Vol. I.] [No. 2.

# REPORTS

OF

# CASES

ARGUED AND DETERMINED

IN THE

## SUPREME COURT OF NEW BRUNSWICK,

WITH A TABLE OF THE NAMES OF THE CASES.

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BY JOHN C. ALLEN, ESQUIRE,
Barrister at Law.

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CONTAINING THE CASES OF TRINITY TERM IN THE ELEVENTH YEAR OF QUEEN VICTORIA, 1848.

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SAINT JOHN, N. B.

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# TABLE OF CASES CONTAINED IN THIS NUMBER.

## PROVINCIAL APPOINTMENT.

JOHN C. ALLEN, Esquire, Barrister &c., to be Reporter of the Decisions of the Supreme Court, in the room of D. S. KERR, Esquire, resigned.

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☞ *The principal part of the Cases in this and the preceding Number of the present Volume of the Reports, was prepared by* **D. S. KERR**, *Esquire, previous to his resignation. The Volume will be completed by, and published in the name of the present Reporter.*

AUGUST 1849.

# CASES

## ARGUED AND DETERMINED

IN THE

# SUPREME COURT OF NEW BRUNSWICK,

IN

# TRINITY TERM,

IN THE ELEVENTH YEAR OF THE REIGN OF VICTORIA.



## MILNER *against* GILBERT.

*Saturday, 17th June.*

The introductory averment in a declaration in an action for slander, containing twenty three counts, stated that before the committing of the grievances mentioned in certain counts (including the eighteenth) the plaintiff had been duly sworn to a certain affidavit made in the Supreme Court before a commissioner duly authorized, concerning certain proceedings in a suit pending in such Court, and that he had been duly sworn to the truth of the matter in such affidavit contained, and that the defendant intending it to be believed that the plaintiff had been and was guilty of perjury &c., spoke and published &c. The eighteenth count stated that in a certain discourse which the defendant had concerning the plaintiff, *and of and concerning the said affidavit* so made by the plaintiff as aforesaid, the defendant *further contriving and intending as aforesaid*, in the presence and hearing &c. spoke and published of and concerning the plaintiff, *and of and concerning the said affidavit* &c., the false, scandalous and malicious words following, "Mr. *M.* (the plaintiff) had sworn falsely," whereby the defendant meant to insinuate that the plaintiff had wilfully sworn falsely in the said affidavit, and had thereby been guilty of wilful and corrupt perjury: Held, that the count was not defective, and that it contained proper averments of the facts necessary to shew that perjury was imputed to the plaintiff. Held also, that to constitute perjury at common law it was not necessary to aver that the affidavit had been used, as the crime did not depend on the subsequent use of the affidavit, but was complete on the false swearing.

If a declaration contains several counts, some of which are bad, and a general verdict is entered on all the counts, the *postea* may afterwards be amended by confining the verdict to the good counts, if the evidence given at the trial was admissible upon them, and it cannot be inferred that any of the evidence or any part of the damages was given distinctly on the bad count.

(*a*) 6 *T. R.* 691. (*b*) *Cro. Eliz.* 724. (*c*) 1 *P. Wms.* 568.

In *Michaelmas* term last, *J. A. Street*, Q. C., on behalf of the defendant, obtained a rule *nisi* for a *venire de novo* in this cause, on account of the badness of the eighteenth count of the declaration—there being no averment that the affidavit mentioned was material to the matter in issue, or that it was used as a judicial proceeding. *Holt* v. *Scholefield (a)*, *Sherington* v. *Ward (b)*, *Cann* v. *Cann (c)*, 2 *Chit. Pl.* 626, note (d), 2 *Chit. C. L.* 302. 304, were cited. *G. Botsford*, for the plaintiff, at the same time obtained a rule *nisi* to amend the *postea* by entering the verdict on the eighth, ninth,

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tenth, eleventh, sixteenth, and nineteenth counts of the declaration.

*G. Botsford*, in *Easter* term last, shewed cause against the rule obtained by the defendant, and was also heard in support of the rule obtained by the plaintiff. The eighteenth count contains in itself sufficient to sustain the verdict. The words are "Mr. *Milner* had sworn falsely," and they refer by the inducement to an affidavit made and used in a cause in Court, which is sufficient to make the false swearing perjury. After verdict, the defect, if there was any, would be cured. It matters not whether the affidavit was material or not: it is sufficient to shew that the words were spoken in reference to a proceeding in Court. The case of *Holt* v. *Scholefield* is overruled by *Leach* v. *Thomas (a)*. The defendant could not derive the least benefit by obtaining a *venire de novo*, and where the verdict can be amended by the Judge's notes, and referred to a particular count, a verdict *de novo* is never awarded, no matter how many bad counts there are. *Chit. Arch.* (8th ed.) 1138, *Eddowes* v. *Hopkins (b)*, *Newcombe* v. *Green* (c), *Williams* v. *Breedon* (d), *Harrison* v. *King* (e), *Ferguson* v. *Mahon (f)*. There was no evidence given on the eighteenth count, which was not equally applicable to the other counts; indeed there is no evidence on the Judge's notes to prove the words absolutely as laid in this count, namely that the plaintiff *had* sworn falsely: all the evidence is of words spoken in the present tense.

*J. A. Street*, Q. C., in support of the rule. *Holt* v. *Scholefield* has not been overruled except as regards arresting a judgment where there is a defective count—the practice now being to award a *venire de novo*. The declaration is defective for not averring that the affidavit was used in a judicial proceeding, *Rex* v. *Taylor* (g); without which an indictment for perjury could not be sustained. In 2 *Chit. C. L.* 302, it is said that to constitute the legal guilt of perjury, the oath must be false, the intention wilful, the proceedings judicial, the parties lawfully sworn, the assertion absolute, and the falsehood material to the matter in question. In the same book,

(a) 2 *M. & W.* 427. (b) *Doug.* 376.
(c) 2 *Str.* 1197. (d) 1 *B. & P.* 329.
(e) 1 *B. & Ald.* 161. (f) 11 *A. & E.* 185. (g) *Holt's R.* 534.

book, p. 305, it is said that if the falsehood be of no importance, it will not be perjury; and that it always lies on the prosecutor to shew that the perjury was material. [STREET, J. That applies to cases of indictment for the crime of perjury: you do not make the distinction between an indictment against a person for the crime, and a charge of perjury, on which a civil action is brought. If you charge a person with perjury, it must be taken in the sense in which it is ordinarily understood. CARTER, J. Suppose there never had been any affidavit, and the plaintiff had been charged with committing perjury in an affidavit made in a certain suit, could he not have maintained an action for the charge?] No; the principles of law are the same in civil as in criminal proceedings. In order to be actionable, the party must be charged with the commission of an indictable offence, and the authorities cited shew what is necessary to constitute the crime of perjury. The plaintiff should have applied at the trial to limit the verdict to the particular counts. It is too late now; for how can the Court possibly undertake to say what part of the damages were allowed on the eighteenth count? The verdict being general, it must be presumed that they gave damages on all the counts. *Rankin* v. *Clarke (a)*. In *Empson* v. *Griffin* (*b*), where in a case similar to the present a Judge's order had been made confining the verdict to the first count, Lord *Denman*, in delivering the judgment of the Court, said that the order was wrong, because the evidence was applicable to the bad count as well as the good, and the damages being general, it could not be known what amount of them the jury meant to ascribe to each.

*Cur. adv. vult.*

CHIPMAN, C. J. now delivered the judgment of the Court. A rule was granted in *Michaelmas* term last, calling on the plaintiff to shew cause why a *venire de novo* should not be awarded, on the ground of the badness of the eighteenth count of the declaration, the verdict being general on all the counts for the plaintiff. The plaintiff obtained a rule at the same time for the defendant to shew cause why the verdict

(*a*) *Bert. R.* 303. (*b*) 11 *A.* & *E.* 186.

should

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should not be confined to the 8th, 9th, 10th, 11th, 16th, and 19th counts; namely, those counts which set out the defamatory words as charging the plaintiff with perjury in an affidavit in *Carman's* suit, without reference to the particular affidavit mentioned in the introductory averments. The other counts, seventeen in number, having all reference to this particular affidavit. Both these rules were heard at the last term. The first question we have to decide is as to the sufficiency of the 18th count. The defamatory words set out in that count as an imputation of perjury are "Mr. "*Milner*" (meaning the plaintiff) "had sworn falsely." It is very clear that the sense of the words cannot be enlarged by *innuendo*, and on the authority of *Holt* v. *Scholefield* (*a*), it seems now perfectly settled that an imputation of being forsworn, or what is equivalent thereto, swearing falsely, is not actionable of itself; but to make it actionable it must appear from the accompanying circumstances to have been meant and understood of such a forswearing or false swearing as would constitute the offence of perjury: and there must be in the declaration necessary introductory averments as to a Court or matter in which the legal offence might be committed, and a *colloquium* of this Court or matter in order to make it appear that the words were spoken in relation thereto—so as to shew on the record that the oath spoken of as false, was a judicial oath; and the reason given for this particularity is that if the plaintiff could merely state in an *innuendo* that by the accusation of false swearing the defendant intended to impute perjury, the averment would involve a question of law, and the jury would have to decide on evidence whether the forswearing did in law amount to perjury, and the question would not be open to the Court on the record. If there be this introductory averment and *colloquium*, it is quite clear that an accusation of false swearing may be alleged to impute perjury, and that if used in that sense it is just as actionable as the term *perjured* itself would have been. On a full consideration, we think the requisites are to be found in the present declaration, and that the 18th count is not defective. The plaintiff sets out in his introduc-

(*a*) 6 *T. R.* 691.

tory

tory averment " that before the committing of the grievance " mentioned in the 18th count" (and other counts which are enumerated), " to wit, on &c. at &c., he, the plaintiff, had " been duly sworn to a certain affidavit made in the Supreme " Court of Judicature in this Province, by and before *Wil-* " *liam Botsford Chandler*, Junior, Esquire, then and there " being a commissioner duly authorized and empowered to " take affidavits &c. of and concerning a certain writ of *tes-* " *tatum fieri facias*, theretofore issued out of the said Supreme " Court against the said plaintiff, at the suit of one *Samuel* " *Carman*, executor of the last will and testament of *Raper* " *Milner*, deceased, directed to the sheriff of *Westmorland* " &c.; and of and concerning the matters relating thereto, " and the said plaintiff had been then and there duly sworn " touching and concerning the truth of the several matters " and things in the said affidavit contained, by the said *W.* " *B. Chandler*, Junior, as such commissioner as aforesaid, " who duly administered an oath touching and concerning " the truth of the matters and things in the said affidavit " contained, and then and there took and received the said " affidavit as such commissioner, he then and there having " sufficient and competent authority to administer such oath, " and take and receive such affidavit." The declaration then proceeds in the ordinary form to allege the intent of the defendant to cause it to be suspected and believed that the plaintiff had been and was guilty of perjury as thereinafter stated, and to subject him to the pains and penalties by the laws of the Province made and provided against and inflicted upon persons guilty thereof: then follows the seventeen first counts, all in different ways charging words which impute perjury, and have been considered actionable, until we come to the count in question, the 18th, which is as follows: " And " afterwards, to wit, on &c. at &c., in a certain other dis- " course which he, the said defendant then and there had of " and concerning the said plaintiff, *and of and concerning the* " *said affidavit*" (namely, the affidavit above spoken of in the introductory averment), "*so made* by the said *plaintiff as afore-* " *said*, in the presence and hearing of divers other good and " worthy subjects of this Province, the said defendant *further*

" *contriving*

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" *contriving and intending as aforesaid*" (namely, intending to have it suspected that the plaintiff was guilty of perjury, and subject him to punishment therefor under the laws of this Province), " then and there in the presence and hearing of " the said last mentioned subjects, falsely and maliciously " spoke and published of and concerning the said plaintiff, " *and of and concerning the said affidavit so made by the plain-* " *tiff as aforesaid*, the false, scandalous and malicious words " following, that is to say, ' Mr. *Milner*' " (meaning the said plaintiff) " ' *had sworn falsely*,' with this that the said plaintiff " will verify that the said defendant meant to insinuate and " have it understood that in the said affidavit so made by the " said plaintiff as aforesaid, he, the said plaintiff, had wil- " fully sworn falsely, and had thereby been guilty of wilful " and corrupt perjury; and so the said last mentioned sub- " jects considered the defendant to mean, to wit, at &c." Here it appears to us that these are proper averments of what was insisted on in *Hawkes* v. *Hawkey* (*a*), as the four links necessary to shew that perjury was imputed, namely: first, the fact of an oath by the plaintiff to the truth of an affidavit made in relation to a cause in this Court before a person competent to administer such oath; second, that there was a *colloquium* about this affidavit with reference to which the words were spoken; third, the words themselves; fourth, the *innuendo* that the defendant meant by those words to impute perjury to the plaintiff in the affidavit he had been so sworn to, and concerning which the *colloquium* was had. All the facts necessary to support this count, namely, that there was such an affidavit so sworn by the plaintiff; that there was a discourse had by the defendant in relation to this affidavit, and that in that discourse he accused the plaintiff of having sworn falsely in the said affidavit; and that the defendant did thereby mean to impute perjury to the plaintiff, and was so understood to mean, and that this was falsely and maliciously done—have been found by the jury; and it appears to us such a finding could not have been had unless the words had imputed not merely what the jury might determine on the evidence to be perjury, but what we find from the record

(*a*) 8 *East*. 427; and *See* Angle v. Alexander, 7 *Bing*. 119.

would

would *prima facie* have constituted perjury if the words were true, and could have been justified as the defendant has undertaken to justify them in his special pleas. The Court has already decided that the person before whom the oath was taken had competent authority as a commissioner to take such affidavits, and that a false oath taken before a commissioner in a judicial proceeding might constitute perjury: the averment therefore in that respect is sufficient; but the objection mainly relied on by the defendant's counsel to the allegations of perjury in this affidavit was, that it was not averred in this count that the affidavit was afterwards read or used; and it was contended on the authority of an old case, *Rex* v. *Taylor* (*a*), that an indictment for perjury would not lie in swearing falsely to an affidavit unless the affidavit was afterwards read and used, and therefore as it was not alleged here that the affidavit of the plaintiff to which the words referred was read or used, the *innuendo* that perjury was intended to be imputed went beyond the prefatory averments, and that the false swearing in the affidavit was not shewn to have been punishable as perjury. But it will be found by reference to the case of the *King* v. *Crossley* (*b*), where this point came up, and where the ruling of *Holt*, C. J., in *Rex* v. *Taylor*, was cited to the effect that on an "indictment for perjury in making an affidavit it "ought to be proved, that the affidavit was read and used "against the party, for without producing and using it, the "bare making an affidavit will not be sufficient." The indictment against *Taylor* was for perjury on the statute of 5 *Eliz. c.* 9, and the indictment concluded *contra formam statuti*, and such perjury could not be committed unless the affidavit was used; but that to constitute perjury under the common law, the crime did not depend on the subsequent use of the affidavit, but was complete by the plaintiff's swearing to the affidavit, though no use was afterwards made of it. Neither the prefatory averments or *innuendo* here allege an intention to impute perjury under the statute, but it must be taken to be an imputation of perjury under the common law, which the plaintiff might have committed

(*a*) Reported in *Skinner* 403, and *Holt's Rep.* 534. (*b*) 7 *T. R.* 315.

by

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by a wilful forswearing in such affidavit. No indictment can be sustained for perjury under the statute of *Elizabeth*, unless some one was actually aggrieved by the offence, which must be averred, and that accounts for the decision in *Rex* v. *Taylor*, but it is different under the common law. For these reasons we think the 18th count good, and that the rule for a *venire de novo* should be discharged. But if the 18th count was bad, as is contended for, the verdict might well stand on the other counts, and be so amended; for this reason that all the evidence given by the plaintiff at the trial was admissible on the other counts, and it is impossible to infer that any evidence or any part of the damages was given on this count distinctly. If any reasonable doubt could be raised on this point, the case should go down to a new jury if the count were bad; but it appears to us that the 18th count and many of the other counts might have been dispensed with, and the admissibility of the evidence and amount of damages be in no manner affected. It must not be lost sight of that there was no question really at the trial as to the speaking of words imputing perjury, or the allusion of those words to the affidavit, but the case turned mainly on the truth of the defendant's special pleas of justification, in which the plaintiff is distinctly charged with the commission of wilful and corrupt perjury in swearing falsely to matters set out in the said affidavit. There are three distinct assignments of perjury, but all in respect to the matters contained in the affidavit; and the jury were directed by the learned Judge, that if the defendant had made out to their satisfaction any of his justifications he would be entitled to their verdict. The rule laid down in *Ch. Arch.* 452 (8th ed.), as deduced from the cases, is this, "If there are several counts "in a declaration, some of which are bad, and by mistake a "general verdict is entered on all the counts, although "evidence was given upon the good counts only, the *postea* "may be amended by the Judge's notes. And where it "appeared from the Judge's notes that the jury calculated "the damages on evidence applicable to the good counts "only, the Court amended the *postea*, although it appeared "that

" that evidence had been given applicable to the bad counts " also." Much reliance was placed by the defendant's counsel on an expression of Lord C. J. *Denman*, in delivering the judgment of the Court in *Empson* v. *Griffin* (*a*), setting aside the Judge's order, confining to the first count a verdict given generally on six counts, one of which (the fifth) was clearly bad. His Lordship's words are, " In this " case we are of opinion that the order confining the " verdict to the first count was wrong, inasmuch as " evidence was given at the trial applicable to the fifth " count as well as to the first; and the damages being " general, it cannot be known what amount of them the " jury meant to ascribe to each." But if the case be looked to, it will be found that all the counts but the fifth set out defamatory words reflecting upon the plaintiff in his character of attorney; whereas the fifth count, which was bad, contained no averment or *colloquium*, nor any reference to the plaintiff's profession, and some of the words set out in the fifth count (which we presume must have a distinct imputation from those of the other counts) were proved. The jury therefore gave damages for the slander of the plaintiff's character generally, as well as for the slander to his professional character, and the Court could not say how much was given for one and how much for the other. This case is therefore very distinguishable from the present, and that of *Henley* v. *Mayor of Lyme Regis* (*b*), which lays down the rule which may be applicable to this case: there a verdict taken generally on two counts was confined to one, because the causes of action in the several counts were the same, and the damages given must have been on the same account. If indeed evidence had been given of the words set out in the 18th count, as words different, or spoken in a different conversation, or affording a different cause of action from those set out in other counts, there would be good ground for the objection; and indeed it was insisted on at the argument, that Dr. *Wilson* proved only the words in the 18th count and not the other: but by the Judge's notes of the trial, it appears that

(*a*) 11 *A. & E.* 186. (*b*) 6 *Bing.* 100.

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Dr. *Wilson* did not prove the words set out in the 18th count, but more nearly those of the 20th, "that Mr. *Milner* "perjured himself." This is all he positively swore to, but *he* added, that he *thought* the defendant said it was in reference to an affidavit *Milner* had made to set aside an execution in a suit of his uncle, on the river *Saint John*, before the Chief Justice at *Saint John*. But Dr. *Wilson* and two other witnesses, *Martin B. Palmer* and *Albert J. Smith*, both attornies of this Court, all testify to the same conversation which took place in *Hickman's* store; and both those gentlemen swear that the defendant used the word "perjured;" saying plaintiff was a perjured man, or that he perjured himself in reference to the affidavit in *Carman's* suit. *William K. Chapman*, *James Cassidy*, and *Thomas S. Sayre*, were witnesses to another conversation, which also took place in *Hickman's* store, a day or two after on the delivery of a letter from the plaintiff's attorney to the defendant, and they all say that the defendant charged the plaintiff with being perjured or having perjured himself in this affidavit, and refused to retract the charge. In fact, no witness speaks to the defendant's using the words "false swearing," except coupled with the word perjured, and all in reference to the affidavit. Under these circumstances we should feel no hesitation, if it were necessary, in confining the verdict to the other counts, and withdrawing it from the 18th—such a course being fully warranted by the evidence; and there would be no use whatever in sending this case down for a new assessment of damages. We have much doubt, however, whether we can now allow the verdict to be confined to the 8th, 9th, 10th, 11th, 16th and 19th counts, without the defendant's consent, if he desires to have the verdict retained on all the counts: indeed several of the other counts set out the words as proved with more particularity than those six counts. Seeing, however, the extreme multiplicity of counts in the declaration, it may be very proper if any question arises as to the costs, to confine the verdict to some few of the counts. The slanderous words imputing perjury were only proved to have been spoken on two different occasions,

occasions, and there were therefore only two causes of action, both in fact referring to the same matter, though set forth with variations, some scarcely perceptible, in the twenty three counts. At present, however, both the rules which were obtained will be discharged.

Rules discharged.

## HORTON *against* TIBBETTS and PICKARD.

Where the declaration averred that the plaintiff indorsed and delivered a certain order of *A.* to the defendants, and the evidence was that the plaintiff indorsed and delivered the order to a firm composed of one of the defendants and other individuals, but in which the other defendant had no interest, in part payment of a debt due to such firm: Held a variance.

THIS cause was tried at the sittings after *Trinity* term last, before *Street*, J.; and on motion of *Street*, Q. C. in *Michaelmas* term last for a new trial, on the grounds of variance and that the verdict for £1165 was against law, evidence, and the charge of the learned Judge, the material facts, so far as they related to the decision of the Court, appeared to be these. The second count of the declaration, on which the verdict was taken, after reciting that the plaintiff on or before the 1st *August*, 1845, had been engaged under contract in making timber on the river *Saint Francis* for the defendants, who had received a part thereof —had incurred very heavy expenses for supplies from defendants—was indebted for men's wages &c—had divers large quantities of timber, supplies &c. still on or near the *Saint Francis*, and a good chance there for future lumbering operations; alleged that the defendants in consideration of the premises, and that one *Barnabas Armstrong* would give the plaintiff £2150 for his chance on the said river, and the said *Armstrong* would give the defendants an order on Messrs. *Wiggins & Son* for £2150, the defendants promised to pay him £1000 clear of all expense, and £165 for men's wages and sundries; and then averred that *B. Armstrong* did agree to give the plaintiff the £2150 for his chance on the said river, and did give his (*Armstrong's*) order on Messrs. *Wiggins & Son* for £2150, bearing date 9th *August*, in the year aforesaid, in favor of the plaintiff or order, whereupon the plaintiff did fully deliver up &c. to *Armstrong* his said chance &c., *and also did indorse and deliver the said order of the*

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*the said Armstrong to the said defendants.* Nevertheless the defendants did not pay the plaintiff the £1000 or £165, according to their said promise &c. To prove the agreement so set out, the plaintiff produced the following memorandum written in pencil, in the hand writing of the defendant *Pickard*, to the other defendant *Tibbetts:* "Dear *James*, I "have come to an understanding with Mr. *Horton* to give "him £1000 clear of all expense, provided that Mr. *Arm-* "*strong* give him £2150 for his chance on the *Saint Francis*, "and Mr. *Armstrong* gives us an order on Messrs. *Wiggins* "& *Son* for £2150. This arrangement I have made with "him—men to pay: this amount includes all expenses." The names of the men were specified in the same paper, and their wages, amounting to £165. *Armstrong* was called by the plaintiff as a witness, proved that he had given to the plaintiff the order required by the agreement, substantially confirmed the terms of the memorandum, and said he did not hear any other. A good deal of evidence was also gone into, shewing that the plaintiff had afterwards been arrested in *Quebec*, harshly treated, and forced into a settlement in order to obtain his release. For the defence, it appeared by the testimony of one *Thorne*, a clerk of *Pickard's*, that at the time of making the above memorandum the defendants did business as a firm where *Pickard* lived, at *Saint Francis*, under the name of *Thomas Pickard & Co.*, and that another firm existed at *Quebec*, where the defendant *Tibbetts* lived, under the style of *Pickersgill, Tibbetts & Co.*, but in which latter, *Pickard* (the defendant) had no interest, and that the plaintiff was largely indebted to the latter firm. This witness also stated, that in *August* 1845, he was present at a conversation between the plaintiff, *Pickard* and *Armstrong*, and heard the bargain; that it was agreed that *Pickard* should give the £1000, and £165 for the men's wages, on the condition that *Armstrong* was to purchase the plaintiff out on the *Saint Francis*, and the plaintiff guaranteed that there were so many sticks of a certain length and size, or it was to be no bargain; and it turned out that the timber fell short in length, size and quantity: also that the plaintiff's bill with the *Quebec* house was to be paid in this arrangement; and that

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that the whole was to be subject to *Tibbetts'* approval, and it was sworn that he did not approve of it. It also appeared, that soon after this arrangement was made the plaintiff went to *Quebec*, and being there arrested at the suit of *Pickersgill, Tibbetts & Co.*, he indorsed the order of *Armstrong* on *Wiggins & Son* over to *Pickersgill & Co.*, towards liquidating their demand, and being still detained in prison at their suit, settled and signed an account with them, in which was credited the order, and gave them his bill of exchange on *Thomas Pickard & Co.*, dated the 9th *November*, 1845, at ninety days, for £629 3*s.* 1*d.*, the balance due on the account so settled, and was thereupon released. The learned Judge, among other things, told the jury that he considered the pencil memorandum not an agreement: it was not signed by either party, nor was there any evidence how it came into the plaintiff's possession, or whether it was the record of a final arrangement between the parties; that if it was intended to be binding between the parties he thought it would have been reduced to writing in ink and signed, and therefore he did not think it could stand in opposition to the positive agreement proved by *Thorne;* that taking that to be the agreement, it was not correctly set out in the second count of the declaration.

