testator for losses sustained during the late war, under the provincial statute, (*b*) under the following circumstances:

Andrew Butler and Johnson Butler (the latter being plaintiff's testator) had been awarded a considerable sum by the commissioners appointed under the above statute.

From the difficulty which they experienced in ascertaining and apportioning the amount of the loss sustained by each of these individuals, the commissioners had awarded them an aggregate sum of £704, leaving it to the parties to appoint an attorney to receive the whole amount and divide it according to their respective rights.

(*a*) 4 Geo. IV.

The claimants were correctly named in the original award of the commissioners; but in the printed schedule or list of persons to whom sums were awarded, they were called "Andrew and John," instead of Johnson Butler.

Johnson Butler died, and appointed the plaintiff his executrix.

Shortly after the publication of the schedule, a Mr. William Crooks, by virtue of a power of attorney from the representative of Andrew Butler and the representative of John Butler, received the whole of the sum awarded by the commissioners, from the defendant, who paid it, as usual, upon reference to the printed schedule, without reference to the original document.

Under these circumstances there was a verdict for the plaintiff for £219, subject to the opinion of the court upon several points reserved; the principal, and only one upon which it became necessary for the court to decide, being "whether the defendant was liable to this action as being a public officer."

Macaulay, for the plaintiff, contended, that Mr. Dunn, by his laches in depending upon the printed schedule, and not going to the office of the commissioners or the government office, where he might, by reference to original documents, have ascertained who were the parties actually entitled, had subjected himself to pay this money a second time. This would, no doubt, be the case with private individuals, and he considered that his situation as a public officer, as far as regarded his liability in this case, made no alteration.

He distinguished between cases which might be cited on the other side and the present, inasmuch as in those there was no specification, whereas in the present the particular sums having been appropriated by schedule to each individual, renders the defendant liable *pro tanto* to each person, and contended that the defendant's situation was more analogous to that of a paymaster who received sums appropriated to individuals, than to that of an officer who received large sums for general purposes. He cited Stewart v. Tucker (*a*) as shewing that the former description of officer was liable.

He further observed, that Lord *Mansfield's* observation in Burrow (*b*) would include the present case, viz., "That the gist of the action for money had and received is, that the defendant, upon the circumstances of the case, is obliged by the laws of nature, justice and equity to refund the money."

He observed further, that an application to the government, which might be pointed out as the plaintiff's counsel, would probably be answered by a reference to the Receiver-General.

Robinson, Attorney-General, contra, after premising that the object of this defence was to ascertain whether Mr. Dunn was a public officer, liable to the actions of individuals in matters relating to the disposition of the funds entrusted to his charge, contended, as a general position, that public officers were not so liable.

That the case of the paymaster, cited from Black-

(*a*) 2 W. B. 1137. (*b*) 1 Burrow, 1012.

stone's reports, was professedly brought to ascertain whether an officer could assign his half pay, and it had been observed that the declaration in that case was ill drawn and the case confined.

The case of McBeath v. Haldimand (*a*) supported his general position, and was considered as decisive in the subsequent case of Unwin v. Wolsley. (*b*)

That the distinction attempted to be drawn beween moneys appropriated and unappropriated was done away by the case of Williams v. Everett. (*c*) In that case, although it was one of a private transaction, the court determined that although the defendant had received a gross sum, which had been remitted to him, with instructions to pay a certain part of it to the plaintiff, yet that an action for money had and received upon an implied assumpsit would not lie, and that the principle and reasoning, as laid down by Lord *Ellenborough* in that case, was not affected by the circumstance of the defendant's refusal to apply the funds entrusted to him, agreeably to the direction of his principal. The question which naturally suggests itself in the present, as well as in the case cited, is that put by Lord *Ellenborough—an locupletior factus est.* When did the sum claimed become money had and received to the use of plaintiff? If the defendant, in the present action, had been robbed of the whole sum entrusted to him, would every person named in the schedule have been entitled to bring his action, and would each of them have lost his claim to any compensation elsewhere?

In the case before the court, as well as in the case

(*a*) 1 T. R. 172. (*b*) 1 T. R. 674. (*c*) 14 East, 597.

cited, the defendants might have been called upon at any time by the principal in the one instance, and by the government in the other, to have returned the money deposited. When, then, could the money so deposited, or any portion of it, have become money had and received to the defendant's use? At what time could the law have raised an implied assumpsit?

The late case of Gidley, executor of Holland, v. Lord Palmerston, (*a*) he further observed, had placed this matter beyond doubt; it being in that case determined "that assumpsit could not be maintained against the Secretary-at-War, by a retired clerk of the war office for his retired allowance, although such allowance was included in the yearly estimates drawn for by such secretary, and received by him as applicable to such specific allowance, upon the ground that it would tend to expose him to an infinite number of actions to be brought by any person who might suppose himself aggrieved.

SHERWOOD, J.—The plaintiff has a verdict subject to be set aside, and a nonsuit entered, should the determination of the court be in favour of the defendant on the points reserved at the trial, among which is the following: "the defendant acted in this transaction as a public officer of the government, and no action on an implied assumpsit lies against him by the plaintiff." The sum claimed by the plaintiff is £219 16s. 6d., being a part of a larger amount allowed to the plaintiff's testator for losses which he sustained during the late war with the United States of America, a part of which has been placed in the hands of the defendant as the Receiver-General of this pro-

vince, for the purpose of being paid over to the person legally entitled to receive it.

The defendant, it appears, has paid the money, but it is asserted that he has paid it to a wrong person, and the plaintiff alleges, he has brought this action to recover it for the rightful owner. At the trial of the cause, I inclined to think the action would well lie against the defendant for money had and received to the plaintiff's use, but upon looking into authorities which I shall presently mention, I am fully convinced this action cannot be supported. The cases I allude to are Macbeath v. Haldimand, 1 T. R. 172; Unwin v. Wolsley, 1 T. R. 674, and Gidley, executor of Holland, v. Lord Palmerston, 3 Broderip and Bingham, 275, and although the circumstances of none of these cases are precisely analogous to the present case, still they fully establish in my opinion the doctrine, that public policy will not allow an action to be brought like the present, against any person acting in the public character and situation of the defendant.

The plaintiff must also fail on another ground, which is the total absence of any implied promise. The money cannot be said to have been received to the use of the plaintiff, because it undoubtedly belonged to the Crown, and the defendant received it from the Crown in his public character of Receiver-General of Upper Canada, and in that capacity is responsible to the Crown only. The constitutional remedy of the plaintiff is by petition to the Crown, and consequently a nonsuit ought to be entered.

Chief Justice.—The general rule seems to be

that where a public officer has a trust or discretionary power reposed in him, although he may err in its execution, unless he does so wilfully he is not liable to an action at the suit of an individual. Further, that if his duty is purely ministerial, his situation is analogous to that of a paymaster of a regiment, and he is not protected by the general principle of law, contended for by the defendant's counsel. Upon considering the general circumstances of this case, I am of opinion that the defendant's situation is more analogous to that of Lord Palmerston, than to that reported in Blackstone, and that this action therefore does not lie.

Per Curiam.—A nonsuit to be entered.

TAYLOR v. RAWSON.

Where a declaration upon common process was endorsed, "filed conditionally until special bail, &c.," the court refused to set aside the proceedings as irregular.

In this case a bailable process had been issued against the defendant, but those proceedings had been discontinued and a common process issued and served —appearance was entered according to the statute, and a declaration was filed, but was endorsed to plead *de bene esse* until special bail was put in and perfected; a copy had been served upon the defendant and a demand of plea given; judgment was afterwards signed for want of plea. It did not appear how the copy of the declaration was endorsed.

Boulton, Solicitor-General, moved last term for a rule *nisi* to set aside the interlocutory judgment and proceedings thereon for irregularity—the declaration

having been improperly endorsed, and such endorsement having tended to deceive the defendant, who might reasonably have supposed that the declaration was a continuation of the bailable proceeding.

Macaulay shewed cause, he assumed (as it did not appear otherwise) that the copy of the declaration served had not been endorsed, and, therefore, could not have deceived the defendant; and that the demand of plea having been served, either with or after the declaration, left no room for doubt.

He cited Cort v. Jaques, in which case the service of a notice of declaration, as filed generally, instead of the notice *de bene esse*, was held not to be such an irregularity as would set aside a judgment, (*a*) and the other authorities below. (*b*)

Chief Justice.—If this endorsement upon the declaration had actually deceived the defendant, there would have been a strong ground for setting these proceedings aside; but the court consider that a demand of plea having been also served, left the defendant no room for doubt.

Per Curiam.—Rule discharged.

McPherson v. Sutherland.

Macaulay applied for a rule *nisi* to stay proceedings upon an execution against goods and chattels taken out under a *cognovit actionem*, and judgment thereon entered, upon an affidavit setting out a ver-

(*a*) 8 T. R. 77. (*b*) Impey 182; Sellen 222.

bal agreement at the time of the cognovit given, that the plaintiff would resort only to the lands of the defendant's testator for payment of his debt.

The court observing, that the defendant must resort to an action upon the agreement, if so advised, as they could not interfere summarily,

Refused the application.

SEWELL v. RICHMOND, (EXORS. OF.)

Where, in an action for goods sold, the defence to which was that the goods were intended to be smuggled, it was doubtful (the verdict being general) whether the jury understood that the plaintiff knew that the goods were contraband. The court granted a new trial.

This was an action tried at the assizes for the Midland District, and a verdict for the plaintiff. The defence set up was that the articles sold to the defendant were contraband.

The defendant's testator had resided at Kingston, and by letter directed to the plaintiff at New York, desired him to forward to Gravelly Point, a small village on the Saint Lawrence, opposite to Kingston, sixty chests of tea.

The tea was put on board a vessel at New York, packed in chests unusually small, having upon them not the name of Richmond, but the mark R. C., such not being the ordinary mark of either Richmond or the plaintiff, and directed to a forwarder at Gravelly Point.

Robinson, Attorney-General, had obtained a rule

nisi to set aside the verdict, and grant a new trial on the ground of its being contrary to law and evidence, and now by consent and leave of the court argued first in support of the rule, it having been granted without argument.

He acknowledged that the case of Holman v. Johnson seemed against this application, as Lord *Mansfield* had there considered that mere knowledge that goods were intended to be smuggled would not preclude a plaintiff from recovering their value in the English courts, but that it was to be observed upon that case, that the contract was made and perfected in the foreign country, in the ordinary course of business, without any assistance given by the plaintiff in furtherance of the smuggling, but that in the present case the contract must be considered as made at Kingston, as much as in the United States.

He admitted that this case was not easily reconciled to the later decisions, which went more upon the ground of public policy, a ground which, he urged, was much to be considered in this province, where a very extensive frontier offered innumerable points for carrying on contraband trade.

He contended that in the later cases knowledge in a plaintiff (evident and indubitable) that the goods were intended to be smuggled, accompanied by any act in furtherance of the illegal transaction, would preclude his recovering their value in the courts of this country. He cited Biggs v. Lawrance (*a*) in support of this position, observing that the packing

(*a*) 3 T. R. 454.

the tea in an unusual manner in the present case, was analogous to the mode of furnishing the brandy in small kegs with the slings in the case cited. That although in that case the circumstance of the plaintiffs being British subjects seems to have been relied upon, yet the later case of Weymall v. Read, (*a*) went to shew that foreign merchants are bound to recognise the smuggling laws, and with the greatest propriety, as being made in reference to matters in which they are especially concerned. He considered that case as parallel to the present. There the foreigner packed his lace in a peculiar manner to prevent discovery; in this case he packed and marked the tea in a peculiar manner, and forwarded it to a place where it could not be supposed, with any shadow of reason, to be consumed in any other manner than in a contraband trade.

He contended further, that the doctrine of participation, as laid down by Lord Chief Justice *Eyre*, in the case of Lightfoot v. Tenant, (*b*) should be applied to cases of this sort, for that parties who knew that the transaction which they were engaged in was illicit, would indemnify themselves for the risk which they sustained by charging an extraordinary price for the article furnished, and so might be considered as partners in the transaction. The Attorney-General also cited the case of Laughton v. Hughes, (*c*) as not only shewing that the *scienter* was to be ascertained from circumstances without direct evidence, but also as establishing that the general policy of law required that vendors should not recover for goods to be employed in an illicit manner, insisting that

(*a*) 5 T. R. 599. (*b*) 1 B. & P. 551. (*c*) 1 M. & S. 592.

the plaintiff in this case had, as observed by Lord *Ellenborough* in the case cited, contributed *quantum in illo* to the illegal transaction, and also as it recognised the cases of Biggs and Lawrence, and Weymell v. Read. He concluded by observing, that as there could be no possible doubt from the facts in the present case that the plaintiff knew the nature of the transaction he was engaged in, and had also assisted in the furtherance of it, that he could not recover in the action.

Macaulay, contra, contended, that the cases cited were those in which British subjects having engaged in smuggling transactions against those laws which they were bound to recognise, were precluded from recovering, and that their being British subjects was the express ground of the decisions in the latter cases. That in the present case, as in that of Holman v. Johnson, the transaction was completed at New York, and that if that case was law, a decision against the plaintiff in the one before the court would be to legislate, and not to expound the law.

That no sufficient argument in favour of the present application could be drawn from motives of public policy; which he considered as leaning the other way, for to decide against the present plaintiff would be to interdict foreign trade.

No foreign merchant would trust the inhabitants of this country with his property, if defences like the present were to be set up to prevent his recovering their value.

That such defences were highly immoral and should

not be sanctioned, unless in cases where the imperious and plain demands of public policy required it, which in the present case was more than counterbalanced by the injury which foreign credit would sustain by a decision in favour of the defendant.

The counsel cited Vandyke and others v. Hewett, (*a*) and Johnson and others v. Hudson. (*b*)

The CHIEF JUSTICE observed, that as it could not be inferred from the general verdict given in this case, whether the jury considered the *scienter* as proved or not, that he considered (without going into the merits of the case) that it was a proper one to be submited again to a jury.

Per Curiam.—Rule absolute.

APPLEGARTH v. RHYMAL.

Case for diverting a water-course.

An injury to a water-course considered as an injury to a permanent right, and in such case the court will grant the plaintiff a new trial, although the probable amount to be recovered by a verdict may not be large.

This was an action tried at the assizes for the Gore District, and a verdict for the defendant.

It appeared in evidence that the plaintiff had, for many years, occupied a mill upon the stream in question.

That the defendant had recently erected another mill upon the same stream, about five miles above the mill of the plaintiff.

(*a*) 1 East, 95. (*b*) 11 East, 180.

That during the time which the defendant occasionally took to fill his pond, the water of the stream ceased to flow in its usual quantity or velocity to the mill of the plaintiff, whereby his works were not only occasionally stopped, but when the defendant let his water off, it flowed in such a quantity as to overflow and injure the plaintiff's dam, by carrying away the brush, soil, gravel, &c., of which it was composed.

The testimony given, as to the damage sustained, was very discrepant, the witnesses of the plaintiff (who were his servants, or persons resident at or in the immediate neighbourhood of the mill) estimating it at upwards of twenty-five pounds currency, whereas the witnesses of the defendant (who were persons living at a distance from the mill) stated that he could have received very little or no injury.

The judge who tried the cause charged the jury in favour of the plaintiff, who, however, found a verdict for the defendant.

Taylor having obtained a rule *nisi* to set aside the verdict, on the ground of its being contrary to law and evidence, and the judge's charge.

Robinson, Attorney-General, shewed cause.—He insisted that the action being for a tort, the damages in which (assuming for argument that there could have been a verdict for the plaintiff) must have been very small, the court would not interfere for the sake of giving the plaintiff a chance of recovering a verdict which, in all probability, could not exceed £5.

That the judge having explained the law to the

jury, and having charged them in the plaintiff's favour, his duty was finished and satisfied, and that it would be unreasonable that the defendant should be harrassed with a second trial because the judge differed in opinion with the jury as to the preponderance of conflicting testimony, to weigh which is the peculiar province of the jury, and more especially so in cases of tort.

That the present was a hard action, tending to establish an unfair monopoly; that the amount of the injury was trifling—circumstances which would determine the court in refusing this application, according to the authorities to be found in Wilson's and other reports.

Taylor, in reply, contended that the position "that the court will not grant new trials on the ground of verdicts being contrary to evidence, where there is conflicting testimony," should reasonably be restrained in its application to those cases where there is something like an equality in the conflicting testimony, and could not be extended to cases like the present, where the evidence on one side was as a feather compared to that on the other, where there could be no reasonable doubt upon the fact of the injury, and where the jury must have acted either from their own misconceived notions of the law or from a wrong bias.

That the negative testimony of the defendant's witnesses should have had little weight when opposed to the positive testimony of the plaintiffs, who were persons qualified to judge of the injury and its extent,

and who had computed the amount of the damage sustained by the plaintiff in consequence of it.

That the present case bore more analogy to an action for the infringement of a permanent right, where courts grant new trials, although the amount of the immediate pecuniary injury may be trifling, than to cases of tort which had been referred to by the defendant's counsel. In the latter there was no scale by which the amount of the injury could be ascertained, but in the present case the damage could be and had been computed.

That it was matter of serious consideration, in cases like the present, that it was necessary that plaintiffs should resist any infringement of their right at once, and not by laches and length of time to give an opportunity to a defendant to justify that as a right, which commenced in aggression.

SHERWOOD, J., delivering the opinion of the court. —This is an action for obstructing a stream of water. The plaintiff is owner of the lands on both banks of the stream, and erected a mill and a dam on his own premises. Many years afterwards the defendant also built a mill and a dam further up the same stream, in consequence of which the water of the river was sometimes kept back when wanted by the plaintiff, and at others was allowed to come down in a much larger quantity than necessary, and with greater impetuosity than it naturally flowed. It was proved at the trial that both these changes in the ordinary progress of the stream occasioned injury to the plaintiff.

On the part of the defendant several witnesses gave their opinion that the plaintiff sustained no damage, others thought it very small. The witnesses for the plaintiff spoke of facts which, if true, established beyond a doubt that the plaintiff had been injured, and the witnesses for the defendant did not contradict those facts, but merely expressed their opinion of the absence of damage. The credibility of the witnesses on both sides was not impeached, beyond what a difference of opinion relative to the question of damage might possibly occasion.

The course which the argument took on the motion for a new trial suggests three questions in this case:

First.—Whether the prior occupancy of the water by the plaintiff gave him a right to the uninterrupted flow of the stream.

Secondly.—Whether the smallness of the apparent damages, in a case like this, should prevent a new trial.

Thirdly.—Whether this is a case of that description in which the court generally consider a verdict of a jury conclusive.

As to the first question, the common law rule is that a prior occupancy does give a right and property in a current of water to the first occupant, and every subsequent occupant must exercise his right so as not to injure the first occupant.—2 Black. Com. 403.

As to the second question, I know of no case

which ever established the position that a small injury is entitled to no remedy, where the injury itself is of such a nature as to induce a probability of a continuance which would ultimately establish a right in the wrong doer. Great injury and small injury are relative terms, and depend on opinion, and in a case like this are too indefinite to afford any permanent and rational rule, by which a candid mind can be governed in a question of right. It appears to me that the present action is similar in principle to an action on the case by a commoner in England, for an injury done to his right of common. In the case, Pindar v. Wadsworth, 2 East, 153, the court determined that one farthing was sufficient to warrant the plaintiff in bringing his action, where the encroachment of a wrong doer, if not prevented in time, would change wrong into right. Twenty years' uninterrupted possession and occupation of the water in any way, would give a right to the defendant in this case. The jury at the trial of this cause most probably found a verdict for the defendant upon the erroneous opinion that the defendant, owning lands on the banks of the river further up the stream, had as good a right to use the water in any way as if the plaintiff had no previous occupancy.

As to the third question, this case differs essentially from actions of adultery, slander, seduction and other actions of the same kind, where the quantum of damages must always depend in a great degree on sentiment, opinion and feeling, and which may be considered as actions *sui generis*. A measure of damages ascertained by ordinary computation is afforded by the circumstances of this case. Any man

of common sense who worked in the saw mill for two or three years, as one of the witnesses did, could say whether the water was or was not detained sometimes, and at other times let down in excessive quantity, and what difference there was in the quantity of lumber sawed in the mill in different seasons. All these facts were proved at the trial. In general cases the opinion of juries have been revised in England for a great length of time, when the court were convinced that justice required their interference; I do not think this case an exception from the general rule, and therefore think the plaintiff entitled to a new trial.

Rule absolute.

McNair v. Sheldon.

A venue is not changed by a judge's order and service alone, and a defendant will not be entitled to judgment as in case of a nonsuit upon the ground that the plaintiff did not go to trial in pursuance of notice grounded upon such order.

In this case the venue had been originally laid in Niagara, but had been upon defendant's application changed to Gore by order of a judge in vacation. This order had been served upon the plaintiff, but no rule of court was taken out upon it. Notice of trial had been given for the Gore assizes, but the judge's order having been lost, the district deputy clerk of the crown had refused to pass the record.

Macaulay had obtained a rule *nisi* for judgment as in case of a nonsuit, for not going to trial pursuant to notice.

Baldwin, shewing cause, contended that the venue not having been changed by rule issued upon the

judge's order, the venue must be considered as still remaining at Niagara, and that the notice for Gore being nugatory, could not be the ground of a motion.

Macaulay, in reply, contended that the defendant had done what was necessary in serving the judge's order, and that if the plaintiff was interested in a further proceeding being had, he should have attended to it.

SHERWOOD, J.—The question is whether the mere service of the order was a change of the venue. It appears to me that you should have gone further and taken the order to the office, or, as in England, taken out a rule, and therefore, the venue not being changed, it remains where it was at Niagara and not in Gore, and no notice having been given for that district, there can be no judgment as in case of a non-suit.

Per Curiam.—Rule discharged.

GAVAN v. LYON.

At the return of a rule *nisi* the party who has obtained the rule cannot produce affidavits containing new matter.

Upon the return of the rule *nisi* in this cause, the plaintiff offered to produce fresh affidavits to contradict the matters sworn to by the defendant in opposition to plaintiff's original affidavits.

Sed per Curiam.—An affidavit in answer to the affidavits filed against the rule *nisi*, and containing new matter, cannot be read.

Flint v. Spafford.

Parties cannot, by consent, dispense with the ordinary proceedings of the court.

This was a motion for a new trial—pending the argument, the Clerk of the Crown and Pleas observed to the court, that the parties had gone to trial by consent without passing the record of *nisi prius*.

The court observed, that such conduct was a great presumption, and directed the verdict to be set aside without further argument.

Fortune v. McCoy.

A notice of assessment will not be considered as a notice of trial.

In this case the plaintiff had given a notice of assessment instead of a notice of trial, and had taken a verdict without defence.