Rule *nisi* on the foregoing grounds.

*Wilmot*, Q. C., in *Easter* term last, shewed cause; and *inter alia* contended that it was impossible for the Court, who had not heard the evidence, to say that the verdict was against the weight of evidence, or that what the plaintiff relied on as the contract between the parties was not the contract. *Armstrong's* evidence was confirmatory of the contract declared on. This contract could not be overruled merely from being written in pencil: it was explicit in its terms; not a mere proposal for an agreement, but in words thus, "This arrangement I have made with him." *Armstrong* said in his evidence that the language of the paper corresponded with the contract he heard read, and was the same paper which he saw in *Horton's* possession at *Quebec*. Was it not singular that *Armstrong*, who had so much interest in the contract, did not hear any of the conditions relied on

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on by the defendants, if such had been the case. It is unreasonable to suppose that the plaintiff would ever have consented to such a bargain as stated by *Thorne*. If such terms were named, it is reasonable to suppose that *Thorne* merely heard these terms as proposed by *Pickard*, and that he did not hear the final bargain. The indorsement of the order to *Pickersgill, Tibbetts & Co.* was done under *duress*—as the price of the plaintiff's liberty. Though the indorsement was made the 15th of *August*, it did not appear in the books of the *Quebec* firm until the 7th *November* following, and the jury were justified in coming to the conclusion that the draft was indorsed over for the benefit of *Thomas Pickard & Co.* If the contract was to be subject to *Tibbetts'* approval, is it likely that the plaintiff would have given all his valuable property out of his hands, as he did, without the power of regaining it, until he obtained the approval of *Tibbetts?* Such a bargain, connected with the facts and the plaintiff's conduct, is incredible. It was clearly a question for the jury, whether they believed *Thorne's* statements as to the conditions he said were attached to the contract: his testimony is totally irreconcileable with the other facts of the case; and if his testimony was not of sufficient weight with the jury, there is no variance, and the verdict should be sustained.

*Street*, Q. C., in support of the rule, argued that if the contract proved did not support that set out in the second count of the declaration, the plaintiff must fail on the ground of variance. *Chitty on Contracts*, 310, 1 *T. Rep.* 210, 3 *T. Rep.* 646. The averment in the declaration is, that the plaintiff did indorse and deliver the order of the said *Armstrong* to the said defendants, whereas the evidence shews that such order, which was the consideration of the defendants' promise, was not indorsed to the defendants, but indorsed by the plaintiff to *Pickersgill & Co.*, in which firm the defendant *Pickard* had no interest. There was no evidence how the plaintiff got hold of the pencil memorandum, or that it was intended to be a final bargain between them, or that it was ever acted on as such; in fact the evidence all shews the reverse. There was nothing to discredit *Thorne's* evidence, and according to the evidence given

given by him the contract was entirely different from that set out in the declaration.

*Cur. adv. vult.*

CHIPMAN, C. J. now delivered the judgment of the Court. It is quite unnecessary to go at length into the details of this case. What may be the real merits on all the transactions of the parties, or how the balance would stand on a fair adjustment of all their accounts, is not now the question. A verdict has been given for the plaintiff for £1165 *on the second count alone*, which can only be supported on the ground that the special agreement as there set out was actually entered into and concluded by the parties, and that the condition as averred was performed by the plaintiff. Now if we could get over the great difficulty we feel in considering the pencil memorandum, taken in connexion with the other evidence to be proof of the agreement by which the defendants were to be liable to make the payment in case *Armstrong* purchased out the plaintiff for £2150 for his lumbering concerns on the *Saint Francis* (and that a delivery of the order drawn by *Armstrong* on *Wiggins* in favor of the plaintiff for £2150 was a substantial performance of the stipulation), that *Armstrong* should give the defendants an order on *Wiggins* for £2150—we cannot think there was any proof of the delivery of the order to the defendants within the terms of the contract as set out and as averred to have been performed. If the pencil memorandum did contain the agreement made at the time, then it was evidently the plaintiff's duty as soon as he had made the arrangement with *Armstrong* and received the draft on *Wiggins*, to have delivered it to *Pickard*, the party then carrying on the business of the defendants in the Province; but the delivery of the draft as proved was made to *Tibbetts* at *Quebec*, not on account of himself and *Pickard*, but on account of the firm of *Pickersgill, Tibbetts & Co.*, to whom the plaintiff was largely indebted for supplies in his lumbering operations, in which firm *Pickard* had no interest. It is said indeed that the amount of this account formed part of the expenses for which the defendants were to be answerable over and above the sum now recovered

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recovered by the verdict, but it is not the fair conclusion from the evidence that the defendants engaged to that extent; and although we may think the plaintiff was harshly treated in being detained in prison at *Quebec* after he had given up the draft, still there is nothing to show any such legal *duress* as will invalidate the settlement afterwards made by him, upon which he obtained his release: in which settlement the amount of the draft is credited to *Pickersgill, Tibbetts & Co.*, and a large balance admitted to be due to them over and above the draft. The only witness who really proved any agreement actually made between the parties was *Thorne*, who was uncontradicted; and the terms of the agreement as proved by him were very materially different from those set out in the second count, and it would not appear from his evidence that anything was due from the defendants. The circumstance of the plaintiff going at once to *Quebec*, where *Tibbetts* was, is a strong confirmation of the evidence of *Thorne* that the arrangement was to be subject to *Tibbetts'* approval. The treatment the plaintiff received at *Quebec* has probably had a great influence on the minds of the jury; but the verdict they have returned is we think not only against evidence, but also against the Judge's charge; and the rule for a new trial must be made absolute.

Rule absolute.

## JARVIS *against* EDGETT and OTHERS.

A deed of a master in chancery, purporting to be in pursuance of adverse foreclosure, duly registered, is evidence that all the proceedings upon which it is founded were rightly had and done, without producing the decree.

After the plaintiff had become the purchaser of the *locus in quo* by a deed from a master in chancery, duly recorded, but before entry, the defendents, who lived with and claimed under the mortgagor, cut saw logs on the premises and carried them away: Held, that the plaintiff was entitled to recover in trespass under the *asportavit* counts.

IN trespass *q. c. f. et asportavit*, before *Street*, J., at the *Albert* circuit, in *July* last, it appeared that the plaintiff was third mortgagee of the *locus in quo*, and the defendants were the sons of the mortgagor, living with him. The plaintiff in addition to his title as mortgagee, offered in evidence a deed of purchase from *George F. Street*, master

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in chancery, to him (the plaintiff), bearing date the 1st *November*, 1845, duly acknowledged and recorded, and purporting to have been made under a decree of foreclosure of the mortgagor's equity of redemption in the premises. It was objected for the defendants, that the deed of the master in chancery could not be received in evidence without also putting in the decree: this objection was overruled, and the deed admitted. The fact of cutting down trees on the *locus in quo* in the winter of 1846, and carrying them away for saw logs to a mill was proved, but as the mortgagor with his family had never been out of possession of the premises, and the plaintiff as mortgagee had never made an entry on the land, it was contended that not having the possession in fact, he could not maintain this action even on the *asportavit* count. The learned Judge, in charging the jury, told them that if old Mr. *Edgett*, the mortgagor, was in possession when the trespass was committed, and the defendants also, claiming under him, the plaintiff could not maintain trespass for the entry on the land, though it would be no excuse for taking away the trees; and the plaintiff in such case would be entitled to recover on the *asportavit* count. The jury under this direction found a verdict for the plaintiff, on the *asportavit* count, damages £1 5*s*. *Chandler*, Q. C., in *Michaelmas* term last, moved the Court, and obtained a rule *nisi* for a new trial, on the foregoing objections; citing *Com. Dig.*, tit. *Biens* (H), *Smith* v. *Milles* (*a*), *Cooper* v. *Chitty* (*b*), *Smith's L. C.* 268 (American note), *Blackett* v. *Lowes* (*c*). 2 *Greenleaf Rep.* 387, was referred to by the Court.

*A. L. Palmer*, in *Easter* term last, shewed cause. As to the objection to the deed of the master in chancery being inadmissible in evidence without the decree: the Act of Assembly 2 *Vict. c.* 28, *s.* 2, enacts that such deed shall be as valid as if the same were executed by the mortgagor and mortgagee, and every such conveyance having been first duly acknowledged or proved according to the provisions of the law relating to the registry of deeds, may be registered &c.; and such conveyances so registered or a copy thereof may be given in evidence in any Court of law or equity in this Province, in

(*a*) 1 *T. Rep.* 478. (*b*) 1 *Burr.* 20. (*c*) 2 *M. & S.* 499.

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like manner as any other registered deed, "and when so "given in evidence shall be deemed and taken to be evi- "dence that all the proceedings on which such conveyance "is founded was rightly had and done." It is impossible to give a more explicit answer to this objection, than by thus quoting the act itself. The next objection is, that the plaintiff was not in possession in fact of the *locus in quo*. The finding of the jury, under the charge of the learned Judge, was on the *asportavit* count for cutting and carrying away the logs, which became personal property. The title of the plaintiff to it was unquestionably proved, and such title drew to it the possession; whereby the plaintiff could clearly maintain trespass: the possession in fact of the soil gave old Mr. *Edgett* no property in the trees. *Higgin* v. *Mortimer* (*a*), 2 *Saund.* 47 a, *Dalton* v. *Whittam* (*b*). Proof of title is *prima facie* evidence of possession. Even in *England* the bargainee could sue for the property severed from the land before entry: the principle has been often illustrated by a landlord maintaining trespass under such circumstances; and in this Province, by actions of replevin for cutting and carrying away timber. [PARKER, J. The question is, whether a party must not bring ejectment, and then bring his action for the *mesne* profits.]

*G. Botsford* in support of the rule. The title to the premises was originally in the first mortgagee. The plaintiff, as subsequent mortgagee, never had any legal estate in the premises. The master in chancery's deed did not convey any legal title to the plaintiff: as mortgagee, he had merely a mortgage of the equity of redemption. One reason why the decree should be produced is, that it may appear whether the direction was to sell the whole or only a part of the land. The plaintiff under the sale was only in the situation of a stranger: old Mr. *Edgett* was in possession of the *locus in quo* before and after the mortgage to the plaintiff. The purchaser, under the master's deed, cannot maintain trespass before entry. If a bargainee could bring an action before entry for cutting the trees, he might also bring ejectment and then trespass for *mesne* profits, and recover twice.

(*a*) 6 *C. & P.* 617. (*b*) 3 *Q. B.* 962.

Trespass

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Trespass to the personalty cannot be maintained, because the possession of the trees was always in the person in actual possession of the land. [PARKER, J. Is not the party in possession after the deed of the master, mere tenant at will to the bargainee.] An action of trover might have been maintained in this case; but trespass cannot be supported unless the plaintiff has had possession. [STREET, J. If *Edgett* is not a trespasser he is tenant at will or sufferance, and had no right to cut the trees.] 2 *Q. B.* 133. There never has been a wrongful taking here; it is at most a wrongful detention. 9 *A. & E.* 354. Trespass *quare c. f.* cannot be maintained against a bargainor who remains in possession after giving the deed. [CARTER, J. cited *Williams* v. *Ladner (a)*.] In that case the tithes were set apart for the proprietor by the tenant, which distinguishes that case. A disseizee cannot maintain trespass until after entry. *Butcher* v. *Butcher (b)*.

*Cur. adv. vult.*

CHIPMAN, C. J. now delivered the judgment of the Court. We very much incline to the opinion that if the plaintiff had been simply a mortgagee (the mortgagor remaining in possession with his assent), he could have recovered in trespass *de bonis asportatis* the value of trees growing on the premises, and cut down and carried away, and converted to their own use, by the defendants, acting under the authority of the mortgagor. The mortgage in fee would have vested the property in the trees in the mortgagee; and although the mortgagor might remain in possession with the express or implied assent of the mortgagee, still without grant or license from the mortgagee, the mortgagor and those claiming under him would not be authorized to cut and take away the trees; for this would have the effect of lessening the value of the security without the consent of the mortgagee. No question here arises as to cutting down trees for the purpose of clearing and cultivating the land, or for other necessary uses; nor as to the right to a growing crop. The trees in question, which must have been growing on the land when the mortgages were given, were cut for the purpose of being

(*a*) 8 *T. R.* 72. (*b*) 7 *B. & C.* 399.

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made into saw logs, carried to a mill, and disposed of for that purpose. *(a)* But in the case before us, *Jarvis* was not merely a mortgagee, but also the purchaser from the master in chancery, under a decree of foreclosure, and holding under a deed from the master, duly executed, acknowledged, and recorded; which, under the Act of Assembly 2 *Vict. c.* 28, had the same effect as a deed given by both mortgagor and mortgagee, and is evidence that all the proceedings on which the conveyance is founded were rightly had and done; and therefore it was unnecessary to give the decree in evidence. Under these circumstances, the defendants could set up no right under old Mr. *Edgett*, the mortgagor. When the trees were cut and turned into chattels, they became the chattels of the plaintiff; and for the taking them away he might rightly maintain trespass. The verdict was, therefore, we think, quite correct, and should not be disturbed.

Rule discharged.

(a) *See* Keech *v.* Hall, 1 *Doug.* 21, and *Smith's L. C.* 293; Ward *v.* Andrews, 2 *Ch. Rep.* 636; 1 *Saund.* 322 & 5; Evans *v.* Evans, 2 *Camp.* 491; *Cro. Car.* 242; 2 *Greenleaf Rep.* 365.

## HARKINS *against* JOHNSON.

In trover by a mortgagee against the defendant, as sheriff of *N.*, for seizing and selling under an execution against the mortgagor, thirty five tons of hay, claimed by the mortgagee on the mortgaged premises, the mortgagor was received as a witness for the plaintiff, under a release entitled in the action, *inter alia*, discharging the party from all demands whatsoever in law and equity, which the plaintiff as mortgagee had against him as mortgagor or otherwise in respect to the hay claimed or the value thereof, and from all payments and claims whatsoever in lieu of the value of the said hay, provided the plaintiff should not recover in the action or otherwise howsoever: Held (*dubitante Parker*, J.), that the mortgagor was thereby rendered a competent witness. Held also, that the direction of the learned Judge to the jury as to the making and effect of certain leases given in evidence was right.

IN trover for thirty five tons of hay, before *Carter*, J., at the *Northumberland* circuit in *September* last, the material facts were these: The plaintiff, the mortgagee of the premises from which the hay was taken, under three mortgages; the two first she held under the will of her late husband, who was assignee of both, the third was given to herself after her husband's death by one *Charles A. Harding*, who had purchased the equity of redemption of the premises, and stood in the place of the mortgagor in all the mortgages; on the 4th *April*, 1842, the money being due on the mortgages, and

*Harding*,

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*Harding*, with the assent of the plaintiff, remaining in possession, he leased the premises to one *Moses Whitney* for seven years, at the annual rent of thirty five tons of hay, to be delivered in the barns upon the premises yearly, so soon as the grass could be cut and made into hay. *Whitney* took possession under the lease, and made payments accordingly. A judgment having been obtained by one *Gabel* against *Harding* on the 20th of *June*, 1843, a *testatum fi. fa.* was put into the hands of the defendant, as sheriff of *Northumberland*, with a direction to levy on the goods and chattels, lands and tenements of *Harding*, for £297 11*s.* 4*d.* On the 4th day of *August*, 1843, *Whitney* being in possession, the plaintiff's attorney, by her directions and with the concurrence of *Harding*, leased the premises to *Whitney* for one year from the 1st day of *May*, 1843, at the yearly rent of thirty five tons of hay, to be delivered on the premises on the tenth day of *September* then next, and to yield up the premises at the end of the term: this lease in its recitals referred to *Whitney's* being in possession of the premises under the lease from *Harding;* that the plaintiff was mortgagee and *Harding* mortgagor thereof; and that the mortgage had become forfeited and obsolete in law. The attorney of the plaintiff, who was called to prove the execution of the lease, stated that he prepared it for her under the instructions of *Harding;* that *Whitney* was sent for, who executed it at the time it bore date, but that the plaintiff not being present, did not sign it until some time in *October* following, and after the conversion of the hay in question. *Harding*, who was offered by the plaintiff as a witness, was objected to as interested: a release was then tendered entitled in the suit, whereby the plaintiff released, acquitted, and forever discharged him "from all action and actions, cause, causes, "and cause of action, claims and demands whatsoever, either "in law or equity, which she had, or ever had, or can have, "against the said *Charles A. Harding* for or on account or "in consequence of any event or termination either way of "the above mentioned suit, or for or on account of any de-"mand, which she, the said *Sarah Harkins*, as mortgagee "or otherwise, had, has, or can have against the said *Charles A.*

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" *A. Harding*, for or on account of a certain quantity of hay, " which forms the subject of this said action; and also from " all claims or demands of every kind whatsoever which she, " the said *Sarah Harkins*, as mortgagee or otherwise, ever " had or can have against the said *Charles A. Harding*, as " mortgagor or otherwise, in respect to the value or amount " of the said hay sued for or claimed in this said action, and " from all payments or claims whatsoever in lieu of the value " of the said hay, provided the same should not be recovered " in this action or otherwise howsoever." It was contended by the defendant's counsel, that the release was insufficient, and that *Harding* was still interested; but the objection was overruled, and *Harding's* testimony admitted: he stated that he had got possession of the premises as early as *June* 1837, had purchased the equity of redemption from one *Copp*, and in *June* 1838, borrowed from the plaintiff £180, which, together with the £480 due on the mortgages and interest, constituted his liability to the plaintiff; that on leaving *Northumberland* in 1842, he leased the premises to *Whitney* by the concurrence of the plaintiff, and it was then agreed that *Whitney* should turn in the amount of the rent as it annually accrued, towards paying off the mortgages which was due for that year; that in *August* 1843, while he was at *Northumberland* on business, the plaintiff, hearing of a judgment against him, asked him if her rent was secured to her according to their understanding, and requested it to be fixed in such a way that she could be secured in getting it—she was going to *Bathurst* the next day, and authorized him to employ the attorney who drew the lease to do what was required for securing her the rent, which he accordingly did, and the lease was executed as described by the plaintiff's attorney; that the whole arrangement was explained to *Whitney* at the time of executing the lease, and that the witness instructed *Whitney* that in future the rent was to be paid to the plaintiff as mortgagee; that on the day following the execution of the lease he saw the defendant, and having heard that he had an execution against the property of the witness, asked him if such was the fact, and was informed it was; that no hay was then cut, and witness informed the defendant

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defendant that the grass on the premises was the plaintiff's, and was to go in discharge of her mortgages: he also stated that he had no other way of paying the mortgage money except by the rent of the premises, and that he never got any benefit from the hay taken on the execution. It also appeared by another witness, that agreeably to the directions of the plaintiff's attorney, he went up to the premises on the 9th of *September* following, and that *Whitney* delivered him, on behalf of the plaintiff, the thirty five tons of hay then in the barns; that he afterwards, by the plaintiff's directions, put a lock on the barns, and that they were broken open by the direction of the defendant, and the hay sold under the execution. It did not appear that the hay had ever been delivered to *Harding*, or that he had in any way interfered with it after the lease from the plaintiff to *Whitney*. The deputy sheriff was called for the plaintiff, who stated that the first levy was made after part of the hay had been cut, and that he sold the hay by the direction of the defendant. For the defence it was proved, that after the lease by the plaintiff to *Whitney*, he had had the lease by *Harding* to him recorded, and put one *Campbell* in possession of the place. *Whitney*, who was called as a witness, stated that after he had put the hay in the barns, and before his delivering of it for the use of the plaintiff, he had pointed it out as *Harding's* hay to the defendant. A lease was put in evidence from the plaintiff to *Campbell*, dated 28th *May*, 1844, and made, as the attorney who drew it stated, to confirm *Campbell* in his possession: this lease, among other things, recited the seven years' lease from *Harding* to *Whitney*, and that *Harding* had assigned it to the plaintiff. It appeared also that the judgment in question had been afterwards assigned from *Gabel* to one *Gale*, and from *Gale* to *Harding's* father, to whom the sheriff, in *November* 1845, paid £35, the proceeds of the hay sold under the execution. It was contended for the defendant, on the foregoing facts, that the one year lease was fraudulently intended to defeat the execution, and not binding on the plaintiff, as she did not sign it until after the sale of the hay; that she was estopped by her rental in the *Campbell* lease from setting up the one year's lease. The learned Judge

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Judge told the jury, that under the circumstances it was competent for the plaintiff, as mortgagee, to claim the rent, and to take a new lease from *Whitney* for the payment of it, and that if the lease from the plaintiff to *Whitney* were a *bona fide* transaction, he thought *Harding* never had any property in the hay; that as to the rental in the *Campbell* lease, they might view it with the other circumstances, but he did not consider it had much bearing on the case, as the assignment of the seven years' lease by *Harding* to the plaintiff, if really made, would be confirmatory of the transaction. Verdict for the plaintiff, £70 damages. *Street*, Q. C., in *Michaelmas* term last, moved the Court, and obtained a rule *nisi* for a new trial, on the grounds of improper admission of *Harding's* evidence, and of misdirection as to the leases; citing 1 *Greenleaf Ev. ss.* 23. 390. 428, *Doe* v. *Tyler (a)*, *Barker* v. *Tyrwhit (b)*, *Chitty's Cont.* 15.

*D. S. Kerr*, in *Easter* term last, shewed cause. As to the objection of improper admission of evidence, which arises on the admission of *Harding*, the mortgagor's testimony. This objection is susceptible of a threefold answer: first, the defendant's counsel had the witness sworn on his *voire dire*, and undertook to shew him interested, but the witness swore most positively that he was not interested, and the defendant adducing no facts to prove he was so, is bound by his evidence. In 1 *Greenl. Ev. s.* 423, it is said "that a party appealing to "the conscience of the witness on the *voire dire*, offers him "to the Court as a credible witness, and it is contrary to the "spirit of the law of evidence to permit him afterwards to "say that the witness is not worthy to be believed;" and note 1. to the same section is to a similar effect. Secondly. It appeared by the evidence that *Harding* was not interested; for having given up the possession of the place in *August* 1843 to the plaintiff, and she taking possession and control of the rents and profits, on these facts the plaintiff would be entitled to be charged in equity in an account before a master, with the fair value of the rents and profits for 1843, in the same manner as if she had originally taken possession of the premises, notwithstanding she allowed the premises to be converted

(a) 6 *Bing.* 390. (b) 4 *Camp.* 27.

converted by other parties, and the amount of that value would be the fair price of the hay at the time of delivery, and not the amount recovered by the verdict. Thirdly. The release seems conclusive as an answer to the objection: it releases all her right to the value of the hay in question, and all *demands whatsoever* as mortgagee against the witness as mortgagor or otherwise in respect to the value or amount of the hay claimed in the action, and from all payments in lieu of the value of it, provided the same should not be recovered in the action or otherwise howsoever. Can there be any doubt that in case the plaintiff had failed in this action, and in accounts afterwards taken in equity between mortgagor and mortgagee, the mortgagor should shew the lease and facts in evidence, the value of this hay, and this release of the mortgagee, that she would be chargeable with the value of the hay on account of the mortgages? Could she set up her failure in this action as an answer to the release, entitled in the action? But it was argued on the other side, that the release was merely a personal discharge to *Harding*, whereas he had a lien on the equity of redemption. In 6 *Bac. Abr.* 629, it is said, that a release of demands discharges all sorts of actions, and "By a release of all demands, all actions, "real, personal and mixed, and all actions of appeal, are "taken away. So a release of all demands extends to inhe- "ritances, and takes away rights of entry" &c. *Co. Lit.* 291. So is it with the release in question. In *Chitty on Contracts*, 779, it appears that a party may release a part of a demand; and in *Doe* v. *Donelly* (*a*), and authorities therein cited, where the debt is discharged the mortgage is discharged; *Cowper* v. *Green* (*b*), *Co. Lit.* 291 b, 264 a, 265, are to the same effect. The cases cited on the other side are wholly dissimilar in facts to the present. As to the misdirection, in reference to the one year's lease, the jury found that the transaction was *bona fide*; but it is said the plaintiff did not sign it at the time it was executed by *Whitney*, and *Chitty's Contr.* 15, was cited to shew that where the promises are mutual both parties must execute at the same time: in pages 16 and 17 however, of the same book, it is laid down

(*a*) *Ante*, vol 3, p. 238. (*b*) 7 *M. & W.* 633.

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as an exception to the general doctrine, that where one party professes to act as agent for another, even without authority, the maxim "*omnis ratihabitio retrotrahitur et mandato priori* "*aequiparatur*" applies. *Story's Agency*, *s.* 239. But here the act was authorized not only by subsequent assent, but by previous command, for the plaintiff authorized *Harding* to employ, on her behalf, the attorney who prepared the release. It was of no importance whether she signed the lease or not: she was bound by the agreement. If during the term she had attempted to take possession of the premises, or had brought ejectment or trespass against *Whitney*, the lease so given would have been a good answer; she was therefore entitled to the advantage of it. The transaction was a mere attornment of *Whitney* to the plaintiff. 1 *Saund.* 234 note (f). The learned Judge was also right in his direction on the *Campbell* lease: it was a mere recital in the lease of a stranger, by which the defendant was not bound, nor entitled to take the advantage; nor was a collateral matter of the kind required to be recited with any certainty. *Greenleaf's Ev. s.* 26. But if it amounted to any thing, the whole recital must be taken together: it states that *Harding* assigned the seven years' lease to the plaintiff; this is entirely consistent with the transaction of the one year's lease, on the executing of which he gave up the possession to *Whitney* for the plaintiff. Could *Harding* have claimed the hay after such assignment? The rent did not come due until after the assignment, when it therefore was entitled to be taken from *Whitney*. *Harding* had no interest in it, nor any thing which the defendant could levy upon: there was consequently no misdirection. The return of the money by the defendant was long after the assignment of the judgment to third parties; and *Harding* swore he never received any benefit of the £35 paid over by the defendant.

*Street*, Q. C., in support of the rule. The execution bound all *Harding's* interest under the lease. If the plaintiff had such an interest as to enable her to recover in this action, it would enure to the benefit of *Harding*, who is the owner of the equity of redemption; he had therefore such an interest as to render him incompetent: the release is nothing but a personal

personal discharge. In order to render *Harding* a competent witness, the release should have been from him to the plaintiff, to discharge her from liability to account for rents and profits. *Harding* was not a party to the first mortgage. If the plaintiff did not recover in this action, could *Harding* say that the amount of this hay must go in reduction of the mortgage, when it was applied in payment of an execution against him? When the accounts are taken respecting this mortgage, the question is what is the property chargeable with, not what is the state of the accounts between the parties. [CARTER, J. The plaintiff claims the hay as landlady of *Whitney*. STREET, J. A Court of equity would look at the intent and meaning of the lease, which was to release the property from so much as the hay would amount to.] The question would be, whether the plaintiff ever had any legal claim against *Harding* for the value of the hay. 6 *Bing.* 390, 1 *Greenlf. E.* 428. The sheriff had a right to sell *Harding's* interest in the property. [PARKER, J. *Harding* had leased the property; he had no interest in the growing crop.] There was no attornment: it was not binding on the plaintiff until she signed it, which was in *October* after the sale. *Chitty on Contr.* 15. She was not bound to accept *Whitney* as her tenant, and until she did so he was not discharged from his liability to *Harding*. Before she signed the lease, the hay had been seized and sold. This instrument cannot be an attornment, because it is only a tenancy from year to year: the subsequent ratification cannot relate back to the time of the lease, because the rights of third parties had intervened. If *Whitney* had paid the rent to *Harding* before the plaintiff had signed the lease, he would have been fully justified under the authority of *Evans* v. *Elliott (a)*. The plaintiff recognized the assignment of the lease to *Campbell*, and if it did not amount to an estoppel is ever strong evidence to go to a jury: it is entirely inconsistent with the claims under the lease from the plaintiff. Recitals are the strongest evidence against a party. *Greenlf. E.* 23. It was proved that the amount realized by the sheriff out of the hay was paid over to *Harding's* father, the assignee of the judg-

(a) 9 *Ad. & E.* 342.

ment:

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ment: *Harding* therefore had a direct interest in the event of the suit, and his evidence ought not to have been admitted.

*Cur. adv. vult.*

CHIPMAN, C. J. now delivered the judgment of the Court. The main question in this case arises upon the competency of *Charles A. Harding*, a witness for the plaintiff. The action was trover against the defendant, the sheriff of *Northumberland*, for levying on thirty five tons of hay and selling the same under an execution against the said *Charles A. Harding* at the suit of one *Gabel*. The hay had been cut upon land in the occupation of one *Whitney*, who held under a lease from the said *Harding*, subject to an annual rent of thirty five tons of hay, to be delivered in the barn on the premises. The hay in question had been put into the barn by *Whitney* as the rent for the then current year. The plaintiff was mortgagee of these premises under three mortgages: the two first she held under her late husband's will, who was the assignee of both; the third mortgage was given to herself after her husband's death by *Harding*, who had purchased the equity of redemption of the premises, and therefore stood in the place of the mortgagor in all the mortgages. He had given directions to *Whitney*, the tenant, to turn in the rent to the plaintiff, to go in reduction of the mortgage money. *Harding's* testimony was objected to because it was his interest for the plaintiff to recover in this action, as whatever she recovered would go in reduction of the amount due from him on the mortgages. However available this objection might have been if there had been no release from the plaintiff, it seems to the majority of the Court that the release given in evidence was sufficient to remove this interest. The release is entitled in this cause, and the plaintiff thereby releases, acquits, and forever discharges the said *Charles A. Harding* "from all action and "actions, cause, causes, and cause of actions, claims and "demands whatsoever, either in law or in equity, which she "has, or ever had, or can have, against the said *Charles A.* "*Harding*, for or on account, or in consequence of any "event or termination either way of the above mentioned "suit, or for or on account of any demand which she, the "said

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" said *Sarah Harkins*, as mortgagee or otherwise, had, has, " or can have against the said *Charles A. Harding*, for or on " account of a certain quantity of hay which forms the " subject of this said action; and also from all claims or " demands of every kind whatsoever, which she, the said " *Sarah Harkins*, as mortgagee or otherwise, ever had or " can have against the said *Charles A. Harding, as mort-* " *gagor or otherwise, in respect to the value or amount of the* " *said hay sued for or claimed in this said action, and from all* " *payments or claims whatsoever in lieu of the value of the said* " *hay, provided the same should not be recovered in this action* " *or otherwise howsoever.*" Now we cannot read this release in any other way but as a complete discharge of *Harding* from the amount due on the mortgage to the extent of the hay, let the termination of this suit be as it may. " All pay- " ments or claims *in lieu of the value of the said hay*" appear to us conclusively to apply to the mortgage money, and nothing else. It appears to us therefore that this release establishes the competency of the witness *Harding*, without adverting to any balance of interest which might arise from the circumstance of the hay having been levied upon under an execution against himself. If the testimony of *Harding* was admissible, there can be no question as to the correctness of the directions given by the learned Judge to the jury; and we therefore think that the rule for a new trial should be discharged.

PARKER, J. I must beg to say I perfectly concur in the judgment which has been delivered by His Honor the Chief Justice except as to one point, on which I entertain doubts. I am quite of opinion that the verdict was right if the testimony of Mr. *Harding* was admissible. I think the plaintiff had a right to take the profits of the land if she pleased: she might treat *Whitney* if he assented as a tenant, or she might consider him a trespasser; and although the lease from the plaintiff to *Whitney* might have had no operation as such to affect the rights of third persons, yet there was quite enough to make it operate as a notice from the plaintiff to *Whitney*, under which he would be justified in delivering the hay to her: and I think Mr. *Harding* was also

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also perfectly justified in securing the hay for her if he could, instead of suffering it to be seized under the execution against himself. The doubt I have is as to the sufficiency of the release. Mr. *Harding* had, it appears to me, a clear interest, which at the time of the trial was not balanced. The question was not whether £36, the proceeds of the hay at the sheriff's sale, was to be paid to the plaintiff or the execution creditor: but that sum having already been paid on the execution, whether the sum of £70, or whatever might be found to be the value of the hay, should go to reduce the mortgage liability of the witness. The witness was clearly therefore incompetent, unless the interest was removed by a proper instrument. Now as the mortgage was still an open transaction, and no certain sum agreed on as the credit or amount of the hay, the instrument necessary to restore the competency of the witness should acknowledge satisfaction *pro tanto*, and be a discharge to that extent on the security not affected by any result of the trial. It appears to me that the amount for which the witness is to have credit was left to be ascertained by the verdict in the case. I have no doubt the plaintiff intended to give a sufficient release, and would probably do so in case of a new trial; but whether the discharge from any demand of the plaintiff in lieu of the value of the hay is sufficiently explicit under the circumstances, I have doubts which I feel bound to express.

Rule discharged.

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IN assumpsit before *Street*, J., at the *Albert* circuit in *July* last, the plaintiff's demand was for one half the amount of a joint and several promissory note, given by himself and the defendant to one *L. H. DeVeber*, bearing date 1st *May*, 1845, payable on the 20th *June*, 1846: the whole of which the plaintiff paid to *DeVeber* when the note fell due. *DeVeber* was called for the plaintiff; and it appeared by his testimony and by deeds put in evidence, that the note in question with others had been given as the consideration of land purchased by the plaintiff, and of which he had received a deed, and at the same time gave a mortgage to *DeVeber* to secure the payment of the purchase money. For the defence it was attempted to be shewn, that the defendant had signed the note as mere surety for the plaintiff, who got the land, and that accordingly the former was not liable; and it was proved by *DeVeber* on cross examination, that the purchase of the land was made in *May* 1845, by the plaintiff alone—the only person *DeVeber* knew in the matter, though he said he was under the impression at the time that it was a joint purchase of both. It also appeared that after the deed from *DeVeber* to the plaintiff, the defendant pastured his horse on the place, gave a lease to another person to do the same, and spoke of the property as belonging to him and the plaintiff. The defendant gave in evidence a deed bearing date the 4th *March*, 1846, from the plaintiff to him of a moiety of the land, expressed to be "in consideration of £150 in hand well and "truly paid at or before the sealing and delivery thereof." The plaintiff called the subscribing witness to prove that no money

The plaintiff having purchased land from *D.* in *May* 1845, took a deed thereof to himself, and gave a mortgage thereon for the purchase money, as was stated by *D.* at the trial, and also the joint and several promissory notes of himself and the defendant, no stipulation having been made with *D.* for the security of the defendant. After the purchase the defendant claimed and exercised a part ownership on the land. Afterwards, in *March* 1846, the plaintiff gave a conveyance of an undivided moiety of the land to the defendant, expressed to be "in consideration of £150 to the plaintiff in hand well and truly paid, the receipt whereof was thereby acknowledged."

The subscribing witness was admitted to state that no money was paid at the time of the execution of the deed from the plaintiff to the defendant, but nothing whatever was then said about the purchase from *DeVeber*, or the defendant's joint liability on the notes.

The plaintiff having afterwards paid the amount of one of the notes to *D.*, brings this action for contribution on the ground that the purchase was made from *D.* for the joint interest of plaintiff and defendant, and the defendant a principal and not a surety on the note: Held (*Parker*, J. *dissentiente*), that he was entitled to recover, and that it might be inferred from the circumstances that the original purchase was on joint account; and that the plaintiff's acknowledgment of payment for the moiety in the deed might be explained by circumstances tending to shew that the condition was made up of the defendant's outstanding liability on the note, so as to leave it a question for the jury to say whether the consideration was so satisfied.

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money was paid on the execution of the deed: this was objected to, on the ground that the plaintiff was estopped from disputing the acknowledgment of it in the deed, but the evidence was admitted; and it appeared that no money was in fact paid at the time the deed was executed. The learned Judge left it to the jury to say whether the defendant had signed the note as mere surety with the plaintiff for the purchase money of the land, or whether he was a joint purchaser of it: if he had not been a joint purchaser, it was not probable the plaintiff would have given him an absolute deed of a moiety without payment of the purchase money; and it might be presumed from the giving of the deed and the non-payment of the purchase money, that it had been previously secured in the defendant's joint liability to pay the notes. Verdict for the plaintiff, £18 3*s.* 4*d.* *A. L. Palmer*, in *Michaelmas* term last, moved the Court, and obtained a rule *nisi* for a new trial for improper admission of evidence, misdirection, and that the verdict was against evidence. *Baker* v. *Dewey* (*a*), *Rountree* v. *Jacob* (*b*), *Harding* v. *Ambler* (*c*), 2 *B.* & *Ad.* 244, 1 *A.* & *E.* 792, *Shirley* v. *Wright* (*d*).

*G. Botsford*, in *Easter* term last, shewed cause. The first question is, whether it was competent for the plaintiff to go into evidence to shew that the consideration of the land was paid. The deed having admitted the payment of the consideration money, the circumstances attending the execution of a deed may be given in evidence, not for the purpose of contradicting the deed, but to shew that the consideration was not paid at the time of execution. [STREET, J. I admitted it on the principle of the registry act allowing the deed to be given in evidence, without calling the subscribing witness. If it was not for the registry act, the defendant would have been obliged to call the subscribing witness, who might be cross examined as to the facts attending the execution.] It was competent for the plaintiff to shew that the consideration which he acknowledged in the deed was the security of the defendant on the notes for the purchase money, a moiety of which he was bound to pay the plaintiff; and was

(*a*) 1 *B.* & *C.* 704.
(*b*) 2 *Taunt.* 141.
(*c*) 3 *M.* & *W.* 279.
(*d*) 1 *Wils.* 0.

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the same as if the plaintiff on giving the deed had taken the defendant's notes for the consideration of it. There was no misdirection; nor was the verdict contrary to evidence, as the circumstances clearly shewed that the defendant had the benefit of half the purchase.

*A. L. Palmer* in support of the rule. There was no evidence that the parties were joint purchasers. The conveyance was made to the plaintiff alone, and there was nothing to shew that the defendant was connected with the original purchase from *DeVeber*, otherwise than as a surety joining in the note for the purchase money. The evidence that the defendant owned the land jointly with the plaintiff, may have meant that he rented it. There was no evidence to go to the jury of an original joint purchase: the evidence that no money passed at the time the plaintiff executed the deed to the defendant was inadmissible, as the deed admitted the receipt of the money. *Baker* v. *Dewey (a)*. If the plaintiff had any remedy, it was on the special contract and not on the common counts. The purchase was made by the plaintiff, who gave a mortgage for it; the defendant was only liable on the notes to *DeVeber*, as surety for the plaintiff, not as joint principal.

CHIPMAN, C. J. This was an action brought to recover half the amount of a joint and several promissory note, given by the plaintiff and defendant to Mr. *Leveret H. DeVeber*, the whole of which had been paid by the plaintiff when the note fell due. It appeared that this with other notes had been given in payment of the consideration money of land conveyed by *DeVeber* to the plaintiff in 1845; a mortgage had also been given by the plaintiff to *DeVeber* of the land in question, as a security for the payment of the notes. In *March* 1846, a conveyance was made by the plaintiff to the defendant of one half of this land. In that deed the conveyance is stated to be "in consideration of £150 to the plaintiff "in hand well and truly paid, the receipt whereof was thereby "acknowledged." It appeared that no money passed at the time of this conveyance; and it was contended on the part of the plaintiff, that the purchase of the land from *DeVeber*

(a) 1 *B. & C.* 704.

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was a joint purchase by the plaintiff and defendant, and therefore it was that the defendant joined in the notes to *DeVeber*, and that the plaintiff made the subsequent conveyance to the defendant of one half of this land. It did not appear that the defendant had paid the consideration money for this half of the land in any other manner; and it appears to me that the consideration in this deed being actually the joint liability of the defendant on the notes given to *DeVeber*, it is not inconsistent with the admission in the deed of the payment of the consideration money. Although no evidence could be admitted to contradict the statement in the deed, yet evidence is admissible to explain in what manner the consideration was paid, whether in money or the equivalent therefor, be it what it might. The question was left broadly to the jury on this state of the facts. There is not a particle of evidence of the defendant's having signed the note as a surety and not as a principal, as the face of the note imports. The learned Judge who tried the cause is strongly impressed with the opinion that the verdict is according to the justice of the case, and I confess that I do not see my way clear in disturbing it.

PARKER, J. I have considered this case with a good deal of attention, and am free to admit that if the question was a proper one to be left to the jury *upon presumption*, they were well warranted in the conclusion they have come to. There are doubtless many strong circumstances in support of it. In addition to what has been said by His Honor the Chief Justice, I may mention, 1. That the defendant's joining in the note does not appear to have been caused by any stipulation made with Mr. *DeVeber*, the vendor, who took security by a mortgage on the land. 2. That the defendant, after the sale by *DeVeber*, and before the conveyance to himself, claimed to have an interest in the land, and pastured his horse there, and allowed another person to do it. 3. That the conveyance by the plaintiff to the defendant was of an undivided moiety. 4. That it is hardly to be supposed, the defendant knowing that there were outstanding notes given for the original purchase money to *DeVeber*, on which the defendant was a joint promisor, should nevertheless pay the consideration

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consideration for the moiety to the plaintiff without regard to these notes; and 5. That no evidence was given by the defendant to shew how and when the consideration was paid. These facts, and probably the circumstances and situation in life of the parties, which the jury might know were not such as to consist with any large money payment, would tend strongly to shew that the verdict is right upon the merits. But I have not been able to get over the difficulty I feel as to any resulting liability for contribution having been incurred by the defendant when the notes were made, seeing that the notes were undoubtedly given as payment of the land to *DeVeber*, and that the land was conveyed to the plaintiff solely; no explanation being given why this is so, if the defendant was a joint purchaser. The defendant had no legal interest in the land, nor is there any thing to shew any binding contract of thep laintiff to convey any interest to him. A liability for contribution would then appear not to have arisen out of the circumstances of the original transaction, unless there was some distinct agreement to that effect, which is not shewn, but to be dependent on the subsequent acts of the parties; and this brings us to the conveyance made in *March* 1846, by the plaintiff to the defendant, which is expressed to be "in consideration of £150 to the plaintiff "in hand well and truly paid, the receipt whereof was "thereby acknowledged." Now I quite agree that this admission was open to explanation, and that it was competent for the plaintiff to shew that the sum was paid not in money but in liabilities. Such is the ordinary course of such transactions, and indeed such is the very mode in which the consideration was paid by the plaintiff to *DeVeber;* and I think the testimony of *Aaron Stevens* was admissible for the purpose of shewing what did, and what did not take place at the execution of the deed; and it would have been open to him to state if he could that the joint liability the defendant was under on the notes to *DeVeber* was agreed, or taken to be the whole or part of the consideration of £150 mentioned in the deed; but *Stevens*, when called, says that nothing was said about the purchase from *DeVeber* or how *Read* got the land. The deed itself recites no joint purchase, nor is it made

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made in terms subject to the mortgage: whatever therefore the meaning and intention of the parties may have been, I cannot see how it is sufficiently manifested to be different from the natural meaning of the deed itself. I feel a difficulty in destroying the admission, or explaining the terms of it by an inference which, though a reasonable one I grant, is by no means a necessary one, and may not be true. I ought perhaps also to add that it was not shewn what proportion the consideration money mentioned in the deed from the plaintiff to the defendant bore to that given to *DeVeber;* or that when the note became due, the defendant was called on to pay any proportion thereof, or had notice that the plaintiff had paid it. Entertaining this opinion, I feel bound to express it; though I regret being obliged to differ at all with the rest of the Court on a case where I have a strong persuasion, not only from the opinion of my Brother *Street*, who tried the cause, but from a perusal of the notes of trial, that the verdict is just on the merits. I am glad, therefore, the doubts I feel are not participated in by my learned Brethren, and will not lead to a disturbance of the verdict.

STREET, J. I quite agree with what has been said by the learned Chief Justice, in this case. This action was brought by the plaintiff to recover a moiety of money paid by him to take up a joint and several note of hand, given by him and the defendant to *L. H. DeVeber:* the note was drawn in the usual form of a joint and several promissory note, and signed by both plaintiff and defendant; upon the face of it therefore they were both equally liable to the holder for the amount, as principals, and there was no evidence in the case to shew that either of them had signed it as security for the other; and the plaintiff having paid the whole of the note, the defendant, *prima facie*, stands legally liable to pay to him his one half, as so much money paid by plaintiff for and on account of the defendant. The defence set up was, that he (the defendant) signed the note only as security for the plaintiff, and as between them he was not liable for any part of it. This of course if made out in evidence would have been a good defence, but the *onus* of proving this was thrown on the defendant; and as it is a question

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question of fact, and not of law, the evidence to support it must be such as will satisfy a jury, the defendant being called upon to relieve himself from his *prima facie* liability as a joint promisor. Now the evidence he drew out on the cross examination of *DeVeber* to support this was, that the note in question was one of several joint notes, given for the purchase money of a lot of land, which was conveyed by *DeVeber* to the plaintiff alone in *May* 1845; the purchase was negotiated with *DeVeber* by the plaintiff alone, who was the only party *DeVeber* personally knew in the matter, although he said he was under the impression at the time that it was a joint purchase of both: at the same time he added that he only knew the defendant in the transaction from his name being on the notes; but it did not appear that *DeVeber* required from the plaintiff that any one should sign the notes, for the purchase money, with him as security, as *DeVeber* says he took a mortgage on the place back from plaintiff as his security for the payment, and would not have conveyed the place as he did upon the security of the notes only. It came out in evidence also that after the purchase, and before the plaintiff had given any conveyance to the defendant, the defendant exercised acts of ownership over the place, by pasturing his horses, and giving leave to another person to do so, and spoke of the place as belonging to himself and *Read*. It appears also that in *March* 1846, before either of the notes became due, the plaintiff who still held the title from *DeVeber* to the whole lot, conveyed one undivided half to the defendant: in that deed a consideration of £150 is acknowledged by the plaintiff to have been received by him for the same, in the usual form, that is, to have been "*in hand well and truly* "*paid at and before the sealing and delivery thereof.*" This was put in evidence by the defendant, to shew that he had paid to plaintiff a valuable consideration for the one half of the lot independent of the notes, and it was contended that the plaintiff was thereby estopped from shewing any other or different consideration from that mentioned in the deed; but evidence was admitted, and I think rightly so, from the witness to the execution of the deed, that no *money* was paid

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paid at that time: this was admitted, not to shew that plaintiff had received no consideration for the conveyance, and thereby contradict the deed, but merely to shew what passed at the time of that conveyance, and that the deed was consistent with the original purchase, being a joint one between the parties, who were equally liable on the notes for the purchase money, and therefore the defendant was entitled to have one half conveyed to him, and that no money was then paid by him to plaintiff for the same; and this evidence was admitted upon the same principle that similar evidence is admitted in cases where deeds are attempted to be avoided on the ground of their being fraudulent: for if the original purchase was a joint one, and this deed was merely given in pursuance thereof, it was an attempt at fraud on the part of the defendant to set it up to defeat his liability to pay for one half of the notes. This conveyance, though not so stated therein, was in fact subject to *DeVeber's* mortgage, which he still held upon the whole property; and it was a strong circumstance for the consideration of the jury, that if the defendant signed the notes, merely as a surety, it would have been a most extraordinary proceeding for him to have purchased an undivided half of the land from the plaintiff, and paid for it so large a consideration, subject as it was to an outstanding mortgage held by *DeVeber* for the whole original purchase money, and he (the defendant) still remaining personally liable to the mortgagee for the whole amount of the notes. And whether it was not much more probable, and consistent with all the circumstances of the case, that this deed was merely to convey a title to the defendant of an undivided half, in pursuance of an original arrangement between the parties for a joint purchase, and thereby to place him in the same situation he would have been if *DeVeber's* deed had conveyed to them both—for they still remained as tenants in common of the whole. Under such a state of circumstances, supported by such evidence, I considered at the trial it was a proper question to be left broadly to the jury, and I so left it. And I have not been able since to satisfy my own mind, upon any rule of law or principle of justice, that I was wrong

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wrong in doing so. The jury have by their verdict found that the defendant signed the notes as a principal in the transaction, and as I was fully satisfied with the verdict, and believe it to be according to the true justice of the case, I think it should not be disturbed, and that the rule for a new trial should be discharged.

Rule discharged.

## BURNHAM ET AL *against* WATTS, GARCELON and WIFE.

In trespass for *mesne* profits, the plaintiffs declared against the defendants *W. G.* and *L.* (the wife of *G*) jointly, and on the trial gave in evidence a judgment in ejectment against *W.* and *L.*, and shewed that after the judgment in ejectment *L.* became the wife of *G*. On objection that *G.* could not be answerable as a party to the alleged trespass, and the point reserved for a nonsuit: Held, that the objection must prevail.

IN trespass for *mesne* profits, tried before *Parker*, J., at the *Charlotte* assizes in *November* last, the plaintiffs proceeded for a trespass from 19th *August*, 1845, to *March* 1847, and gave in evidence a judgment in ejectment by the plaintiffs against the defendants *Watts* and *Lucinda Morrell*, who, since the judgment obtained, had married the defendant *Garcelon*. The declaration alleged a joint trespass by all the defendants, without averring the marriage of *Lucinda Morrell*, or shewing how *Garcelon* became connected. Objection to this was taken on the trial, and the point was reserved, with leave to enter a nonsuit if the Court above should think the objection valid in point of law. *G. D. Street*, in *Hilary* term last, having obtained a rule, contending that the husband was not liable for the torts of his wife before marriage, and citing *Denn* v. *White (a)*, 1 *Chit. P.* 224,

*G. Bolsford* now shewed cause. Mrs. *Morrell* married *Garcelon* after the judgment in ejectment. The present is an action for *mesne* profits. The judgment in ejectment is evidence against the defendants in the ejectment suit. As Mrs. *Morrell* was a defendant in that ejectment suit, and bound by all the liabilities incident to it, *Garcelon*, who married her, is equally bound, and is precluded from contending he was not a party to the ejectment for the purposes of this suit. *Doe* v. *Whitcourt (b)*, 1 *Chitty P.* 105. He married her subject to her liability in the action of trespass: the judg-

(*a*) 7 *T. Rep.* 112. (*b*) 8 *Bing.* 46.