Macaulay moved to set aside the verdict.

Sherwood, J.—It appears to me that the question is reduced to this,—will a notice of assessment, without consent, operate as a notice of trial? I think not, and that as there was no consent here the verdict must be set aside.

Per Curiam.—Application granted.

HILARY TERM, 7 GEORGE IV.

GENERAL RULES.

13th.—It is ordered that from and after the last day of this term, all demurrer books shall be made up with marginal notes opposite the different counts, and other parts of the pleadings, briefly stating the substance of each part, and when so completed shall be delivered to the judges by the party applying for a consilium before his motion paper is filed.

14th.—In future no cause shall be tried at the assizes for any district, unless the record of *nisi prius* is delivered on the commission day, or first day of the court to the marshal, who is hereby authorised to receive for the entering or withdrawing of the same, five shillings and six pence.

15th.—That from and after the last day of this term, when any point or points are reserved at *nisi prius* on the trial of any action, paper books containing accurate transcripts of all the pleadings in the suit, and of the point or points reserved, shall be made up and delivered to the judge, by the party who applied to the court for a consilium to argue such point or points, or makes any other motion respecting them, and that no such motion shall be made till the proper books be delivered.

EASTER TERM, 8 GEO. IV., 1827.

Present:

THE HONOURABLE CHIEF JUSTICE CAMPBELL.
MR. JUSTICE SHERWOOD.

SHUCK v. CRANSTON.

The court refused to consider the service of an order for payment of an insolvent debtor's weekly allowance, under the 2nd Geo. IV., as a service under the late statute, 7th Geo. IV.

The provincial statute 2d Geo. IV., c. 8, s. 3, enacts that in default of payment of the sum of five shillings weekly allowance, pursuant to any rule or rules of court under the provision of an act passed in the 54th year of his late Majesty's reign, entitled, "an act for the relief of insolvent debtors," the first payment of which said sum of five shillings is thereby declared to become due and payable on Monday next, after the service of such rule on the plaintiff or his attorney within the district where such defendant shall be imprisoned, the prisoner, upon application to the said court from which such execution issued, in term time, or a judge thereof in vacation, shall, by order of the said court or judge, be discharged out of custody, &c.

Under this statute the defendant had obtained an order for the weekly allowance of 5s., but could not serve the same upon the plaintiff or his attorney in the district where he was confined, neither of them being resident there.

By the statute 7th Geo. III., which passed subsequent to the defendant obtaining his order, the above clause is repealed, and it is enacted, that the insolvent debtor is to be discharged on the third Monday after the service of his order upon the plaintiff or his attorney, (dispensing with the necessity of the order being served within the district where the insolvent is confined.)

Robert Baldwin applied to the court for the defendant's discharge, the order of court which the defendant had obtained under the old statute having been served upon plaintiff's attorney, and the third Monday having elapsed since such service without payment of the weekly allowance.

The court considered that the new statute had no retrospect to orders obtained under the old one, and that proceedings under the two statutes could not be joined, and the proper mode of proceeding was to take out and serve a rule on the attorney, conformably to the proceedings of the new law.

Per Curiam.—Application refused.

Dascomb v. Heacocks.

The court refused to discharge a defendant upon filing common bail on the ground of his person having been discharged from arrest by an insolvent law of New York.

Robert Baldwin moved for a rule *nisi* to discharge the defendant from custody upon filing common bail, upon an affidavit deposing that his person had been discharged from arrest by an insolvent law of the state of New York.

The court observed that it would not discharge the defendant upon a summary application, and recommended him to plead the fact if so advised.

Per Curiam.—Application refused.

Whelan v. Stevens.

A person hiring himself to work with his own team of oxen is not an object of the British statutes for punishing labourers deserting their service.

This was an action tried at the assizes for the Bathurst District, and a verdict for the plaintiff.

It was brought against the defendant, as a justice of the peace, for convicting and imprisoning the plaintiff under the Statute of Labourers. (*a*)

The plaintiff had been hired by one Wetherley to work with his oxen for a month, and having quitted his service before the time had expired, he had, upon Wetherley's complaint, been convicted and sent to gaol. The verdict was subject to the opinion of the court, whether the defendant was a labourer intended by the statutes.

Boulton had obtained a rule *nisi* to set aside the verdict and enter a nonsuit.

Macaulay shewed cause, he contended that the plaintiff's case was within the mischief of the statute. That he contracted with Wetherley as an husbandman to labour upon the land, one particular class of labourers pointed out by the statute, persons whose regular employment in their occupations was essential to the well-being of society.

(*a*) 20 Geo. 2, c. 19. 31 Geo. 2, c. 11. 6 Geo. 3, c. 25.

That the being employed with oxen should make no difference, that being the usual mode of employment in this country. He cited the case of Lowther v. Radner (*a*) as shewing that a labourer whose exertions were confined to his own person, was not the only one contemplated by the statute. The complainant, one Soph, having in that case contracted for a piece of work, and employed another person under himself to assist in its completion, a case to the full as little embraced by the words of the statute as the present.

The court being of opinion that the plaintiff in this case was not such a labourer as is contemplated by the statutes.

Per Curiam.—Rule discharged.

Briggs v. Spilsbury, J. P.

A conviction bad upon the face of it although not quashed, *held* not to be sufficient defence to an action of trespass.

In this case the defendant, a justice of peace, had convicted the plaintiff under the statute of labourers, for leaving his employment before its expiration, and had sentenced him to three months' imprisonment and correction.

An action had been commenced and referred to arbitrators, who found in favour of the plaintiff.

The case came before the court upon a motion to set aside the award as being against law, with a view to obtain the decision of the court upon the following points :

(*a*) 8 East 113.

First.—Whether the conviction was bad, as not stating that the witnesses were examined in presence of the plaintiff (the party accused.)

Secondly.—Whether, as being a subsisting conviction, (not quashed,) it did not protect the defendant in an action of traspass and false imprisonment.

Boulton, for the defendant, had obtained the rule *nisi*.

Macaulay was for the plaintiff.

The court referring to the cases of the King and Crowther, (*a*) the King v. Vipont and others, (*b*) and the other authorities below, determined the conviction to be irregular, and that, as it appeared to be so upon the face of it, it could not be considered as protecting the defendant against the present action.

Per Curiam.—Rule discharged.

JONES v. SCOFIELD.

Impertinent matter in a return to a writ, considered as a contempt in the sheriff.

As a return to a writ of *capias ad satisfaciendum* against the defendant, the sheriff of the District of London, by a paper appended to the writ, made the following return, upon being ruled, "by virtue of the annexed writ of *ca sa.*" I arrested the body of the said Joa Scofield, as therein I am commanded, whom I have since released upon giving satisfactory secu-

(*a*) 1 T. R. 125; 2 Burr. 1163. (*b*) 5 M. & S. 514; 1 Brod. & Bing. 432.

rity to satisfy the said writ, and with which arrangement the said Jonas Jones, of Brockville, attorney-at-law for the said C. Jones, has acquiesed.

Boulton, Solicitor-General, moved for an attachment against the sheriff upon this return.

The court being of opinion that the surplusage was a contempt of the court.

Per Curiam.—Application granted.

McCollum v. Jones.

Evidence of a verbal agreement to allow land to be set off against the amount of a note, *held* not to be admissible.

This was an action brought upon a promissory note and for goods sold, tried at the assizes for the Johnstown District, and a verdict for the plaintiff. The defendant offered evidence of a verbal agreement entered into sometime after the date of the note, between himself and the plaintiff, for the purchase of a lot of land, whereby it was agreed that the amount of the note, together with a quantity of wheat at various times delivered by plaintiff to defendant, and the value of which formed part of the subject of the present action, should be set off against the price of the land, and of which land the plaintiff had taken possession. The judge who tried the cause refused to admit this evidence, as contrary to the Statute of Frauds.

Boulton, Solicitor-General, had obtained a rule *nisi* to set aside the verdict and grant a new trial.

He contended that the plaintiff having taken possession of the land, was a sufficient part performance of the agreement to take the case out of the statute, and that therefore the evidence should have been admitted.

Macaulay shewed cause. He contended, that to give this contract respecting land in evidence would be a direct violation of the Statute of Frauds. For that to shew the note was satisfied by the contract, the whole agreement must be gone into, an agreement respecting the sale of an interest in land, which is directly prohibited by the first section of the statute. That although such agreements partly performed can be enforced in courts of equity, they cannot be considered as considerations at common law.

That if the defendant had pleaded this contract in bar, he must have stated the contract to be in writing, or his plea would have been set aside upon demurrer.

That the cases in equity which decree a delivery of possession to be a sufficient part performance to take them out of the statute, or where the decrees are in favour of the parties who have been let into possession, who would suffer inconvenience by being dispossessed, but in this case the application is from a party altogether differently situated, namely, the defendant in this action, who cannot be injured by the plaintiff's possession, which he can put an end to whenever he pleases, and also recover for the mesne profits.

Farther, that there having been no part performance, it was competent to the plaintiff to discharge it by parol, as laid down in the case of Crosby v. Wadsworth ; (*a*) which he had in fact done by refusing to accede to it.

The counsel cited the case of Walker v. Constable (*b*) as a strong case to shew the necessity of a contract respecting lands being made in writing, observing that in that case the plaintiff could not recover the purchase money paid for an estate, without shewing an agreement for the purchase in writing, although both parties had agreed that the contract should be abandoned, and he observed in order to apply this case to the present, that in the case before the court a contract in writing should be shewn to enable the defendant to set off the price of the land against his note. Farther, that the note itself could not be avoided by a parol agreement.

He also cited the case of Moggridge v. Jones, as shewing indisputably that the defendant in this action could not set up a non-executed agreement for the sale of land, which was the alleged consideration of this note, in answer to an action upon it.

That as the plaintiff could not by his asserted possession bring an action for the deed, so neither could the defendant resist the payment of his note, for if he could this absurdity would follow, that he might refuse paying either the note or the amount of the wheat, and nevertheless turn the plaintiff out of possession by ejectment, who could not set up a

(*a*) 1 Boss. and Pull., 306. (*b*) 14 East, 485.

parol contract as a title, but that if the court refused this application, the plaintiff would get the amount of his note and wheat, and Jones, the defendant, would get his farm.

That if Jones, the defendant, could bring any action for the amount of his purchase money, it must be a special action, to which a recovery by the plaintiff in this suit would be no bar.

He further noticed, that none of the recepts given for the several quantities of wheat purported that it was to be taken in payment of land, which shewed that in point of fact that might not have been the case.

Boulton, Solicitor-General, contra, admitted the principles advanced by the opposite counsel, but contended that they did not apply to the case before the court; that the counsel had not distinguished between a suit to compel the performance of what was undone, and one to undo what had already taken place, which was the present case, in which McCollum had resorted to the Statute of Frauds to assist him in committing a fraud.

He observed, that there were general loose ideas afloat that all agreements where land is the object are void if not put into writing, but that the statute does not render such agreements altogether void, but reduced the estates thereby contracted for to estates at will only.

That in the present case if the plaintiff is not compellable to perform his contract, he should at least

be the sufferer in the same manner as where a purchaser has paid the auction duty or purchase money, it has been decreed no fraud in the vendor to keep it, but a loss to himself which he must sustain. But there is no case in which a vendee can recover back his purchase money, if a vendor is able and willing to complete his contract. The counsel also referred to the Earl of Aylesford's case, as shewing the futility of setting up defences under the statute where part performance (which he insisted was the present case) took the case out of the statute.

He observed, that the distinctions made between the powers of courts of law and equity were often nugatory, except so far as related to compelling a specific performance. That more than half the suits which were entertained in equity might be tried at law.

The counsel cited Knowels v. Michel as in point, it being there determined that although an agreement might, in its inception, require a note in writing, yet that if its consideration had been in any manner liquidated, the amount ascertained became the subject of an action of assumpsit. (*a*)

That it was clear that Mr. Jones could bring an action for the remainder of the purchase money upon tendering a deed; but that was not his object, he defended this suit in order to prevent the vendee from recovering back the deposit on his purchase money.

That as to plaintiffs having or not having a remedy to compel a deed which had been considered as im-

(*a*) 13 East, 248.

portant to be delivered, the court would not look to that in a case where the vendor had always been ready to complete the purchase.

The counsel asked if the plaintiff had committed waste, would the court allow him to turn round and recover back his purchase money.

That this being an action of assumpsit, the jury should have had all the facts before them, and even if evidence respecting the liquidation of the note could have been excluded (the defendant not having the note to produce) it was quite unreasonable to exclude evidence of the receipt of the wheat, and of the purpose for which it was received.

That the transaction might have been specially pleaded, and such plea would have been good, which the counsel indeed in part admitted, and that if it could have been pleaded it might, in the equitable action upon an assumpsit, be given in evidence.

He concluded by observing, that the evidence offered should have been received on two grounds:

First.—Inasmuch as the facts offered in evidence were a part performance of the agreement.

Secondly.—That the jury might have had it in their power to lessen the damages.

CHIEF JUSTICE.—I consider that this case is within the statute, and, therefore, that the evidence was properly rejected. Nor was there indeed any evidence given at the trial to shew that the note was

paid in part of the purchase money, it having been in point of fact given before any contract of sale was contemplated by the parties.

Per Curiam.—Rule discharged.

KIRK v. TANNAHILL.

It seems that a note made at Albany may be declared upon as such under the statute of Anne.

In this case the plaintiff declared upon a promissory note under the statute of Anne, as made at Albany, to wit, at Niagara, in the district of Niagara.

The defendant demurred upon the ground that the note appearing on the face of it to have been made in foreign parts, could not be considered as a note under that statute.

Washburn, in support of the demurrer, cited an authority, where upon special demurrer to a declaration stating that the defendant made his note at Philadelphia in parts beyond the seas, to wit, at London, &c., according to the form of the statute, the court advised the plaintiff to amend.

Macaulay, contra, contended, that the averment might be struck out, as it was admitted the action would lie at common law; and observed upon the distinction between the present declaration and that in the case cited, it being in the latter stated that the note was made in parts beyond the seas, which was not the case in the present pleading.

The CHIEF JUSTICE concurred in the distinction

made by the plaintiff's counsel, that the action being a thing of mere transitory nature, might be laid any where, and that he did not think it necessary to infer that Albany was in a foreign state.

Per Curiam.—Judgment for plaintiff.

CHOATE v. STEVENS.

In an affidavit to hold to bail, the provincial statute not satisfied by the words, that the plaintiff had reason to believe that the defendant was about to depart this province, without paying, &c.

The defendant was arrested upon an affidavit deposing, that the plaintiff had reason to believe that the defendant was about to depart this province, without paying the said debt.

Ridout had obtained a rule *nisi* to discharge the defendant upon filing common bail, upon the ground that the affidavit was defective, as not using the words of the statute.

Macaulay shewed cause, he contended that no form of words had been given by the statute—that it had merely pointed out the substantial matter to be sworn to.

That the words used in this affidavit expressed the apprehension or belief of the deponent, as well as the word apprehensive, which was that used in the statute. That the word apprehension is explained in Johnson's dictionary, by belief, persuasion, opinion. That to have reason to believe, must mean to have a firm persuasion; that the terms indeed

were synonymous, as well as those, to depart, to leave, that without satisfying or without paying, could not be distinguished.

That the words, reason to believe, are used in the clause of the statute authorising the *capias ad satisfaciendum*, which shews that they were considered by the statute as having a meaning equally strong with the word apprehension.

Ridout, contra, observed, that the word apprehend expressed in a much stronger manner the state of a deponent's mind, than the words "reason to believe" —that the reason might in fact be such as to be worth nothing.

Mr. Justice Sherwood (*absente* C. J.) observed, that it had been contended by the plaintiff, that the words used in the affidavit were synonymous with those used in the provincial statute, but that he believed few words in the English language were exactly alike in meaning. Further, that if the courts allowed parties to depart from the words prescribed by an act of parliament, as proper to be used in the affidavit to hold to bail, there would be no knowing where to stop. That leaving the authority of Johnson out of the question, he did not think the words were, in popular acceptation, synonymous, and that it would be more safe for plaintiffs to use the words set out in the act; he considered, therefore, that the affidavit should be set aside, the defendant undertaking not to bring any action.

Per Curiam.—Rule absolute.

PRIESTMAN v. MCDOUGAL.

Mistake in the caloulation of interest, *held* not a sufficient ground to set aside an award.

Robert Baldwin moved to set aside the award on the ground of mistake in the calculation of interest. The affidavit was made by one of the arbitrators.

Per Curiam.—Application refused.

MCNAIR v. SHELDON.

The motion for a commission to examine witnesses must be supported by affidavit.

Robert Baldwin applied upon motion only, without affidavit for a commission to examine upon interrogatories.

Per Curiam.—Application refused.

CULVER v. MOORE.

There is no necessity for a term's notice by a defendant signing a nonpross, &c., although four terms may have elapsed without any proceeding had.

In this case the defendant filed a demurrer to the declaration on the 5th December, 1825.

Plaintiff joined in demurrer on the 7th. The defendant not having brought the demurrer on to argument,

On the 28th of March, 1827, the plaintiff ruled the defendant to enter the issue, which not being done, the plaintiff signed a judgment of nonpross.

Macaulay moved for a rule *nisi* to set aside the nonpross, on the ground that four terms had elapsed

between the 7th day of December, 1825, the time plaintiff joined in demurrer, and the day of his ruling the defendant to enter the issue.

The court observing that the rule respecting a term's notice, did not apply to cases where a party took a step to put an end to a suit, as to judgments of nonsuit or to the trial by proviso, and referring to the authorities below. (*a*)

Per Curiam.—Application refused.

GAVAN v. LYON.

An agreement between the parties takes away the necessity of a term's notice.

In this case there had been an agreement at the assizes for 1825, that the trial should be put off until the next assizes.

The plaintiff shortly before the time for trial gave a notice, but not in sufficient time to satisfy the rule requiring a term's notice of proceeding, where four terms have elapsed. He went to trial and obtained a verdict.

Boulton had obtained a rule *nisi* to set aside the proceedings as irregular, urging that the plaintiff having actually given notice of trial, should have given it in a regular manner.

Per Curiam.—The agreement made between the parties rendered a term's notice of trial unnecessary

(*a*) Barnes, 2 Sulkeld.

in this case, and the defendant will therefore take nothing by his motion.

Ridout was for the plaintiff.

Rule discharged.

Robinson v. Hall.

The court refused to discharge a prisoner debtor from custody, upon the ground, that the gaoler having taken him before a magistrate upon a charge of felony, without warrant, permitted an escape.

Baldwin made an application for an order of court to discharge the defendant out of the custody of the gaoler of the Midland District. The gaoler, upon an alleged charge of larceny, had, without warrant from a magistrate or any other authority, carried the defendant before a justice of peace to be examined, and had afterwards re-conveyed him to gaol. The counsel contended this was an escape, and that as it was voluntary on the part of the gaoler, the defendant was entitled to his discharge.

Per Curiam.—Application refused.

Baldwin then applied for an *habeas corpus*, which was granted.

Jones v. Stewart.

Where a paper contains matter which is grossly libellous *per se.*, without reference to any particular situation or office, it is no objection to a verdict upon such libel, that the office mentioned in the declaration was of an inferior grade, that it was not sufficiently proved that the plaintiff held such office, that there was no such office in fact, that no proof had been adduced that the person mentioned in the declaration as principal in the office was so in fact, nor is an objection that the libel does not support the innuendoes supported by shewing that there was other matter in the libel, not set out in the declaration, which indicated the defendant's reasons for

its publication. Nor is such libel excused on pretence of its being a formal application to the head of a department to redress grievances. And charging a person with violating a public trust for the purposes of revenge are words libellous *per se.*, and do not require connecting with any particular office. An office may be introduced as an explanatory circumstance.

This was an action for a libel, tried at the assizes for the Johnstown District, and a verdict for the plaintiff for £2 5s.

The libel consisted of detached parts of a letter written to Mr. Sutherland, the Postmaster-General at Quebec, accusing the plaintiff of misconduct in the management of the post-office at Brockville.

The declaration, after the usual inducement as to plaintiff's character, stated him to be a merchant and co-partner, carrying on business with one Henry Jones, postmaster, and that he (plaintiff) was occasionally employed as the deputy acting postmaster, agent or clerk of the said Henry Jones, to transact the affairs and duties appertaining to the office of postmaster at Brockville.

It then, after the usual averment of malice, sets out the libellous matter as follows, but without alleging it to be written concerning any office:

"A false, scandalous, malicious and defamatory libel in the form of a letter to Daniel Sutherland, Esquire, Postmaster-General, Quebec, containing, &c., the false, &c., and libellous matter following, that is to say: I (meaning him the said John Stewart) am teacher of the Bathurst District school, held in the town of Perth, Sidney Jones, meaning the said Sidney Jones, the acting paymaster at Brockville, for Henry Jones, the nominal one scarcely ever makes

up a packet, bears me (meaning the said John Stewart) some ill-will, and I (meaning himself the said John Stewart) believe he (meaning the said Sidney Jones) does not hesitate to violate a public trust for the mean gratification of personal revenge. I (meaning himself the said John Stewart) request that you (meaning the said Daniel Sutherland) will interfere your authority to check the insolence of office, (meaning that the said Sidney Jones insolently discharged the duties of his said office,) and allow every subject of his Majesty in this province equally to enjoy the benefit of a post-office establishment, without lying at the mercy or capricious whim of any deputy's deputy, who may delay, overcharge, or otherwise injure papers directed to any one, and then endeavour to screen himself in the mean, dirty subterfuge, that he is not accountable for his conduct, as he was acting for another. By means, &c."

The letter upon which the action was founded, after the words personal revenge, contained an account of the various alleged grievances which had induced the defendant to write to Mr. Sutherland, which, however, were omitted in the declaration, being considered by plaintiff's counsel as unnecessary to the support of his action.

The verdict was subject to the following objections made by the defendant's counsel, upon which *Macaulay* obtained a rule *nisi* to set aside the verdict and enter a nonsuit :

Firstly.—That the office was insufficient to warrant the action.

Secondly.—That there was no sufficient proof that the defendant held the office.

Thirdly.—That there was no such office in fact.

Fourthly.—That Henry Jones was not proved to have possessed the office.

Fifthly.—That the letter does not support the innuendoes.

Sixthly.—That the letter being a formal complaint to the head of a department, it is not the subject of an action for libel.

The judge who tried the cause had charged the jury that they should consider whether the complaint, as stated in the letter, was a *bona fide* charge, for if so, that the action would not lie.

The Attorney and Solicitor-General shewed cause; in answer to the first objection, it was observed, that the law had not excepted any public officer, whatever rank or estimation his office might be held in, from defending himself against libellous attacks, and the office of constable was instanced.

In answer to the second, third, and fourth objections it was observed, that the defendant had assumed in his libel the facts, that there was such an office, that the defendant held or acted in it, and that Henry Jones was the principal, which relieved the plaintiff from the proof of those facts. In support of which position the counsel cited the authorities below. (*a*)

(*a*) T. R. 366; 2 Starkie, 860.

To the fifth.—That there were no grounds for stating that the libel did not support the innuendoes; that the words bore the plain meaning ascribed to them, and that it was unnecessary to set forth more of a paper than was necessary to substantiate the plaintiff's charge; that if there were other parts of the composition which explained or mitigated the offensive matter, they were fit (as had been done in the present case) to be considered by the jury.

And that the charges were of so direct and gross a nature as to render any averment that they were published concerning any particular office unnecessary.

As to the last objection, the counsel observed, that the obvious matter for consideration was, whether, under pretence of a *bona fide* communication with a view to correct abuses, a person was authorised, in general terms, to accuse another of the violation of public trust, for the gratification of personal revenge, of insolence in office, and the other gross and unwarrantable charges put forth in the libel; that the answer to which consideration, which reason, principle, and the authorities gave, was obviously that this could not be done; that epithets outrageously abusive could not be justified under pretence of any such communications.

That neither reports of cases in courts of justice, or arguments of counsel, if impertinent or without instruction, were allowed to contain such matter.

That to justify such a libel as the one before the court, the defendant's counsel must go upon the nar-

row untenable principle that no complaint against a public officer, however offensive the language, could be the ground of an action for a libel. In support of these observations the counsel cited the authorities below. (*a*)

Macaulay, contra, insisted that the plaintiff having in his declaration set forth an office, and that he was the officer, was bound to prove those averments; whereas he had in his defence proved that he was neither principal nor deputy, not having acted in the office for two years; that if he had in fact acted in the office, it was not such an one as entitled him to an action. In support of these positions he cited the authorities below. (*b*)

In support of the objection that the libel was not supported by the proof, he urged, that as there was much more matter contained in the letter than in the libel as stated upon record, and which matter went to explain the reasons for the defendant's complaint, the whole letter, with its extenuating and explanatory parts, was intrinsically a different composition, bearing a very different interpretation to the extracted part when taken alone.

That there should have been a statement that the libellous matter was written "of and concerning the alleged office."

That the matter, as charged, did not warrant the innuendoes.

(*a*) Starkie 136; 3 B. & A. 161, 702. (*b*) Starkie 115, 116, 433, 859, 60, 373; 1 Ventris, 275.

That the paper itself, and the statement in the declaration taken separately, did not bear the same sense. The counsel read the commencement of the letter as follows:

"I would not trouble you by letter at this time, but a sense of duty urges me to make you acquainted with the treatment which I have received from the Brockville post-office;" he then read the first branch of the libel set forth in the declaration, and proceeded with the intermediate part of the libel from the words personal revenge as follows: "Last fall I received several small single letters from the Brockville post-office, all marked double, and all following each other in succession."

"This strange coincidence caused me to write a note to Sidney Jones, civilly requesting an explanation; instead of this my own note is put under cover without remark or comment, charged double and sent to Perth. I then sent him another note while I was in Brockville, which I must confess was not very complimentary to his integrity in the discharge of a public situation. This shared the same fate with the former one, viz., 'charged double and sent to Perth.' I am agent for the Canadian Review. When the parcel of the third number of this work, which was meant to supply the Perth subscribers, was on its way to this place, it was intercepted at Brockville, where it lay several weeks; and when at last it was thought proper to forward it, it was stripped of the cover, directed to me, and given to the post-carrier, who charged 4s. 6d. extra postage, whether by Jones' order or not I cannot say. I wrote to Mr. Chisholm

how I had been treated; he strongly advises me to represent the whole transaction to you as the only person capable of finding a remedy for the evil; I have done so."

The counsel, after reading the remainder of the libel charged, contended, that the whole sense of the letter, taken together, altered the sense of the part charged as the libel, and so varied from the matter on the record.

In support of these positions the counsel cited the authorities below. (*a*)

On the ground of the letter being an authorised application for redress to the head of the department, the counsel observed, that although the terms used might be uncouth, that such may be used if the case warrants it, and the party is not actuated solely by malice; and that if the subject matter be true, malice did not alter the propriety of the complaint.

That the jury should have been directed to consider, whether malice was or was not the preponderating motive upon reference to the whole tendency of the paper. That to have found the verdict against the defendant they should have been convinced that he had no ground for his complaint. [*Sherwood*, J., here called to the counsel's recollection, the evidence of the witness Titt, and asked if he meant to contend that there was no evidence of malice.]

That there was nothing in the letter itself, written by an angry man, to shew malice.

(*a*) Starkie on Libels, 334, 7, 44; on Evid. 1546; 4 M. & S. 164, 5; 1 Saunders, 243, N. 4; 8 East, 427; 5 B. & A. 615; 1 Campbell, 352, 3; 2 Comp. 398.

He concluded by observing, that he doubted whether the jury understood the charge properly, that they might have thought the direction to them was merely to consider whether the face of the libel itself shewed malice.

The CHIEF JUSTICE observed, that the authority cited from Ventris, which confined actions for libel to offices of a certain grade, was not now the law, and that the other grounds stated were not sufficient to warrant a nonsuit.

Per Curiam.—Rule discharged.

SAME v. SAME.

Macaulay moved to arrest the judgment upon the ground that there was no averment in the declaration that the libel was written of and concerning the plaintiff's office, contending that the cause of action, as set forth, was imperfect without such averment. He also insisted, that charging the plaintiff with insolently discharging the duties of his office, was not libellous without some explanation, and was another ground for his motion. He cited the authorities below. (*a*)

The Chief Justice observed, that the libel was such as would be actionable without any office being mentioned or referred to.

That the averment respecting such office might be struck out and sufficient ground of action would still

(*a*) 4 M. & S. 164; Cowper, 686; Com. Dig. c. 10.

appear upon the record, the words, "violating a public trust," might be taken without reference to any office, and would be libellous.

SHERWOOD, J., observed, that however valid the objection might be in an action for words merely, he did not consider them so in a case of written libel.

Where words are not actionable in themselves, without referring to a trade or profession, there must be the averment contended for by the defendant's counsel. Not so in the present case, where the mention of office is merely introduced as explanatory; and that the plaintiff's conduct would have been most extraordinary if it had been introduced with any other view, as he had brought evidence at the trial to prove that he had not acted in the office for a length of time.

That the words alleged, viz., that the plaintiff would violate public trust for purposes of revenge, were libellous *per se*, without reference to any office, and made it unnecessary to resort to the doctrine contended for by the defendant's counsel.

Per Curiam.—Application refused.

WALBRIDGE v. LUNT.

A commissioner who takes a recognizance of bail cannot himself make the affidavit of such taking.

This was an application to stay proceedings upon the bail bond, which had been taken, in consequence of the affidavit of bail being put in having been

sworn to by the commissioner himself who took the recognizance.

Per Curiam.—Application granted upon payment of costs.

SMITH v. KENNETT.

A notice of intended motion for judgment as in case of a nonsuit will not supply the place of a rule *nisi*.

Plaintiff's counsel moved for judgment as in case of a nonsuit (absolute) upon affidavit of the usual facts, and that notice of the intended motion had been given.

Per Curiam.—Rule absolute refused, but rule *nisi* granted.

WOOD, ADMINISTRATOR, &c., v. LEEMING ET AL., DEVISEES, &c.

The court refused to interfere summarily to set aside a sheriff's sale and covenant, for payment of purchase money entered into thereon, upon grounds suggesting that the sale was unfair, and that the court had an equitable jurisdiction over the acts of its officers.

Boulton, Solicitor-General, applied for a rule *nisi* to set aside the proceedings had under a sheriff's sale, by which he had sold lands as in the hands of the defendants to a Mr. O'Hara, who had given an obligation under seal for the amount of the purchase money; the application also prayed an order upon the sheriff to give up or cancel the obligation for the purchase money given by Mr. O'Hara.

The grounds of the application were that a good

title could not be made, and that these proceedings and sale having been made by an officer of the court, were sufficiently under their control to authorise an equitable interference, particularly as there was no Court of Chancery in this country to which Mr. O'Hara could apply.

Per Curiam.—Application refused.

NICHALL v. CARTWRIGHT AND ANOTHER.

Robinson, Attorney-General, applied for leave to enter judgment upon a cognovit against one defendant only. Suggestion of the death of the other being entered upon the roll.

Per Curiam.—Application granted.

DOE EX DEM. DUNLAP v. MCDOUGAL.

Where the heir and the widow of the mortgagor remained in possession after the death of the ancestor, but had frequently recognised the title of the mortgagee, it was held no disseisin.

This was an action tried at the assizes for the Niagara District, and a verdict for the plaintiff.

Colin MacNab, the elder, being seised in fee of the premises in question, mortgaged them to Edwards by deed, dated the 16th February, 1802, whose estate became absolute at law, in consequence of the non-payment of the mortgage money on the first of October in the same year.

In the year 1810, Colin MacNab, the mortgagor,

died, having continued in possession until his death, leaving his widow and heir in possession. In the same year, but subsequent to the mortgagor's death, Edwards, the mortgagee, conveyed absolutely to the heir of the plaintiff's lessor. Edwards never having made any actual entry, the tenant in possession claimed as purchaser at a sheriff's sale, which took place under a *fieri facias* issued against the lands of Colin MacNab. It was insisted at the trial, that the mortgage having been executed more than twenty years ago, a presumption arose that the mortgage money had been paid. To rebut this presumption, evidence was given of conversations had between the widow as well as Colin MacNab, the heir of the mortgagor, and the agent of the mortgagee, with a view of settling the amount due upon the mortgage. Also of the infancy of plaintiff's lessor during a great part of the period which had elapsed since the execution of the mortgage.

The judge who tried the cause had not particularly called the attention of the jury to the fact of presumption of payment.

Boulton, Solicitor-General, had obtained a rule *nisi* to set aside the verdict and grant a new trial, the verdict being contrary to law and evidence, contending, that Edwards having been disseised by MacNab's heir, had not been able to make an effective deed of bargain and sale to Dunlap, and for non-direction of the judge.

Robinson, Attorney-General, shewed cause.—After premising that Edward's deed to Dunlap, the ances-

tor of plaintiff's lessor, being absolute instead of by way of mortgage, was immaterial, as mortgagors and mortgagees could do nothing to prejudice each other, the mortgagor having his equitable remedy against the assignee, as well as against the original mortgagee. (*a*)

He observed that the possession of the mortgagor was the possession of the mortgagee, and that he could never stand in his way. (*b*)

That he was a tenant at sufferance and not at will, which invalidated any argument which considered the death of MacNab, the elder, as the determination of an estate at will. In the case reported in Croke, (*c*) the mortgagor made a lease for three years, and after its expiration returned into possession. The lessee being a stranger and without privity, it was attempted to make him a disseisor, but it was held that the case worked no disseisin.

That to make the heir of MacNab a disseisor his father must have been a disseisor, or he must have entered tortiously, which was not the present case. His situation was analogous to that of a trustee or agent, who could not be disseisors. That an equity of redemption being now considered as the subject of inheritance, the heir must be considered as having continued in possession merely with the view of exercising that right.

He further contended that the elder MacNab not having in him an estate of freehold, and, therefore,

(*a*) 2 Black. Com., 158; 1 Coke, Litt., 210. (*b*) 2 Institute. (*c*) Croke, James, 660.

not being a disseisor, his heir could not be considered as such.

He stated that the absurdity and inconvenience of the doctrine of considering an heir who merely remained in his ancestor's lawful possession as a disseisor, would prevent all mortgages from taking place, as no one would lend his money upon real security if he was liable to be disseised in the manner conteuded for.

As to the ground of presumption of payment he contended that the evidence of Mr. Dickson was sufficient to rebut it. That there was a great distinction between presumptions of this sort, and the time appointed by the Statute of Limitations. In the case of bonds the custom had been to consider 20 years as a ground of presumption, but no time had been established for mortgages, and that it was farther answered by the deeds being in possession of Dunlap, and the infancy of the plaintiff.

Boulton, contra, contended that a person not in actual possession cannot convey. Edwards, therefore, not having been in possession, as he had been disseised by the entry of the heir of MacNab, could not convey. He supported his position by reference to the Statute of Uses, which enacts that when any persons shall be seised of lands, &c., to the use of another, the *cestui que* use shall stand and be seised or possessed of the land, &c.

That in the present case Edwards, having been disseised by the entry of Colin, the younger, could

not stand seised to the use of another, and therefore his deed of bargain and sale could not raise an use in Dunlap's favour.

He admitted that while MacNab, the elder, lived, Edwards, the mortgagee, was in possession by virtue of the possession of MacNab, the mortgagor, who was quoad his tenant; but that his tenancy being at an end by his decease, and it being necessary that the freehold should subsist somewhere, (*a*) it vested in Colin, the son, who took an unqualified possession as heir of his father, which the counsel contended amounted to a disseisin: for where one takes as heir, he takes the whole estate.

That the case cited of a mortgagor making a lease for years was not in point, as the disseisin was purged by the return of the mortgagor into possession, as it would have been in the present case if MacNab had returned into possession after disseisin. The counsel insisted there was no case to shew that the heir of a mortgagor was in the same situation with his ancestor.

In the present case the heir entered generally without consent; paid no interest; and no inference, the counsel contended, could be made by the court that his entry was not tortious.

The evidence of Dixon as to the conversations held with him and the widow were insufficient—payment of interest might have altered the case. (*a*)

He doubted also whether the evidence given of

(*a*) Saunders, 246. (*a*) 5 B. & A., 604.

these conversations should not have been rejected by the judge who tried the cause.

That if it was said that the possession which was continued after MacNab's death was that of the widow, it would, after her forty days, have the same effect of disseising Edwards, and thereby making him incapable of being seised to Dunlap's use; for every unlawful continuation of possession, is a trespass in the same manner, as every continuation of the possession of goods stolen is a fresh asportation in the county to which they are taken.

That arguments drawn from the inconvenience which persons residing abroad or at a distance would suffer by being compellable to make entries, were obviated by the consideration that they might do it by attorney.

As to the presumption of payment of the mortgage money, he contended from the case of Wilson v. Wetherley, (*a*) that the twenty years' possession of MacNab and his heir was a sufficient ground for the presumption, which the evidence of the conversations had between the widow and children and Mr. Dixon was not sufficient to rebut, they not having been proved to have had any interest, and he contended that the evidence should not have been received.

He concluded by observing that the questions before the court were, whether Edwards was not out of the possession when he made the bargain and sale to Dunlap.

(*a*) Bull., N. P.

not stand seised to the use of another, and therefore his deed of bargain and sale could not raise an use in Dunlap's favour.

He admitted that while MacNab, the elder, lived, Edwards, the mortgagee, was in possession by virtue of the possession of MacNab, the mortgagor, who was quoad his tenant; but that his tenancy being at an end by his decease, and it being necessary that the freehold should subsist somewhere, (*a*) it vested in Colin, the son, who took an unqualified possession as heir of his father, which the counsel contended amounted to a disseisin: for where one takes as heir, he takes the whole estate.

That the case cited of a mortgagor making a lease for years was not in point, as the disseisin was purged by the return of the mortgagor into possession, as it would have been in the present case if MacNab had returned into possession after disseisin. The counsel insisted there was no case to shew that the heir of a mortgagor was in the same situation with his ancestor.

In the present case the heir entered generally without consent; paid no interest; and no inference, the counsel contended, could be made by the court that his entry was not tortious.

The evidence of Dixon as to the conversations held with him and the widow were insufficient—payment of interest might have altered the case. (*a*)

He doubted also whether the evidence given of

(*a*) Saunders, 246. (*a*) 5 B. & A., 604.

these conversations should not have been rejected by the judge who tried the cause.

That if it was said that the possession which was continued after MacNab's death was that of the widow, it would, after her forty days, have the same effect of disseising Edwards, and thereby making him incapable of being seised to Dunlap's use; for every unlawful continuation of possession, is a trespass in the same manner, as every continuation of the possession of goods stolen is a fresh asportation in the county to which they are taken.

That arguments drawn from the inconvenience which persons residing abroad or at a distance would suffer by being compellable to make entries, were obviated by the consideration that they might do it by attorney.

As to the presumption of payment of the mortgage money, he contended from the case of Wilson v. Wetherley, (*a*) that the twenty years' possession of MacNab and his heir was a sufficient ground for the presumption, which the evidence of the conversations had between the widow and children and Mr. Dixon was not sufficient to rebut, they not having been proved to have had any interest, and he contended that the evidence should not have been received.

He concluded by observing that the questions before the court were, whether Edwards was not out of the possession when he made the bargain and sale to Dunlap.

(*a*) Bull., N. P.

And whether the evidence of the conversations referred to in argument, should not have been rejected ?

SHERWOOD, J.—All the objections taken at the trial of this cause are abandoned except one, which is, that when the conveyance was made by Edwards to Dunlap the former was not in possession of the premises so conveyed, but that a disseisor had the actual possession at that time, and it therefore became necessary, in order to effect a valid conveyance, for Edwards to enter and seal a deed on the premises. It is admitted that Colin MacNab, the mortgagor, died in possession of the premises in April, 1810, and that Edwards made the conveyance in question in the month of October following. In the interim between the last mentioned periods, and at the time of the execution of the conveyance by Edwards, the widow of the mortgagor was in possession of the premises, and subsequently continued in such possession for a number of years.

While the widow so resided on the premises and after the conveyance from Edwards to Dunlap, both she and Colin MacNab, the younger, the heir-at-law of the mortgagor, acknowledged that the mortgage money had not been paid, and seemed desirous that it might in some way be satisfied. These appear to me the principal facts in the case.

In the argument upon the motion for a new trial, the defendant contended that the act of taking possession and continuing it by the widow amounted to a disseisin, and that Edwards being a disseisee no-

thing passed by his deed. The sole question therefore for the court to determine, is whether there was a disseisin or not; because I take it for granted that if there was, the deed from Edwards was ineffectual.

Whatever may have formerly been the doctrine relative to disseisin, it seems to be fully settled at this day, that to constitute a disseisin the act must be of that nature that an intention to disseise can be clearly inferred from it. (*a*)

In order to make a title by disseisin there must be a wrongful entry. (*b*) In the present case, I think no inference can be drawn that the widow intended to disseise the mortgagee; but on the contrary, her recognition of his title is quite apparent from her admission of the justice of his demand, and of its actual existence. It is true that this recognition was made several years after she commenced to occupy the premises; but still I think it goes to shew the intention with which she took possession, and negatives the fact of disseisin. Neither Edwards, the mortgagee, nor Dunlap, his assignee, ever objected to the occupation of the premises by the widow, which appears sufficient to me to warrant the inference that both of them assented, especially as the widow admitted the validity of the claim under the mortgage. The view, therefore, which I take of the whole case is, that the occupation of the widow was by the assent and implied permission of Edwards, and subsequently by Dunlap, and that the widow from the beginning fully recognised the claim under the mortgage, and if so, that there was no adverse possession.

(*a*) 12 East, 141; 3 M. & S., 271. (*b*) 1 Salk., 245; 5 B. & A., 689.

It appears to me that the deed from Edwards to Dunlap is a valid conveyance, and that the lessor of the plaintiff is entitled to judgment.

The CHIEF JUSTICE, referring to the case of Smartle v. Williams, (*a*) observed, that he considered there were sufficient circumstances in this case to take it out of the dictum there laid down, "that the entry of the heir of a mortgagor upon the mortgaged estate was a tortious entry," as in the present case the heir who remained upon the mortgaged estate after the decease of the mortgagor, had always acknowledged the title of the mortgagee.

Per Curiam.—Rule discharged.

IN THE MATTER OF HUGH CARFRAE.

The court refused to order a sheriff to re-fund money received by him as the price of land sold at sheriff's sale, the purchaser having been ejected upon the ground that lands could not be sold under a *fi. fa.* as assets in the hands of an administrator.

This was an application on the part of Mr. Carfrae, for an order upon the late sheriff of the Home District, to re-fund the sum paid to him as the purchase money of a freehold estate, which had many years ago been assigned to him as the purchaser thereof by sheriff's deed.

The estate had been sold under a judgment obtained in a suit of Gray v. Ruggles as assets in the hands of the administratrix, and the purchase money still remained in the sheriff's hands. The heir-at-law had recently brought an ejectment and recovered the

(*a*) Holts Reports, 6 W. & M.

possession upon the ground that freehold estate was not subject to be sold, as assets in the hands of an administrator.

The CHIEF JUSTICE observed, that this application had arisen in consequence of the difference of opinion in this court, respecting the construction or operation of the 5th Geo. II., some of the judges having considered that lands might be sold as assets in the hands of an administrator, while others considered that they could not. That his own had been the latter impression, and the Chief Justice referred to the case of Wycott v. McLean, administrator of Robinson. (*a*)

Mr. JUSTICE SHERWOOD observed, that he was not prepared to say whether lands in this province can or cannot be sold by process against executors or administrators. Lands in Barbadoes, he observed, were considered as quasi chattels until the testator's or intestate's debts were paid. He wished to have the question argued before he gave an opinion on the subject.

Per Curiam.—Application refused.

DE RIVIERE ET AL. V. GRANT.

Where the plaintiff declared as upon a penal bill, and gave in evidence a bond with a condition in the usual form, it was held not a sufficient variance to set aside a verdict, it should have been taken advantage of by special demurrer upon oyer.

This action was tried at the assizes, where the plaintiff was nonsuited with leave to move. The declaration was upon a bill penal, stating that the

(*a*) Vide Ruggles v. Carfrae.

defendant by his certain writing obligatory sealed, &c., bound himself, his heirs, &c., unto plaintiffs in the sum of £8218 of lawful money, &c., to pay or cause to be paid unto plaintiffs the full sum of £4109 with interest, as follows, that is to say (setting out the instalments) averment of non-payment. Plea *non est factum.*

The evidence given at the trial to support this declaration was a bond with a condition thereunder in the ordinary modern form, upon which the plaintiff was nonsuited.

Washburn had obtained a rule *nisi* to set aside the nonsuit and enter a verdict for the amount of the debt declared for. He observed that the form had been taken from Morgan's precedents, and now moved to make the rule absolute.

SHERWOOD, J., gave the judgment of the court.—The declaration in this case states that the defendant is indebted to the plaintiffs upon a penal bill to secure the payment of a less sum by several instalments. At the trial a bond was produced in evidence to support the action, which corresponds in the amount of penalty with the penal bill, and contains a condition for the payment of a less sum by instalments at the same time, and of the same amount as mentioned in the declaration. It was objected at the trial, that a material variance was apparent between the penal bill declared upon, and the bond produced in evidence, because the latter had a condition underwritten.