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ment in ejectment being good evidence against her before marriage, is good evidence against her and the husband after marriage; and he continued in possession some months after the judgment in ejectment. In an action of trespass against *A. B.* and *C.* jointly, it is not the course to set out that one commanded the trespass, and the others committed it. By marrying, *Garcelon* assented to the trespass, and became a trespasser by relation in torts committed by the wife before marriage. The action must be brought against the husband and wife. [STREET, J. Is it not necessary to set out in the declaration that the trespass was committed by the wife.]

CHIPMAN, C. J. It strikes me that the objection taken for a new trial must prevail.

PARKER, J. and STREET, J. were of the same opinion.

Rule absolute.

## THE QUEEN *against* THE JUSTICES OF YORK.

Where affidavits used in moving for a rule *nisi* for a mandamus, were entitled in a cause: Held irregular, and the motion dismissed, but no costs allowed to the successful party.

IN *Easter* term last, *G. Botsford*, on behalf of one *Andrew Blair*, obtained a rule *nisi* for a mandamus to the Justices of *York*, to shew cause why they should not pay over to *Blair* a sum of money alleged to be in their hands. The affidavits on which the motion was founded were entitled "*The Queen* "v. *The Justices of York.*"

*D. S. Kerr* now shewed cause, and submitted that the affidavits were entitled in a suit, whereas there was none such pending: they should be entitled in the Court but not in a cause; and cited *Ex parte Nohro (a)*, *Drury* v. *Howe (b)*, *Regina* v. *Walworth (c)*.

*G. Botsford* contra, contended that the entitling of the affidavits, if objectionable at all, was merely surplusage, and did not vitiate them.

CHIPMAN, C. J. I do not see how you can get on. The rule must be discharged.

*Kerr* applied for costs.

CHIPMAN, C. J. There can be no costs allowed in Crown cases.

(*a*) 1 *B. & C.* 267. (*b*) *Ante*, vol. 3, p. 583. (*c*) 10 *Jurist* 967.

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## LYONS *against* MERRITT.

In trespass, where a boundary was the prominent question in dispute, and the plaintiff, in addition to his evidence of the line which he sought to establish, and the trespasses committed within it, proved a trespass of cutting forty trees on his side of the line, claimed by the defendant. The learned Judge, on the evidence of both sides, left the questions of the lines to the jury, telling them that the line proved by the defendant was the more correct one, but that they might find for the plaintiff for the value of the trees, and the jury, in returning a verdict for the plaintiff, stated that they found the line claimed to by the plaintiff to be the correct line; a new trial was granted, it not appearing to the Court that, on such finding, the jury had confined their damages to the trespass for cutting the trees.

TRESPASS *q. c. f. et asportavit*, before *Carter*, J., at the *Queen's* circuit in *March* last, the prominent question was a disputed boundary between the parties, the plaintiff claiming by a line run by one *Mahood*, and the defendant relying on one ran by a surveyor named *Whipple*. It appeared by *Mahood's* evidence that he ran the line the reverse of the course laid down, and did not bring it out corresponding with the boundaries described in the grant. Besides the plaintiff's claim under the *Mahood* line, and shewing the trespass had been committed within it, he proved by a witness that there were about forty tamarack trees cut on the plaintiff's side of the *Whipple* line. The learned Judge left the question of boundary to the jury, telling them he considered the *Whipple* line the more correct one, and that the plaintiff could not recover any thing more than the value of the trees cut over the *Whipple* line. The jury brought in a verdict for the plaintiff, damages £5, stating that they found the *Mahood* line to be the correct one. *D. S. Kerr*, in *Easter* term last, obtained a rule *nisi* for a new trial, on the ground that the verdict was against law and evidence.

*A. R. Wetmore* now shewed cause. Though there was not positive evidence of the boundary line, still if there is evidence to support the verdict, the Court will not disturb it. There is ample evidence to sustain the verdict in the cutting of the trees, and the plaintiff is not to be deprived of it because the jury have thought proper to make an absurd declaration about the *Mahood* line. There was no positive evidence of the value of the trees, but the jury were fully justified in finding their value to be £5: had the jury given damages for the cutting between the two lines, the damages would have been much larger. If the case were sent down for a new trial, the result would be similar to the present. This verdict cannot be evidence in a subsequent action of ejectment between these parties. There is ample evidence to support the verdict if the jury had not made the declara-

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tion. [PARKER, J. No doubt of it.] And the Court ought not to interfere, for the jury may make the same remark on the second trial. [CHIPMAN, C. J. From what the jury said, it must be taken that they gave the damages for the trespasses according to the *Mahood* line. PARKER, J. The plaintiff's counsel might have requested the Judge to send the jury back to find for the value of the trees. CHIPMAN, C. J. There is nothing to shew as against the declaration of the jury that the damages were given for the trees cut: the object of a new trial is to do justice to the parties more completely.]

*Kerr* in support of the rule. The object of this suit was not damages, but to establish the line; and if the verdict be allowed to stand, it may perhaps be used in future to the prejudice of the defendant, in an action to eject him from the land between the two lines. [The Court stopping *Kerr.*]

CHIPMAN, C. J. There must be a new trial. The only question is the costs, and we wish to consult the learned Judge who tried the cause. We therefore postpone the judgment until next term. *(a)*

*(a)* Rule absolute for a new trial ordered on payment of costs, in *Michaelmas* following.

## DOE dem. HATHEWAY *against* MUNRO.

The estate of a lessee for years is not complete, without actual entry; therefore where a lessor in ejectment made title under a lease from *D.*, without shewing any entry under the lease, and it appearing also that the defendant had been several years in possession: Held, that the lessor's title was incomplete.

IN ejectment, before *Carter*, J., at the *Saint John* circuit in *January* last, the lessor of the plaintiff put in evidence a deed of the premises, bearing date 16th *June*, 1843, from *Nathaniel DeVeber* and wife to *Gabriel DeVeber;* a lease of the same premises, dated 20th *May*, 1846, from *Gabriel DeVeber* to the lessor for seven years, acknowledged and recorded 10th *January*, 1848; and a notice to quit the premises: it appeared that the defendant had held possession for a number of years. A nonsuit was moved for and ordered on the ground that the lessor's title was not complete without entry, which had not been shewn. The lessor refused to become nonsuit. The case proceeded, and the jury under

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under the charge of the learned Judge, found for the defendant. *Scovil*, in *Hilary* term last, moved the Court, and obtained a rule *nisi* for a new trial on the ground of misdirection. *Doe* v. *Watts (a)*, *Goodright* v. *Keator (b)*, *Co. Lit.* 46 b, *Adams' Eject. by Tillingh.* 12. 13. 41. 60. 93. 95. 157. 262. 692, were cited.

*G. Botsford* now shewed cause. There was no connexion or privity shewn between the lessor of the plaintiff and the defendant. In 2 *Black. Com.* 314, it is laid down that "In "leases for years, an actual entry is necessary to vest the "estate in the lessee, for the bare lease gives him only a "right to enter, which is called his interest in the term, *in-* "*teresse termini*, and when he enters in pursuance of that "right, he is then and not before in possession of his term, "and complete tenant for years." *Co. Lit.* 46. Here the "lessor never entered, he therefore had no complete title: he had only an inchoate interest. *Woodfall L. & T., by Harrison*, 113. [CHIPMAN, C. J. His title is incomplete.] As to the consent rule, it leaves the lessor of the plaintiff to prove what right he had to grant the lease to *John Doe*. [The Court stopped *Botsford*, and called on]

*A. R. Wetmore* in support of the rule. Ejectment is a creature of the Court, to enable a party to get possession of property which he is entitled to: formerly the lease was actually made out in order to avoid the liability for maintenance. The party was obliged to enter on the land to execute the lease: the lease is a mere fiction of law. The consent rule having admitted the lease to *John Doe*, it must necessarily admit all that was essential for the lessor to enable him to make the lease; but the consent rule does more: it admits the entry of the party under the lease as well as the ouster, and so admitting the entry it became unnecessary to prove it made. A lessee before entry has an *interesse termini* that he may assign to another, which can only be reconcileable with a complete title in the assignee before the assignment, and equally complete for the purposes of an assignment. If the lessee before entry can assign the term to another, whose title after entry is complete, the lease

(a) 9 *East*. 17. (b) 2 *Doug*. 477.

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to *John Doe* before entry and the confession by the consent rule of his entry, cures all the difficulty and answers the objection. [STREET, J. The whole question turns upon whether the lessor had a right to make the entry.]

CHIPMAN, C. J. The question is not whether a party can maintain ejectment without actual entry, but whether his estate is complete without it. The estate of a lessee for years is not complete without actual entry.

PARKER, J. The estate from *Gabriel DeVeber* to the lessor of the plaintiff ought to appear; and not so appearing, the lessor shewed no right to make the lease to *John Doe*.

STREET, J. If there be another party in possession who refuses to let the lessor of the plaintiff in, he is not in a condition to make a lease to another: at least an entry ought to be actually made before ejectment brought.

Rule discharged.

*Saturday, 24th June.*

Where an action is pending against a party and his attorney for imprisoning the applicant, on a *ca. sa.* set aside for irregularity, but which had not been put on file, and was wanted as evidence on the trial; the Court ordered the attorney to file the *ca. sa.* in the office of the clerk of the pleas.

## ROBERTS *against* WATSON.

*Charles Fisher*, pursuant to notice, moved for a rule requiring the plaintiff's attorney in this suit forthwith to file in the office of the clerk of the pleas of this Court a *ca. sa.*, issued by him against the defendant at the suit of the plaintiff, on or about 2d *January*, 1846, directed to the sheriff of *Carleton*, returnable of *Hilary* in the last mentioned year. The application was founded on an affidavit of the sheriff of *Carleton*, stating that such writ had been received by him from the plaintiff's attorney, that the defendant had been arrested upon it, committed to gaol, where he remained until he got bail for the limits; that after the writ was returnable, the sheriff returned it to the attorney, and subsequently the defendant was discharged by the sheriff in obedience to a rule of this Court, on account of the said writ having been irregularly issued. It likewise appeared that search had been made in the clerk's office for the writ, but it was not found on file. The above named defendant had brought an action, which was pending against the plaintiff and

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and the attorney who issued the writ, and it was sworn that the writ or an exemplification thereof was wanted to be used on the trial. The counsel contended that the plaintiff's attorney should have filed the writ—that it was issued out of this Court by him for the purpose of the suit, and should now be made available for the parties at the approaching trial.

*D. S. Kerr* contra, submitted that the motion should not prevail; that the action pending was an unjust proceeding against the attorney, who was not aware of the defect for which the writ was set aside; and it was oppressive against the plaintiff in this action, as it was not pretended that the defendant had ever questioned the debt, or paid any part of it. The applicant should have had a complete cause of action before he commenced it, by having the writ on file if he were entitled to it. The attorney may have been induced to defend the suit, and rested his whole defence on the applicant's incomplete cause of action. But the applicant was not entitled to what he sought. The writ was set aside for irregularity, and not on file, the Court have no controul over it. The attorney was not bound to file the writ after it was set aside; and the Court refusing to recognize it as a process to protect the attorney, should not compel him to produce it to his disadvantage, nor help the defendant with evidence to make out his case on the approaching trial. This is an indirect mode to force an admission out of a party to a suit. Compelling him against whom an action is pending, by order of Court to furnish evidence by which he may be condemned, seems directly contrary to precedent and right.

*Fisher* was heard in reply.

*Cur. adv. vult*

CHIPMAN, C. J. now delivered the judgment of the Court. This is an application on the part of the defendant for a rule on the plaintiff's attorney, to file the writ of *capias ad satisfaciendum*, issued out of this Court against the defendant at the suit of the plaintiff, on or about the 2d of *January*, 1846, directed to the sheriff of *Carleton*, returnable in *Hilary* term 9th *Victoria*. The sheriff's affidavit shews that he returned this writ after it had been executed and after it was returnable, to *Charles A. Harding*, the plaintiff's attorney; and

*Charles*

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*Charles Fisher's* affidavit shews that he has searched the clerk's office, and finds that this writ has never been filed. He also states that the defendant has brought an action against the plaintiff and *Charles A. Harding*, his attorney, for the trespass and imprisonment of the defendant under the said writ, and that the defendant will require the said writ or an exemplification thereof on the trial of the said action. This application is opposed only on the ground that the writ in question has been set aside by the order of this Court for irregularity since it was executed and returnable, and it has thereby become a nullity, and the plaintiff's attorney cannot now be called on to file the same, as it would be compelling him to furnish evidence against himself. But the writ was issued out of this Court, though improperly and irregularly, and was made returnable into this Court, and therefore, though set aside, this Court can order it to be brought in and filed, if a case is made out whereby it is shewn that the defendant can make use of it. The case of *Jones* v. *Williams and others* (*a*), shews that this will be done. In this case *Parke*, B. says, "that though the writ may be void for some "purposes yet the plaintiff may desire to make use of it for "others; for instance, he may wish to question the propriety "of the sheriff's charge, or to bring an action for extortion: "it is enough to say that he may make some use of a void "writ." We therefore think the defendant has made out a sufficient case, and that this application should be granted. We agree with Mr. *Kerr*, that the most proper time for requiring the execution to be filed would have been at the time of applying to have it set aside; but on consideration we do not think the delay a sufficient excuse for not filing it, if it is in Mr. *Harding's* possession and can be filed, which is not denied. The only consequence of refusing to grant this rule would be to let in secondary evidence of the execution, if Mr. *Harding* did not produce it on notice. Evidence of the execution could not be excluded. It is better for all parties that the writ itself or an exemplification of it should be produced. **A rule absolute must go to the attorney forthwith to file the said writ in the office of the clerk of this Court.**

**Rule absolute.**

(*a*) 9 *Dowl. P. C.* 710.

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## WIGAN and MAIN *against* NIXON.

ASSUMPSIT on a promissory note, with the common counts. Plea, general issue and notice of set off. At the trial, before *Street*, J., at the *York* sittings after *Michaelmas* term last, the plaintiffs, by their particulars, claimed upwards of £1106, accruing from *August* 1844 to *April* 1846, against the defendant; and it appeared by the evidence, that during the above period the plaintiffs, doing business as merchants in *Stanley*, and having extensive dealings with *Bedell & Co.*, merchants of *Fredericton*, and indebted to them, had made large advances to the defendant, a lumberer in *Stanley*, on an understanding between them that the defendant was to turn in his lumber to them, sufficient to satisfy their account. The defence set up was that the defendant had turned in to the plaintiffs more lumber and other payments than were sufficient to satisfy their accounts, and was entitled to a considerable balance; and it appeared that in the spring and summer of 1845, the defendant had turned in his lumber to the plaintiffs, and during the winter of 1846 had cut and hauled out a large quantity of logs. One *William Turner*, a surveyor, who had been in the employ of the plaintiffs, swore that he made the survey of the logs gotten in 1846, between the months of *January* and *April* inclusive, by the directions of the plaintiffs, as they were brought to the brows of the *Nashwaalk* stream; that the quantity of logs of the defendant's so surveyed by *Turner*, exclusive of shares belonging to one *Elliott* and one *O'Donnell*, was 454,129 superficial feet: one of the plaintiffs having assisted in this survey, with the knowledge and concurrence of the defendant, who claimed twenty shillings per thousand for the logs. It was likewise proved by one *Francis Campbell*, that in a conversation which he had lately had with *Main*, one of the plaintiffs, he informed the witness that the plaintiffs had got all the timber and logs the defendant had got out for them in 1844, 1845 and 1846; that the logs gotten in 1846 by the

In assumpsit for supplies and advances; the defendant, in order to meet the amount proved by the plaintiffs and to claim a balance, gave in evidence a quantity of logs delivered by the defendant in 1846, to *B. & Co.*, with the assent of the plaintiffs, to pay a debt due from the plaintiffs to *B. & Co.*; in reply the plaintiffs shewed an agreement between the defendant and *B. & Co.*, stipulating that the logs were delivered to *B. & Co.* by defendant, *B. & Co.* to give the defendant 20s. per thousand, the defendant to pay the plaintiffs through *B. & Co.*, any amount justly due by defendant to plaintiffs, and stumpage to *B. & Co.*, and any balance due after deducting the amount of such account and stumpage, *B. & Co.* were to pay defendant. The learned Judge told the jury that the defendant was entitled to be allowed for the logs in this action to the extent of paying the plaintiffs' account, but not to claim a balance in the way of set off: Held, that the direction of the learned Judge to the jury was right.

defendant,

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defendant, and surveyed by *Turner*, had been handed over to *Bedell & Co.* by the plaintiffs' consent and for their benefit, at twenty shillings per thousand, to pay a debt the plaintiffs owed *Bedell & Co.* One *Thomas Buchanan* also testified, that in a conversation he had lately had with *Main* he had informed him to a similar effect. It likewise appeared, that in the spring of 1846 the defendant had thrown off the logs so surveyed by *Turner* into the *Nashwaalk* stream, and that *Bedell & Co.* had gotten them. The plaintiffs, in reply to this evidence, and to defeat the defendant's claim for the logs of 1846 in this action, put in evidence the following letter or agreement:

"*Fredericton, April 26th*, 1846.

"MR JAMES NIXON,

"*Dear Sir*—Having purchased the lumber cut by you and your "parties (from off the lease given by the *N. B.* and *N. S. Land* "*Company*), at a public sale held in *Stanley* a few days ago by the "deputy sheriff, Mr. *E. W. Miller*, Junior, but not wishing to take "any undue advantage of said sale, we will give you for said lumber "at the rate of 20*s.* per M. feet superficial, deliverable by you on "the brows, subject however to the same being put into the water "at your own proper expense: the survey to be that made on the "lumber when in the market at *Saint John*. It being understood "that we are to be at the expense of driving said lumber from the "place at which the lumber is put into the stream to the mouth of "the *Nashwaalk*, and we are to be at the risk of the same being "taken from the mouth of the *Nashwaalk* to the place of delivery "in the *Saint John* markets. In settling up for the above lumber "you are to pay to Messrs. *Wigan* and *Main*, through us, whatever "amount there may be justly due by you to them, and also to pay "stumpage to us on the said lumber, at and after the rate of 3*s.* 6*d.* "per M. feet superficial, and any balance there may be due to you "after said claims and stumpage are paid, we agree to pay over to "you in cash.

"We are, Sir,

"Your most obedient servants,

"W. J. BEDELL & Co."

On the back of the above letter was the following:

"I acknowledge to have received a copy of the agreement on "the other side of this paper, and hereby agree to the conditions "and terms of the same as expressed."

"JAMES NIXON."

It was contended for the plaintiffs, that by the above agreement the defendant had sold the logs of 1846 to *Bedell & Co.*, who had expressly undertaken to pay him, and he was

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was accordingly not entitled to charge the plaintiffs with them. For the defendant it was urged, that this transfer was made at the instance of the plaintiffs and for their benefit, to pay off a debt due from them to *Bedell & Co.*, and that the defendant was entitled under the Act of Assembly relating to set-off, to have a balance, if the jury should find any, certified in his favour. The learned Judge in charging the jury, after going over the evidence, told them if they believed the evidence of *Campbell* and *Buchanan*, and that the plaintiffs had assented to the agreement to transfer the logs to *Bedell & Co.*, the defendant had a clear right to apply the amount of these logs to meet to the fullest extent any demand which the jury should find the plaintiffs had proved, but no further; as by the terms of the agreement the defendant was to look to *Bedell & Co.* for any balance due him, and could not recover it as a certified balance in this action; and at the suggestion of the counsel on both sides, the learned Judge further directed the jury to state in bringing in their verdict, the amount which they found due on the plaintiffs' account, and the amount of the lumber turned in by the defendant to the plaintiffs in 1845, and also the amount of the logs turned in to *Bedell & Co.* in 1846, after deducting the stumpage. The jury brought in a verdict for the defendant, and stated that they found the whole amount of the plaintiffs' account proved to be £836 15*s.* 7*d.*; the amount of the defendant's account proved, exclusive of logs in 1846, to be £528 19*s.* 9*d.*, and the amount of logs delivered in 1846, deducting the stumpage thereof at 3*s.* 6*d.* per thousand, to be £374 11*s.*; leaving a balance in favour of the defendant after deducting the stumpage of £66 15*s.* 2*d.*

In *Hilary* term last, the Court was moved by *J. A. Street*, Q. C., and *D. S. Kerr*, respectively: the former to obtain a rule *nisi* for a new trial, on the ground of misdirection of the learned Judge as to the agreement; the latter, to have the balance found by the jury, together with the amount of the stumpage, entered as a set-off for the defendant. The Court, by the consent of the counsel, granted a rule *nisi* to enter a verdict for the plaintiffs for £307 15*s.* 10*d.*, being the balance due the plaintiffs after deducting the amount due

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the defendant, exclusive of the logs turned in to *Bedell & Co.*, provided the learned Judge was wrong in his construction of the agreement as against the plaintiffs; otherwise, the verdict to stand: and if the Court should think that, under the agreement, a balance ought to have been certified in favour of the defendant, to have it entered for such balance as the Court might determine.

The *Attorney General* and *D. S. Kerr* were now heard for the defendant; and *J. A. Street*, Q.C., for the plaintiffs.

CHIPMAN, C. J. I think the result of the decision must be, that the verdict should stand. The verdict for the defendant entered generally as it is, seems fully to correspond with the agreement and intent of the parties.

PARKER, J. I am of the same opinion. By the agreement *Bedell & Co.* stipulate that the balance due shall be paid by them to the defendant. I think the jury were justified in the decision they came to: the defendant must look to *Bedell & Co.* for any balance due him, and it must be arranged between them.

STREET, J. I am of the same opinion as at the trial. The very object of the arrangement by *Bedell & Co.* was to secure to themselves the debt the defendant owed the plaintiffs for supplies, and if there was any balance, *Bedell & Co.* would be answerable to the defendant for it: this was all done by the plaintiffs' consent. Under these circumstances I think the verdict ought not to be disturbed.

Rule discharged.

## THE QUEEN *against* HARRIS.

Where the defendant, an indented apprentice, was convicted before two Justices, under the Acts of Assembly, for making brooms contrary to an agreement contained in an indenture which he executed while an infant: Held that the conviction was bad.

*W. J. Ritchie* moved to quash a conviction by Justices *Harding* and *Needham* of the defendant, an apprentice, for absconding and breaking his indentures. It was stated in the conviction, brought before the Court in obedience to a *certiorari* issued by Mr. Justice *Parker* in last vacation, and returnable

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returnable at this term, that *Thomas M. Sime*, of the city of *Saint John*, broom manufacturer, personally appeared before Justice *Needham*, and informed him that the defendant was bound to serve as an apprentice to him *(Sime)* in the said trade, by indenture dated 11th *December*, 1844, for four years, and the defendant on the 12th *June*, 1847, absconded and quit the service of *Sime*, and engaged himself in the business of broom making in the Province of *New Brunswick*, within the term from and after 11th *December*, 1844, contrary to the terms and conditions of his indenture and contrary to the form of the Act of Assembly in such case made and provided; that the defendant, after being duly summoned before the Justices *Harding* and *Needham*, on 29th *April*, 1848, appeared, heard the charge, and declared that he was not guilty of the offence; and the said Justices proceeded to examine the charges. It also appeared by the conviction, that the indenture in question was executed by *Sime* and the defendant on 11th *December*, 1844, while the defendant was an infant, and the acknowledgment of the defendant's assent thereto was taken in the city of *Saint John*, before *William Wright*, Esquire, a Justice of the Common Pleas of the county of *Northumberland*. Various objections were made to the conviction; but the one upon which the Court quashed it, arose on a covenant or agreement in the indenture as follows: "It is hereby further agreed between the said *T.* "*M. Sime* and the said *John T. Harris*, that the said *John* "*T. Harris* can leave the employment of the said *Thomas* "*M. Sime* at the end of two and a half years from the date "of this indenture, provided he do not learn or cause to be "learned any person or persons in the art or trade of broom "making, residing or about to reside in any of the *British* "provinces of *North America, or engage himself in any way* "*in the said business during the whole of the above term of four* "*years, under the penalty of* £50 *currency, to be paid to the* "*said Thomas M. Sime, or to re-enter the employment of the* "*said Thomas M. Sime, and serve the remainder of his said* "*apprenticeship, to-wit, one and a half years.*" The evidence on this, for the prosecution, was by one *Howith*, who swore that on the 10th of *March* previous he went to the store of *John*

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*John Harris*, in the city of *Saint John*, to buy some brooms, and there saw the defendant, and asked him the price of the brooms; to which he replied they were 15*s.* per dozen; that upon the witness remarking they looked like very good brooms, the defendant said "Yes, I made them all myself;" and on asking defendant if there was no other person connected with him, he replied "No, I made them all with my "own hands:" the witness observed that he had bought brooms from *Thomas M. Sime*, to which the defendant answered "Yes, that he believed he had seen him there when "he was an apprentice with *Sime;*" that the defendant shewed the witness brooms of different qualities, and said he had been living with *Sime* about two years and a half. For the defence, one *William Ruddock* testified that he was an apprentice with *Sime* when the defendant was there, and was at the time of giving evidence in the employ of *Sime;* that there was some dispute between the parties as to the time when the two years and a half expired, but the defendant remained until the time *Sime* contended it expired, and then went away with the knowledge of *Sime;* that the defendant afterwards received his pay due on the indenture, in money of different descriptions; that the witness was not present when the money was paid, but assisted him to carry home the money. On the foregoing evidence the Justices convicted the defendant, and adjudged that he be committed to the common gaol of *Saint John* for two weeks. It was, among other things, contended by

*Ritchie* for the defendant, that this conviction was not warranted by the Acts of Assembly. The 26 *G.* 3, *c.* 37, *s.* 3, provides that all indented servants and apprentices who shall absent themselves from their service, shall be liable to make satisfaction by service after the time of their indenture is expired, double the time of service so neglected &c. Sec. 5 declares that before any indenture (within the act) is finally concluded the parties shall go before one of His Majesty's Justices of the Peace, who shall examine whether the apprentice has any just objection to such indenture, and if he has not, shall give a certificate accordingly; and the 7 *G.* 4, *c.* 5, enacts that it shall be lawful to and for any two Justices of

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of the Peace in any county in this Province, upon application or complaint made upon oath by any master &c. against any indented servant or apprentice for absenting themselves from his service (which oath such Justices are hereby empowered to administer), to issue their warrant for bringing the offender before them, and to hear, examine, and determine such complaint, and to punish the offender by commitment to the common gaol &c., there to remain and be corrected, and held to hard labour for a reasonable time, not exceeding one calendar month. The latter act being the only one authorising the conviction of the party, the provisions of both acts must be strictly observed before any conviction can take place. Now besides the conviction in question shewing no complaint *on oath*—no complaint on oath before *two Justices*—nor any warrant by two Justices, as 7 *Geo.* 4 requires—nor any acknowledgment before a Justice of the Peace, save Mr. *Wright*, who had jurisdiction only in *Northumberland* and not in the city of *Saint John;* the evidence shews no absconding from *Sime's* service, but that the defendant went away with the knowledge of *Sime*, who paid him according to the indenture. The commencing the business of broom making is not an absconding from the service within the act. The Justices had no jurisdiction in such a case. If the defendant could be liable at all, it could only be for the penalty of £50, or in an action of covenant, and not under the act for absconding from service.