Although the declaration in this case is not drawn

with technical precision, and such a form ought never to be adopted when the instrument declared upon is accompanied with a condition, still, I think, that since the passing of the statute 8th and 9th Will., 3, c. 11, that there is no essential difference in the legal effect of a penal bill for payment of money by instalments, and an obligation with a condition for the same purpose. In my opinion no objection on the ground of variance in this case should have been allowed at the trial, and if any advantage could have been taken of such a circumstance, it must have been so done upon special demurrer after obtaining oyer of the obligation, and not on the plea of *non est factum*, which was pleaded in this case. The case of Cartridge v. Griffith, (*a*) and the case of Harrison v. Vallance, although their circumstances are quite different from the present, go to establish the doctrine that the legal effect of a deed is to be considered at the trial rather than the exact correspondence of form, and that the plaintiffs ought not to be nonsuited on the ground of misdescription if the deed produced in evidence can have the same legal effect as the one mentioned in the declaration. I think the nonsuit should be set aside.

Per Curiam.—Rule absolute.

(*a*) B. & A., 57; 1 Bingham, 45

TRINITY TERM, 8 GEO. IV., 1827.

Present:

THE HONOURABLE CHIEF JUSTICE CAMPBELL.
MR. JUSTICE SHERWOOD.

THE KING v. WHITEHEAD, ONE, &C., AND WARD, ESQUIRE.

Where an attorney of this court practising in an inferior court has charged, and the judge has allowed costs clearly not sanctioned by law, this court will punish by fine or attachment.

Mr. Ward, the judge of the district court of Newcastle, and Mr. Whitehead, one of the attorneys of this court, having this day appeared at the bar upon the return of an attachment which had issued against them; against the former for a charge of extortion, and for having in several instances taken illegal fees for business done in the district court, and for having made charges for disbursements which he had not in fact made; against the latter on a charge of not having adhered (in the taxation of Mr. Whitehead's bills) to the table of fees prescribed by the provincial statute. The circumstances had been presented by the grand jury at the quarter sessions for the Newcastle District, and had been by the judge referred to the consideration of the Solicitor-General there present, who had brought the facts before this court in a former term, which facts having been substantiated to the satisfaction of the court by affidavits, and those facts not having been satisfactorily answered to the court upon interrogatories administered to the

defendants, an attachment had issued, which being this day returnable, the Attorney-General moved for the judgment of the court, which was pronounced by the honourable the Chief Justice, as follows:

CHIEF JUSTICE.—Mr. Whitehead—the manner in which the accusations against you have been brought to the notice of the court, namely, by the representation of a grand jury of the country, give them additional importance.

In their presentment, which stated various acts of extortion, and other unfair practices, I perceived they had included many things which were more fit subjects for the examination of this court than for the investigation of the petit jury at the assizes, and I therefore referred them to the consideration of the Crown officer, who has deemed it his duty to bring them before this court, in the manner which he has done.

The court have examined a great number of affidavits, containing charges against you of having taken illegal fees; they have also examined a great number of bills of costs which have been taxed and allowed in the different districts of this province, by the persons who had the immediate superintendence of the practice of the district courts, and which bills you have produced, in order to shew that your charges do not in general vary from those taxed in other courts. If the charges authorised in those bills were even larger than those you have made, that circumstance would be no justification. Your exhibiting those documents was rather injudicious, as

rendering it imperative upon the court to draw a comparison, the result of which is unfavourable to you, as the greater part of them do not come up to yours.

It appears that you have for a considerable time injured the suitors in the district wherein you practice, in a manner very discreditable to the general administration of justice, and particularly so to the character of that court in which you have been principally conversant.

It is the duty of this court to superintend the proceedings of all inferior jurisdictions, but your conduct is more especially and immediately under the cognizance of this court, in which you are a minister, and in virtue of that character are allowed to practise in the local courts of the country.

This court consider your conduct as so improper, in many instances, that it would be justified in striking off your name from its roll; but, considering that this is the first instance of the kind that has been brought before the court, it is unwilling to proceed to such extremities, but such a sentence must be pronounced as may strongly mark its disapprobation of your conduct, and, at the same time, convince you that a repetition of the same would be visited by the heaviest censures. The sentence of the court, therefore, is, that you pay a fine of fifty pounds, and remain in custody until the same is paid.

Mr. Ward, you may imagine that this court feel much pain in finding it necessary to visit, by their

reprehension, a person whose respectability of character has been so long and so well established in this province; but the complaint which has been brought to light against Mr. Whitehead considerably implicates you, and, therefore, you have necessarily been called upon. You have given the best explanation of the misconduct or neglect attributed to you of which you were capable; but that explanation is not satisfactory. We must either suppose a degree of ignorance or gross negligence, by no means complimentary to a person of your profession and situation, or be obliged to attribute your conduct to motives which would be still more disgraceful and even criminal.

Among other instances, the charge which has appeared against you is taxing illegal fees, as costs of the day, against a plaintiff in whose behalf you had granted a new trial, and has been fully substantiated; nor is the excuse offered by your counsel, that those fees were taxed by the consent of the attorneys concerned for both the parties in the suit, at all satisfactory. To allow such an excuse would introduce a doctrine too injurious to suitors to be admitted by this court. It would render it too easy a matter for attorneys opposed to each other to connive at improper charges, to the great injury of suitors.

You have an act of the legislature of this country pointing out a table of fees by which you are to be directed in your taxation of costs, and by no other.

Setting at naught the provisions of this statute, you have incurred the imputation of great neglect

or of improper motives, either of which this court are bound to notice.

The family connexion which it appears subsists between you and Mr. Whitehead, compared with other facts, unfortunately gives a ground for suspicion that you may from that circumstance have allowed yourself to have been subjected to a degree of improper influence incompatible with your duty, but which may have probably arisen from your good opinion of, as well as your good feelings towards, that gentleman.

This connexion made it your duty to be doubly vigilant in cases in which that party was concerned; for however amiable such a feeling may be in private life, it must never be allowed to interfere in the administration of justice. It induces a bias of which we are not always sensible, and which ought, therefore, to be the more cautiously guarded against.

The items which you have allowed in your taxations of costs, as appears by the affidavits exhibited, are, without doubt, contrary to law, and as it is not only in the power, but also the duty of this court to see strict justice is duly administered, in all inferior jurisdictions, you have subjected yourself to its censure.

This court is, however, pleased to find that this reprehensible conduct on your part has not proceeded from the criminal motive of putting money in your own pocket, so that your character for integrity in that respect remains unimpeached, but still your duty should go further.

Although in consideration of this distinction which the court has been able to draw in your favour, and of your general excellent character it is inclined to be lenient, you must be apprised that a repetition of such conduct would be severely visited.

The inferior courts of this country have not that discretion in establishing the quantum of costs which has been given to this court; such courts have nothing to do but to adhere to the table of fees pointed out by the statute.

This you have not done, and are, therefore, highly censurable; but the court considering that you have not been influenced by corrupt motives, do only sentence you to the payment of a fine of five pounds, which is the greatest degree of lenity it could possibly exercise towards you.

Taylor v. Rawson.

Where a person in possession of a promissory note sued in the name of the payee, the court refused to set aside the proceedings after judgment upon an affidavit by the supposed payee that he had never possessed such a note; the defendant at the same time not swearing that he had never given such a note.

George Boulton moved for a rule *nisi* to discharge the defendant out of custody, upon the ground that one David Smith had carried on the proceedings against defendant without any authority from the nominal plaintiff, or why said Smith should not be attached.

The action had been commenced upon a promissory note signed by the defendant, which had been purchased by Smith and put in suit in plaintiff's name.

The affidavit to support the motion was made by the nominal plaintiff, who resided in the state of New York. It stated that he never empowered in writing or by parol any person to sue for or discharge a note payable to himself by the defendant, as he never was the owner, possessor, or proprietor of such a note.

There was no affidavit made to the same effect by the defendant, or denying his having given the note upon which the action was brought. The defendant was in custody upon a *ca. sa.*, after having suffered judgment to go by default.

The court observing that the application was out of season, and that the defendant had tacitly acknowledged that he had signed the note, not having contradicted it by affidavit.

Application refused.

ROBINSON v. HALL.

The court refused to discharge a prisoner out of custody on the ground that the gaoler had taken him to a magistrate upon suspicion of his having committed a larceny in the gaol. The court refused to commit a prisoner brought by *ha. co.* from a county gaol to the custody of the sheriff of York. The court determined it not unreasonable for the gaoler to charge 6d per mile, both going and returning with a prisoner by *habeas corpus*.

The defendant, a prisoner in the custody of the gaoler of Kingston, was brought up under a *habeas corpus* issued last term, the writ of *capius ad respondendum* under which he was confined, and the return to the writ of habeas corpus being read, *Baldwin* moved for his discharge under the following circumstances: the prisoner was some time after the re-

turn of the mesne process under which he had been confined, suspected by the gaoler of having committed a larceny in the gaol, and he thereupon, assisted by an escort of soldiers, took him without any warrant before a magistrate residing in the town of Kingston, without the limits of the gaol; and after his examination and commitment, took him back into custody. It appeared that the defendant was afterwards acquitted of the charge at the quarter sessions.

Baldwin contended that this removal by the gaoler was a voluntary escape, and that therefore the prisoner's subsequent confinement being illegal he was entitled to his discharge, and cited Atkinson v. Matteson, and the cases there cited, as shewing by clear inference, that a prisoner once voluntarily permitted to go at large after the return of the writ, (mesne process) cannot be re-taken by the bailiff; shewing, that although a bailiff may permit a prisoner to go at large before the return of the writ he cannot do so after it.

The counsel cited the case of Borthman v. the Earl of Surrey, (*a*) as shewing that a bailiff, who removes a prisoner out of his custody without a *habeas corpus* or other lawful authority, is liable in debt for escape.

He further contended that as in the present case the gaoler could have had no pretence or claim to an escape warrant, that he could not therefore re-take or bring back the prisoner after he had taken him out of the gaol.

(*a*) 2 T. R., 5.

The *Attorney-General*, in reply, observed that there was a distinction between mesne process and execution, that, in the latter case, the close custody of the prisoner, the *arcta et salva custodia* was the plaintiff's satisfaction for the debt, but that in the former the custody was only with a view to the production of the defendant at the close of the suit, and that therefore other custody than that of the gaol answered the same purpose, and doubted if the court would enquire in what custody a prisoner confined upon mesne process was.

That it was unreasonable to suppose that a prisoner could not be removed on any occasion without an *ha. co.* At the sessions where the testimony of prisoners might be required it could not be obtained.

That none of the authorities went to shew that the party imprisoned might himself apply to be discharged under circumstances like the present.

That if the counsel could cite any instance of a prisoner in execution being discharged by the court, who had been taken to gaol, after a temporary removal, under the circumstances of the present case, he might perhaps doubt as to a case upon mesne process.

Robert Baldwin, in reply, observed that it was not argued that a *habeas corpus* was at all times necessary to remove a prisoner for the purpose of giving testimony as a witness, or being himself examined when accused criminally, but that certainly some authority known to the law must be resorted to,

otherwise the party, he contended, was out of custody while going before a magistrate or any other tribunal.

That the question here is, whether voluntary escape or not, if the conduct of the gaoler made an escape, which he contended it did, he considered that the court would discharge the prisoner.

He further observed there was no distinction between mesne process and execution after the return of the writ.

CHIEF JUSTICE.—Admitting that the conduct of the gaoler may have been in this case illegal, the court would decide in too summary a manner, upon the rights of third persons if they were to discharge the defendant. It appears that the processes under which he is in custody are legal, and whatever his remedy, by action, may be against the gaoler, the court do not consider that he ought to be discharged upon this summary application. If the gaoler has suffered an escape, the court consider that he is amenable to the parties at whose suit the defendant is in custody, and under the circumstances they cannot grant this application. The prisoner was therefore remanded.

Per Curiam.—Application refused.

Baldwin now applied to the court to commit the prisoner to the custody of the sheriff of York, but the court refused the application, on the ground that the committing prisoners brought up from county gaols to the custody of that officer, would be subjecting him to too great a burthen and responsibility.

Baldwin also objected to the charge of £10 for bringing the prisoner up, but it appearing that the mileage for bringing the prisoner up and conveying him back amounted to that sum, the court decided the charge to be reasonable.

The sheriff of the Home District asked the court if he ought to receive the prisoner into his custody during his stay at York, without an order from the court. The court replied that the *ha. co.* was a sufficient warrant to him, and that it was his duty to receive him.

Bardon v. Cawdell.

Where a person had been arrested under a judge's order, the court considered it not necessary to make use of the precise words pointed out by the provincial statute, authorising arrest.

Small moved to set aside the arrest in this case, upon the ground that the affidavit to hold to bail, and upon which a judge's order had been granted, did not follow the words of the statute. The words of the affidavit were that the defendant was about to leave the province as the plaintiff was informed and verily believes, whereas the words of the statute are that the plaintiff is apprehensive that the defendant will leave this province, &c.

The court observed, that the clause of the statute which authorised an arrest under a judge's order, had no reference to the clause containing the form of the affidavit, and that as it was necessary that there should be an order in this case, the strict adherence to that form was dispensed with by such order.

Per Curiam.—Application refused.

The King v. Bidwell.

To subject a person to the penalty of the 22d Geo. II., c. 46, for suing out process, &c., the attorney allowing his name to be used must be first convicted.

An application was made against the defendant, by the Solicitor-General, for a rule to shew cause why an attachment should not issue against him for having practised, as an attorney of this court, without being authorised so to do, and for a contempt in abusing the process of this court in discharging one White out of execution, without sufficient authority, said White having been confined upon a *capias ad satisfaciendum* at the suit of one Brook. (*a*)

It appeared to the court, in respect to the first part of the charge, that the defendant had been, for several years, acting as the managing clerk of Mr. Daniel Washburn, formerly an attorney of this court, and, in fact, had in a great measure conducted the business of the office, and of Mr. Washburn's clients; but it also appeared from Mr. Bidwell's affidavit that he was employed at a salary, and did not participate as a partner in the profits of the office. The intention of instituting these proceedings was, in some measure, to compel Mr. Bidwell to refund to Mr. McLean, the sheriff of the Midland District, a sum which he had been compelled to pay in an action for an escape, the ground of which was that he had released a prisoner in execution by the written direction of Mr. Bidwell, as clerk or agent to Mr. Washburn, such direction being unauthorised and void.

Sherwood, J., pronounced the judgment of the court as follows :

(*a*) See the case of Brook v. McLean.

Application has been made to the court for a rule to shew cause why an attachment should not be granted against Mr. Bidwell, upon the following accusations :

Firstly.—That he abused the process of this court by discharging, without legal authority, a debtor in the custody of the sheriff on a *ca. sa.*

Secondly.—That being an unqualified person, he practised as an attorney of this court by using the name of the late Mr. Washburn, who permitted him to do so contrary to the statute 22 Geo. II., cap. 46, sec. 11.

With respect to the first accusation, it appears to me that the discharging a debtor out of custody, without authority to do so, does not constitute a criminal abuse of the process of this court, so as to render the agent liable to an attachment without some circumstances shewing fraud, deceit, or gross imposition. The party injured may resort to a civil action.

As to the second charge, I can find no instance of the conviction of a person under the statute 22 Geo. II., who acted merely as the clerk or servant of a licensed attorney, at a fixed salary or stipulated wages in the ordinary transactions of the professional business of his master.

From a perusal of the statute I am also inclined to think that in all charges of the description now under consideration, it is necessary, in the first instance, to convict the attorney who has improperly allowed his name to be used by an unqualified per-

son, before any proceedings can be had against the latter; for if convicted at all, such unqualified person must, by the express provision of the statute, be convicted at the same time, or at least upon the same complaint and proof which have been previously adduced against the attorney himself.

The ancient common law rule of principal and accessary, without any relaxation, seems to have been in the contemplation of the legislature at the time of this enactment.

Mr. Bidwell, in his affidavit, filed in answer to the affidavit of the prosecutor, distinctly and positively states, that he was not a partner with Mr. Washburn, but was *bona fide* his clerk or servant at a fixed salary, by the year.

For these reasons, I think, that even a rule *nisi* ought not to be issued.

Per Curiam.—Application refused.

READ v. JOHNSON.

A demand of plea cannot be served before declaration filed, however short the time may be.

Small moved for a rule *nisi*, to set aside the interlocutory judgment, signed in this case for irregularity on the ground that the service of the demand of plea had preceded the filing of the declaration. It appeared that the demand of plea had been served upon the clerk of the defendant's attorney in the crown office, a few seconds before filing the de-

claration. The counsel insisted on the words of the statute, which are "that the plaintiff may after a declaration filed, and service of a copy upon the defendant, by demand in writing, call for a plea."

Boulton, Solicitor-General, contra, contended that the demand of plea might be served at the same time with the declaration, and that the court would not notice the very small portion of time which had elapsed between the one and the other in this case, and would consider the acts as simultaneous, and cited Edmonton v. Osborn, and Maxwell v. Skerret.

The CHIEF JUSTICE observed that applications like the present tended to the discredit of courts of justice, but that although a simultaneous service of the declaration and demand of plea might be held good, yet as it appeared in this case that the demand had actually been served before declaration filed, that the court were bound by the express words of the statute.

Per Curiam.—Application granted.

The CHIEF JUSTICE observed that the appointment of Mr. Cawdell or any other deputy to perform the duties of clerk of the Crown, must be with the sanction of the court.

KEEFER v. MERRILL, ET. AL.

The court will not set aside an arrest upon the ground of irregularity in the affidavit to hold to bail after a prisoner has in fact escaped.

Washburn had obtained a rule *nisi* to discharge the defendants out of custody, upon filing common bail, for defects in the affidavit to hold to bail.

It appearing to the court that two of the defendants had escaped from gaol some months previous to this application, it being in fact made with a view to exonerate the sheriff from his liability.

Per Curiam.—Rule discharged.

Boulton, Solicitor-General, was against the application.

DAVIDSON DOE EX DEM. v. ROE.

Service upon one of several tenants in possession of the same parcel of land is sufficient.

Boulton, Solicitor-General, applied for a rule *nisi* to set aside the proceedings in ejectment in this case, upon the ground of only one of two tenants in common having been served with the declaration and notice.

The court referring to the case in Bosanquet v. Puller, and observing that the cases, where a service upon one tenant had not been considered as sufficient, contemplated the tenants being in possession of different and distinct parcels.

Per Curiam.—Application refused.

MCLEAN v. HALL.

A plaintiff cannot arrest a defendant for the amount of purchase money paid for an estate conveyed to him by deed, upon the ground that the defendant, the vendor, was not lawfully seised, but must resort to his covenant and proceed by judge's order.

The defendant in this case had been arrested upon an affidavit, stating that the plaintiff had purchased a house from him for £50. That he had

covenanted that he was the lawful owner, and lawfully seised of the property sold; which, in fact, he was not, and that he was indebted to the plaintiff in £55, by virtue of such covenant, with the usual conclusion. No judge's order had been obtained.

Macaulay had obtained a rule *nisi* to set aside the arrest. *Boulton*, Solicitor-General, shewed cause.

Per Curiam.—Rule absolute.

STOCKING v. CROOKS.

An award will be set aside if arbitrators examine one of the parties upon oath, they not having been authorised to do so by the submission.

Ridout had obtained a rule *nisi* to set aside the award in this case, on the ground that the arbitrators had exceeded their authority by receiving evidence not warranted by the submission.

The arbitrators had taken the evidence of the plaintiff upon oath. The defendant, although he did not resist this, declined being sworn himself. The counsel cited Caldwell on Arbitration, 53, and the same work passim; also, 2 Taunton, 254.

Rule absolute.

BASTABLE AND ANOTHER v. MOWATT.

Where a defendant applied for security for costs by affidavit, dated 22d May, and one of the plaintiffs deposed in an affidavit on the 21st June, that he was resident at Kingston, where, in fact, he was in gaol, the court ordered security.

The defendant applied for security for costs upon an affidavit, dated the 22d of May last, stating the

non-residence of plaintiffs within the jurisdiction. The plaintiffs opposed the application upon an affidavit, stating that one of them was resident in Kingston, where, in fact, he was confined in gaol; the last affidavit was sworn 21st June.

Application granted.

RANSOM AND SHELDON v. DONAGHUE.

Where a defendant had been arrested by one of two plaintiffs for £18, and was afterwards arrested in the name of both for £18 10s., the court ordered the bail bond to be cancelled.

Macaulay had obtained a rule to shew cause why the bail bond should not be delivered up to be cancelled, upon an affidavit stating that the defendant had been held to bail in a former action for the same debt, at the suit of one of the plaintiffs—the former affidavit was for £18. The one in the present action for £18 10s.

Rule absolute, with costs.

Robert Baldwin was for the defendant.

SMITH v. SULLIVAN.

The affidavit to hold to bail upon a promissory note must state it to be payable.

Ridout having obtained a rule *nisi* to discharge the defendant from arrest upon filing common bail. The affidavit not stating the promissory note upon which the action was brought "to be payable."

Per Curiam.—Rule absolute.

Brown v. Waldron.

The court will not set aside an execution upon the ground that the action was commenced in debt and the cognovit given in assumpsit.

Washburn had applied to the court for a rule *nisi* to set aside the execution in this cause, upon the ground that the action had been commenced in debt, and the cognovit given in assumpsit. *Boulton*, Solicitor-General, shewed cause.

Per Curiam.—Application refused.

Doe ex dem. Stewart v. Radich.

The operation of the Statute of Limitations is not suspended by the 59 Geo. III., c. 3 Where twenty years' possession has followed a division of adjacent lots, ejectment will not lie, although the division may have been inaccurate.

The lessor of the plaintiff and the defendant having about five and twenty years ago received grants of adjacent lots, employed a surveyor to run the line between them, and, thereupon, divided their lands agreeable to such survey, and the defendant made considerable improvements on the land so assigned to him. It being lately surmised by plaintiff's lessor that the survey had been inaccurately made, he employed a surveyor to re-survey the land, who having surveyed the land anew, according to the directions of the provincial statute, for ascertaining and establishing boundary lines, 59 Geo. III., c. 3, gave in evidence that the old survey was incorrect, and that the land on which the defendant had made his improvements, in fact, belonged to the plaintiff's lessor under the grant from the Crown.

It was contended at the trial, by the counsel for

the defendant, that his twenty years' possession barred the plaintiff's lessor from an action of ejectment; by the plaintiff's counsel that the possession not having been adverse, but under a mutual understanding, arising from the error of the surveyor, that the Statute of Limitations was no bar, and even if it had been, that the provincial statute establishing meridian lines gave the plaintiff's lessor a right of entry commencing from its passing. The jury found a verdict for the plaintiff, subject to the opinion of the court upon the above points.