*Jack* contra. If the contract is beneficial to the apprentice it is binding upon him: he binds himself for four years, with liberty to go in two and a half years, provided he fulfil a condition, which he expressly violates, and whereby he is placed in the same situation as if no such provision existed. [PARKER, J. He left with the permission of the master at the end of two and a half years. I do not see how you can make out an absconding of the defendant, if that clause is struck out of the indenture. I do not see how you can get on. There is nothing illegal in the agreement that the defendant should not make brooms within certain limits, but being an infant he is not bound by it.]

*Per Curiam.* The conviction must be quashed.

Rule accordingly.

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## GOSS *against* MESSINETT.

Where a new trial has been granted in order that the jury might find whether actual payments had been made, agreeably to certain receipts produced in evidence on a former trial between the parties—if the defendant defeat that object by pleading a release *puis darrein continuance*, the Court will set aside the plea with costs.

The Court in such a case has no authority to order the release to be given up to be cancelled.

THIS was an application to set aside a plea of release pleaded *puis darrein continuance*, at the *Charlotte* autumn assizes in 1847, to have the release delivered up to be cancelled, and that the defendant should pay the costs of the motion. From the affidavits on both sides it appeared, that the action had been brought in the name of the plaintiff, as a trustee for the benefit of one *Justus Wetmore*; that a trial had taken place between the parties at the *Charlotte* spring assizes in 1845, on which occasion the defendant tendered in evidence two receipts from the plaintiff, and one of them purporting to be in full of all demands, but the jury notwithstanding, returned a verdict in favor of the plaintiff for £179 8*s.* 6*d.*; that afterwards, in *Trinity* term, 9 *Victoria* (*a*), the verdict was set aside, and a new trial granted; that the cause was again entered for trial at the *Charlotte* autumn assizes in 1847, when the release in question was pleaded in the manner already stated; that the learned Judge was obliged to receive the plea, and postpone the trial of the cause. It also appeared from the affidavits on the part of the defendant, that his attorney, in whose custody the receipts had been left, mislaid them, and that to remedy this state of things the release had been obtained; and it was not until after the plea of release was pleaded that the receipts were found.

The *Solicitor General* having read the affidavits on the part of the plaintiff, was stopped by the Court, who called upon

*J. W. Chandler*, on the other side. There seems to be but four classes of cases, in which the Court will exercise its equitable jurisdiction, and set aside a plea of release: 1st. Where there are several plaintiffs, and one of them fraudulently gives a release to the prejudice of his co-plaintiff. To this class belong *Jones* v. *Herbert* (*b*), *Mount-*

(*a*) *See* 3 *Kerr* 201.

(*b*) 7 *Taunt.* 421.

*stephen*

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*stephen* v. *Brooke* (*a*), *Innell* v. *Newman* (*b*), *Skaiffe* v. *Jackson* (*c*). 2d. In the case of a bond. If the obligor after notice of the assignment procures a release from the obligee to defraud the assignee, the Court will set aside the release. *Legh* v. *Legh* (*d*), *Craib* v. *D'Aeth* (*e*). The principle of this class of cases is very obvious: by the terms of the bond the obligor expressly agrees to pay the obligee or *his assigns.* 3d. Where the tenant, a mere nominal plaintiff, releases an action to defeat his landlord, who is obliged to bring an action in the name of his tenant, the Court will set aside the release. *Payne* v. *Rogers (f).* 4th. Where the plaintiff is but a *bare* trustee, and gives a release in fraud of his *cestui que trust*, the Court will set aside the release. *Manning* v. *Cox (g).* Now it is extremely clear that the present case does not range itself under any of those classes, but falls under a different class, in which the right of the plaintiff to release the action is fully recognized by the Courts. *Alner* v. *George* (*h*), *Bauerman* v. *Radenius* (*i*), *Gibson* v. *Winter* (*k*), *Green* v. *Williston* (*l*), *Rawstorne* v. *Gandell* (*m*). With the exceptions already mentioned, a Court of law can only look to the strict legal rights of the parties. It was competent for *Goss* at any time during the progress of the action, or antecedently to its commencement, to have received payment from the defendant, give a receipt in full, and even in defiance of *Wetmore*, defeat the action. He might after the receipt of the money have given it back to the defendant, and a receipt in full with the knowledge of the facts, whether any money be paid or not, is a discharge of the claim of the creditor: it is an executed gift. *Bristow* v. *Eastman* (*n*). If therefore the plaintiff could defeat the action by receiving payment, or giving a receipt in full, the release in this case cannot be disturbed. [PARKER J. I am not prepared to dispute your law upon this point, but does not this application rest upon other grounds? A new

(*a*) 1 *Chit. Rep* 390.
(*b*) 4 *B. & Ald* 419.
(*c*) 3 *B. & C.* 421.
(*d*) 1 *B. & P.* 447.
(*e*) 7 *T. Rep.* 670, note.
(*f*) 1 *Doug.* 407.
(*g*) 7 *J. B. Moore* 617.
(*h*) 1 *Camp.* 392.
(*i*) 7 *T. R.* 666.
(*k*) 5 *B. & Ad.* 96.
(*l*) 3 *Kerr* 58.
(*m*) 10 *Jurist* 294.
(*n*) 1 *Esp.* 172.

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trial was granted in this case upon the distinct understanding that the parties should go down to trial again, and submit the question to a jury, whether the defendant actually made the payments mentioned in the receipts or not; and your plea of release defeats that object.]

*Per Curiam (absente*, the Chief Justice). Let the plea be set aside with costs. We have no authority to order the release to be delivered up to be cancelled.

Rule accordingly.

## PORTER *against* BURNES.

A rule for the sheriff to bring in the body of the defendant, may be taken out in term, without motion in Court.

*Quere.* If the usual rule for body be entered in the docket agreeably to the practice, it may not be taken out in vacation?

The name of the officer making the arrest, need not appear on the rule to bring in the body.

Under the 2d rule of *Hilary T.* 1832, it is not necessary to enter an exception to bail in the Judge's book.

A rule dischargeable *without* costs, if moved *with* costs, will be discharged with costs.

*Lee* moved in last *Easter* term to set aside with costs, a peremptory rule on the sheriff of *Charlotte*, entitled of *Hilary* term 11 *Vict.*, to bring in the body of the defendant. The grounds offered were—1st. That the rule to bring in the body could not be taken out without motion in Court, or under a Judge's order in vacation. 1 *Chitty's Arch.* (6th ed.) 210. And the present was taken out in vacation, and no order on file. [Parker, J. If the rule for body and to plead are entered in the docket, is not that sufficient?] 2d. The name of the officer making the arrest was not indorsed on the rule. 1 *Chitty Arch.* 89. [Parker, J. The name of the officer making the arrest need not appear: the sheriff makes the return, *cepi corpus*, in his own name, and takes the bail bond.] 3d. The exception to the bail put in before Mr. Justice *Carter* in this case was not duly entered, as it appeared by the affidavit that the bail was not excepted to by entering the exception in the Judge's bail book. *Rex* v. *The Sheriff of Middlesex* (*a*), *Hodson* v. *Garrett* (*b*), *Thwaites* v. *Gallington* (*c*.) Rule *nisi* granted on the first and last grounds.

*A. Campbell* now shewed cause. In this Province a rule cannot be taken out in vacation at all, even by a Judge's order: in *England* it is by a particular statute, not extending here. In the present case it appears that the rule was actually taken out in *Hilary* term after *precipe* filed for the purpose,

(*a*) 5 *B. & C.* 389. (*b*) 1 *Chit. Rep.* 174. (*c*) 4 *D. & R.* 365.

and

and under such circumstances the practice does not require an actual motion in Court. By the *English* practice the Judges keep a book for entering bail. The second rule of *Hilary* term, 1832, in this Province, is different; requiring the exception to be entered with the Judge before whom bail is put in: that was done in this case, by writing the exception with the title of the Court and the cause on a separate piece of paper, and filing it with the Judge; and the same, together with the indorsement of the learned Judge thereon, was duly filed by him with the clerk of the pleas—the learned Judge having stated that he kept no book; all which appears by the affidavits in the case. The affidavit of the opposite side does not state that the attorney had not information that the exception was filed, but that it was not entered in the Judge's book. No entry in a book is necessary by the practice of this Province. 1 *Tidd's Pr.* (9th ed), 309. 484. [The Court stopping *Campbell*, called on .

*S. R. Thomson* in support of the rule. The rule on the sheriff should have been by motion to the Court. [CHIPMAN, C. J. It has never been the practice in this Court, and the practice of the Court is the law of the Court.] The exception should have been entered in a bail book. [PARKER, J. The plaintiff could not have done more than he did, if the Judge had kept a book. STREET, J. Our rule of Court only requires the attorney to enter the exception with the Judge. I enter the exception in the book myself.]

CHIPMAN, C. J. I do not apprehend that it is necessary under our rule of Court to enter the exception to bail in a book, though it is a more convenient practice. The rule must be discharged without costs.

*Campbell.* The rule was moved with costs, and when that is the case, it is discharged with costs.

CHIPMAN, C. J. That settles the point. If parties will move their rules with costs, they must take the consequence.

Rule discharged with costs.

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## WATSON *against* ROBERTS and HARDING.

Trespass for false imprisonment. Plea, that the plaintiff was arrested on a *ca. sa.*, issued on a judgment against him; replication, that the *ca. sa.* was irregularly and improperly issued, and was in consequence thereof afterwards adjudged by the Court to have been irregularly and improperly issued, and was by a certain rule of the Court ordered to be set aside for irregularity. On special demurrer: Held, that there was no duplicity in the replication. Held also, that an allegation, "as by the said rule or order still remaining in Court will appear," or "that such rule or order remained in force," was not necessary to be stated in the replication. Held also, that it was not essential that the nature of the irregularity for which the *ca. sa.* was set aside should appear in the replication; and that after the writ was set aside for irregularity, it would afford no justification for any thing done under it before it was set aside.

TRESPASS for false imprisonment *(a)*. Second plea, *actio non*, because he says the defendant *Roberts* having obtained judgment against the plaintiff, retained *C. A. Harding*, the other defendant, an attorney of the Supreme Court, who sued out on the judgment a *capias ad satisfaciendum* to the sheriff of *Carleton*, against the plaintiff, by which he was arrested and imprisoned &c. Replication: *precludi non*, because he saith "that the said supposed writ of the said "Lady the Queen, called a *capias ad satisfaciendum*, against "the said plaintiff, directed to the sheriff of *Carleton*, in the "said second plea of the said defendants described, and by "virtue of which they, the said defendants, have attempted "to justify the committing of the said several trespasses in "the said declaration mentioned, was irregularly and improperly issued by the said *Charles A. Harding*, as such "attorney as aforesaid, and was in consequence of such irregularity afterwards, to wit, in *Easter* term in the tenth "year of the reign of our said Lady the Queen, by the said "Court of our said Lady the Queen, at *Fredericton*, adjudged "to have been irregularly and improperly issued, and was "by a certain rule of the said Court then and there made, "ordered to be set aside for irregularity with costs, and the "said plaintiff, who was then held under the said execution, "ordered to be discharged out of the custody of the sheriff "of *Carleton*," &c. Special demurrer, assigning for causes, 1. That the said replication is double, informal, uncertain and defective in this, that it states that the said writ of *capias ad satisfaciendum*, in the said second plea and in the said replication mentioned, was irregularly and improperly issued by the said *Charles A. Harding*, and in *Easter* term in the tenth year of the reign of our Lady the Queen, by the said Court of our said Lady the Queen, at *Fredericton*, adjudged to have been irregularly and improperly issued out, and also states that it was by a certain rule of the said Court then

*(a) See* 3 *Kerr*, 509, and *Ante*, p. 94.

and

and there made, ordered to be set aside for irregularity with costs; thus attempting to rely upon a judgment of the Court and also upon the order of the Court, two separate, distinct, and independent grounds for invalidating the said writ of *capias ad satisfaciendum*, requiring separate, distinct, and independent answers, and leading to independent and different issues. 2. And for that the said replication is uncertain in this, that it states an adjudication by the Court on the said writ of *capias ad satisfaciendum* as to its having been irregularly and improperly issued, but it is not stated in and by the said replication how or in what manner such adjudicature appears, whether by record, order, or how otherwise; nor is it stated in such a way that any proper traverse can be put in, or issue taken thereon, or properly answered. 3. And for that the said term "adjudged," as used in the said replication, is uncertain in its meaning. 4. That it is stated in the said replication that by a certain rule of the said Court then and there made, it was ordered that the said *capias ad satisfaciendum* should be set aside for irregularity with costs, but it is not stated nor is it shewn, in and by the replication, that the said rule or order of the Court continued or is still in existence, or that the same appears by any such rule or order in existence at the time that the said replication was put in, or before, or at the commencement of this suit, or that the said rule or order remained in force from the making of the said rule to the commencement of this suit, and have not been reversed, altered, or set aside or made void, or how the same appears. 5. Nor is it stated or shewn in the said replication, that such rule had been made or obtained according to the course and practice of the said Court of our said Lady the Queen, or how the same came to be made, or that the defendants or either of them, or any person on their behalf, were heard before the said Court, or appeared therein, prior to or on the making of the said rule or order, or that either of them had ever had any notice by which they or either of them could have had any opportunity of defending himself or themselves against the said rule or order, or of shewing cause against the same, or that any rule *nisi* had been first obtained and served on the said

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said defendants or either of them, or that any of the necessary steps had been taken according to the course and practice of the said Court of our said Lady the Queen, to procure such rule or order, or to set aside such writ, or to render such rule or order effective against the said defendants or either of them, nor is it shewn upon what evidence or proofs the same was set aside. 6. Nor is or are the ground or grounds stated or set forth in and by the said replication, or in what respect the said writ was irregularly and improperly issued, or whether the said writ was by the said Court set aside, or what was the nature of the irregularity alleged in the said replication; whether for grounds the said writ was void *ab initio*, rendering it no defence, or for a ground which would have made such writ a good justification of the trespasses complained of up to the time of its being so set aside; nor is it stated, nor does it appear in and by the said replication, that the said writ of *capias ad satisfaciendum* was ordered to be set aside before the committing of the said supposed trespasses in the declaration mentioned, or after they were so committed; and if before they were so committed, that the defendants or either of them ever had any notice or knowledge that the said Court had adjudged or had made such rule or order as aforesaid. 7. And for that it is not stated, nor does it appear in and by the said replication, that the said writ ever was set aside in pursuance of the said rule or order, or otherwise, or that the said rule or order in reference to the said writ was ever acted upon, or the said writ taken off the files, or given up and cancelled, or otherwise operated on, so as to affect its validity or force in any way. 8. And for that it does not appear in and by the said replication, whether the said rule so made was a rule *nisi* or a rule absolute, or whether it was a general rule of the Court concerning the practice of the Court, applying to the writ of *capias ad satisfaciendum* referred to in the said replication, and to other writs of the like sort, or was made solely to apply to the particular writ mentioned in the said replication. 9. And for that the said replication is argumentative and uncertain in this, that it is stated in and by the said replication that the said writ of *capias ad satisfaciendum* by a rule of

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of the said Court was ordered to be set aside for irregularity &c., instead of stating that it was set aside by the order of the Court, or that the said Court ordered it to be set aside, and that it was so set aside. The case was argued on a former day in this term.

*D. S. Kerr* in support of the demurrer. The shape of the replication, that the *ca. sa.* was adjudged by the Court irregularly and improperly issued, and by a rule of the Court ordered to be set aside, is a departure from all the precedents of such a pleading, and appears double. The replication in *Parsons* v. *Loyd (a)* is free from this objection; in *Codrington* v. *Loyd (b)* the language is single, viz. the *ca. sa.* "ordered to be set aside for irregularity;" in *Jones* v. *Williamson (c)* it is alleged singly, "by a rule it was ordered." So the replication in *King* v. *Harrison (d)*, in alleging the quashing of a writ, "the Court by a rule ordered it to be "quashed;" *Prentice* v. *Harrison* (*e*), the Judge "by an "order ordered the writ to be set aside." The same mode is observable in 2 *Chitty's P.* 998, and in many other places. The defendants have a right to take issue on a single point; and if a rejoinder in this case had taken issue and succeeded in invalidating the order stated in the replication, it would nevertheless have admitted the judgment of the Court; or if the adjudging were traversed, the defendants would thereby admit the order setting aside the *ca. sa.* for irregularity; and those are matters triable in different ways, the one by the record, the other by the rule of Court and evidence before a jury. Also the form of alleging is bad for uncertainty. In pleading and relying upon judgments it is always essential to shew that they continue in force *a fortiori* with respect to rules of Court, which are less certain, and not unfrequently altered or abandoned. *Rex* v. *Bingham (f)*. Accordingly all the forms allege that the rule or order continues or appears. In *Codrington* v. *Loyd* the form runs "as by the "said rule and order now remaining &c. will more fully ap-"pear." So it is in *King* v. *Harrison*, *Jones* v. *Williamson*, *Prentice* v. *Harrison*, *Rankin* v. *DeMedina* (*g*), *Dudlow* v.

(*a*) 3 *Wils.* 341. (*b*) 8 *A. & E.* 449.
(*c*) 8 *M. & W.* 349. (*d*) 15 *East.* 612.
(*e*) 4 *Q. B.* 852. (*f*) 3 *Y. & J.* 101. (*g*) 1 *M. G. & S.* 153.

*Whatchorn*

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*Whatchorn* (*a*), *Farmer* v. *Mottram* (*b*), *Gingel* v. *Bean* (*c*), and 3 *Chitty's P.* 998. But in the present case no such allegation is made, nor does it appear that the defendants or either of them was ever heard before the making of such rule, or that it ever came to their knowledge. It should appear in the replication what the nature of the irregularity was for which the *ca. sa.* was set aside. In *Blanchenay* v. *Burt* (*d*), it was held that a *ca. sa.* sued out more than a year and a day after judgment without a *sci. fa.* was an irregularity, and might be taken advantage of by writ of error or by motion to the Court; and in *Prentice* v. *Harrison*, such is given as an instance of erroneous process, which though set aside is a good justification for all matters done under it up to the time of its being set aside. So in 1 *Chit. Arch.* (last ed.) 567 note (*x*), it is said "if the writ is only erroneous, a "party may justify after it has been set aside for an act done "under it before it has been set aside," citing *Prentice* v. *Harrison* and *Blanchenay* v. *Burt*. Now the irregularity for which the *ca. sa.* mentioned in the replication was set aside, may have been for the very cause of suing out a *ca. sa.* more than a year and a day after judgment without a *sci. fa.*, and though an irregularity, a good justification for the imprisonment complained of up to the time of its being set aside. *Rankin* v. *DeMedina* it is true seems contrary, but there *Blanchenay* v. *Burt*, a decision of the Queen's Bench which had overruled *Mortimer* v. *Piggott*, was not adverted to, nor the point brought to the notice of the Court. 2 *Saund.* 6 a, note (b), *Sandon* v. *Proctor* (*e*), 9 *Dowl.* 1010. There is no instance shewing that after a record is reversed, trespass can be maintained: the party may resort to his common law remedy by writ of restitution. According to *Prentice* v. *Harrison*, the writ of *ca. sa.* alleged in the replication to have been set aside, may be assumed against the party pleading it to have been an erroneous process, for which a writ of error would lie, and the setting of it aside by the Court instead of a reversal by writ of error, does not destroy the defendant's justification. Nor does it appear that the

(*a*) 16 *East* 39. (*b*) 1 *Dowl. & L.* 781.
(*c*) 1 *M. & G.* 50. (*d*) 4 *Q. B.* 707. (*e*) 7 *B. & C.* 804.

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writ ever was set aside, or the rule of Court acted upon. There is a wide difference between the Court ordering, and the order being carried out. [CHIPMAN, C. J. The order sets it aside.] It does not appear that the order continued in force, as there is no allegation to that effect.

*J. A. Street*, Q. C., contra. There is no duplicity in the replication. In *Stephens on Pleading* 262, it is said that no matter, however multifarious, will operate to make a pleading double, that together constitute one connected proposition or central point. The allegation in the replication that the *ca. sa.* was adjudged by the Court to have been irregularly issued and ordered to be set aside, is a connected proposition leading to a single point, and not offering two independent answers to the same thing, as the demurrer supposes. The replication shews that the *ca. sa.*, under which the defendants attempt to justify, was set aside for irregularity, and states the means by which it was done, viz., by a rule of the Court; and it is not necessary to state in the pleading, as by the rule appears: this, though commonly done, is mere surplusage. Where matter of record is the foundation of the matter pleaded, it is necessary to state it *prout patet per recordum*, because it is triable only by the record: not so with rules of Court, which are matters *in pais*, triable by the country. *Barnes* v. *Eyles* (*a*). In *Brown* v. *Jones* (*b*), it was held to be necessary only to shew that the writ had been set aside, nor was there in that case any averment "as by the order "appears." In 18 *Vin. Abr.* 185, it is said that where *prout patet per recordum* is unnecessarily alleged, it is surplusage. An order of Court once made, its continuance is presumed until the contrary appears; and if it had been altered or abandoned, the defendants were bound to shew it in their rejoinder. There is no authority to support the defendants in this point of the demurrer. As to stating the ground of irregularity for which the *ca. sa.* was set aside, that is not necessary to be done. The replication in this case states that it was set aside for irregularity, and this is all that is required: it is quite as full as the replication in *Rankin* v. *DeMedina*, the last authority to be found on the subject,

(*a*) 8 *Taunt.* 512. (*b*) 15 *M. & W.* 191.

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and which in every way sustains this replication. The cases do not bear out the proposition that a writ set aside for irregularity will afford a justification for matters done under it before it was set aside. *Rankin* v. *DeMedina*, *Green* v. *Elgie (a)*, *Wilson* v. *Tummen* (*b*), and numerous other authorities, are to the contrary.

*J. W. Chandler* was heard in reply.

*Cur. adv. vult*

CHIPMAN, C. J. now delivered the judgment of the Court. This is a case of demurrer to the plaintiff's replication to the defendants' second plea. Numerous objections have been taken to the replication in this case. The first is for duplicity; but it is clear there is nothing in this objection. The replication alleges the writ to have been irregularly and improperly issued, and that it was in consequence adjudged by the Court to have been irregularly and improperly issued, and was by a rule of Court ordered to be set aside for irregularity. Now there is no duplicity in this: it merely amounts to the one substantial allegation, that the writ was set aside, shewing how and for what cause it was so set aside; and the term "adjudged" is the proper term to designate the decision of the Court in making the rule. The next objection is, that it does not state how or in what manner the adjudication appears; that is, that it does not refer to the rule in the words as "by the said rule or order still re-"maining in the Court will appear." But although this mode of pleading seems to have been adopted in some cases, there is no authority to shew that it is necessary. It is a matter of fact to be tried by a jury, and not by the record; and it is only when *nul tiel record* can be pleaded that the *prout patet per recordum* is necessary. The rule of Court is not a record, nor can its existence be tried as such, but it is merely evidence to be adduced to the jury to prove the fact of the decision of the Court on an interlocutory motion in a cause; and we think the replication has alleged all that is necessary to shew that fact, and that it was unnecessary to allege that the rule still remained in force, for that will be presumed until the contrary appears; and if it has been

(*a*) 5 *Q. B.* 99. (*b*) 6 *M. & G.* 236.

revoked,

revoked, it is for the defendants to shew this in their rejoinder. The main objection which required the most serious consideration is, that the replication ought to have specified what was the irregularity in the writ for which it was set aside; as it was contended by the defendants' counsel that if the writ was only erroneous and not void *ab initio*, it would still be a justification for any thing done under it before it was set aside, and therefore the replication is not a good answer to the defendants' second plea unless it shews the irregularity was one that made the writ void. The only authority adduced for this is a *dictum* in a note to *Archbold's Practice* (1st vol.), 567, last edit. But the authorities there cited do not bear out that *dictum*, and is at variance with the doctrine laid down in the same page of the same book, which says that an irregular writ will be a justification for any thing done under it before it is set aside, but cannot be pleaded as such, after it is set aside; and so it was decided in the case of *Riddell* v. *Pakeman (a)*. For a writ that is void in itself can never be a justification, and does not require to be set aside to defeat its operation. The plea sets out a *ca. sa.*, which does not appear to be erroneous, but which may be irregular. The replication has alleged the writ was set aside for irregularity, which is all that is necessary according to the decision in the case of *Rankin* v. *DeMedina (b)*, which is one of the latest authorities cited on this question, and there is nothing in this decision inconsistent with the case of *Prentice* v. *Harrison;* for the latter case turned upon the omission in the replication to allege any cause for setting aside the writ—it merely stated the writ was set aside, without saying for what; and the Court held that the plaintiff was bound to shew that the writ must have been illegal when put in force, which an irregular process is. We are therefore of opinion that the replication is well enough in this respect. As to the other grounds of demurrer, they are all clearly not sustainable, and it is unnecessary to advert to them in detail. Our judgment therefore is for the plaintiff on this demurrer.

*Kerr* now moved for leave to withdraw the demurrer, and

(*a*) 2 *C. M. & R.* 30. (*b*) 1 *C. B.* 183.

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to rejoin the fact that the *ca. sa.* had been set aside for having issued more than a year and a day after judgment, without first reviving it by a *scire facias*. He urged that in authorities of *Blanchenay* v. *Burt* and *Prentice* v. *Harrison*, such a rejoinder would afford a sufficient justification; and contended that *Tindal*, C. J., had refused such an amendment in *Rankin* v. *DeMedina*, on the ground that the writ was void, which was contrary to all the authorities excepting *Mortimer* v. *Piggott*, which had been expressly overruled; but

The Court refused the amendment, being of opinion that under such circumstances the *ca. sa.* after being set aside would afford no justification for the trespass complained of. *(a)*

*(a) See* further, as to the effect of Rules of Court, 2 *Stark. E.* 988; Selby v. Harris, 1 *Ld. Raym.* 745; Still v. Halford, 4 *Camp.* 17; Dance v. Robson, *M. & M.* 294; Compton v. Chandless, 4 *Esp.* 18; Woodroff v. Williams, 6 *Taunt.* 19.

## SHERLOCK, Assignee &c. *against* M'GEE, WILSON, and M'CARTY.

The non payment of a debt does not *per se* constitute a breach of an administration bond, "well and truly to administer according to law" the goods and chattels of the intestate.

Alleging a *devastavit*, without averring the value of the goods and chattels wasted &c., is bad upon special demurrer, as no measure of damages can thereby be submitted to the jury.

DEBT on an administration bond. The declaration stated amongst other things not now material, that the defendants with one *Charles M'Gee* (since deceased) on the 27th *January*, 1844, made their certain writing obligatory, sealed &c. (profert) and acknowledged themselves to be held &c. unto the Surrogate Judge of probates in and for the county of *Charlotte* in the said sum of £600, to be paid to the said Surrogate Judge of probates for the time being. And the said plaintiff, as assignee as aforesaid, according to the form of the statute in that case made &c. say that the said writing obligatory was made with a condition. [Here followed the condition.] Vide Act of Assembly 3 *Vict. c.* 61. The plaintiff, as assignee &c., further says that the said *James M'Gee* at the time of his death, to wit, on the 1st day of *January*, 1844, to wit, at &c., was indebted to the said plaintiff in the sum of, to wit, £30, in two several promissory notes made by the said

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said *James M'Gee* in his life time, payable to the said plaintiff, for the recovery whereof the plaintiff after the death of said *James M'Gee*, and after the making of the said writing obligatory, *as* of *Hilary* term 7 *Victoria*, impleaded the said *Margaret M'Gee* and *Charles M'Gee* (the said *Charles M'Gee* being since deceased) in Her Majesty's Supreme Court of Judicature for the said Province, and afterwards, *as* of *Trinity* term in the year last aforesaid, recovered judgment in the said Court against the said *Margaret M'Gee* and *Charles M'Gee*, as administrators of the goods and chattels and credits of the said *James M'Gee*, deceased, for the sum of £70 6*s.* 2*d.*, being the damages recovered by him, the said plaintiff, of them, with his costs of suit; and the said plaintiff, as assignee as aforesaid, further saith that the said judgment still remains in full force, not reversed, satisfied, or otherwise vacated, and that the said plaintiff hath not been able to obtain any execution or satisfaction of or upon the said judgment from out of the goods and chattels and credits of the said *James M'Gee*, which came to the hands of the said defendants, as administrators of the said *James M'Gee*, after his death, to be administered or otherwise, although goods, chattels and credits of the said *James M'Gee*, deceased, after his death and before the said recovery of judgment by the said plaintiff as aforesaid, to wit, on the 27th *January*, 1844, to wit, on &c., of a large value, to wit, of the *value of* £500, *did come into the hands and possession of the said Margaret M'Gee, as administratrix as aforesaid, to be administered*, and out of which said sum of money, she, the said *Margaret M'Gee*, as administratrix as aforesaid, could, might, and ought to have paid and satisfied the said judgment, to wit, at &c. And for a further breach of the conditions of the said writing obligatory, plaintiff further saith that the goods, chattels and credits of the said *James M'Gee*, deceased, at the time of his death, *which at the time of the making the said writing obligatory had come into the hands and possession of the said Margaret M'Gee and Charles M'Gee in the life time of the said Charles M'Gee, as administrators as aforesaid, to be administered, were not well and truly administered by them as such administrators &c. according*

*to*

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*to law;* and further, *that other* goods, chattels and credits of the said *James M'Gee*, deceased, at the time of his death, which after the making of the said writing obligatory and prior to the 1st day of *Aug st*, 1845, had come into the hands and possession of the said *Margaret M'Gee*, as such administratrix as aforesaid, to be administered, were not well and truly administered by her according to law, but on the contrary thereof the said goods and chattels and credits of the said *James M'Gee* in his life time, which at the time of the making the said writing obligatory and afterwards had come into her possession, as administratrix, to be administered, were afterwards, to wit, on &c. at &c., *by her*, the said *Margaret M'Gee, eloigned, wasted, converted, and disposed of to her own use*, contrary to the form &c. of the said writing obligatory and the condition &c., to wit, on &c.; whereby and in pursuance of the Act of Assembly in such case made and provided, an action hath accrued to the said plaintiff, as assignee of the Surrogate Judge of probates in and for the said county of *Charlotte*, to demand and have of and from the said defendants the said sum of £600 above demanded, yet the said defendants &c. Damages £200. Special demurrer by the said *Joseph Wilson* to the first breach. Joinder. Causes: that the breach as assigned is not within the scope and intent of the conditions of the said writing obligatory; that the breach merely states the non-payment by the administratrix, *Margaret M'Gee*, of a debt by simple contract due from the intestate, *James M'Gee*, in his life time to the said plaintiff, and that he (the plaintiff) after the death of the intestate recovered a judgment at law for the said simple contract debt with costs against the administratrix and administrator, which judgment is in full force, and that goods, chattels and credits of the intestate, after his death and before the recovery of the said judgment, to the value of £500, did come to the hands of the said administratrix, to be administered, wherewith she might, could, and ought to have satisfied the said judgment. Now these allegations do not import that the administratrix did not well and truly administer the goods, chattels and credits of the intestate, but at most that she had not paid the said plaintiff the

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the said judgment, and even that fact is matter of implication, not of positive averment. The whole allegations taken together merely amount to an argumentative traverse that the administratrix paid and satisfied the said judgment from and out of the goods, chattels and credits, which were of the intestate. Further, it is not alleged that the said administratrix and administrator, or either of them, misappropriated or malappropriated any of the said goods, chattels and credits, which came to their hands to be administered. Further, it is not alleged, nor does it appear by the said breach, that the estate of the intestate has suffered any damage or injury by the acts or omissions of the administratrix and administrator, or either of them, or that the said plaintiff has used any legal diligence to obtain the payment of the said judgment. Special demurrer by *James M'Carty* to the first breach. Joinder. Causes: the same as those assigned by *Joseph Wilson*, with the following in addition, namely, that the said breach contains no allegation of the pecuniary value of the said goods and chattels said to have been eloigned, wasted, converted, and disposed of by the administratrix and administrator to their own use. In the absence of an allegation as to the pecuniary value of the said goods and chattels, no measure of damages for the said breach firstly above assigned could be submitted to the jury. Again, the said *James M'Carty* is not apprised of the case which the plaintiff intends to make against him, as respects the value or amount of the goods, chattels and credits of the estate of the intestate, alleged to have been eloigned &c., and it is therefore impossible for the said *James M'Carty* to plead with any degree of certainty or precision to the said breach thus assigned. Again, that those goods, chattels and credits, stated to have been eloigned, wasted, and converted as aforesaid, may for aught that appears to the contrary have been exhausted in the funeral expenses of the intestate, or covered by some debt against the administratrix and administrator as such, and exceeding in amount the value of the said goods, chattels and credits, alleged to have been eloigned &c., and having priority in the order of payments over the debt of the said plaintiff. Further, that

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a portion of the breach fourthly assigned is covered by the breach firstly assigned, and also that the plaintiff has attempted to assign in his declaration two specific breaches of the same branch of the conditions of the bond. Further, it does not appear from the declaration in respect to the breaches firstly and fourthly assigned, that any order was made by the Court of Chancery to assign the said bond to the said plaintiff. Besides &c.

*J. W. Chandler* in support of the demurrer. This administration bond is according to the form prescribed by the Act of Assembly 3 *Vict. c.* 61, and the act itself is founded upon the report of the commissioners for judicial inquiry, published in the year 1833. This is the first attempt that has been made for about two hundred years to assign the non payment of a debt as a breach of the condition of an administration bond, and that attempt failed. *Archbishop of Canterbury* v. *Wills (a)*. The condition of the administration bond under our Act of Assembly is precisely similar to that under the statute 22 & 23 *Chas.* 2, *c.* 10, *s.* 1; therefore the decisions which have been made in *England* upon this statute apply in full force to the points raised by the demurrers in the present case. The statute 22 & 23 *Car.* 2, *c.* 10, was not passed to enlarge the rights of the creditors, or to make new provisions for their benefit, its object was to afford a remedy to legatees, heirs, and next of kin. These are historical facts. That branch of the condition of the bond upon which the points in this case arise, is in the following words, "that the administrator shall and do well and "truly administer according to law the goods and chattels "of the deceased" &c. It is no ground of forfeiture that the administrator has not paid the debts of the intestate. *Archbishop of Canterbury* v. *Wills*. Indeed if the non payment of a debt could be assigned as a breach of the condition, the moment after the bond was executed the whole body of the creditors might individually bring and sustain actions against the sureties, and leave the administrators untouched. It never could have been the intention of the law, that the condition should have this sweeping effect. With respect to

(a) 1 *Salk.* 316.

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the second ground of demurrer, viz., that it does not appear by the breach that the estate of the intestate has suffered any damage or injury by the acts of the administrators. This, it is submitted, is a fatal defect. The Act of Assembly already quoted, 3 *Vict. c.* 61, *s.* 57, expressly enacts "whenever such bond shall be so put in suit, recovery may be "had thereon to the full extent of *any injury* sustained by "the estate of the deceased person by the acts or omissions "of such executor" &c. Now it by no means follows from the *devastavit* set forth, that the estate sustained any injury. In legal parlance, an administrator would commit a *devastavit* by paying debts out of the order of their legal priority, if he in doing so exhausted all the assets; and this statement occurring in the declaration is to be taken upon demurrer most strongly against the plaintiff. If the question had arisen after verdict by way of motion in arrest of judgment, or on error after judgment by default, the result would be different perhaps—because the presumption in these cases shifts and is in favor of the plaintiff; but the objection having been made upon demurrer to the declaration, the language of the declaration is taken most strongly against the plaintiff. This is a well established rule in pleading. So far the causes of demurrer assigned by both defendants are identical; but *M'Carty*, one of the defendants, assigns further causes of demurrer—that the breach contains no allegation of the pecuniary value of the goods and chattels stated to have been wasted, and that consequently no measure of damages can be submitted to the jury. This is an action of debt on bond, in which the plaintiff, if he succeeds, will at law recover the penalty, but a breach must be assigned or suggested, under the statute 8 & 9 *Wm.* 3, *c.* 11, *s.* 8, and the plaintiff can only recover in fact the damages found or assessed by the jury, together with costs; but the declaration as framed does not admit of the proof of any damage. Again, it is objected by the demurrer that the plaintiff has attempted to assign two specific breaches of the same branch of the condition of the bond. The statute 8 & 9 *Wm.* 3, does not permit this to be done. The statute is certainly compulsory upon the plaintiff, but he can only assign

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assign one breach upon each branch of the condition. The declaration in this respect is open to the objection of duplicity. 1 *Chit. on Plead.* 369, *Com. Dig., Pleader* (C. 33).

The *Solicitor General* contra. Although the administration bond under our Act of Assembly 3 *Vict. c.* 61, is precisely similar to that prescribed by the statute 22 & 23 *Car.* 2, *c.* 10, *s.* 1, the whole of our act must be taken together, and read as forming one system in respect to the duties and liabilities of executors and administrators, not only to legatees, heirs, and next of kin, but to *creditors* also; and it is owing to this distinguishing characteristic that the case cited on the part of the defendants has no application. Actions upon bonds of this nature are very infrequent in a Court of law in *England*. The Ecclesiastical Courts and Courts of Equity there are generally resorted to for a remedy in cases of disputes arising between the personal representatives of an intestate or testator, and the legatees, heirs or next of kin. The last and leading case at law upon the subject is the case of *The Archbishop of Canterbury* v. *Robertson (a)*. That action it will be observed was brought for the benefit of one of the next of kin, and the Court held that a *devastavit* conceived in the same form as that used in this case, sufficiently set forth a breach of the condition "well and truly to administer" &c. Our Act of Assembly places a *creditor* upon the same footing with a legatee, heir, or next of kin, and therefore the case just cited is clearly in point for the plaintiff. The plaintiff in the event of a recovery on the bond stands as a trustee for the creditors, legatees, heirs, and next of kin; the sum recovered is assets, the distribution of which is under the order and direction of the Court of Chancery. The simple contract debt due the intestate, the recovery of a judgment in this Court against the personal representatives of the intestate is fully set forth, the possession of assets by them sufficient to satisfy the judgment, and the appropriation of the assets by the defendants to their own use, is distinctly averred, and not denied by the defendants; and if these facts do not constitute a breach of the condition, it is hard to say what language

(a) 1 *C. & Mee.* 690; 3 *Tyr.* 419.

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could be employed for the purpose. The acts charged against the defendants must by necessary intendment be an injury to the estate of the intestate. A breach of any branch of the condition would entitle the plaintiff to recover the penalty of the bond, and the measure of damages in this case would be the amount of value of the assets converted by the defendant, which is matter of evidence. As respects the assignment of the breaches of the same branch of the condition, and in support of which is cited 1 *Chit. on Plead.* 369, below in the same page the rule is thus laid down, "Where the defendant's contract was general, as if a te-"nant agree to observe the due course of husbandry, the de-"claration may state various breaches of good husbandry." 4 *East.* 154. That case furnishes an answer to the objection.

*J. W. Chandler* in reply.

*Cur. adv. vult*

CHIPMAN, C. J. now delivered the judgment of the Court. This is an action on an administration bond, given by the defendant *Margaret M'Gee*, as the administratrix of one *James M'Gee*, deceased, intestate (together with one *Charles M'Gee*, administrator, since deceased), and by the defendants *Wilson* and *M'Carty*, as their sureties to the Surrogate for the county of *Charlotte*, in the form prescribed by the Act of Assembly 3 *Vict. c.* 61, and put in suit by the plaintiff, a creditor of the intestate, as assignee of the bond, pursuant to the fifty seventh section of that act. Several breaches are assigned, and the defendants *Wilson* and *M'Carty* have appeared separately, and demurred specially to different breaches. The first assigned breach to which the defendant *Wilson* demurs is rather informal, but being treated as an assigned breach by both parties we shall consider it as such, and examine its validity. It alleges in substance that the intestate being indebted to the plaintiff, the plaintiff commenced an action in this Court against the administrators for the recovery thereof, and in *Trinity* term 7 *Vict.* recovered judgment against the said *Margaret M'Gee* and *Charles M'Gee*, as administrators of the said intestate, for £70 6*s.* 2*d.*, which said judgment still remains in full force, not reversed, satisfied, or otherwise vacated; and that

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the said plaintiff had not been able to obtain any execution or satisfaction of or upon the said judgment out of the goods, chattels and credits of the intestate, which came to the hands of his administrators to be administered, or otherwise, although goods, chattels and credits of the intestate, after his death and before the recovery of the said judgment, of large value, to wit, of the value of £500, came into the hands and possession of the said *Margaret M'Gee*, as administratrix as aforesaid, to be administered, out of which she could, might, and ought to have satisfied the judgment. In short it is assigned as a breach of the bond that the administratrix, though she had sufficient assets, did not pay a debt of the intestate's for which judgment had been recovered against her as administratrix, without alleging any execution issued and returned, or any *devastavit* by her committed, by which the estate was injured; and to this the defendant *Wilson* specially demurs, shewing for cause among other grounds that this was not a breach of the administration bond. And of this opinion we clearly are, on a review of the Act of Assembly under which the bond is taken, and the form of the bond itself. It must be admitted certainly that whatever doubts may have arisen in *England* as to the administration bond being taken for the security of the creditors as well as the next of kin, our Act of Assembly clearly intends that creditors may avail themselves of the bond, and that if assets which have come to the hands of the administrators, and which ought to be applied to the payment of debts of the intestate, have been wasted or misapplied, the sureties on the bond should be liable as well as the administrator to make good the deficiency; but it does not appear to have been contemplated that the mere receipt of assets and non payment of them to a particular creditor, should be a breach of the bond so as to enable him for his own benefit to recover the amount of his individual debt by a suit on the bond, when the administrator has in his hands assets wherewith the debt might be satisfied. Had that been the intention, a similar provision would have been made probably for suits on administration bonds as the Act of Assembly 6 *Wm.* 4, *c.* 1, provides in regard to sheriffs' bonds. The fifty seventh section of the act

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3 *Vict.*, before referred to, after declaring how the bond may be put in suit by an order of the Court of Chancery at the instance of a creditor, legatee, or next of kin, enacts that "recovery may be had thereon to the full extent of any injury sustained by the estate of the deceased person by the "acts or omissions of such administrator within the purview "of the bond, and to the full value of all the property of the "deceased person within the purview of the bond, *received* "*and not duly administered by such administrator;* and the "amount recovered on such bond (expenses deducted) shall "be deemed assets, and shall be applied and distributed under "the order and direction of the said Court of Chancery; and "the said Court of Chancery may from time to time order "such bond to be put in suit as occasion may require: provided always, that the whole amount to be recovered in "any such suit or suits shall never exceed the penalty of "the bond." It will be perceived that although the act allows the bond to be put in suit by a creditor in his own name as assignee, under an order of the Court of Chancery, and seems also to contemplate (if necessary) successive suits and recoveries, so that the whole amounts recovered shall not exceed the penalty of the bond, yet the amount to be recovered in any suit is not limited to or regulated by the amount of the debt due to the creditor who sues, but by the value of the property received and duly administered by the administrator; and the reason for allowing more than one recovery was probably to provide for the case of other assets getting into the administrator's hands, and misapplied subsequent to the first recovery; not that each creditor who has an unsatisfied debt should have an action: neither does the act contemplate that the creditor suing is to levy and receive the damages assessed in the action on the bond, and apply them himself to payment of his debt; but that the amount recovered shall be assets of the estate, to be applied in the course of administration, and this under the order of the Court of Chancery—the administrator in consequence of his misconduct not being considered longer trustworthy. In *England*, as is well known, where the jurisdiction over probates and administrations is vested in the Ecclesiastical

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Ecclesiastical Courts, the administration bond is taken in the name of the archbishop, bishop, or other ordinary by whom the administration is granted; and although put in suit for the benefit of persons interested in the distribution of the estate, is not in law assignable, but the action is brought in the name of the obligee himself, and the amount recovered, paid into the Ecclesiastical Court. In the case cited, *Archbishop of Canterbury* v. *Robertson (a)*, Lord *Lyndhurst*, C. B., after pronouncing the judgment of the Court that the recovery should be for the full amount of the money misapplied by the administrator, said "The action is brought "at the instance of the next of kin, in the name of the arch- "bishop, the whole therefore will be paid into the Ecclesi- "astical Court. The Ecclesiastical Court will have the "jurisdiction as to the application of the whole: it becomes "the effects of the intestate, which will be distributed under "the decree of the Ecclesiastical Court." The question which occurs in this case has arisen no doubt from the provision of the act allowing an assignment of the bond to a creditor or next of kin to be sued in his name, instead of having the suit in the name of the Surrogate, to whom it is given for the benefit of the creditors or next of kin; and for this provision, when the liability of a plaintiff on the record to costs is taken into account, there was supposed no doubt to be good reason. The act 3 *Vict. c.* 61, was, as is well known, in a great measure founded on the report of the commissioners of judicial inquiry, made in *January* 1833, though with some alterations, principally occasioned by the more efficient organization of the Court of Chancery, which had taken place between the period of the report and the passing of the act, and which made the establishment of the Court of the Governor and Council (as recommended by the commissioners) unnecessary; and probably on this and other accounts the legislature have thought it better the administration bond should be taken in the name of the Surrogate Judge by whom the administration was actually granted, than in that of the Governor, and to be assignable for the purposes of suit, still however retaining the same regulation

(a) 1 *C. & Mee.* 690.

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as to the extent of the sum to be recovered and the application thereof in the course of administration under the order of the Court in which the jurisdiction is vested. It is very clear from the report and indeed from the act itself, that the object of the new provision was to make the administration bond effectual for the due settlement of the estate, and not to serve the purposes of particular creditors. It may perhaps be found that some further regulations are necessary to guard against the consequences of allowing actions in the name of an assignee, and to prevent an improper use of the judgment or execution in the action at the suit of an individual creditor; but this matter falls more properly under the cognizance of the Court of Chancery, and may be provided for by some general rule or by the terms of the order on which the suit is founded. A special application may always indeed be made to this Court to prevent any improper use of its judgment or process. For the reasons given there must be judgment for the defendant *Wilson* on this demurrer, and also for the defendant *M'Carty* on a similar demurrer, which was put in by him to the first assigned breach. We then come to a special demurrer to what is called the fourth assigned breach: but the usual form of assigning distinct breaches has been so little attended to in the declaration before us, that had not both parties, the defendants in the demurrer and the plaintiff in the joinder thereto, styled it the breach *fourthly* assigned, we should have been puzzled to determine whether it was intended for the second, third, or fourth breach. After setting out what is called the first breach the declaration proceeds as follows: "And for a "further breach of the said condition of the said writing "obligatory the said plaintiff, as assignee as aforesaid, "further saith, that the goods, chattels and credits of the "said *James M'Gee*, deceased, at the time of his death, "which at the time of making the said writing obligatory "had come into the hands of the said *Margaret M'Gee* "and *Charles M'Gee* as administrators as aforesaid, to be "administered, were not well and truly administered by "them as such administrators as aforesaid, according to "law, and further" (without saying this is another breach of the

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the condition of the bond in the ordinary form), "that the "other goods, chattels and credits of the said *James* "*M'Gee*, deceased, which after the making of the said "writing obligatory and prior to the first day of *August*, "1845, came into the hands and possession of the said "*Margaret M'Gee*, administratrix as aforesaid, to be "administered, were not well and truly administered by "her &c., but *on the contrary* thereof, the said goods, "chattels and credits of the said *James M'Gee*, which *at* "*the time of the making* the said *writing obligatory and* "*afterwards* had come into the hands and possession of the "said *Margaret M'Gee*, as administratrix as aforesaid, to "be administered, were afterwards, to wit, on the day and "year last aforesaid, at &c., by her, the said *Margaret* "*M'Gee*, eloigned, wasted and converted to her own use, "contrary to the form and effect of the said writing obliga-"tory and of the condition thereof to wit, at" &c. As regards the substance of this breach, we are satisfied both on reason and authority, that any act of wasting or misapplication of the assets which came to the hands of the administratrix was a breach of the condition of the bond, the extent of which within the averments was properly matter of evidence. But as the demurrer is special, certain objections of form have also been taken. The first objection is that the amount or value of the goods and chattels alleged to be eloigned, wasted and converted by the said administratrix is not set out, therefore no measure of damages is given in the assignment of breach. It is also objected, that no value is given to the goods and chattels which had come to the hands of the administrators at the time of the making the writing obligatory. It is also objected, that part of this breach is covered by the first assigned breach, and that in this latter assignment two specified breaches are assigned of the same branch of the condition of the bond. The declaration has certainly not been drawn with much care. The value of the property received and not *duly administered* by the administratrix, *Margaret M'Gee*, is the measure of damages in the action, and the breach assigned is that the administratrix wasted the

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the goods which *at the time of the making the said writing obligatory and afterwards* had come to her hands to be administered: yet in this assignment, if it be treated as all one breach, there is no averment of goods coming to her hands alone at the time of the making the writing obligatory, but to the hands of the two administrators, and of these no value is alleged; and the goods she is charged with receiving are goods received *after the making of the bond* and before the 1st day of *August*, 1845. As to the necessity of stating the value of the goods charged to be wasted, in the assignment of breaches in the condition of a bond, we do not find any case precisely in point, but the general rules of pleading require that some value should be stated where it forms the measure of damages. True the value may be stated under a videlicet, and the plaintiff is not tied to proving the exact sum, but still the value stated in the declaration forms a limit, and therefore is always alleged sufficiently large to cover the utmost that can be proved (*a*). The objection would not avail after verdict, but it appears to us is good on special demurrer. Supposing this to be so, it is urged as an answer, that the value does appear by reference to the previous allegations in the declaration, namely in this way, that the declaration alleges the value of goods, chattels and credits received by the administratrix, all of which she is charged with eloigning, wasting, or converting to her own use. This allegation of value only appears in what has been treated as the first assigned breach, wherein it is alleged that after the death of the said *James M'Gee* and before the recovery of judgment (which on the record must be taken to be 11th *June*, 1844), that being the first day of *Trinity* term in the seventh year of Queen *Victoria* (in which term the judgment is alleged to be awarded), goods, chattels and credits of large value, to wit, of the value of £500, came to the hands and possession of the said *Margaret M'Gee*, as administratrix as aforesaid, to be administered. If the last date given above, viz. 11th *June*, 1844, corres-

(*a*) *See Steph. on Pld.* (4th ed.) 324; 1 & 2 *Chitty*; Ward *v.* Harris, 2 *B. & P.* 265; Andrews *v.* Whitehead, 13 *East.* 102; Jourdain *v.* Wilson, 4 *B. & Ald.* 266.