Robinson, Attorney-General, for the defendant, contended, that the case was within the principle and intention as well as the language of the statute, viz., "no person shall make an entry into lands but within twenty years next after their right or title, which shall first descend or accrue to the same; and in default thereof, such persons so not entering, and their heirs, shall be utterly excluded and disabled from such entry after to be made;" that the intention of the statute was if a defendant has been twenty years in possession, the claimant shall be barred from his entry, and that a person must find as well as assert his right in that time.

That if the mistakes of surveyors were to be considered as preventing the operation of the statute, it would be almost inoperative in this country.

That error or mistake should no more prevent its operation in cases of ejectment than in those of assumpsit, trespass, &c. The counsel cited the cases of Esson v. Esson, Cook v. Danvers, and Duroura v.

Jones, (*a*) as determining that where the statute has begun to run that its progress cannot be stayed by subsequent circumstances.

Boulton, Solicitor-General, contra, contended that the twenty years' possession intended by the Statute of Limitations was an adverse possession ; and that under the circumstances of this case an ouster should at least have been found or presumed by the jury.

That the statute did not at any rate bar the plaintiff until he had acquired a right of entry under the provincial statute, which directed the manner in which lines between lots were to be run.

The defendant in this action had been in peaceable possession of the premises in question, under a different title from the plaintiff's, for more than twenty-five years before the day of the demise mentioned in the declaration in ejectment. Each of the parties had a deed from the Crown, the one of the east and the other of the west half of a lot on the river St. Lawrence, and those deeds were issued more than twenty-five years before the commencement of this action, as before stated. This period of uninterrupted occupation on the part of the defendant, under a distinct title from the lessor of the plaintiff, since the statute of 21 James I., cap. 16, sec. 1 is like a descent at common law which tells entry, and transfers the right of possession from the lessor of the plaintiff to the defendant, even if the former has the legal right of property. Stokes v. Berry 2d, Salk.,

(*a*) 6 East, 80; 7 East, 299; 4 T. R., 300.

421. Taylor v. Horde, 1. Burrow, 119. The plaintiff does not claim to come within any exception contained in the Statute of Limitations, but alleges that the provincial statute 59 Geo. III., cap. 14, sec. 12, takes his case out of the statute 21 James I. It appears to me the provincial statute cited by the plaintiff was made for the express purpose of regulating the mode of surveying lands subsequently to the passing of that act. I think the legislature intended by the 12th section, to give the court an equitable power to secure a reasonable compensation to such claimants only who are not protected by the Statute of Limitations, on account of their possession, since the issuing of the king's patent, being less than twenty years. To render the Statute of Limitations inoperative you must shew a repeal of its enactments. This has not been shewn. If the lessor of the plaintiff is in truth the rightful owner of the premises, he has by his own negligence rendered a resort to a higher remedy indispensably necessary to obtain his land. In my opinion his estate, if he has any, has been divested and put to a right of property alone. The right of possession, I think, is gone. The lessor of the plaintiff contends that as no adverse possession on the part of the defendant was proved at the trial, the Statute of Limitations does not reach his case. It appears by the evidence that the defendant held under a deed from the Crown, and not under any title at all identified with that of the lessor of the plaintiff; and the lessor of the plaintiff never claimed any right to the premises till after a lapse of more than twenty-five years, during all which time the defendant had the king's grant and lawful possession under it. Adverse claim or possession as re-

lates to either party appears to me to be quite out of the question. The plaintiff acquiesced in the defendant's possession, because he never thought himself the owner of the land, and the defendant never disputed any claim of possession on the part of the plaintiff, because none was ever made before this action was brought. A claim to the possession is now made for the first time, and, as I said before, I think it comes too late.

Per Curiam.—Nonsuit to be entered.

Beasley v. Stegman.

Where in an action on bond for the performance of an award, the count set out the intention of plaintiff's daughter and her husband, the defendant, to live separate. That it was submitted to arbitrators to settle the amount of an allowance to be paid her in lieu of alimony, &c., upon plaintiff's entering into such security as should be deemed proper to indemnify her husband, &c., and that plaintiff should, when the award was made known, enter into such security. That the condition of the bond was to pay defendant's wife what should be awarded upon plaintiff entering into such security—assigning for breach, (without stating that the award had fixed the nature or amount of the security,) that the award had fixed the allowance at £50, payable quarterly, thenceforward, commencing from the day of her departure from her husband, the defendant, (a day, in point of fact antecedent to the submission,) averring that plaintiff did afterwards by his deed, &c., covenant to indemnify, &c., that although plaintiff afterwards tendered said covenant, and exhibited the bond and award, (without any profert of the covenant,) and demanded the sum, to wit, £62 10s., being one year and one quarter from the 6th of September, 1822, being the day of the separation, &c., (a day antecedent to the submission,) due on the award—refusal of payment—was held good upon a special demurrer objecting to it as inconclusive, having a retrospect not warranted, and wanting profert of the covenant. A second count omitting the statement of notice of the award and a request to pay also *held* good A third count assigning for breach, that plaintiff offered to enter into any security as might be deemed proper to indemnify, &c., yet that defendant refused to accept any thing at all therein, (without stating a tender of a covenant,) also *held* sufficient, upon the ground that defendant's refusal to accept any thing at all discharged the plaintiff from making such tender.

Debt upon bond for performance of award. The first count of the declaration set out: first the submission, viz.:—that differences had arisen between

plaintiff's daughter and her husband, the defendant, their intention to live separate, and that defendant should make her an allowance upon the plaintiff's entering into such security as should be deemed proper to indemnify defendant against further claims on the part of his daughter; and that the plaintiff and his daughter had agreed to leave the amount of the allowance to be settled by arbitrators, who should fix the amount and times of payment, &c., that plaintiff when said award was made known, should enter into such security as should be deemed proper to indemnify defendant, &c.

Secondly, the condition, &c., to perform the award of the arbitrators, and to pay defendant's wife such sums as should be awarded her upon the plaintiff entering into such security as aforesaid.

And then assigned for breach: that the award had fixed the allowance from the defendant to his wife yearly, at the yearly sum of fifty pounds, payable quarterly thenceforward, commencing from the day of her departure from her said husband, &c. And that although plaintiff did afterwards by his certain deed under his hand and seal, in consideration of the said provision, &c., covenant that defendant's wife should not molest him, &c., or institute any suit for alimony, &c., and referring to the deed. And that although plaintiff afterwards, &c., tendered and offered to defendant the said covenant, and requested him to accept the same, and exhibited the aforesaid bond and also the award, and demanded the sum, viz.: £62 10s., being one year and one quarter from the 6th of September, 1822, being the day of the se-

paration of the defendant and his wife, due on said award; yet defendant refused to accept the covenant or pay the amount, &c.

The second was similar to the first, omitting the statement of the request to defendant to accept the covenant, and also the exhibition of the bond and award.

The third count similar to the others; but assigning for breach that plaintiff offered to enter into any security as might be deemed proper to indemnify, &c., and that although a large sum was due under said award, to wit, £62 10s., &c., yet the defendant refused to accept any thing at all therein, whereby he discharged the plaintiff from giving any security—request and refusal of payment.

Demurrer—assigning for causes—

To the first count—that it appears thereby, that defendant was bound to pay the sum awarded, &c., upon the plaintiff's entering into such security as should be deemed proper, &c., and that it is not stated in the said first count what security it was deemed proper the said plaintiff should enter into, or that defendant had deemed the covenant therein alleged to have been made and tendered, to be such security as it was proper the said Beasley should enter into, and that it does not appear that the plaintiff ever did enter into such security as was required before defendant could be legally called upon, according to the condition of his said bond, to pay the sum awarded, and consequently that it does not appear by the said count that the plaintiff at the

time of commencing his action was entitled to claim any sum under the award.

That according to the obvious intent, &c., of the bond and condition, it was submitted to the arbitrators, and they ought to have awarded the proper security—and that as it appears by the said first count that they did not do so, the award is inconclusive and void.

That plaintiff has not made profert of the supposed deed or covenant, whereby defendant might have had oyer ; it not appearing that said covenant is in existence.

That said award directs that a yearly allowance of £50 shall be paid by defendant to his wife quarterly thenceforward, commencing from the day of her departure from her said husband, &c.; but that it is not stated at what time she did depart, &c., or that she ever did depart; therefore void for uncertainty.

That the award, as set forth, directs a sum of money to be paid as an annual allowance to commence from a day antecedent to the said award or to the bond of submission of the defendant set forth —whereas the bond and the condition recite an intention to live separate thenceforward, and submits to the said arbitrators what allowance shall be paid on account of such separation, and for no other thing; wherefore arbitrators could not legally award any allowance to accrue from a period antecedent to said submission; and that they have named a day for the commencement of said allowance, on which they had

not power to make the said allowance commence, and that no day being named, &c., except by reference to a period to which the power of the arbitrators did not extend, the award is altogether *null* and *void.*

That no period is mentioned when the annual allowance is to cease; wherefore the award is altogether uncertain, inconclusive and void.

To the second count the same objections as to the first, and that it is not stated therein that the defendant had any notice of the award; nor is it averred that he was requested to comply with the same.

To the third count.

That the arbitrators have not awarded the nature of the security, as objected to the first count.

That it sets forth the award as directing a sum of money to be paid, commencing from a day antecedent, as objected to the other counts.

That no period is stated when the allowance is to cease.

That no notice is stated, as in the objection to the second count.

Joinder.

Robinson, Attorney-General, in support of the demurrer, observed, that it was absurd to suppose that the plaintiff could get rid of the covenant alluded to in the pleadings by tendering his own deed.

That a party cannot be said to give security, unless he gives something more than his own personal liability.

That the giving security was a condition precedent, before completing which the plaintiff's right of action did not accrue.

That it was the duty of the arbitrators to have qualified the uncertain and general terms in the submission, by pointing out the nature and security, which was the evident intention of the parties, and, without doing which their award was useless.

In support of these observations the counsel cited the authorities below. (*a*)

That it was the fair interpretation of the submission that the award was not to have a retrospective operation, but which the arbitrators have given it.

That admitting such was the intention of the parties, the awarding an allowance from the time of the departure of defendant's wife, left the allowance uncertain and subject to future litigation.

That the award wanted mutuality in directing one party to pay to the other fifty pounds annually, without any equivalent.

That the want of profert of the covenant tendered was also a ground of demurrer, for, that a plaintiff must bring into court any deed which contains a condition precedent, to be performed upon his part, be-

(*a*) 2 Mod. 272; Strange, 1024.

fore doing which he acquires no right of action, (*a*) and this to enable the defendant to judge as well of its due execution as of its sufficiency.

That the omission of a period at which the allowance was to cease was also an objection to the award.

He observed, upon the third count, that the general averment, that they tendered any security the defendant should deem proper, was objectionable; for that the nature and quantum of the security was not more within the decision of the defendant than within that of the plaintiff, but should have been settled by the arbitrators; and that want of an averment of notice of the submission and award was bad, and that no precedent could be found to sanction such an omission. The counsel also cited the authority below. (*b*)

Macaulay, in reply, contended that the submission to pay such allowance as should be awarded, gave the arbitrators a retrospective power, and that although they had not named a day from which it was to commence, yet having named the annual sum to be paid was sufficient, and that it was unreasonable to expect that they should name a time of departure, as in fact there had been several.

That it was no part of the duty of the defendant to tender the sum awarded and demand sufficient security; and if it was not given, he had a right of action. The counsel cited the authority below (*c*) to shew that the party to whom a deed is to be made, must show what he wants.

(*a*) Lord Raymond, 776; Croke Eliz. 212; Com. Dig. Pleader. (*b*) Strange, 432. (*c*) 1 Ventris, 195.

That had a security been referred to the arbitrators, there might be some ground for objection to their award if they had neglected to ascertain it.

The giving the security, he contended, was not a condition precedent; but, that the plain intention of the arbitrators was to leave the defendant to his action if proper security was refused. He cited the authorities below. (*a*)

Observed further, that the second objection was involved in the first, the true question being whether it was necessary for the arbitrators to establish the security.

That the want of profert was a matter dehors the award, and might be amended if necessary: admitted that if a party claimed under a deed he must make profert, but that the deed in question was inducement only, and, indeed, no deed until delivery.

Compared it to a deed tendered by a vendor at a sale who never made profert of it, in an action to compel a completion of the purchase.

As to the uncertainty of the day of departure, he observed that the fact itself was admitted by the submission. That in awards, that is certain which can be made so, and it was the object and intention of courts of justice to uphold and establish rather than to overturn them by nicety of construction. (*a*)

Upon the objection of want of mutuality, he did

(*a*) Com. Dig. Arbitrator, E; Caldwell, 95-8; Saunders, 189; 1 Burr., 278. (*a*) Caldwell, 114, 19, 144, 94; 2 Wilson, 267; 2 Saunders, 62.

not consider that it applied; but, at any rate, a release might be considered as intended.

Upon the want of notice, as objected to the third count, he considered notice as unnecessary, unless it had formed a part of the submission; and that defendant had discharged the plaintiff from tendering any deed by his general refusal as set out in the first count.

And further observed, that if there was any thing in the objection made to the award having a retrospect, that the words having that effect might be rejected as surplusage; and its operation might be considered as bounded by the term "henceforward."

Attorney-General, contra, observed that words much more loose than those in the submission had been considered as making a condition precedent, which could not be got rid of by the party to be charged ascertaining the security.

That if the arbitrators had authority to award retrospective payments, some period should have been stated for their commencement, which not having been done leaves the award uncertain and nugatory; and if they had not power to do so they have exceeded their authority, which equally vitiates the award.

Further, that whenever a tender of a deed is necessary, a profert is necessary.

As to the anxiety of the courts to support awards, he observed that that anxiety was shewn only in

cases where it was attempted to impeach the justice of a perfect award, not where it was uncertain and inconclusive.

SHERWOOD, J., in pronouncing the judgment of the court, made the following observations.—After perusal of the pleadings in this case, I am of opinion that no one of the special causes of demurrer is tenable which the defendant has assigned against the several counts in the declaration. The only question, therefore, which remains to be determined is, whether the plaintiff has done every thing on his part, required by law to enable him to support an action for the non-payment of the money awarded. The first two counts in the declaration are precisely similar in principle, and may, therefore, be considered together. The statement of the plaintiff's case, in these counts, clearly shews it was necessary for him either to give security to the defendant, or to offer to do so, before he could legally call upon him for the payment of the money. Now has he not tendered security? The defendant by his pleading has not disclosed any objection to the security itself, or to the written instrument by which he proposed to perfect the security. The defendant contented himself with barely refusing the security without assigning any reason for such refusal, and, therefore, it must be presumed that he had no good objection to it. What more could the plaintiff do? It was out of his power to compel the defendant to accept security. If the defendant thought the security insufficient he should have said so, and then the plaintiff must have tendered better security, or stated his right to recover the money on the one already offered. The

defendant, however, chooses to be wholly passive, and trust to the failure of performance of what was necessary to be done by the plaintiff. In this, I think, he has been mistaken, and that the plaintiff has gone far enough to support his action on these two counts.

The third and last count in the declaration, after setting out the bond upon which the action is brought, together with the award of the arbitrators, contains an averment that the plaintiff offered to give any security as might be deemed proper, without alleging the tender of any draft of a deed or other instrument to perfect the security to the defendant.

The plaintiff then further avers that the defendant wholly and absolutely refused to accept of any security.

The question on this count, therefore, is, whether the plaintiff should have gone further and tendered the draft of a deed to compensate the security to the defendant. In the case of Jones v. Barkley, a draft of an assignment was tendered by the plaintiff to the defendant; but I think the decision there did not turn on that point. Lord *Mansfield* said in that case, "the party must shew he was ready; but if the other stops him on the ground of an intention not to perform his part, it is not necessary for the first to go further, and perform a nugatory act."

In the present case the plaintiff offered to give any security that might be deemed reasonable; upon

which the defendant absolutely refused to accept of any security at all; and at the same time, wholly refused to pay the money awarded by the arbitrators. It is contended by the defendant, that the plaintiff should have gone on and tendered a draft of a deed as stated in the first two counts. It appears to me, however, that such an act would have been perfectly nugatory and idle after the broad refusal of the defendant to accept any security at all, or to pay any money. It is true, that unless there is a discharge from the other party going further, the plaintiff must take every step necessary for him to do, in which the defendant's concurrence is not requisite, before he can avail himself of a refusal by the defendant. In the case now before the court, I think the words and conduct of the defendant, as stated in the third count, amounted to a discharge to the plaintiff from executing any security at all to the defendant, on the ground of the intention of the latter never to pay the money awarded by the arbitrators.

The defendant in effect says to the plaintiff, that he need not give himself any further trouble, for no security would be accepted which he could by any possibility offer.

In my opinion the plaintiff is entitled to judgment.

Per Curiam.—Judgment for the plaintiff.

Doe ex Dem. Moffat v. Hall.

It seems that a conveyance from the sheriff by deed under seal is necessary to complete a vendor's title to lands sold under the provisions of the 5th Geo. II. That the return upon the *fi. fa.* cannot be considered as a mode of giving such title. Nor can such vendor take a title by act and operation of law alone. That a neglect on the part of the sheriff to advertise the property sold, would not defeat the vendor's title; and although the land may be knocked down to the agent of a firm, the deed of conveyance may be afterwards made by request of the partners conveying to any individual of the firm.

This was an action of ejectment tried at the assizes for the Johnstown District, and a verdict for the plaintiff. The action was brought upon a sheriff's deed by which he assigned to the plaintiff's lessor 25,000 square feet of land with storehouse, buildings, &c. It appeared in evidence that 5000 feet of the land in question had not been included in the description of the premises inserted by the sheriff in the public advertisement for the sale, but the frame-house, store and premises, which were in fact included in the 5000 feet omitted, had been mentioned in the advertisement. The premises had been knocked down by the sheriff to one McCarley, who acted at the auction as agent to Moffat and Company, who were plaintiffs in the action under which the premises had been sold under 5th Geo. II., at £752, a sum considerably exceeding the value of that part of the land which was not occupied by the house, &c., which the defendant held under a separate deed, but which was intended to be comprised in the sheriff's advertisement. The sheriff forthwith made a deed of the 20,000 feet, more or less, and the store, frame-house, &c., thereon erected, to Moffat, the plaintiff's lessor, who took the same for the benefit of himself and his co-plaintiffs in the action, but who, finding a few days after the sale, that the 20,000 feet did not include the house which had been advertised,

applied to the sheriff, who, upon his representation and receiving indemnity, executed a second deed comprising the whole 25,000 feet. It was intended by the sheriff to advertise the whole of defendant's premises, situate in Brockville; his mistake arose from the circumstance of defendant's holding his premises under two deeds, one including the 20,000 feet, the other 5,000, on which the store and frame house were erected. The defendant insisting that the house, &c., were not comprised in the advertisement, sheriff's sale, or first deed, and that he had no right to execute a second deed varying both from the advertisement and the first deed, kept possession, upon which the action was brought. It was in evidence by McCarley, the agent, at the trial, that he, as well as all persons present at the auction, understood that the whole of Hall's premises were under sale.

Boulton, Solicitor-General, having obtained a rule *nisi* for a new trial objected—

Firstly.—That the sheriff could not legally execute a deed to plaintiff's lessor alone, that the deed should have been made to the whole firm in whose name the *fi. fa.* had issued.

Secondly.—That having executed one deed he could not execute another. And,

Thirdly.—That the plaintiff's lessor can only take the premises mentioned in the advertisement, viz., the 20,000 feet, the sheriff not having any power to include any thing not therein clearly comprised, he

being after the sale, *functus officio*, and the sale and not any subsequent deed, being the act which gave purchasers at sheriff's sales their title.

Robinson, Attorney-General, shewed cause.—He stated the principal question to be whether the buildings which, in point of fact, were erected on the 5000 feet omited in the advertisement, could be considered as included in the general words more or less. He contended as to the first objection, that it was immaterial as far as respected the defendant whether McCarley, the agent, was the actual purchaser for the whole firm or any individual of the house of Moffat & Co., for the appointment of an agent was legal and proper to prevent property being unfairly enhanced, if the real purchaser was known; and noticed that it was the practice in this country for one partner of a firm to take an estate in the manner practised on this occasion for the purpose of more conveniently turning it into money for the benefit of the firm.

As to the second objection, he contended that if the whole premises were embraced in the first deed under the more or less, the house having been also mentioned, that such first deed could not be invalidated by the second; that if the first did not by its general words include the whole of it, that the omission of the exact number of feet was well supplied by the second deed, which could not be vitiated by the first.

As to the third objection, viz., that plaintiff's lessor must stand or fall by the advertisement, he con-

tended that the advertisement having noticed the house and buildings, which where situated on the small adjacent lot of land, was sufficient to include the whole property, as it appeared in evidence that it was understood by all parties at the sale that the whole property was intended to be included; and that if this was not the case, either the first deed or the second deed included the whole; that no advertisement for sales could be so correctly drawn or so exact as not to leave room for a consideration of the intention of the parties.

That the advertisement was a mere formality, required by the statute, and although the sheriff might be liable to a defendant to the amount of any injury which he might have sustained by irregularity in the advertisement; yet, if there was a fair sale the purchaser could not be affected, for that the statute was merely directory. And he instanced the cases of attorneys-at-law, returning officers, and convictions by justices, where, though the former had taken out no license or the latter had erred, yet their acts would be considered valid.

That if the correctness of the advertisement was essential to support a purchaser's title, there would be no purchasers, from the great difficulty of sustaining an ejectment to enforce possession.

That the jury have, in this case, determined the intention of the parties, and rendered that certain which was before uncertain; and it being plain that the justice of the case was with the plaintiff, the verdict should remain with him, and defendant resort to an ejectment in his turn.

Boulton, Solicitor-General, contra, premising that that question was one of strict law, contended, that the only mode of designating or pointing out the property to be sold was by reading the advertisement, as was done, for the property itself was out of view. And the same being an advertisement of 20,000 feet, was purchased by the agent, Mr. Carley, who immediately received possession. That the rule of *caveat emptor* must apply, the purchaser should have inspected the property.

He asked, that if, as has been contended, the advertisement for 20,000 feet could pass the 25,000, and so include the houses, why did not the plaintiff's lessor bring his action for the 20,000 feet?

That the proper question for the jury to have decided was, whether the second deed was not tautological; that deeds must be made so as to embrace the quantity of land intended to be transferred, and cannot be enlarged by the *ipse dixit* of all the people in Brockville.

That whether the conduct of the defendant was strictly honourable or otherwise, it was not his business to point out the property to the sheriff, such conduct can scarcely be expected from a person so situated.