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ponded with that given in the averment immediately preceding the charge of wasting, there would be no difficulty in getting at the value by the reference contended for; but in that we find that she is charged with not duly administering "the other goods, chattels and credits, which after the "making of the said writing obligatory *and prior to the* 1*st* "*day of August*, 1845, came into her hands as administra- "trix, to be administered," and then follows the assignment of breach now under consideration, which can hardly be disconnected from the words which immediately precede it, for it is made part of the same sentence—"but on the *con-* "*trary thereof* the said goods &c. which at the time of "making the said writing obligatory and afterwards" &c. What can the time described as *afterwards* mean but the time occurring between the making the writing obligatory and the 1st day of *August*, 1845. If we are right in this, and issue had been taken on the charge of wasting the goods, it would have been open to the plaintiff to prove the receiving and wasting of goods subsequent to the judgment, viz. between the 11th *June*, 1844, and the 1st day of *August*, 1845, no value of which is alleged either directly or by reference. We do not think therefore we can find in this assignment of breach any value alleged as the measure of damages to be assessed thereon, and for that reason we think the assignment defective, and that there should be judgment for the defendant *M'Carty* on his demurrer thereto, unless the plaintiff has leave to amend. It is unnecessary to consider the other objections, one of which really does not exist if the parties can treat the charge of wasting as a breach distinct from the charge of not administering, as they do, by calling it a fourth breach. To several of the objections, which were we conceive waived at the argument, we think it unnecessary to advert particularly. There must be judgment for both of the defendants on these demurrers, to the breach first assigned by the plaintiff, and for the defendant *M'Carty* on the breach fourthly assigned by the plaintiff, unless the plaintiff will agree to amend.

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ASSUMPSIT on a promissory note, drawn by the defendant for £300, payable to the plaintiff at his office in *Saint John*, and on a bill of exchange, dated 17th *July*, 1845, for £500, drawn by the defendant, payable to his own order in *Dublin*, ninety days after date, indorsed to the plaintiff, and protested for non acceptance. Plea, general issue. At the trial before *Parker*, J., at the last *August* circuit in *Saint John*, the plaintiff in order to prove the presentment of the note, and the presentment for acceptance and protest of the bill of exchange, put in evidence an account including the note and an item as follows, "Protested exchange, £500 "sterling," with charge for the difference of exchange, protesting, and interest on the same, up to the 19th *December*, 1846; and it was testified by Mr. *Otty*, who was at this time a professional adviser of the plaintiff, that some time after the note and bill of exchange became due, namely, on 19th *December*, 1846, the defendant called into the plaintiff's office in *Saint John;* that the account was on the desk, and the plaintiff and defendant went particularly through all the items of the account; that the defendant objected to an item of £37 10*s.*, which both parties agreed should be struck off: the defendant then said the account was all correct, took a copy, and promised to pay the balance. The learned Judge told the jury that it was a question for them, whether the protested bill of exchange mentioned in the account, was the £500 bill drawn in *Dublin*, then declared on and produced in evidence; that he thought there was sufficient evidence by the admission in the account of the presentment of the note and the presentment and protest of the bill of exchange, if the protested bill of exchange specified in the account were the bill then declared on, and he thought it might be inferred to be the same, as there was no evidence of more than one bill between the parties. The plaintiff had not proceeded for the balance of the account stated in his particulars, but had gone on the bill and

In assumpsit on a promissory note payable at a particular place, and a bill of exchange payable to the defendant's order, and protested for non-acceptance, the only evidence to prove the presentment of the note, and the presentment and protest of the bill of exchange, was by a settled account between the plaintiff and defendant including the note and bill in question, with a promise by the defendant to pay the balance, and which account contained a charge for "protested exchange:" Held, that the admission in the account furnished sufficient evidence to dispense with the preliminary proof of presentment and protest, and that it was open to the jury to infer that the protested exchange mentioned in the account as the identical bill declared on in this action; it being of the same amount, and there being no evidence of any other bill existing between the parties.

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and note; he would only, however, be entitled to recover that balance, which was less than the amount of the bill and note. Verdict for plaintiff. *W. J. Ritchie*, in *Michaelmas* term last, moved the Court and obtained a rule *nisi* for a new trial, on the grounds of misdirection as to the presentment of the note, and presentment and protest of the bill of exchange, and that the verdict was against law and evidence. *Watters* v. *Lordly* (*a*), *Chitty on Bills*, 505. 507.

*Gray* now shewed cause. From *Otty's* evidence, which stood uncontradicted, there could be no doubt about the correctness of the learned Judge's charge as to the sufficiency of the evidence. The preliminary proof would have been gone into, but was rendered unnecessary by the defendant's admission in the account. This account, which contained the note and bill of exchange in question, and contained also a charge for protesting bill of exchange, was read over and examined item by item by the defendant: a charge in the account of £37 10*s.* was objected to by the defendant, and struck off. As to the note, the charge for protesting bill of exchange was examined and admitted to be correct, and there was no evidence whatever of any other bill of exchange between the parties to which the charge for protesting could apply, except to the one in question. In *Watters* v. *Lordly* there was proof of *laches*, but not so here: the defendant by his admission admits that every thing necessary on the plaintiff's part has been done, and thereby dispenses with the necessity of adducing the preliminary proof.

*Ritchie* in support of the rule. If there had been a *bona fide* settlement between the plaintiff and defendant, the former would have relied upon that; but it was not attempted to proceed on the account stated, but on the note and bill of exchange, by declaring on them specially; and it became necessary for the plaintiff to make out the allegations of his pleading by proof of them. The note is payable at a particular place, but there was no evidence given on the trial to show either that the note was presented or that it was at the plaintiff's office, when it became due.

(*a*) 2 *Kerr* 13.

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As to waiver of the preliminary proof, there can be no such unless the party has the knowledge of the *laches*. The evidence on the bill of exchange was still more loose: even had the protested bill mentioned in the account been identified with the one declared on, there was no proof of the presentment, and the waiver of presentment must be clearly, explicitly, and unequivocally proved. *Chitty on Bills*, 505. 507. But of the knowledge of the *laches* there was no evidence. Then as to identity: what evidence is there that the protested bill named in the account was the bill declared on? The bill declared on is payable in *Dublin;* in the account it does not appear where the bill is payable. The account furnished no evidence of a secondary liability on the bill: the evidence at most only went to establish a primary liability. The promissory note was out of the plaintiff's possession, and in *Otty's* possession when the conversation took place. [STREET, J. This was some months after it was due: you do not shew it out of plaintiff's possession when it became due.] It was the plaintiff's business to shew affirmatively that the note was at his office when it fell due, and not shewing it, the inference is that the note was not there.

CHIPMAN, C. J. I see no ground for making the rule absolute. One question is, whether there was sufficient evidence to identify the protested bill mentioned in the account with the bill declared on? I think the description of it in the account, there being no proof of any other bill between the parties, sufficient *prima facie* evidence for the jury to infer that it was the bill declared upon: the admission in the account was a clear acknowledgment of liability to pay the bill, and equally so as to the note.

STREET, J. As to the note, I think it was clearly identified. The only question is on the bill: whether the protested exchange mentioned in the account is the bill on which the action is brought? It formed the principal item on the debit side of the account: there was no evidence of any other bill or transaction of that nature between the parties at the time. I think there was *prima facie* evidence for the jury: they have been satisfied of the identity, and the

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the Court cannot say that they were wrong; and if it be the same bill, I think there was clear evidence of a waiver of preliminary proof by the defendant's express promise to pay the balance.

PARKER, J. This case is certainly open to the observation made by the defendant's counsel: as it is unusual where a balance is struck not to bring an action on the account stated, but that was for the jury. There was no doubt about the settlement between the parties—Did it refer to the bill and note declared on? The defendant came into Court knowing what the demand was for: no evidence was given by him of any other bill existing between the plaintiff and himself. Then is there not evidence to leave to the jury that the admission of "the protested bill of exchange" applied to this bill? The evidence could not be shut out from the jury. It is said there cannot be a waiver unless the party knows of the *laches;* but we have no proof here that the presentments were not made: the settlement of the account was a dispensation of the preliminary proof. If there had been any objection for the want of presentment or notice, the proper time for the defendant to have taken it was when the parties went into the examination of the accounts.

Rule discharged.

## STREET *against* THE SAINT ANDREWS STEAM MILL and MANUFACTURING COMPANY.

In assumpsit and judgment by default, damages assessed at £17 17*s.* and full costs taxed: Held, that the plaintiff was only entitled to summary costs, and that the defendant had not waived his right to insist upon summary costs by suffering judgment by default, or omitting to take steps to be present at the taxation.

*Lee* moved on a former day in this term for a rule on the master to review the taxation of costs in this cause. Judgment by default in assumpsit had been signed 28th *April* last, on a promissory note, assessed at £17 17*s.*, costs taxed at £9 0*s.* 10*d.*, and a *fi. fa.* issued, returnable in this term. The Court intimated a doubt whether the defendants were not too late in making the application, but granted a rule

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*nisi*, with stay of execution. *O'Connor* v. *N. B. and N. S. Land Company (a)*, *Chitty's Arch.* 1273.

*J. A. Street*, Q. C., now shewed cause; and contended that the defendants had by their conduct waived the objection, and were too late in this application: they were acquainted by the summons that the action was not summary, and should have given notice to the plaintiff that he was entitled to only summary costs.

CHIPMAN, C. J. This is not a matter of mere irregularity. The law is positive and plain that where the plaintiff recovers less than £20, he shall not be entitled to more than summary costs. The case must be referred to the master.

PARKER, J. I had some doubts when the rule was moved. I thought the defendants ought to have taken out a rule to be present at the taxation, but that is not so. Here damages were assessed at £17 17*s.*, and the Act of Assembly declares that in such cases only summary costs shall be allowed. I think there has been no *laches*: the application is made the first term after the taxation. As to waiver, the defendants having agreed to pay in a particular manner, I think it was quite open for the plaintiff to shew any particular ground why he did not proceed in a summary way. There is no authority to tax beyond summary costs.

Rule absolute.

(a) 1 *Kerr* 276

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## KETCHUM *against* THE PROTECTION INSURANCE COMPANY. *(a)*

In a fire policy, the insurers by an indorsement thereon, consented that the loss should be payable to the order of *W.*: Held sufficient in a declaration for covenant on the policy to allege that the loss was not paid to the plaintiff nor to *W.*; and that as such indorsement gave *W.* no legal interest in the property, it did not preclude the assured from maintaining an action in his own name; nor was it necessary to aver any order from *W.* in favour of the assured.

By the tenth condition attached to the policy it was stipulated "that in the event of a loss the "assured should deliver to the insurers a particular account in writing, signed with his own hand, "and verified by his oath, and that he should also declare on his oath whether any and what other "insurance had been made on the property insured, and in what general manner (as to trade, "manufactory, merchandize, or otherwise) the building containing the property insured, and the "several parts thereof, were occupied at the time of the loss, who were the occupants of such buil-"dings, and when and how the fire originated, as far as he knew or believed, and that the assured "should procure a certificate under the hand and seal of a magistrate or notary public (most con-"tiguous to the place of the fire, and not concerned in the loss as a creditor, or otherwise related "to the assured), that he had made due inquiry into the cause and origin of the fire, and also the "value of the property destroyed, and was acquainted with the character and circumstances of the "assured, and did verily believe that the assured really and by misfortune, and without fraud or "evil practice, sustained by such fire loss or damage to the amount therein specified." The declaration stated the fire to have happened on the 29th *July*, 1845, and that the compliance with this condition, in respect of notice of the fire, took place on the same day; as to the delivery of a particular account in writing, on the 20th *August*, 1845; and in respect to the declaration on oath, the 27th *March*, 1846: Held sufficient, the respective times having been laid under a videlicet; the performance of these acts, whether in due season or not, being matter of evidence. Held also, that as *W.* had no legal interest, it was not necessary to state that he was not related to the notary.

By the fifteenth condition annexed to the policy, it was declared "that no suit or action of any "kind against the insurers for the recovery of any claim under the policy, should be sustained in "any Court of law or Chancery, unless such suit should be commenced within the term of twelve "months next after the cause of action accrued" &c.: Held, that this was a condition subsequent—the subject of a plea. Held also, that an allegation in a count upon a policy containing this condition, that the insurers had no mayor, president &c., upon whom process could be served (introduced to anticipate a probable objection that the action is not brought within the twelve months), is mere surplusage.

The preliminary proof required by the tenth condition may be waived, and being a question of fact, the mode of waiver need not be stated. The fifteenth condition being the subject of a plea, an averment in the declaration that the insurers had waived it, would not be traversable; therefore it might be passed by without notice. Held also, that it could not be waived—that lapse of time extinguished the liability of the insurers, which could not be revived by waiver; but *Semble*, that they might dispense with the condition by deed, and if a deed could avail as a dispensation it should be replied to a plea of the condition. Held also, that the fifteenth condition was valid in law, and operated as an effectual bar every where; therefore a plea of the fifteenth condition to a count containing an averment of waiver of this condition, is properly pleaded. A replication to such a plea, that the defendants were a foreign corporation, and that no action could have been sustained within the twelve months unless they had voluntarily appeared, and there was no means of compelling their appearance, although the plaintiff was willing to prosecute within the twelve months, is bad, as it neither confesses nor avoids any thing material, for the plaintiff might have sued out process within the twelve months, or the defendants might have been sued in the country where they are incorporated, and they are not estopped by voluntarily appearing, from setting up the lapse of time as a defence.

A plea, embodying the tenth condition, which stated that after the fire, to wit, on the 26th *August*, 1845, the plaintiff was required by the defendants to deliver an account in writing under his

COVENANT. The declaration contained five counts. The first count alleged that at the city of *Saint John*, to wit, on the 27th day of *January*, A. D. 1845, by a certain deed poll

*(a) Reported by J. W. Chandler, Esquire.*

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poll or policy of insurance then and there made (profert) in consideration of $40 to the defendant then and there paid by the plaintiff, the receipt whereof defendants did by the said deed poll acknowledge, they (the defendants) did thereby insure the said plaintiff against loss or damage by fire to the amount of £4000 on his general stock of merchandize, not hazardous and hazardous, consisting chiefly of dry goods, contained in the shop and ware rooms in the eastern section of the fire-proof brick and stone building, situate on lot No. 13, on the west side of and fronting on *Prince William* street, in the city of *Saint John* and Province of *New Brunswick*, then occupied by the said plaintiff and other persons for purposes hazardous and not hazardous; and the said defendants did in and by the said deed poll or policy of insurance promise and agree to make good unto the said plaintiff, his executors, administrators and assigns, all such loss or damage, not exceeding in amount the sum insured, as should happen by fire to the property as above specified, from the 27th day of *January*, 1845, at twelve o'clock at noon, until the 27th day of *January*, 1846, at twelve o'clock at noon, *the said loss or damage to be estimated according to the true and actual value of the property at the time the same should happen, and to be paid within sixty days after notice and proof thereof made by the assured, in conformity to the conditions annexed to the said deed poll or policy of insurance;* and it was by the said deed poll or policy of insurance provided and declared that the said defendants should not be liable to make good any loss or damage by fire, which might happen or take place by means of any invasion, insurrection, riot, or civil commotion, or of any military or usurped power; and it was by the said deed poll further provided, that in case the said plaintiff should have already any other insurance against loss by fire on the property thereby insured, not notified to the said defendants and mentioned in or indorsed upon the said policy, then the said insurance should be void;

hand, verified by his oath and by his books of accounts &c., and permit extracts &c. to be taken respecting the loss &c., and the plaintiff refused, is not double, as they all go to establish one point —the non performance by the plaintiff of that part of the tenth condition.

A traverse in a plea that the plaintiff was not interested in the goods insured to the whole amount of their value, is too large; for if he was interested in any part, he is entitled to recover *pro tanto*.

To a declaration, which averred performance by the plaintiff of all the acts required by the tenth condition to be performed by him, a plea traversing the performance of all these acts, is good, according to the rules of pleading at common law.

A plea which, first, traverses an allegation in the declaration of the delivering an account of loss according to the tenth condition, and secondly, sets up fraud, is unobjectionable. The refusal to deliver an account in such case is indicatory of fraud, and is consistent with the general charge of fraud subsequently made.

A plea alleging false swearing in a statement *A.* annexed to the declaration of loss made by the plaintiff, is bad, for not averring that any such statement was annexed, and for not shewing when and before whom the oath was made, or in what particular the statement was false.

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and if the said plaintiff or his assigns should thereafter make any other insurance on the same property, and should not with all reasonable diligence give notice thereof to the said defendants, and have the same indorsed on the said deed poll or policy of insurance, or otherwise acknowledged by them in writing, the said policy should cease and be of no further effect; and if any subsequent insurance should be made on the property insured, which with the sum or sums then already insured should in the opinion of the defendants amount to an over-insurance, the defendants reserved to themselves the right of cancelling the said policy by paying the plaintiff the unexpired premium pro rata; and in case of any other insurance upon the said property thereby insured, whether prior or subsequent to the date of the said policy, the said plaintiff should not in case of loss or damage be entitled to demand or receive of the defendants any greater portion of the loss or damage sustained than the amount thereby insured should bear to the whole amount insured on the said property; and it was by the said deed poll or policy of insurance agreed and declared to be the true intent and meaning of the parties thereto, that in case the said building should at any time after the making and during the continuance of the said insurance be appropriated or applied, or used to or for the purpose of carrying on or exercising therein any trade, business or vocation, denominated hazardous or extra hazardous, or specified in the memorandum of special rates in the terms and conditions annexed to the said policy, or for the purpose of keeping or storing therein any of the articles, goods or merchandize, in the same terms and conditions denominated hazardous or extra hazardous, or included in the memorandum of special rates, unless in the said deed poll otherwise specially provided for, or thereafter agreed to by the said defendants *in writing*, and added to or indorsed upon the said policy, then and from thenceforth so long as the same should be, or appropriated, applied, used or occupied, those presents should cease and be of no force or effect; and it was moreover declared by the said deed poll, that the said insurance was not intended to apply to or cover any books of accounts, neither securities,

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securities, deeds or other evidences of title to lands, nor to bonds, bills, notes or other evidences of debt, nor to money or bullion; and the said policy was made and accepted in reference to the conditions thereto annexed, which were to be used or resorted to in order to explain the rights and obligations of the parties thereto, in all cases not therein otherwise specially provided for; and the said plaintiff in fact says, that the said terms and conditions in and by the said deed poll or policy of insurance mentioned and alluded to are as follows. [A statement of the conditions was then set forth, but the two following only are material in the present case.]

" 10. All persons insured by this company, and sustaining " loss or damage by fire, are forthwith to give notice thereof " to the company; and as soon after as possible to deliver " in a particular account of such loss or damage, signed " with their own hands, and verified by their oath or affir- " mation; and also if required, by their books of account, " and other proper vouchers; and permit extracts, and " copies to be made. They shall also declare on oath, " whether any and what other insurance has been made on " the same property; what was the whole value of the sub- " ject insured; in what general manner (as to trade, manu- " factory, merchandize, or otherwise) the building insured or " containing the subject insured, and several parts thereof, " were occupied at the time of the loss, and who were the " occupants of such building; and when and how the fire " originated, so far as they know or believe; they shall also " procure a certificate under the hand of a magistrate or " notary public (most contiguous to the place of the fire, " and not concerned in the loss, as a creditor or otherwise, " or related to the insured or sufferers), that they have " made due inquiry into the cause and origin of the fire, and " also as to the value of the property destroyed, and are " acquainted with the character and circumstances of the " person or persons insured, and do know, or verily believes " that he, she, or they really, and by misfortune, and without " fraud or evil practice, hath or have sustained by such fire, " loss and damage, to the amount therein mentioned; and " shall also, if required, submit to an examination, under

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" oath, by the agent or attorney of the company, and " answer all questions touching his, her, or their knowledge " of anything relating to such loss or damage, and sub- " scribe such examination, the same being reduced to " writing; and until such proofs, declarations, and certi- " ficates are produced, and examination if required, the loss " shall not be deemed payable. Also, if there appear any " fraud or false swearing, the insured shall forfeit all claim " under this policy. Where merchandize, or other personal " property, is partially damaged, the insured shall forth- " with cause it to be put in as good order as the nature of " the case will admit, assorting and arranging the various " articles according to their kinds; and shall cause a list or " inventory of the whole to be made, naming the quantity " and cost of each kind. The damage shall then be ascer- " tained by the examination and appraisal of each article by " disinterested appraisers, mutually agreed upon, one half " the expense to be paid by the insurers. 15. It is further- " more hereby expressly provided, that no suit or action of " any kind against said company, for the recovery of any " claim upon, under or by virtue of this policy, shall be sus- " tainable in any Court of law or chancery, unless such suit " or action shall be commenced within the term of twelve " months next after the cause of action shall accrue; and " in case any such suit or action shall be commenced against " said company after the expiration of twelve months next " after the cause of action shall have accrued, the lapse of " time shall be taken and deemed as conclusive evidence " against the validity of the claim thereby so attempted to be " enforced." And the said plaintiff avers that he did at the time of effecting the said policy, to wit, on the 27th *January*, A. D. 1845, to wit, at the city aforesaid, pay to the said defendants the said sum of $40 mentioned in the said policy; and the said plaintiff further saith, that the said defendants did after the making of the said policy and before the happening of the loss hereinafter in this count mentioned, to wit, on the 13th *May*, A. D. 1845, to wit, at the city of *Saint John*, by indorsement in writing on the said policy, consent that the said policy should cover merchandize either owned

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owned by the said plaintiff or consigned to him on commission or on trust, and that the *loss*, if any, was to be payable to the order of *Augustus W. Whipple;* and the said plaintiff further saith, that heretofore and after the making of the said last mentioned policy, to wit, at the city aforesaid, to wit, on the day and year last aforesaid, by a certain deed poll or policy of insurance then and there made (profert), in consideration of the sum of $26 to the said defendants by the said plaintiff, the receipt whereof the said defendants did thereby acknowledge, they (the said defendants) did insure the said plaintiff against loss or damage by fire to the amount of $4000, in addition to the sum already insured by the said first mentioned deed poll or policy of insurance, on the general stock of merchandize not hazardous and hazardous, consisting chiefly of dry goods, either owned by the said plaintiff, consigned to him on commission or in trust, contained in his shop and ware-rooms, in the eastern section of the fire proof brick and stone building, situate on lot number 13, on the west side and fronting on *Prince William* street, in the city aforesaid, occupied by the said plaintiff and others, for purposes hazardous and not hazardous; and the said defendants did in and by the said deed poll secondly in this count mentioned, promise and agree to make good unto the said plaintiff all such loss or damage, not exceeding in amount the sum insured, as should happen by fire to the property as lastly above specified, from the 13th day of *May*, 1845, at twelve o'clock at noon, unto the 13th day of *November*, 1845, at twelve o'clock at noon, the said loss or damage to be estimated according to the true and actual value of the property at the time the said loss should happen, and to be paid within sixty days after notice and proof thereof made by the said plaintiff, in conformity to the conditions annexed to the said last mentioned policy; and the said plaintiff in fact saith, that the said last mentioned policy contained the same provisos, agreements, and declarations, terms and stipulations, and to the same effect, as are mentioned and contained in the deed poll or policy firstly in this count mentioned and hereinbefore set forth, and that the said policy secondly in this count mentioned had the same reference