After premising the importance of having the mode of selling freehold lands under writs of *fi. fa.*, under the 5th Geo. II. clearly understood. To shew that the sheriff's deed was inoperative, the counsel observed, that in the manner at present practised it could not be considered as a bargain and sale, as it

wanted the principal requisite, viz., seisin by the bargainor, for the sheriff never took possession, and the advertisement could not give him seisin. That if the sheriff was seised he could put the purchaser into possession, which was never attempted, and which he could not do even in case of a chattel interest, Mr. Justice *Buller* merely hinting in the case cited that it might.

That there was no reason to distinguish the sale of lands in this country from the mode practised in England by elegit, and that if a deed was necessary in this country, it would be more so in those proceedings, for though the lands extended under that proceeding were a chattel in the hands of the plaintiff, they were in nature of a freehold. Mr. Justice *Sherwood* observed, that lands extended in England were so done by inquisition, and differed most materially from lands sold by *fi. fa.* in this country, which became an absolute property; whereas those extended were returned to the debtor after the debt was satisfied. The counsel observed, that he thought an inquisition should be had in this country, that the purchaser's title might commence by record. Mr. Justice *Sherwood* observed, that he considered that mode of proceeding would not answer the exigency of the statute.

The counsel further observed, that the sheriff had a mere qualified property sufficient only to excuse him from being a trespasser. That if he was in possession he should give an account of the rents and profits, but that in point of fact he always left the owner in possession to contest the title of the purchaser for years.

With respect to the statute under which real property was sold, he observed, that its language, viz.: "That real estate should be subject to the like remedies for seizing and selling it, &c.," which he construed to be by inquisition. To an observation from the court that commissioners gave deeds, he observed, that such commissioners were authorised by statute, pointing out the particular deeds they were to give, which they could not depart from.

The counsel concluded by insisting that the sheriff's deed was of no validity; that if it was objected that without a deed the sale could not be perpetuated, he considered that it might be effectually done by the sheriff making a return on the writ of *fi. fa.*, of the whole transaction, which return he should consider as more efficient, at a trial of *nisi prius*, than an authorised deed, and,

He further contended, that the property having been knocked down to McCarley, the agent at the sale, the sheriff was then *functus officio*, and could not transfer the property by deed or any other means, to any other person, distinguishing his authority from that of an auctioneer.

Robinson, Attorney-General, being required, by the court, to speak to the Solicitor-General's objections, on the ground of the sale being the only efficient act of the sheriff, observed,

That there was no law to compel the sheriff to sell by auction; that he might sell privately, even after a bidding at auction, and his sale would be good, and

With respect to the statute under which real property was sold, he observed, that its language, viz.: "That real estate should be subject to the like remedies for seizing and selling it, &c.," which he construed to be by inquisition. To an observation from the court that commissioners gave deeds, he observed, that such commissioners were authorised by statute, pointing out the particular deeds they were to give, which they could not depart from.

The counsel concluded by insisting that the sheriff's deed was of no validity; that if it was objected that without a deed the sale could not be perpetuated, he considered that it might be effectually done by the sheriff making a return on the writ of *fi. fa.*, of the whole transaction, which return he should consider as more efficient, at a trial of *nisi prius*, than an authorised deed, and,

He further contended, that the property having been knocked down to McCarley, the agent at the sale, the sheriff was then *functus officio*, and could not transfer the property by deed or any other means, to any other person, distinguishing his authority from that of an auctioneer.

Robinson, Attorney-General, being required, by the court, to speak to the Solicitor-General's objections, on the ground of the sale being the only efficient act of the sheriff, observed,

That there was no law to compel the sheriff to sell by auction; that he might sell privately, even after a bidding at auction, and his sale would be good, and

considered him in that respect in the same situation as an attorney or trustee; that no memorandum of a bidding at auction could set aside a deed under seal. (*a*) The counsel compared his sales also to those of masters in Chancery in England, which were not unfrequently superseded and a deed made to another person than the purchaser at auction. That the sales of freehold, in this country, were little analogous to the extent under an elegit in England, which conveyed no title, and the mode of conducting which was derived from a statute. (*b*) That there was no absurdity in considering the sheriff's deed as a bargain and sale.

It must be executed by persons in possession or having authority.

In this country it is commonly done by persons who are not in possession, and who frequently have never been in the country.

That the 5th Geo. II., which makes lands goods, gives the sheriff a sufficient title. He would ask whether, if after the sheriff had seized lands, he could not bring an action against persons pulling down houses, cutting down timber, &c.

That it could not with any shadow of reason be asserted, that a sheriff after an action of freehold lands was *functus officio*,—that clearly here as after the sale of a term for years in England, he must complete his sale by a competent conveyance, a form of deed proper for the subject matter—in the case of a chattel interest, by an assignment, in the case of freehold by grant or other competent deed.

(*a*) 5 Mod., 376. (*b*) Westminster, 2d.

The 5th Geo. II. requires the sheriff to seize and sell, certainly to proceed to sale, and to complete the sale according to the subject matter; he stands in some situation as an attorney, and conveys the whole interest of his principal, whatever it may be; that there may be special reasons for commissioners of bankrupts or other public authorities being directed in their mode of conveyance, but it is a most illogical inference to say, that because the act of Geo. II. has authorised sheriffs to sell, that they shall not convey.

That the form of conveyance, namely, that of a bargain and sale, has been the original and constant practice in this province, and has always been given in evidence and recognised at *nisi prius*. That there is no authority for a sheriff to make a special return to his *fi. fa.* Any other return, than that he had made the money, would be nonsensical. He makes a special return of the lands he has extended upon an elegit, because he is specially required by the writ so to do, and the term extent is only used in the statute to secure the debts of the Crown. The counsel cited the cases below (*a*) to shew that terms for years were transferred by sheriffs, in England, by deed, viz., by assignment.

That the Statute of Frauds requiring all assignments of land (except leases for three years) to be in writing, makes it necessary for the sheriff to assign lands by instrument in writing, and the sheriff's deeds of this country are, in point of fact, assignments, by the name of whatever species of conveyance they may be designated.

(*a*) 5 B. & A. 243; 1 B. & P. 506; 3 T. R. 295.

They must be signed by the party or his agent, and, to this purpose, the sheriff is the agent by the operation of law.

That the 5th Geo. II., putting real property in the colonies upon the same footing with chattels, authorises the sheriff to assign it as he conveys chattels, in England, by bill of sale.

That sheriff's titles are included in the Registry Act of this province, and that if some competent deed was not registered agreeable to its provisions, a purchaser would be liable to lose his property, for he cannot register a *fi. fa.*

That his situation is analogous to that of executors who sell land to pay debts if a testator will that his land be sold to pay debts. The executors sell, although they have no express authority or estate granted to them, so the sheriff is authorised by act of parliament to sell.

That the true reason why the statute did not point out any particular mode of conveyance is, that in different colonies different modes of conveyance might be adopted or required, as their laws took their origin from different sources.

The English law is adopted here, and, therefore, we use an English form of conveyance, namely, that of a bargain and sale.

Boulton, Solicitor-General, contra, observed, that he did not mean to contend that deeds were altogether useless and void, and not to be executed; but

that they amounted to nothing more than an evidence under seal of what the sheriff had transacted at the sale. That the cases cited of sales by attorneys or others were not in point. Attorneys proceeded by deed from the principal pointing out the extent of his authority, and the particular estate he was to sell. An auctioneer merely sold, but could not convey; in cases of second sales, the first was not completed by deed, and was in fact no sale. To make a parallel case, you should shew a sale to A. and a conveyance to B.

That sales by masters in Chancery are not analogous; they never gave deeds, but the principal, the master having no interest any more than an auctioneer has.

The sheriff has only a special property in goods and chattels, until he can sell and return his writ, and can have no other in freeholds in this country, converted into chattels by operation of the statute; when once he sells, his special property is totally at an end, even if he quits the possession of chattels after seizure, and the defendant retakes them and sells, the sheriff cannot recover from the purchaser.

The power, if such exists, for the sheriff to bring actions for injuries to freehold property, shews no possession, for the owner of goods may bring trespass for injuries or asportations to goods, which he has never possessed. If property is in execution and afterwards an extent comes before sale, the extent shall be preferred; (*a*) which cases shew that

(*a*) 1 Leeming, 282; 1 T. R. 730; 16 East, 254, 278; Blades and another v. Arundall, 1 M. & S. 797.

the property is not altered by the sheriff's seizure either in lands or goods.

The counsel observed that it was the duty of the sheriff, under a *fi. fa.* against lands, to go upon the lands and take possession by a twig, turf, &c. [Mr. Justice *Sherwood* asked whether the sheriff's deed stated that he had seized and taken the land into his possession.] The counsel observed, that that was not the case. He further observed, that the sheriff ought to leave a bailiff in possession.

The counsel further contended, that from the various definitions of title given by Blackstone, sheriffs' titles in this country must be considered as titles by record or none at all, for they come under no other definition. That the only titles mentioned are those by record, by descent, by deed, or by devise; that the sheriffs do not agree with the description or requisites of any deeds mentioned in the law authorities; therefore, if their titles are not by record, they are no titles at all, unless we can invent some fifth sort of title, not hitherto recognised.

That the only title a sheriff can give is a title by sale at auction, and his assignment or bill of sale are only evidences of what he must have previously sold there, in a correct and proper mode. That in the present case, the sheriff having sold by auction under 5th Geo. II., he was, for the reasons stated, *functus officio* the moment the hammer was down, and the purchaser was entitled to the property if he paid the money, and the sheriff could neither sell to another or change the exact quantity or species of property sold.

The counsel further observed, that the sheriff had no property in the thing sold, or it would be liable to his debts, &c., (upon the Chief Justice observing that no body supposed he had more than a special authority,) he continued, that he then could not have such a property as could raise a trust or give possession. (*a*) That the bankrupt laws were in point, although they authorised a sale, yet it was found necessary to point out the particular mode of conveyance. That where estates are created by operation of law, as by elegit, license of occupation, &c., the sheriff gives possession, but he is a mere conduit pipe to effect the intention of the law.

Under statute Geo. II. he is not required to do so. Further, he contended, that the sheriff could not convey, by bargain and sale, for he could not seize an equitable estate, (*b*) which is all that passes by bargain and sale.

As to the necessity for a deed by the sheriff, he observed, that there was none; that he was not compellable to give one, and, therefore, should not do it. And if so it could not be necessary that a purchaser should receive it.

The case cited can only mean that he need not, not that he ought not to return the writ *fi. fa.*

He concluded by observing the great variance between the advertisement and the deeds. The advertisement contained only one town lot, whereas the property contended for was two town lots, as appeared

(*a*) Showers, 87. (*b*) 8 East, 466.

by the diagram in evidence. They were subject to separate assessments, and that it was unreasonable to suppose a separate estate could be included under the terms "more or less," even if the deed could have any effect as separated from the advertisement and sale by auction, which he contended it could not.

SHERWOOD, J., pronounced the judgment of the court.

The defendant has taken several exceptions to the plaintiff's right of action in this cause; but it seems to me that the determination of the three following objections will be sufficient to set aside or establish the verdict:

Firstly.—Whether the knocking down of any lot of land to the highest bidder at public auction by the sheriff transfers the estate therein to the bidder?

Secondly.—Whether the 5,000 feet of land in dispute were offered to sale, and in fact sold by the sheriff?

Thirdly.—If the last mentioned land was sold, whether the estate in the same was vested in the lessor of the plaintiff and his co-partners in trade?

The first statute of the provincial parliament of Upper Canada, passed in the 32nd of Geo. III., introduced all the laws of England into this province, relative to property and civil rights. At the same period the statute 5th Geo. II., chap. 7, which renders lands liable to the payment of debts, began to be acted upon in this country. For seventeen years

afterwards the provincial legislature passed no law to direct the sheriff to advertise lands or goods before he proceeded to sell them. And, indeed, I am not aware of any express enactment even at this day requiring the sheriff to sell goods or lands at auction, although it may, perhaps, be inferred from the phraseology of the acts on the subject of sales made by the sheriff.

The usage and practice for about thirty-five years has been for the sheriff to sell both goods and lands at auction, because the laws of the late province of Quebec required it to be done, and the actnal repeal of those laws in this province never changed the mode of effecting sales under writs of execution. Little importance, however, attaches to the manner of making a sale by the sheriff, because it becomes necessary to examine how he must proceed to effect a valid title to the vendee. The statute 5th Geo. II., c. 7, in general terms, makes lands in the colonies liable to be sold for the satisfaction and payment of debts under the same species of process by which goods and chattels are sold, and, in my opinion, the legislature did not intend, by this statute, to define the mode of perfecting a conveyance to the purchaser from the sheriff, but leaves that part of his duty to be regulated by the laws of the province where the lands sold are situate.

To render lands liable to the payment of debts, and also subject to be sold under the same kind of process and proceeding, and in the like manner as goods and chattels, it appears to me were the sole objects of the British parliament in enacting the 4th section of the 5th Geo. II. I therefore conclude that

the power and authority which the law gives the sheriff to sell land, and the actual requisites also established by law to the completion and validity of the title, are entirely distinct. In my opinion the knocking down of any lot of land by the sheriff to the highest bidder at auction, is in itself an inchoate and imperfect proceeding, preliminary to the completion of the title to the vendee by a subsequent act on the part of the sheriff.

I consider that the sheriff, by virtue of the 5th Geo. II., the King's writ of execution and the seizure made under it, has a property in, and legal possession of, the debtor's lands, so far as to enable him for a valuable consideration to sell and convey all the estate to a *bona fide* purchaser, for the purpose of satisfying the judgment obtained by the creditor; I further think that he has the power, and that it is his duty to give a valid title to his vendee, as any other vendor, for a valuable consideration, is bound by law to give.

When the sheriff in England, under a writ of *fi. fa.*, seizes a lease for a longer duration than three years, and sells the term, it is necessary for him after the sale to execute a written conveyance to the purchaser, and the sheriff in this province must do the same, and by a parity of reasoning he is bound to give an equally valid conveyance when he sells the fee simple in the premises; Doe ex. Dem. Stevens v. Denston, is an authority to shew the manner in which the law requires the sheriff to convey a term in England. (*a*) The defendant has contended, that the return of the sheriff on a writ of *fi. fa.* amounts to a title, but it appears to me, that such a return is only

(*a*) 1 B. & A. 230.

a relation or statement on record for the information of the court, that the sheriff has levied the whole or a part of the debt and costs, or that he has not been able to do so, but this proceeding, in no one particular, bears any analogy to the common assurances by which lands are conveyed. I am of opinion that a deed from the sheriff to the vendee under an execution, is an eligible mode of completing a transfer of the estate. It may be registered in the county where the land lies; and the good of the public, and the policy of the laws require such an ultimate authentication of the title in every instance where it is practicable. The defendant has further contended in support of a different mode of conveyance, and to shew a deed from the sheriff unnecessary, that the estate in the lands sold by him under a *fi. fa.* passes to the vendee by act and operation of law only.

The most frequent case in which I am aware of any estate in lands passing by the mere act and operation of law only, without the assistance of any species of actual assignment between the parties interested, is, that of an implied surrender, which usually is where another estate, entirely incompatible with the existing estate accepted, or where a particular estate is transferred to the person having the immediate reversion or remainder at the time the surrender takes place, as in the case of Thomas v. Cook, (*a*) in which it was held by the court, that the peculiar circumstances of the case constituted an implied surrender to the landlord of the tenant's interest, by act and operation of law, and consequently was not within the third section of the Statute of Frauds. The doctrine of implied surrender, at any

(*a*) 2 B. & A. 119.

rate, bears no kind of analogy to the laws governing the sales of real estates in fee simple for valuable considerations, and, therefore, I conclude that wherever such sales are made by the sheriff, the estates are not conveyed to the vendee by the mere act and operation of law only, but by that act and operation joined to other acts on the part of the sheriff.

Another important question, in the course of the argument in the principal case, was incidentally made; whether it was necessary to the validity of the purchaser's title, to prove an advertisement of the lands by the sheriff previous to its sale at auction? It appears to me that such proof by the vendee is not at all requisite, because the statute requiring the sheriff to advertise the lands before he sells them is clearly directory, and a failure in this part of the sheriff's duty cannot affect an innocent purchaser by any existing legal principle. If the defendant has been injured by the sheriff's neglect in advertising the lands for sale, he has his action against the sheriff, exactly as he would have for not advertising goods and chattels before he sells them.

As to the second objection, whether the 5,000 feet of land in dispute was offered to sale, and in fact sold by the sheriff? This was a question peculiarly within the province of the jury to decide under the direction of the court, upon a full consideration of all the circumstances of the case.

Evidence on both sides was actually adduced to the jury, and the result of their deliberations was, that the sheriff offered to sale, and actually did sell the premises in question to the firm of Gillespie, Moffatt & Co., for the price of £690.

It appears to me that this finding of the jury is conclusive, especially as no new evidence, relative to the fact, has been offered or mentioned by the counsel for the defendant.

The third and last objection is, if the last mentioned land were sold, whether the estate in the same was vested in the plaintiff and his co-partners in trade?

I have already stated, that my opinion is, that the knocking down of any parcel of land to the highest bidder, at auction, by the sheriff, does not of itself transfer the estate to such bidder, in fee simple, without the aid of some subsequent act on the part of the sheriff. After the individuals composing the firm of Gillespie, Moffatt & Co., had paid to the sheriff the purchase money for the premises bought by them, they requested the sheriff, by their agent, as I understand from the counsel, to give a conveyance of the estate purchased to the lessor of the plaintiff, one of the partners in trade, for the use of the whole firm.

This, it appears, the partners wished to be done for their own convenience in the course of their mercantile business, and for no sinister or improper purposes whatever.

I really can discover no good reason why partners in trade should not be at liberty to make such an arrangement for their own convenience, and it appears to me not to contravene any principle of law or justice.

Upon consideration, therefore, of the whole case, I think the postea should be delivered to the lessor of the plaintiff.

Postea to the plaintiff.

A DIGEST

OF

ALL THE REPORTED CASES

IN

THE COURT OF KING'S BENCH.

FROM TRINITY TERM, 4 GEO. IV., TO TRINITY TERM, 8 GEO. IV.

ABATEMENT.

Pleading in.]—*See* PRACTICE, 24.

ACCIDENT.

By fire.]—New *nisi prius* record made up, the original having been destroyed by fire. *White* v. *Hutchinson*, 305.

ACCORD.

With satisfaction.]—Accord, with satisfaction, *held* a good plea to breach of covenant, and leave to withdraw the demurrer refused. *Bayard et al.* v. *Partridge*, 406.

ACCOUNT STATED.

In an action for goods sold, and upon an account stated, where the plaintiff's demand had been of several years' standing, and the jury gave a verdict for £18; the court, upon a motion for a new trial, considered that evidence of an acknowledgment by letter of an account being due, and of an account having been read over to the defendant, to which he made no objection, coupled with evidence that an item of £2, which was contained in the bill of particulars produced in court, was the same with that contained in the account so read over to the defendant, and with the witnesses' belief that the accounts were the same, was sufficient to support the verdict, though one principal ground of the witnesses' belief of the accounts being correspondent arose from his knowledge of the plaintiff's character. *Large* v. *Perkins*, 62.

ACTION.

Form of.]—Case, and not trespass, is the proper remedy against a sheriff for selling goods under a *fi. fa.* before the eight days are expired. *Moore* v. *Malcolm*, 273.

On the case.]—*Semble*, that if in an action upon the case for not manufacturing 400 bushels of wheat into flour, the plaintiff recovers damages equal to the value of the wheat delivered to the defendant, he cannot bring an action for goods sold for a part of the wheat which

had, in point of fact, been re-delivered to the plaintiff, and that such re-delivery should have been given in evidence in mitigation of damages. And that an action upon the common counts could not, at any rate, be sustained in such case. *Andrus* v. *Burwell*, 382.

Pleadings in.]—In an action on the case against a sheriff, for not giving notice of the sale of effects taken in execution, at the most public place in the township, *held* not necessary to set out the name of such place. A statement that defendant sold the goods without legal notice, and that he sold them for less than their real value, not considered as distinct and independent grounds of action. *Malcolm* v. *Rapelje, Sheriff, &c.*, 361.

AFFIDAVIT.

Form and requisites of.]—An affidavit not considered as inefficient because the place of taking it was omitted in the *jurata*. *McLean* v. *Cumming*, 184.

1. *To ground application for security for costs.*]—Where a plaintiff had left the province, the affidavit requiring security for costs should state that he has become a stationary resident in a foreign jurisdiction. *Micklejohn et al.* v. *Holmes*, 39.

2. To ground an application for costs, upon malicious arrest, the affidavit must state that the defendant was arrested without reasonable or probable cause. *McIntosh* v. *White*, 57.

Supplementary, where allowed.]—*See* COGNOVIT, 2.

1. *To hold to bail.*]—An affidavit to hold to bail, stating that the defendant is indebted to the plaintiff upon a certain bond or obligation is insufficient. *Prior* v. *Nelson*, 176.

2. An affidavit to hold to bail, stating, "that the defendant was indebted to the plaintiff, in the sum of £50, for the use and occupation of a certain tenement," *held* sufficient. *Ferguson* v. *Murphy*, 206.

3. The court set aside an arrest, the affidavit to hold to bail not setting forth the deponent's name in words at length. *Richardson* v. *Northrope*, 331.

4. Where a person had been arrested under a judge's order, the court did not consider it necessary to make use of the precise words pointed out by the provincial statute, authorising arrest. *Bardon v. Cawdell*, 486.

5. The affidavit to hold to bail upon a promissory note must state it to be payable. *Smith* v. *Sullivan*, 493.

6. In an affidavit to hold to bail, the provincial statute is not satisfied by the words, "that the plaintiff had reason to believe that the defendant was about to depart this province without paying, &c." *Choate* v. *Stephens*, 449.

AGREEMENT.

See PLEADING, 1.

AMENDMENT.

See PLEADING, 1.

1. When the writ issued from the office of the deputy clerk of the Crown in an outer district, the venue being laid in the Home District, the plaintiff had leave to amend upon payment of costs. *Crawford* v. *Ritchie*, 84.

2. The court permitted an amend-

ment to be made in the address, cause of action, and teste of a writ of *capias*. *Myers* v. *Rathburn*, 202.

3. Judgment roll amended by adding costs. *Wright* v. *Landell*, 304.

4. A writ of *fieri facias* may be amended so as to have relation to the day of the entry of the judgment. *Andrus* v. *Page*, 348.

ARBITRATION.

1. Where the plaintiff's attorney had attended a meeting of arbitrators, and they had made their award; the court refused to set aside the same, upon the ground that the plaintiff had not attended to give his evidence agreeable to the provision in the rule of reference, from the mis-carriage of a notice sent to him by his attorney for that purpose, and although the decision of the arbitrators proceeded principally upon the evidence of the defendant. *Macdougall* v. *Camp*, 87.

2. The court refused to set aside an award on the ground that the arbitrators had desired it not to be delivered until the costs for making it were paid. *Gee* v. *Atwood*, 119.

3. Where a cause has been referred by this court to arbitration, notice of the time of the sitting of the arbitrators must be given to the attorney in the cause. *Allan* v. *Brown*, 335.

ARREST.

1. An officer employed in executing the process of the court discharged from arrest. *Welby* v. *Beard*, 304.

2. The court will not set aside an arrest upon the ground of irregularity in the affidavit to hold to bail after a prisoner has in fact escaped. *Keefer* v. *Merrill et al*, 490.

3. A plaintiff cannot arrest a defendant for the amount of purchase money paid for an estate conveyed to him by deed, upon the ground that the defendant, the vendor, was not lawfully seized, but must resort to his covenant, and proceed by judge's order. *McLean* v. *Hall*, 491.

4. Where a defendant had been arrested by one of two plaintiffs for £18, and was afterwards arrested in the name of both for £18 10s., the former amount being included in the second, the court ordered the bail bond to be cancelled. *Ransom and Sheldon* v. *Donahue*, 493.

ARTICLED CLERK.

See ATTORNEYS, 1.

ASSESSMENT OF DAMAGES.

The court refused to set aside an assessment of damages upon the ground that the verdict was too low from a misapprehension in the jury. *Perkins* v. *Scott*, 405.

ATTACHMENT.

See ATTORNEYS, 3, 5, 8. AWARD, 6.

1. Where a rule *nisi* for an attachment for non-payment of money had lapsed, the court refused to renew the rule without a fresh affidavit. *Roy et al.* v. *Delay*, 9.

2. Attachment lies against commissioners of courts of requests who try causes in which they have an interest, though remote. *Rex* v. *McIntyre et al.*, 22.

3. Where a sheriff had returned a writ in an informal manner, the court refused an attachment in the first instance. *Bayman* v. *Struther*, 39.

4. Where defendants had been brought into court upon an attach-

ment, although they cleared themselves upon interrogatories of imputed contempt, the court refused to allow costs against the prosecutor, although he had omitted a fact in his affidavit which might have affected their decision upon granting the attachment, and although one of the affidavits upon which the attachment was moved for, was not filed early enough for them to answer it by a counter affidavit. *Rex* v. *McKenzie and McIntyre*, 70.

ATTORNEYS.

See PRACTICE, 4.

1. A person may be admitted an attorney of this court upon his own affidavit of service, where the attorney to whom he was articled is absent from the province. *Ex parte Radenhurst*, 138.

2. A certificate from the master, and an affidavit of the person entitled, stating "that he had, during his clerkship, done every thing required of him," was held not sufficient to entitle him to be admitted an attorney of this court. *Ex parte Lyons*, 171.

3. An attorney of this court, practising in the district court, is liable to an attachment for not paying over moneys received for his client. *Carruthers* v. ——— *one, &c.*, 243.

4. An attorney in this province is privileged to sue and be sued at York. *Smith* v. *Rolph, one, &c.*, 272.

5. The court will not issue an attachment against an attorney to compel him to pay over money to his client which he had in fact forwarded, but which had been lost by accident. *Radcliffe* v. *Small, one, &c.*, 308.

6. *Quære*, whether an attorney suing as an unprivileged person, is entitled to charge fees. *Beardsley* v. *Clench*, 309.

7. An attorney, merely as such, is not authorised to discharge a defendant in execution, certainly not without receiving the debt, and the sheriff so discharging a debtor upon his authority will be liable as for an escape. *Brock* v. *McLean, Sheriff*, 235.

8. Where an attorney of this court, practising in an inferior court, has charged, and the judge has allowed costs clearly not sanctioned by law, this court will punish by fine or attachment. *Rex* v. *Whitehead and Ward*, 476.

9. To subject a person to the penalty of the 22nd Geo. II., cap. 46, for suing out process, &c., the attorney allowing his name to be used, must be first convicted. *Rex* v. *Bidwell*, 487.

AWARD.

See COSTS, 1.

1. Where there is no provision in an order of reference at *nisi prius*, to make it a rule of court, the court will not set aside the award. *Cumming* v. *Allen*, 205.

2. A mistake in the calculation of interest, *held* not to be a sufficient ground to set aside an award. *Priestman* v. *McDougall*, 451.

3. An award will be set aside if arbitrators examine one of the parties upon oath, they not having been authorised to do so by the submission. *Stocking* v. *Crooks*, 492.

4. Where in an action for bond for the performance of an award, the court set out the intention of plaintiff's daughter and her husband, the defendant, to live separate. That

it was submitted to arbitrators to settle the amount of an allowance to be paid her in lieu of alimony, &c., upon plaintiff's entering into such security as should be deemed proper to indemnify her husband, &c., and that plaintiff should, when the award was made known, enter into such security; that the condition of the bond was to pay defendant's wife what should be awarded upon plaintiff's entering into such security; assigning for breach (without stating that the award had fixed the nature or amount of the security) that the award had fixed the allowance at £50, payable quarterly thenceforward, commencing from the day of her departure from her husband, the defendant, (a day in point of fact antecedent to the submission,) averring that plaintiff did afterwards by his deed, &c., covenant to indemnify, &c. That, although plaintiff afterwards tendered said covenant, and exhibited the bond and award, (without any profert of the covenant,) and demanded the sum, to wit, £62 10s., being one year and one quarter from 6th September, 1822, being the day of the separation, &c., (a day antecedent to the submission,) due on the award—refusal of payment was held good upon a special demurrer objecting to it as inconclusive, having a retrospect not warranted and wanting profert of the covenant. A second count omitting the statement of notice of the award, and a request to pay, also *held* good. A third count assigning for breach that plaintiff offered to enter into any security as might be deemed proper to indemnify, &c., yet that defendent refused to accept any thing at all therein, (without stating a tender of covenant,) also *held* sufficient, upon the ground that defendant's refusal to accept any thing at all, discharged the plaintiff from making such tender. *Beasley* v. *Stegman*, 498.

5. The court will not, upon a first motion, grant a rule absolute for an attachment for non-performance of an award, although the party consents by his counsel. *Stewart* v. *Crawford*, 409.

6. It seems to be sufficient in an action upon bond, conditioned for the performance of an award upon the plea of *non est factum*, and subsequent suggestion of breaches by the plaintiff to prove the record an award tallying with it. That if a defendant proposes to object to matter apparent upon the face of the award, or to variance between it and the submission, he should pray oyer and demur. *Lossing* v. *Horned*, 219.

BAIL.

See PRACTICE, 25.

1. *Affidavit to hold to bail, passim*.—Where one of the bail to the sheriff had, in consequence of the defendant leaving the province, and under an apprehension that he would not return to defend the suit, given a cognovit in his own name to the plaintiff, the court upon an affidavit of merits stayed the proceedings upon the cognovit. *Roberts* v. *Hasleton*, 32.

2. Where the defendant, one of the sheriff's bail, had from misapprehension given the plaintiff in the original action a cognovit, and had moved for and obtained an order to stay proceedings upon it until the action against the principal could be tried, which order was conditional upon payment of "all costs incurred by proceedings against the sheriff's bail," the court determined that the costs of the proceedings upon the cognovit

should be considered as such costs. *Hasleton* v. *Brundige*, 84.

3. Where a defendant presented himself to the sheriff in discharge of his bail before the return of the *ca. sa.*, which had been lodged in the office merely to fix the bail, and the plaintiff nevertheless proceeded against them, this court set aside the proceedings. *Ward* v. *Stocking et al., Bail of Mosier*, 216.

4. Where a defendant had neglected to put in special bail upon the representation of the plaintiff that it was unnecessary, (they being about to compromise,) proceedings upon the bail bond were stayed for one month to give defendant an opportunity to put in such bail. *Myers* v. *Rathburn*, 202.

5. The *ca. sa.* lodged in the sheriff's office to charge the bail is not a charging in execution. *Dorman* v. *Rawson*, 278.

BAIL BOND.

See ARREST, 4.—BAIL, 4.

BILLS OF EXCHANGE.

1. Where the plaintiff, endorsee of a promissory note payable on demand, had taken it two years after its date and was cognisant of an agreement entered into between the holder from whom he took it and the defendant, (the maker,) that the same should be set off against a bond of which the defendant was obligee, and the then holder the obligor, the court held that a plea stating these facts was good upon general demurrer. *Brooke* v. *Arnold*, 25.

2. Where a note was made payable at a particular place, although no averment of its being presented there for payment appeared upon the record, this court after a verdict for the plaintiff, and proof at the trial of a subsequent promise, refused a nonsuit. *McIver et al.* v. *McFarlane*, 113.

BODIES CORPORATE.

The declaration at the suit of a corporation named the individuals composing it, and also described them in their corporate capacities. The breach was in their names as individuals only. The court *held* that a *non pros.* might be signed and execution issue against them in their private capacities. *Markland et al. Commissioners, &c.*, v. *Dalton*, 125.

BREACHES.

Suggestion of.]—*See* AWARD, 4.—PROOF, 2.

CERTIORARI.

When the judgment of the court of requests had been set aside upon the application of the defendant, without any interference on the part of the plaintiff, the court refused to grant an attachment against him for non-payment of costs of removing the proceedings. *Cramer* v. *Nelles*, 36.

COGNOVIT.

See PRACTICE, 12; AND BAIL, 1, 2.

1. One partner cannot sign a cognovit in the name of a firm without a special authority, and a judgment entered upon such will be set aside with costs. *Holme* v. *Allan and Gray*, 348.

2. A supplementary affidavit al-

lowed to be filed after judgment entered upon cognovit, stating that it had been taken as prescribed by the rule of court. *Everingham* v. *Robinett*, 380.

3. The court will not set aside an execution upon the ground, that the action was commenced in debt, and the cognovit given in assumpsit. *Brown* v. *Waldron*, 494.

4. The rule requiring the name of an attorney to be endorsed upon a cognovit, does not apply where an attorney is plaintiff. *McLean* v. *Cumming*, 184.

5. The court will give leave to enter judgment upon cognovit against one defendant, the other being dead. *Nichol* v. *Cartwright*, 464.

COMMISSION TO EXAMINE.

The motion for a commission to examine witnesses must be supported by affidavit. *McNair* v. *Sheldon*, 451.

COMMON COUNTS.

Where action cannot be sustained upon.]—*See* ACTION ON THE CASE.

CONDITION, (PRECEDENT.)

Where discharged.]—*See* AWARD, 4.

CONTEMPT.

Impertinent matter in a return to a writ considered as a contempt in the sheriff. *Jones* v. *Schofield*, 441.

COSTS.

See AFFIDAVIT, 1, 2.—ARBITRATION, 2.—ATTACHMENT, 4.—CERTIORARI.—STATUTES, 6.—BAIL, 2.

1. Where an action is commenced in King's Bench, and arbitrators upon reference award damages under £15, the plaintiff is not deprived of costs under the district court act. *Lang* v. *Hall*, 215.

2. Where an action was brought upon a promissory note, the consideration for which had arisen in the district of A.; and the plaintiff brought his action and recovered a verdict under £15, in the district of B., the court refused to set aside the judge's certificate to entitle the plaintiff to costs under the district court act. *Secord* v. *Horner*, 215.

3. The court refused to order a plaintiff to pay to defendant's executors the costs of not going to trial pursuant to notice. *Morris* v. *Randal*, 299.

4. In an action for a libel wherein the plaintiff recovered only 20s. damages, the judge who tried the cause refused to certify. *Cameron and Wife* v. *McLean*, 298.

5. The court determined it not unreasonable for the gaoler to charge 6d. per mile both going and returning with a prisoner by *habeas corpus*. *Robinson* v. *Hall*, 482.

6. Where a defendant applied for security for costs by affidavit, dated 22nd May, and one of the plaintiffs deposed in an affidavit on the 21st June, that he was resident at Kingston, where in fact he was in gaol, the court ordered security. *Bastable et al.* v. *Mowatt*, 492.

COVENANT.

A plea stating that plaintiff enjoyed an estate without eviction, held not a sufficient answer to a count setting out a covenant that plaintiff should enjoy free from incumbrances. *Sherwood* v. *Johns*, 232.

COURT OF REQUESTS.

See ATTACHMENT, 2.

DEBTOR AND CREDITOR.

See PAYMENT.

DEEDS.

See SEAL.

DEMURRER.

See PRACTICE, 17.—PLEADING, 1.

The court gave leave to withdraw a demurrer upon payment of costs and pleading issuably, though the plaintiff had lost a trial. *Tully* v. *Graham*, 41.

DEPUTY CLERKS OF THE CROWN.

See PRACTICE, 1; AND VENUE, 2.

The court required that the appointment of deputy clerks of the Crown should be sanctioned by the court. *Cawdell ex parte.*

DISSEISIN.

Where the heir and the widow of the mortgagor remained in possession after the death of the ancestor, but had frequently recognised the title of the mortgagee, *held*, not to be disseisin. *Doe ex dem. Dunlap* v. *Macdougall*, 464.

DISTRICT COURTS.

See COSTS, 1, 2.

Where a plaintiff has special counts in his declaration, but abandons them and recovers upon counts within the competence of a district court, this court will order judgment to be entered on those counts only. *Wentworth* v. *Hughes*, 178.

DISTRICT OFFICES.

See PRACTICE, 1, 4.

EJECTMENT.

See LIMITATIONS, (STATUTE OF.)

1. Though a probability exists that a defendant in ejectment may have merits, the court will not necessarily grant a new trial, the verdict in ejectment not being conclusive upon the parties. *Stansfield Doe ex dem.* v. *Whitney*, 130.

2. A landlord may be admitted to defend in ejectment without an affidavit stating that he is so. *Griffin Doe ex dem.* v. *Lee*, 235.

3. The order of this court which authorises rules to be taken out in the deputy's office, in the country, does not include rules *nisi* in ejectment. *Clarke Doe ex dem.* v. *Roe*, 247.

4. Where it was sworn that the declaration, in ejectment, was served upon the tenant in possession, the court refused to set it aside upon an affidavit, stating it to have been served upon a servant or stranger upon the premises. *Dunlop Doe ex dem.* v. *Roe*, 350.

5. Where judgment is obtained against the casual ejector, in consequence of the tenant in possession having neglected to give notice to his landlord, this court will set the judgment and writ of possession aside, and compel the tenant to pay costs. *Robertson Doe ex dem.* v. *Metcalf*, 377.

6. Service upon one of several tenants in possession of the same parcel of land is sufficient. *Davidson Doe ex dem.* v. *Roe*, 491.

EJECTMENT.]—*English rules in.*

Plaintiff's attorney having served his declaration in ejectment, with notice to appear in a term not issuable, agreeable to a modern rule of the Court of King's Bench, in Eng-

land, not introduced into this country nor appearing in Tidd's Edition of 1817, the judgment was set aside. The English rule is now adopted. *Griffin Doe ex dem.* v. *Roe*, 203.

Also see *Burger Doe ex dem.* v. ——, 269.

Also, *Rules of Court*, 225.

ESCAPE.

See ATTORNEY, 7.—PLEADING, 3.

The court refused to discharge a prisoner from custody, upon the ground that the gaoler having taken him before a magistrate without warrant, had suffered a voluntary escape. *Robinson* v. *Hall*, 453.

EVIDENCE.

See ACCOUNT STATED, PROOF, 2.—*Exigi facies*, PRACTICE, 3.—SLANDER, 1, 2.

1. Where the witness who proved the notice required by the statute to be given to a J. P. before action brought, had, in his examination in chief, sworn that he had served a true copy of the notice produced in court; but, upon his cross-examination, said that it might vary a word or two, and the judge at *nisi prius* had, in consequence, directed the jury to find a verdict for the defendant. The court granted a new trial. *Gardner* v. *Burwell*, 54.

2. The court refused to set aside a verdict against the sheriff, in an action for an escape upon the ground that the coroner's jury, who tried the cause, was the same with that returned by the sheriff, that the plaintiff had produced the original *ca. sa.* instead of a copy, or that the judgment against the party escaping had been obtained without consideration. *Payne* v. *McLean*, 325,

EXECUTION.

See PRACTICE, 9, 10.

1. A defendant may, upon the affidavit required for the arrest of the persons of debtors, issue an execution against the body of a plaintiff who has suffered a judgment of non-pros. *Johnson* v. *Smadis*, 138.

2. Where, with a view to give a defendant time, the plaintiff had upon the misinformation of the deputy sheriff, given a receipt for the debt, as the only proper mode of staying the execution, and which receipt the sheriff had stated in a return to the writ of *fi. fa.* the court ordered an *alias* to issue. *Hinnerley* v. *Gould*, 143.

3. The court refused to set aside upon motion a *ca. sa.* which had been issued upon judgment more than a year old, no *sci. fa.* having issued to revive it. *McNally* v. *Stevens*, 263.

EXECUTORS.

See COSTS, 3.—PRACTICE, 6.

1. Where one of three executors is deceased, and the survivors bring an action in right of their testator, the declaration must state that payment has not been made to the deceased executor. *Nichall et al. Exor.* v. *Williams*, 21.

2. Where the plaintiff had recovered a verdict against executors for a breach of promise of marriage made by their testator, the court would not (on the ground that such an action could not lie against personal representatives) arrest the judgment. *Davy* v. *Myers*, (*Executors of*,) 89.

EXIGENT.

See PRACTICE, 3.

FIRE.

See ACCIDENT.

FOREIGN COURTS.

The judge's private seal is no evidence of the proceedings of a court of justice. *Brown* v. *Hudson*, 272.

FOREIGN LAW.

1. A foreign law authorising the discharge of an insolvent debtor must be directly proved, and the court will not listen to an application for the discharge of such person, after he has allowed judgment to go by default, and is in execution. *Brown* v. *Hudson*, 346.

2. A power of attorney and contract of sale, passed before a notary, in Lower Canada, (an instrument not under seal,) is not sufficient to authorise a conveyance of lands in this province. *Sheldon Doe ex dem.* v. *Armstrong*, 352.

3. Where the person of an insolvent debtor is discharged from arrest by a foreign authority, the court will not set aside an arrest made under the process of this court, for the same cause of action, it not being bound to model or restrain the course of proceeding by that of other countries. *Brown* v. *Hudson*, 390.

4. The court refused to discharge a defendant upon filing common bail on the ground of his person having been discharged from arrest, by an insolvent law of New York. *Dascomb* v. *Heacocks*, 438.

FRAUDS.

1. *Statute of.*]—An item in an account stated, being the sum charged for the price of a lot of land does not make it incumbent on a plaintiff to prove the agreement respecting such land to have been made in writing. *Dalton* v. *Botts*, 281.

2. Evidence of a verbal agreement to allow land to be set off against the amount of a note, *held* not to be admissible. *McCollum* v. *Jones*, 442.

GRANT FROM THE CROWN.

The King's patent gives the patentee an estate sufficient to maintain trespass without evidence of actual entry. *Clench* v. *Hendricks*, 403.

GRANTEE OF THE CROWN.

See STATUTES, 1.

HABEAS CORPUS.

See COSTS, 5.

HUSBAND AND WIFE.

A recognition by a party that A. is his wife, is sufficient to charge him with necessaries although they do not cohabit, having, in fact, separated, and although she may not *stricti juris* be his wife. *Hawley* v. *Ham*, 385.

INCIPITER.

See PRACTICE, 5.

INDICTMENT, (COPY OF.)

See PRACTICE, 13.

INFERIOR COURTS.

See ATTORNEYS, 3, 8.

INQUISITION.

Where an inquisition had been found against the defendant under

the provincial statute, 54 Geo. 3, the court refused to set the same aside on the grounds that the lands vested in the Crown by that inquisition had been granted by the Mohawk Indians to the defendant for a term of 999 years, in trust for the support of his wife (a Mohawk woman) and three children. *Rex.* v. *Phelps*, 47.

INSOLVENT DEBTOR.

See FOREIGN LAWS, 1, 3.

1. The court will not grant a rule absolute in the first instance for the discharge of an insolvent debtor for non-payment of the weekly allowance, unless the affidavit states that no interrogatories have been filed by the plaintiff. *Williams* v. *Crosby*, 10.

2. An affidavit to ground the detention of a prisoner who has applied for his discharge for non-payment of his weekly allowance, must not only state his being possessed of property which he became entitled to subsequent to his imprisonment (or his obtaining his allowance,) but also that he has secreted or fraudulently parted with it. *Williams* v. *Crosby*, 18.

3. A prisoner insolvent applying for his weekly allowance, is suffi ciently described in the affidavit as a prisoner in execution in the gaol of the Midland District, at the suit of the plaintiff. *Shuck* v. *Cranston*, 370.

4. The court refused to consider the service of an order for payment of an insolvent debtor's weekly allowance, under the 2nd Geo. IV., as a service under the late statute, 7th Geo. 4th. *Shuck* v. *Cranston*, 437.

5. The court will not grant an insolvent debtor an order for the arrears of his weekly allowance which had accrued pending an unsuccessful application for his discharge. *Moran* v. *Maloy*, 408.

INTEREST.

The court will not order satisfaction to be entered upon judgment without payment of interest. *Logan* v. *Secord*, 173.

INTERROGATORIES.

See WITNESS, 1.

JUDGMENT.

The court refused to set aside a verdict in an action for an escape on the ground that the judgment was without consideration. *Payne* v. *McLean*, 325.

JURY.

The court refused to set aside the verdict against the sheriff on the ground that the coroner's jury, who tried the cause, was the same with that returned by the sheriff. *Payne* v. *McLean*, 325.

KING'S BENCH.

1. The proper style of this court is, "before his Majesty's justices," not before the King himself; *coram vobis*, not *coram nobis*. *Boulton* v. *Randal*, 127.

2. The court refused to interfere equitably to set aside a sheriff's sale, and covenant for payment of purchase money entered into thereon. *Wood* v. *Leeming*, 463.

LABOURERS.

A person hiring himself to work with his own team of oxen, is not an object of the British statutes for

punishing labourers deserting their service. *Whelan* v. *Stevens*, 439.

LIBEL.

See COSTS, 4.

Where a paper contains matter which is grossly libellous *per se.*, and without a reference to any particular situation or office to make it so, it is no objection to a verdict upon such libel, that the office mentioned in the declaration was of an inferior grade; that it was not sufficiently proved that the plaintiff held such office; that there was no such office in fact; that no proof had been adduced that the person mentioned in the declaration, as principal in the office, was so in fact; nor is an objection that the libel does not support the inuendoes supported by shewing that there was other matter in the libel, not set out in the declaration, indicating the defendant's reasons for its publication; nor is such libel excused on pretence of its being a formal application to the head of a department to redress grievances; and charging a person with violating a public trust are words libellous *per se.*, and do not require connexion with any particular office. An office may be introduced as an explanatory circumstance. *Jones* v. *Stewart*, 453.

LIMITATIONS.

Statute of.]—The operation of the Statute of Limitations is not suspended by the 59th Geo. III., cap. 3. Where twenty years' possession has followed a division of adjacent lots, ejectment will not lie, although the division may have been inaccurate. *Stuart Doe ex dem.* v. *Radish*, 494.

MAGISTRATES.

See TRESPASS, 1, 2.

MALICIOUS ARREST.

See STATUTES, 6.—AFFIDAVIT, 2.

MANDAMUS.

1. *Quære*, whether this court will award a mandamus to a treasurer of a district. *Rex* v. *Harris*, 10.

2. This court refused to issue a mandamus to justices of a district to order parliamentary wages to be paid to the representative of a town under the provincial statute. *McBride, Rex.* v. *The Magistrates of Niagara*, 394.

MEMBERS OF THE HOUSE OF ASSEMBLY.

See PRACTICE, 15.

Wages of.]—*See* MANDAMUS, 2.

MILLS.

See NUISANCE.

MOTIONS.

See ARREST, 2.

NEW TRIAL.

See ACCOUNT STATED, EJECTMENT, 1.—PRACTICE, 11, 26.—TROVER, SEDUCTION, 1, 2.

1. The motion for a new trial must be made within the first four days of term succeeding the trial, *i. e.*, before the expiration of the rule for judgment.—*Orser* v. *Stickler*, 42.

2. Smallness of damages no objection to a new trial, where a verdict is manifestly contrary to evidence and the judge's opinion. *Brookfield* v. *Sigur*, 200.

3. Where justice has been done between the parties, the court refused to grant a new trial upon the ground that it had been agreed between the contending parties that

a third person should have been applied to, to settle the subject matter of the action, the third person being under no legal liability to do so. *Nevils* v. *Wilcox*, 265.

4. *Semble*, that where heavy damages are given in an action of covenant for good title, and it appears that the plaintiff knew the state of defendant's title, the court will grant a new trial, and will intend that in that case excessive damages have been given contrary to evidence. *Emery* v. *Miller*, 336.

NON-PROS.

See PRACTICE, 19.

BODIES CORPORATE.

See EXECUTION, 1.

NON-SUIT.

See PRACTICE, 11.

1. Where a plaintiff suffers a nonsuit voluntarily, the court will not afterwards set it aside. *Saunders* v. *Playter*, 37.

2. A nonsuit cannot be moved for in bank, unless a point has been reserved at *nisi prius*. *Brookfield* v. *Sigur*, 200.

3. A nonsuit cannot be moved for in bank, unless it has been moved for at *nisi prius*, and the point reserved by the judge with the plaintiff's consent. *Hawley* v. *Ham*, 385.

4. If a defendant moves a nonsuit, and afterwards examines witnesses, the plaintiff is entitled to any benefit which he can obtain from their evidence in support of his case. *Brock* v. *McLean, Sheriff*, 398.

Judgment as in case of.]—*See* PRACTICE, 11, 22.

NOTICE.

Miscarriage of.]—*See* ARBITRATION, 1.

Where four terms have elapsed after issue joined, a term's notice is necessary to be given before any subsequent proceeding, unless within the four terms a notice of intention to proceed has been given. *Henderson* v. *McCormick*, 412.

NUISANCE.

A defendant who takes upon himself to abate a nuisance, viz.: a mill-dam, may be called upon to pay damages for any injury done to the plaintiff's property, beyond what was necessary for the purpose of removing the public inconvenience. *Truesdale* v. *McDonald*, 121.

ONUS PROBANDI.

See PROOF.

OYER.

See WITNESS, 2.

PARTNER.

See COGNOVIT, 1.

PAYMENT.

Where a debtor is indebted upon two accounts, and makes a payment without directing to which account it is to be placed, the creditor has his election to place it to which he pleases, unless there is a specific direction for its application, or circumstances in the case tantamount to one. *Hagerman* v. *Smith*, 123.

PLEADING.

See TRESPASS, 3, 4, 5, AND COVENANT.—VARIANCE.

1. Where, to a declaration in debt upon bond, the plea stated that the plaintiffs had not made a conveyance according to agreement,

the plea held bad upon special demurrer, for want of shewing what the agreement was, although the agreement was referred to, and its contents might be collected from the condition of the bond as set out upon oyer. *McGilvray and Wife* v. *McDonell*, 139.

2. In an action for breach of covenant for quiet enjoyment, freedom from incumbrances, &c., it is sufficient for the declaration to state that one A. B. was seized before the conveyance to plaintiff, and that plaintiff was obliged to pay him £300 to obtain possession,—without stating eviction by A. B.—a plea stating that defendant's executors, as aforesaid, submitted to arbitration, does not imply that they submitted in their character as executors. *Bleeker* v. *Myers, and Myers, Executors, &c.*, 285.

3. A plea to an action for an escape, setting out "that the *ca. sa.* was not endorsed with the sum set out in the declaration," *held* bad upon special demurrer. *Brock* v. *McLean, Sheriff, &c.*, 310.

4. Counts in assumpsit cannot be joined in a declaration with counts in debt, and such misjoinder is not cured by verdict. *Beebe* v. *Secord et al.*, 409.

POWER OF ATTORNEY.

See FOREIGN LAWS, 2.

PRACTICE.

See DEMURRER.—NEW TRIAL, 1.—VENUE, 2.—WITNESS, 1, 2.

1. There is no occasion for the seal of the court to be affixed to a record of *nisi prius* in an outer district, where the suit has been instituted and cause tried there. *Scott* v. *Macgregor*, 88.

2. A writ of *venditioni exponas* against lands and tenements having but a few days between the teste and return is irregular, although the exigencies required by the provincial statutes, respecting the teste, delivery and return of the *fi. fa.* upon which it was grounded, may have been complied with. *Armour and Davis* v. *Jackson*, 115.

3. A writ of *exigi facias* will be awarded by this court, upon the application of a prosecutor, without its being applied for by the Attorney-General. *Rex.* v. *Elrod*, 120.

4. Where a bill had been filed against an attorney in the office of an outer district, and proceedings had thereupon to verdict and judgment, the court refused to set them aside for irregularity. *Mitchell* v. *Tenbroeck, one, &c.*, 126.

5. The entry of the incipitur upon the roll is a sufficient entry to enable the defendant to move for judgment as in case of a nonsuit. *Brown* v. *Stuart*, 144.

6. Where husband and wife, executrix, are sued, service of process upon the husband only is sufficient as well as in other cases. *Shuter and Wilkins* v. *Marsh et Ux., Executrix*, 172.

7. An application for a judge's certificate that a cause is a proper cause for a special jury must be made immediately after the trial, on the same day the cause is tried. *Binkley* v. *Desjardines*, 177.

8. A capias cannot issue upon a verdict in trespass without a judge's order. *McLeod* v. *Bellars*, 273.

9. An alias *fi. fa.* may issue against lands and tenements returnable at such a distance of time as to allow the sheriff to advertise, &c. *Nickall* v. *Crawford*, 277.

10. A *fi. fa.* may issue against defendant's goods, although he may

be discharged from prison for not having been regularly charged in execution. *Dorman* v. *Rauson*, 265.

11. Where the plaintiff's attorney consented to a nonsuit, under an apprehension that he would be allowed to move for a new trial, the court granted the same, although his consent had not been coupled with the leave of the judge at *nisi prius* to move. *Cameron and wife* v. *McLean*, 298.

12. A witness to a cognovit having left the province, leave was given to enter up judgment. *King* v. *Robins*, 299.

13. A copy of an indictment for high treason may be had by consent of the Attorney-General. *Rex* v. *John McDonell*, 299.

14. *Semble*, that a rule to plead is necessary where bail is filed according to the statute. *Smith* v. *Sumner and Nevills*, 308.

15. The court gave leave to issue an original summons to warrant the testatum issued against a member, after motion to set the proceedings aside for irregularity. *McKoane* v. *Fothergill*, 350.

16. A rule to plead where necessary, may be given at any time in vacation. *Campbell* v. *Berrie, one, &c.*, 381.

17. Leave to withdraw demurrer to plea of accord with satisfaction to action for breach of covenant refused. *Bayard* v. *Partridge*, 406.

18. The motion for a commission to examine witnesses must be supported by affidavit. *McNair* v. *Sheldon*, 451.

19. There is no necessity for a term's notice by a defendant signing a non-pros, &c., although four terms may have elapsed without any proceeding had. *Culver* v. *Moore*, 451.

20. An agreement between the parties takes away the necessity of a term's notice. *Gavan* v. *Lyon*, 452.

21. A commissioner who takes a recognisance of bail cannot himself make the affidavit of such taking. *Walbridge* v. *Lunt*, 462.

22. A notice of intended motion for judgment as in case of a nonsuit, will not supply the place of a rule *nisi*. *Smith* v. *Kennett*, 463.

23. A demand of plea cannot be served before declaration filed, however short the time may be. *Read* v. *Johnson*, 489.

24. Time may be granted to plead partnership in abatement, but will not be renewed upon the ground that it had been omitted to be filed in consequence of overtures of accommodation. *Grey* v. *Holme*, 393.

25. Where a declaration upon common process was endorsed, filed conditionally until special bail, &c., the court refused to set aside the proceedings as irregular. *Taylor* v. *Rawson*, 421.

26. A venue is not changed by a judge's order and service alone, and a defendant will not be entitled to judgment as in case of a nonsuit upon the ground that the plaintiff did not go to trial in pursuance of notice grounded upon such order. *McNair* v. *Sheldon*, 433.

27. At the return of a rule *nisi*, the party who has obtained the rule cannot produce affidavits containing new matter. *Gavan* v. *Lyon*, 434.

28. Parties, by consent, cannot dispense with the ordinary proceedings of the court. *Flint* v. *Spafford*, 435.

29. A notice of assessment will not be considered as a notice of trial. *Fortune* v. *McCoy*, 435.

30. Where four terms have elapsed after issue joined, a term's notice is necessary to be given before any subsequent proceeding, unless within the four terms a notice of intention to proceed has been given. *Henderson* v. *McCormack*, 412.

31. A rule to plead is necessary in bailable actions. *Mead* v. *Bacon*, 180.

32. Proceedings against an attorney set aside; the rule to plead having been given before the bill served. *Madill* v. *Small, one, &c.*, 186.

33. Costs allowed by this court for not proceeding to assessment of damages pursuant to notice. *Cross and Fisher* v. *Cronther*, 186.

34. A plaintiff cannot, after taking out his *ca. re.* in one district, file his declaration in another. *Throope* v. *Cole*, 214.

PROMISSORY NOTE.

1. Evidence of a promissory note, although varying from that set out in the declaration, was considered as sufficient to support the common counts. *Hathaway* v. *Malcolm*, 182.

2. Where the payee of a note endorsed the same to A. upon an usurious consideration, and A. afterwards failed in an action against the drawer, upon the ground of usury, such payee may, nevertheless, recover against the drawer; and it seems that the ground of the failure, in the former action, may be proved by any person present at the trial; and it is not necessary to prove a re-endorsement by the usurer to the payee. *Bidwell, admor. of Washburn*, v. *Stanton*, 366.

3. It seems that a note made at Albany may be declared upon as such under the statute of Anne. *Kirk* v. *Tannahill*, 448.

4. Where a person in possession of a promissory note sued in the name of the payee, the court refused to set aside the proceedings after judgment upon an affidavit by the supposed payee, that he had never possessed such a note, the defendant, at the same time, not swearing that he had never given such a note. *Taylor* v. *Rawson*, 421.

PROOF.

See PROMISSORY NOTES, 1, 2.

1. Where a vessel is seized as not being British built, under the provisions of 7th and 8th of William III., the *onus probandi* lies upon the claimant, *i. e.*, to recover it he must prove that the vessel in question was built at a British port. *Rex* v. *Nash*, 197.

2. It seems to be sufficient, in an action upon bond, conditioned for the performance of an award upon the plea of *non est factum*, and subsequent suggestion of breaches by the plaintiff to prove the bond and submission set out upon the record, and an award tallying with it; and if a defendant purposes to object to matter apparent upon the face of the award, or to variance between it and the submission he should pray oyer and demur. *Lossing* v. *Horned*, 219.

RETURN OF WRITS.

See CONTEMPT.

Receiver-General of this province not liable to actions at the suit of individuals, for money placed in his hands by the executive to be distributed among them. *Butler, Exor.*, v. *Dunn, Rec. Gen.*, 415.

RULE OF COURT.

See PRACTICE, 22.—ENGLISH RULES.

This court fully recognises the rule of Hilary Term, 3rd James I., which orders that no cause once argued and determined shall again be brought before the court. *Boulton* v. *Randall*, 127.

Construction of.]—*See* INSOLVENT DEBTORS, 1.

RULE.

Lapsed.]—*See* ATTACHMENT, 1.

RULE TO PLEAD.

See PRACTICE, 14, 16.

A rule to plead is necessary in bailable actions. *Mead* v. *Beacon*, 180.

SATISFACTION.

See EXECUTION, 2, AND INTEREST.

SCIRE FACIAS.

See EXECUTION, 3.

A *scire facias* will not issue against an heir under the provisions of the 5th Geo. II., although an execution may have issued against the goods and chattels in the hands of the administrator, and a return of *nulla bona* has been made. *Paterson* v. *McKay*, 43.

SEAL.

A circular flourish with the word (seal) inscribed is not a legal seal. *Nagle* v. *Kilts*, 269.

SEDUCTION.

1. Where in an action for seduction of the plaintiff's daughter, evidence had been given of connivance on the part of the mother, and great negligence on the part of the father, and the jury found a verdict for the plaintiff with £200 damages, the court granted a new trial. *Bedstead* v. *Willie*, 60.

2. Gross neglect upon the part of the parents is held a ground for a new trial in an action of seduction. *Hogle* v. *Ham*, 248.

SHERIFF.

See ACTION ON THE CASE, (PLEADINGS IN.)—ATTACHMENT, 3.—ATTORNEY, 7.—CONTEMPT.—JURY.—VENUE, 3.

SHERIFF OF YORK.

The court refused to commit a prisoner brought by *ha. co.* from a county gaol to the custody of the sheriff of York. *Robinson* v. *Hall*, 482.

SHERIFF'S SALE.

See KING'S BENCH, 2.

SLANDER.

1. Where in an action for defamation brought by a person describing himself in the declaration as a druggist, vender of medicines and apothecary, the witnesses proved that several persons practising physic had purchased medicine from him; this evidence upon a motion for a nonsuit was considered sufficient to support the verdict. *Terry* v. *Starkweather*, 57.

2. In an action of slander a defendant may give "facts and circumstances" in evidence, in mitigation of damages. *Johnson* v. *Eastman*, 243.

SMUGGLING.

Quære, whether a foreigner forwarding prohibited goods to a place in the United States, so situated as to furnish a strong presumption that they would be smuggled, can

maintain an action for the price of of such goods. *Sawyer* v. *Manahan*, 315.

See likewise *Sewell* v. *Richmond*, *Executors of*, 423.

2. Where in an action for goods sold the defence to which was that the goods were smuggled, it was doubtful (the verdict being general) whether the jury understood that the plaintiff knew that the goods were contraband. the court granted a new trial. *Sewell* v. *Richmond*, 423.

SPECIAL JURY.

See PRACTICE, 7.

STYLE OF THIS COURT.

See KING'S BENCH, 1.

STATUTES.

27th Henry VIII., cap. 9.

1. *Semble*, that a grantee of the Crown never having taken possession, is subject to the provisions of the statute of Henry the VIII. *Purdy qui tam* v. *Ryder*, 236.

43rd Elizabeth.

2. It is not compulsory upon a judge at *nisi prius* to grant a certificate under the 43rd of Elizabeth. *Macguire* v. *Donaldson*, 247.

5th Geo. II.

3. *Semble*, that a *fi. fa.* cannot issue against lands and tenements of an intestate deceased as being assets in the hands of an administrator. *Ruggles, Goodfame ex dem.* v. *Carfrae*, 211.

See also SCIRE FACIAS.

4. The court refused to order a sheriff to refund money received by him as the price of land sold at sheriff's sale, the purchaser having been ejected upon the ground that lands could not be sold under a *fi. fa.* as assets in the hands of an administrator. *In re Carfrae*, 472.

5. As to 20 Geo. II., cap. 19; 31st Geo. II., cap. 11; 6th Geo. III., cap. 25.

See LABOURERS.

49th Geo. III., cap. 4.

6. Where a plaintiff had arrested a defendant for a considerable sum of money, and evidence had been given in court of a larger sum being due to the plaintiff, and the cause was then referred, with other matters, to arbitration, and the arbitrators awarded the possession of a mill to the plaintiff, and £6 or £7 only in money, the court refused to give costs to the defendant, under the provincial statute for preventing vexatious arrests. *McGregor* v. *Scott*, 56.

7. *Semble*, the words of the statute, "being arrested and held to special bail," are satisfied by a defendant being arrested and imprisoned. *Ib.*, 56.

Geo. III. cap. —, Registry Act.

8. *Semble*, that a will is sufficient to give an estate, although not registered, provided no previous transfer of the property has been registered. *Link, Doe ex dem.* v. *Ausman*, 227.

9. As to 2nd Geo. IV., and 7th Geo. IV.

See INSOLVENT DEBTORS, *passim*.

STATUTE OF FRAUDS.

See FRAUDS, STATUTE OF.

STATUTES.

1. *Construction of.*]—Where by the operation of provincial enactments a plaintiff is unable to give a proper date to the notice at the foot of a *ca. re.*, a general notice to

appear on the first day of the term was held sufficient. *Brown* v. *Smith*, 187.

2. Whereby a clause of a prior statute, the two directors having the smallest number of votes of the five chosen in a former election, are declared to be ineligible at any subsequent election, and by a subsequent statute the number of directors was fixed at seven, and that statute named the persons who were to constitute the board until the next election. The court *held* that two of the board having vacated their seats by non-residence, rendered it unnecessary for two of the remaining five to vacate their seats, as having the smallest number of votes at such subsequent election. *Rex* v. *Welland Canal Company*, 300.

Public or private.]—The statute vesting the property of a particular bank in the hands of commissioners, with power to hear and determine claims made upon the bank by creditors, though stated in the preamble to be made "on behalf of a great portion of the inhabitants of the province," was not considered by this court as a public statute. *Markland et al., Commissioners*, v. *Bartlet*, 146.

TRESPASS.

See ACTION, FORM OF.

1. Where magistrates commit a party upon a general charge of felony given upon oath, they will not be liable to an action of trespass, although the facts sworn to in order to substantiate that charge may not in point of law support it. *Gardner* v. *Burwell et al., Justices, &c.*, 189.

2. Omitting to state the conviction of a defendant in his warrant of commitment, will not subject a justice of the peace to an action for false imprisonment, provided the actual conviction is proved upon his defence. *Whelan* v. *Stevens*, 245.

3. It is necessary in a declaration in trespass for mesne profits to state that the land was the land of the plaintiff; such omission is not cured by stating his expulsion. *Grant et al.* v. *Fanning*, 342.

4. Where it is intended in trespass to justify that the *locus* in *quo* was a highway, the averment must be direct, not left to inference; and a justification in a second plea for entering such of the closes as are not included in the limits of the highway alluded to in the first, will also be insufficient; and a plea proposing to justify the cutting down trees on the adjacent land to repair the highway, must mention the number and description of the trees cut down. *Orser* v. *McMichael et al.*, 356.

5. In trespass *quare clausum fregit*, and for destroying goods, the township laid is descriptive and must be proved as laid; and if the trespass is proved to be in another township, the variance will not be cured, because the township laid has the same name with the county in which the true township is situate. *Mattice* v. *Farr et. al.*, 218.

6. A conviction bad upon the face of it, although not quashed, *held* not to be a sufficient defence to an action of trespass. *Briggs* v. *Spilsbury*, 440.

TROVER.

It seems that where a party purchases the goods of another at public sale, a notice given by the owner at such sale, dispenses with the necessity of a demand and refusal to maintain trover, and a new trial will not be granted upon the ground of fresh evidence, it not appearing that it could not have been produced at

the former trial. Fraud cannot be presumed contrary to a verdict. *Haren* v. *Lyon*, 370.

USURY.

See PROMISSORY NOTE, 2.

VARIANCE.

Where the plaintiff declared as upon a penal bill, and gave in evidence a bond with a condition; *held* not a sufficient variance to set aside a verdict. It should at least have been taken advantage of by special demurrer upon oyer. *De Riviere et al.* v. *Grant*, 473.

VENUE.

See TRESPASS, 5.

1. The court will not change the venue in an action upon bond, conditioned for the performance of an award without special grounds. *Lossing* v. *Horned*, 83.

2. The venue cannot be laid in the district of A., an outer district, or in the Home District, when the writ has been issued in the district of B., also an outer district. *Crawford* v. *Ritchie*, 84.

3. The court will not change the venue where a sheriff is defendant, on the ground that he cannot attend at the trial. *Brock* v. *McLean, Sheriff*, 235.

4. A venue is not changed by a judge's order and service alone, see PRACTICE, 27, and *McNair* v. *Sheldon*, 433.

VERDICT.

Grounds of, how proved.] — *See* PROMISSORY NOTE, 2.

WARRANT OF ATTORNEY.

A plaintiff and defendant having settled the action between themselves, without paying the attorney's costs, the court refused to make the attorney produce his warrant in an action instituted against the bail to recover costs. *Shankland* v. *Scantlebury et al., bail of Baxter*, 231.

WELLAND CANAL COMPANY

See STATUTES, CONSTRUCTION OF, 2.

WITNESS.

See COMMISSION TO EXAMINE.—PRACTICE, 18.

1. The court will not, under the provision of the provincial statute for issuing commissions to examine witnesses about to leave the province, order such commission before declaration filed. *Saunders* v. *Playter*, 37.

2. A person who assigns his property to trustees for the benefit of his creditors, considered as a competent witness to a bond given to those trustees by one of his debtors; and an (L. S.) need not be inserted to a deed set out upon oyer. *Moffatt et al.* v. *Loucks*, 305.

3. *Semble*, that a returning officer whose conduct has been impeached, is not entitled to his expenses as a witness before a committee of the House of Commons, although he was summoned to attend by the speaker's warrant, in the same manner as other witnesses. *Blacklock* v. *McMartin*, 320.

WATER-COURSE.

An injury to a water-course considered as an injury to a permanent right, and in such case the court will grant the plaintiff a new trial, although the probable amount to be recovered by a verdict may not be large. *Applegarth* v. *Rhymal*, 427.

ROWSELL & ELLIS, PRINTERS, TORONTO.