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ence to the same terms and conditions thereto annexed, as are above mentioned and set forth; and the said plaintiff further saith that by a memorandum in writing, at the request of the said plaintiff indorsed on the said last mentioned policy by the said defendants, it was declared by the said defendants that the loss, if any, on the said last mentioned policy was to be payable to the *order of the said Augustus W. Whipple;* and the said plaintiff avers, he did at the time of the effecting of the said last mentioned policy, to wit, on the 13th day of *May* in the year last aforesaid, pay to the said defendants the said sum of $26, mentioned in the said last mentioned policy; and the said plaintiff in fact saith that he, at the time of the making of the said deed poll or policy of insurance firstly in this count mentioned, and from thence until the time of the making of the said deed poll or policy of insurance secondly in this count mentioned, was interested in the said merchandize mentioned in the said policy firstly in this count mentioned and thereby intended to be insured, to a large amount, to wit, to the amount of all the monies thereby insured thereon; and the said plaintiff further saith that he, at the time of the making of the said deed poll or policy of insurance secondly in this count mentioned, and from thence until the loss and damage hereinafter in this count mentioned, was interested in the said merchandize and property in the said two several policies of insurance respectively in this count mentioned, and thereby intended to be insured, to a large amount, to wit, to the amount of all the monies thereby insured thereon, that is to say, in the sum of $8000, which said sum of $8000 is equal to the sum of £2000 of lawful money &c.; and the said plaintiff further saith, that after the making of the said two several deeds poll or policies of insurance, and before the expiration of the respective times limited in the said two several deeds poll or policies respectively, and whilst the same were and remained in full force, to wit, on the 29th day of *July*, A. D. 1840, to wit, at the city of *Saint John* aforesaid, the said insured merchandize and property were burnt, consumed and destroyed by fire, which did not happen or take place by means of any invasion, insurrection, riot, or civil commotion, or of any military

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military or usurped power, whereby the said plaintiff then sustained a loss and damage estimated according to the true and actual value of the merchandize and property so burnt, consumed and destroyed, at the time of the happening of the said fire, to a large amount, to wit, to the amount of $4880=£1220, of lawful &c. on the said merchandize and property insured in and by the said deeds poll or policies of insurance, and so burnt, consumed and destroyed as aforesaid, of all which the said defendants afterwards, to wit, on the day and year last aforesaid, to wit, at the city &c. had notice; and the said plaintiff further says, that he did not make any other insurance upon the said merchandize and property other than in and by the said two several deeds poll or policies of insurance; and the said plaintiff avers, that he did at the respective times of effecting the said policies cause the building, in which the said merchandize and property so insured by the said policies respectively was contained, and also the said insured property, to be correctly described to the said defendants; and the said plaintiff avers, that at the times of and after the effecting of the said policies respectively, and before and at the times when the said merchandize and property were so consumed, burnt and destroyed as aforesaid, the risks insured against by the said defendants in and by the said policies respectively or either of them, was not increased by any means within the controul of the said plaintiff, nor were the buildings and premises in which the said insured goods were contained occupied in any manner, so as to render the said risk more hazardous, than at the respective times of the making of the said policies; and the said plaintiff further says, that the said building mentioned in the said respective policies, was not at the time when the said merchandize and property were so burnt, consumed and destroyed as aforesaid, appropriated, applied, or used to or for the purpose of carrying on or exercising therein any trade, business or vocation, denominated hazardous, extra hazardous, or specified in the memorandum of special rates in the said terms and conditions annexed to the said policies respectively, or for the purpose of keeping or storing therein any of the articles, goods, or merchandize,

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in the same terms and conditions denominated extra hazardous or mentioned in the said memorandum of special rates; and the said plaintiff further says, that although he has in all things conformed himself to and performed and observed all and singular the articles, stipulations, matters and things in the said two several deeds poll or policies of insurance contained, which on his part were to be performed and observed, according to the tenor and effect, true intent and meaning of the said two several deeds poll or policies of insurance; and although the said plaintiff did use all possible diligence in saving and preserving the said merchandize and property insured as aforesaid; and although he (the said plaintiff) did forthwith after the said merchandize and property were so consumed, burnt and destroyed as aforesaid, give notice thereof to the said defendants, to wit, on the 29th day of *July*, in the year last aforesaid, to wit, at the city &c.; and although he (the said plaintiff) did as soon as was possible after such fire, to wit, on the 20th *August*, in the year last aforesaid, to wit, at the city &c. deliver in a *particular account*, in writing, to the said defendants of such loss or damage, signed with his own hand and *verified by his oath*; and although he (the said plaintiff) did after the said fire, according to the said conditions, to wit, on the 27th *March*, A. D. 1846, to wit, at the city &c. declare on his oath that no other insurance was made on the same property, *and did then and there declare what was the whole value of the subject insured, in what general manner the building containing the said merchandize and property so insured, and the several parts thereof, were occupied at the time of the loss above mentioned, and who were the occupants of said building, and when and how the said fire originated so far as he (the said plaintiff) knew or believed*, and did after the said fire, to wit, on the day and year last aforesaid, to wit, at the city &c. deliver such *declaration on oath* to the said defendants; and did then and there procure a *certificate* under the hand of *Samuel Scovil*, a notary public most contiguous to the place of the said fire, and not concerned in the said loss as a creditor or otherwise related to the said plaintiff, that he (the said notary) had made due inquiry into the cause

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cause and origin of the said fire, and also as to the value of the said property destroyed, and that he was acquainted with the character and circumstances of the said plaintiff, and that he (the said notary) did verily believe that he (the said plaintiff) really and by misfortune, and without fraud or evil practice, had sustained by the said fire loss and damage of the property so insured as aforesaid, to wit, to the amount in the said certificate mentioned, to wit, the sum of $4880 and upwards; and although he (the said plaintiff) did after the said fire, to wit, on the day and year last aforesaid, to wit, at the city &c. deliver to the defendants such certificate, and although a long time, to wit, more than *sixty* days have elapsed since the said defendants had notice of the said fire, and of the said damage and loss of the said plaintiff therefrom as aforesaid, and since the proof of the loss was received by the said defendants at their office, yet the said plaintiff in fact says, that the said defendants have not paid unto him (the said plaintiff) the said loss and damage, or replaced the merchandize and property so insured, and so, to wit, consumed and destroyed as aforesaid, with other merchandize and property of the same kind and equal goodness, nor have they (the said defendants) paid the said loss and damage unto the said *Augustus W. Whipple* or to his order, contrary to the tenor and effect &c. of the said two several deeds poll or policies, and of the covenants of the said defendants on that behalf so made as aforesaid; and the said plaintiff in fact says that the said defendants, although often requested so to do, have not kept the said covenants &c. by them made as aforesaid, but have broken the same, and to keep the same with the said plaintiff have hitherto wholly refused, and still do neglect and refuse. Second count: And whereas also heretofore, to wit, at *Hartford* in the state of *Connecticut*, one of the *United States* of *America*, that is to say, at the city aforesaid, in the city &c., to wit, on the 27th *January*, A. D. 1845, the said defendants then and there being a company by the laws of the said state of *Connecticut*, incorporated by the name of *The Protection Insurance Company*, and having power by the laws of the said

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said state to act as an incorporated company in the name of the said *Protection Insurance Company*, and by and under their common seal, and the said company then and there having and using a common seal, and having power and authority by the laws of the said state to make and enter into the deeds poll or policies of insurance hereinafter in this count mentioned, by a certain other deed poll or policy of insurance then and there made (profert). The count then alleged that the losses were to be paid to the order of *Augustus W. Whipple*, and averred as follows: that at the time of the making of the policy of insurance in this count firstly mentioned, to wit, on the 27th *January*, 1845, and from thence continually up to the time of the commencement of this suit, there was not in the Province of *New Brunswick* any mayor, president, or other *head officer*, or any secretary, clerk, treasurer or cashier of the said corporation, or other person upon whom service of process against the said defendants could be made, according to the Act of Assembly prescribed for the service of process on corporate bodies, whereby the said plaintiff could compel the appearance of the said defendants to any suit in any Court of law within this Province. Averment of waiver of the tenth condition, as far as respects the certificate of a magistrate or notary. Breach, in non payment to plaintiff or to *Augustus W. Whipple*. The third count stated, that heretofore and at the respective times of making the deeds poll and effecting the insurance hereinafter mentioned in this count, the said defendants were incorporated by the laws of the state of *Connecticut*, one of the *United States* of *America*, then in force within the said state, and had authority by the laws of the said state of *Connecticut* to make and enter into the deed poll or policies of insurance in that count mentioned, and by the said laws had authority to sue and were liable to be sued within the said state by and under the name of the *Protection Insurance Company*, by which they are and were incorporated; and the said defendants at the time of the commencement of this suit were and continued so incorporated as in this count mentioned; and the said plaintiff further saith, that the individual members

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members or persons constituting the said incorporated company, were not at the time of the making of the said respective deeds poll or policies liable by the laws of the said state of *Connecticut*, nor have they at any time since the making of the said policies been liable to be sued personally within the said state of *Connecticut*, upon or in respect of any deeds poll or insurance effected by the said company, by or in the name and under the seal of the said corporation; and the said plaintiff saith, that the said defendants were not at any time or times heretofore, and are not now incorporated by virtue of any Act of Assembly of this Province, or by virtue of any act or acts of the Imperial Parliament of *Great Britain* and *Ireland*, or by any royal charter or otherwise, than by the laws of the said state of *Connecticut* as aforesaid; and the said plaintiff further saith, that the defendants being so incorporated by the said laws of the said state of *Connecticut* as in this count is mentioned, they (the defendants) at *Hartford* in the said state of *Connecticut*, to wit, at the city aforesaid, to wit &c. The remainder of the count was similar to the first count. Breach, non payment to plaintiff or *Whipple*. Fourth count: Like the first count with this difference, that it alleges a waiver of the *tenth condition* as far as respects certificate, and also an averment that the defendants waived and discharged the plaintiff from the performance and observance of and compliance with the *fifteenth condition*. Fifth count: In all respects like first count, except that it averred that the loss was payable to the order of *Whipple*, and alleged a waiver of the tenth condition as respects the certificate of a magistrate &c. The defendants, after craving oyer of the policies &c., pleaded, 1st. *Non sunt facta* to all the policies in the first, second, third, fourth, and fifth counts. 2d. *Actio non*, because they say that the plaintiff after the said losses and damage by fire in the first, second, third, fourth, and fifth counts, in the said declaration respectively mentioned, to wit, on the 26th *August*, 1845, at *Saint John* aforesaid &c., was required by the said company to deliver in an account in writing of the said loss or damage, signed with his own hand and verified by his oath or affirmation,

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tion, and by his books of account and other proper vouchers, and was then and there required to permit extracts and copies to be made therefrom, respecting the amount of the loss and damage suffered in the stock in trade so insured in the said two policies of insurance in those counts mentioned; the same request being then and there a reasonable request in that behalf, he (the plaintiff) then and there neglected and refused to deliver in such account to the said company, and then and there refused to permit extracts and copies to be made from his books of account or other vouchers, touching and concerning the amount of the loss or damage suffered in the said stock in trade, insured in the said two deeds poll or policies of insurance in those counts severally mentioned, and hath not delivered the same or permitted the same, contrary &c. to the tenth condition. Verification. (The same plea to all the counts). 3d. That at the time of the making of the said deeds poll or policies, firstly in the first, second, third, fourth and fifth counts, of the said declaration mentioned, and from thence until the time of the deeds poll or policies &c., secondly in the said several counts respectively mentioned, the said plaintiff *was not interested in the said merchandize mentioned in the said policies firstly in the said several counts respectively mentioned, and thereby intended to be insured to a large amount, to wit, to the amount of all the monies thereby insured thereon*, and that at the time of the making of the said deeds poll or policies &c. secondly in the said several counts respectively mentioned, and from thence until the loss and damage thereinafter in those counts respectively mentioned, the said plaintiff *was not interested in the said merchandize and property in the said two policies &c. respectively in those counts mentioned to a large amount, to wit, to the amount of all the monies thereby insured thereon, that is to say, the sum of* $8000 = £2000, *as in the first, second, third, fourth, and fifth counts* of the said declaration respectively mentioned; concluding to the country &c. (Same plea to whole declaration.) 5th. Plea of the fifteenth condition to all the counts of the declaration, viz. *Actio non*, because they say that in and by the printed conditions annexed and referred to by the

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the said deeds poll or policies of insurance respectively mentioned, it was amongst other things expressed, declared and provided, that no suit or action of any kind against said company, to wit, the said defendants, for the recovering of any claim under or by virtue of the said deeds poll or policies of insurance, should be sustainable in any Court of law or chancery, unless such suit or action should be commenced within the term of twelve months next after the cause of action should accrue; and in case any such suit or action should be commenced against the said company, to wit, the said defendants, after the expiration of twelve months next after the cause of action should have accrued, the lapse of time should be taken and deemed as conclusive evidence against the validity of the claim thereby so attempted to be inferred; and the said defendants further say, that the said several supposed causes of action in the said declaration mentioned (if any such have been or still are) did not, nor did any or either of them accrue to the said plaintiff, at any time within the term of twelve months next before the exhibiting of the bill of the said plaintiff against the said defendants in this behalf, in manner and form as the said plaintiff hath above thereof complained against them, the said defendants, and this &c.; concluding with verification. 6th. As to the first count, that the plaintiff did not give notice of the loss he had sustained to the said company, and that the plaintiff did not as soon after as possible deliver in a particular account of his said loss or damage, signed with his hand and verified by his oath, and did not declare on his oath that no other insurance was made on the same property, and did not then and there declare what was the whole value of the subject insured, in what general manner the building containing the said merchandize and property so insured, and the several parts thereof, was occupied at the time of the loss in the said first count mentioned, and who were the occupants of such building, and when and how the said fire originated so far as he (the said plaintiff) knew or believed, and did not deliver such declaration on oath to the said defendants, and did not then and there procure a certificate under the hand of *Samuel Scovil*,

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a notary public, most contiguous to the place of the said fire, and not concerned in the said loss as a creditor or otherwise, or related to the said plaintiff, that he (the said notary) had made due inquiry into the cause and origin of the said fire, and also as to the value of the said property destroyed, and that he was acquainted with the character and circumstances of the said plaintiff, and that he (the said notary) did verily believe that the said plaintiff really and by misfortune, and without fraud or evil practice, had sustained by the said fire loss and damage of the property so insured as therein aforesaid to the amount in the said certificate mentioned, to wit, the sum of $4880 and upwards, and did not deliver such certificate to the defendants in manner and form as the said plaintiff hath above in that count alleged. Nevertheless for plea in that behalf the defendants in fact say, that although the plaintiff did deliver in an account in writing and a declaration on oath, and a certificate under the hand of *Samuel Scovil*, yet the said plaintiff did not duly, properly and reasonably prove his said loss or damage, according to the form and effect of the said tenth condition referred to by and indorsed on the said deeds poll &c. respectively. And this the said defendants are ready to verify. (Same plea to all the counts.) 7th. As to the first: *Actio non*, because the said plaintiff did not as soon as possible after the said loss or damage in this count mentioned, deliver in a particular account of such loss or damage, signed with his hand and verified by his oath, in manner and form as the said plaintiff hath above in that count alleged. Nevertheless for plea in this behalf the said defendants say, that in the claim made for the said loss and damage in this said first count mentioned and set forth, there appeared to be *fraud* within the true intent and meaning of the said tenth condition referred to and indorsed on the said deeds poll &c. respectively, that is to say, fraud in taking the quantity, nature and value of teas, ribbons, and other stock in trade, in that count supposed to have been burnt, consumed and destroyed by fire, contrary to the said tenth condition. Verification. (Same plea to all the counts.) 8th. *Actio non* as to the said first count,

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count, because they say that the plaintiff, in order to support his claim for the said loss or damage in that count mentioned, on &c. at &c., made a declaration on oath, and the said defendants in fact further say, that in support of the said claim for the said loss and damage in that count mentioned, *there was false swearing* within the true intent and meaning of the said tenth condition referred to by and indorsed on the said deeds poll &c., that is to say, false swearing in this, to wit, the said plaintiff then and there swore that the statement annexed to the said declaration on oath, marked A, contained a true statement of the loss and damage of him, the said plaintiff, whereas the said statement marked A, did not contain a true statement of the said loss and damage, contrary to the said tenth condition. Verification. (Same plea to all the counts.) 9th. *Actio non* as to the said first count, because they say that the said plaintiff, in order to support his claim for the loss and damage in that count mentioned, did after the fire therein mentioned, to wit, on the 6th *August*, A. D. 1846, to wit, at the city &c. deliver in a particular account in writing to the said defendants of such loss or damage, signed with his own hand and verified by his oath; and the said defendants say, that in support of the said claim for the said loss and damage in that count mentioned there was false swearing, within the true intent and meaning of the said tenth condition referred to by and indorsed on the said deeds poll &c., that is to say, false swearing in this, to wit, the said plaintiff then and there swore that the statement annexed to the said account in writing, marked A, contained a true statement of the loss and damage of him, the said plaintiff, whereas the said statement marked A, did not contain a true statement of the said loss and damage, contrary to the said tenth condition, referred to by and indorsed on the said deeds poll &c. respectively. Verification. (The same plea to all the counts). 10th. *Actio non* as to the said first count, because they say that by the burning and consumption of the said insured merchandize and property by the said fire, in the said first count mentioned, the plaintiff did not sustain a loss and damage estimated according to the true and actual value of the merchandize

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merchandize and property so burnt, consumed, and destroyed, at the time of the happening of the said fire, to a large amount, to wit, to the amount of $4880, as in the said first count is mentioned. Concluding to the country. (Same to all the counts.) 11th. *Actio non* as to the second count, the same plea as the tenth plea to the first count, concluding with a verification. The pleas to the third count were the same as those to the second count, excepting the plea of non waiver of the tenth condition. The pleas to the fourth count were the same as those to the second count, with the addition that the defendants did not waive the fifteenth condition, and the pleas to the fifth count were similar to those pleaded to the second count. The plaintiff replied to the fifth plea, and demurred to the second, third, sixth, seventh, eight, ninth, tenth, eleventh, thirteenth, and fourteenth pleas, and assigned the following grounds. Demurrer to second plea—Refusal to permit extracts &c. *Causes*—Duplicity, refusal to deliver in an account to defendants, and also to permit extracts of copies to be made from his books of accounts and vouchers respecting loss; one of which refusals constitutes a distinct ground of defence: request to make an account and permit extracts not alleged to be made before action brought or exhibiting bill. It is not stated that the plaintiff had any books of accounts or vouchers relating to loss; that same was made by defendants on the plaintiff, or that the loss had not then been ascertained and proved; and further the same not alleged to have been made in a reasonable time. Demurrer to third plea—No interest in goods. *Causes*—Attempt to raise an immaterial issue; whether plaintiff interested to the amount of all the monies insured; traverse too large. Demurrer to sixth plea—Tenth condition not complied with. *Causes*—Attempt to put in issue several matters of defence, each of which is distinct, viz., that the plaintiff did not give notice of the loss, that he did not deliver a particular account signed and verified by his oath, that he did not declare on his oath that no other insurance was made on the same property, that he did not make and deliver a declaration of value, that he did not make and procure a certificate,

cate, and that the plaintiff did not duly, and properly, and reasonably prove his loss. Plea does not shew what kind of proof of loss plaintiff failed to make, viz., whether by verification on his own oath, by books of account or vouchers, or by his examination; that the plea tenders an immaterial issue by traversing that the certificate in the said first count mentioned to have been obtained was not procured at the time in the said first count mentioned, whereas the time is laid under a videlicit, and is immaterial, and no distinct issue can be taken upon the said averments in the said sixth plea; and the defendants attempt to avoid without confessing. Demurrer to seventh plea—Fraud in claim. *Causes*—Duplicity—attempt to set up several matters of defence, each of which is distinct, viz., that the plaintiff did not as soon as possible after the loss in the said first count mentioned deliver in a particular account of such loss, signed with his own hand and verified by his oath, and that there appeared to be fraud; and for that the plea attempts to avoid the plaintiff's claim by alleging new matters, viz., that there appeared to be fraud in the claim made, without confessing and avoiding that the allegation of fraud is not sufficiently definite, and is of such a nature as to affect the question of loss &c. Demurrer to eighth plea—False swearing in declaration. *Causes*—Not sufficiently certain and positive. It is not shewn when, where, or how the declaration on oath was made, or before whom the said plaintiff was sworn; and it does not appear that the statement made in the eighth plea was untrue in any material point, or that there was any wilful misstatement; and that it should be shewn in what respect the statement is untrue, in order that the materiality may be seen, and that the plaintiff may be able to take a certain issue on a material point; and that the said eighth plea does not shew whether the false swearing was in the declaration on oath referred to in the eighth plea, or that the alleged false swearing was orally or in any affidavit. Demurrer to ninth plea—False swearing in account in writing. *Causes*—That it does not shew when, where, or how the plaintiff made the alleged false swearing, or before whom the plaintiff was sworn; and that it does not appear that the

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the said statement made in the said ninth plea was untrue in any material point, or that there was any wilful misstatement; and that it should be shewn in what respect the statement is untrue, in order that the materiality may be seen, and that the plaintiff may be able to take a certain issue on a material point. Demurrer to tenth plea—Loss not estimated &c. *Causes*—Issue tendered too large, and offers issue on an immaterial point, as it is not necessary for the plaintiff to prove a loss to the amount alleged, as he would be entitled to recover for any loss, large or small; also, that the plea does not offer a certain issue as to the plaintiff having sustained a loss by the said fire; also, the plea is double, it traverses a loss to the amount alleged in the first count, and also attempts to put in issue that the loss was not estimated according to actual value of the merchandize burnt at the time of the fire. Demurrer to eleventh plea—That it should have concluded to the country. Demurrer to thirteenth plea—Non compliance with the tenth condition. *Causes*—Duplicity, because it sets up several matters of defence, each of which is distinct, viz., plaintiff did not forthwith after merchandize burnt give notice thereof to the defendants, that he did not deliver a particular account in writing to the defendants of the loss, that he did not declare on oath no other insurance had been made, that he did not deliver such declaration on oath to the defendants, that the plaintiff did not prove his loss according to the tenth condition; that plea is uncertain in not shewing what kind of proof the plaintiff failed to make, viz., whether by verification on his own oath, by books of account and vouchers, or by his examination. No certain issue can be taken on the averments in this plea, and the defendants attempt to avoid without confessing. Demurrer to fourteenth plea—Fraud in the claim within the meaning of the tenth condition, assigning similar grounds to those taken to the seventh plea. The plaintiff replied to the fifth plea: that at the time of the making of the policies and the causes of action accrued, and from thence continually until twelve months next thereafter, no action could have been sustained against the said defendants at the suit of the plaintiff

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plaintiff in this Court, without the defendants voluntarily appearing in the said Court to answer the action of the plaintiff, defendants all the time being a foreign incorporated company, and not a company incorporated by any Act of Assembly of the Province, and there being no person at the said time in the Province upon whom process in any suit of the plaintiff against the defendants could be made, and there being no means by the course and practice of the Court by which the defendants could be brought into the Court house, to answer any action commenced against them by the plaintiff within the said twelve months; and the plaintiff avers, that although he was ready and willing to and would have prosecuted his said claim for the loss in this Court within twelve months after the causes of action accrued, yet the defendants within the said twelve months refused to appear to any action in the said Court at the suit of the said plaintiff, by means whereof no action could within the said twelve months have been sustainable against the defendants at the suit of the plaintiff. Verification. The defendants demurred to this replication, and assigned the following causes: 1st. Replication double, tenders three issues, viz., 1st. No action could have been sustained against the defendants at the suit of the plaintiff without defendants voluntarily appeared in Court; 2dly. That at the said time, when &c. there was no person in this Province upon whom service of process could be made; 3dly. That defendants refused to appear in this Court at the suit of the plaintiff. Also, the replication shews that defendants are a foreign corporation, and there is nothing to shew that they could not have been sued in the country where incorporated, within the time limited by the conditions of the policy. Also, the replication shews the defendants at the time &c. were a foreign corporation, that therefore it must be presumed that the plaintiff intended to look for his remedy to the Courts of that country only where incorporated. Also, that the replication shews that the defendants were a foreign incorporated company, and that the refusal to appear in this Court was the exercise of a right within the terms of the contract, evidenced by the policies. That though it states that the

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plaintiff had no means of compelling the defendants' appearance in *this Court*, it does not state that he could not compel their appearance in any *other Court of this* Province, and that the plaintiff had no remedy against the defendants under the laws of this Province. *Also, that issues one, two, and three, tendered by the plaintiff, are immaterial.* Replication also ambiguous. The plaintiff joined in demurrer, and at the same time gave notice of the following objections to the fifth plea: 1st. That being pleaded to the whole declaration, and not traversing allegations in the fourth count, that the defendants waived and discharged plaintiff from performance of the fifteenth condition; defendants have admitted same, and therefore defendants cannot allege as a defence the plaintiff not doing that which the defendants have discharged him from doing; plea being pleaded to the whole declaration, bad. 2dly. That the fifteenth condition applies only to Courts within the state of *Connecticut*, where the policies were effected, as stated in the second and third counts; and the said fifth plea being pleaded to the whole declaration, and bad as to the second and third counts, is bad to the whole. 3dly. That the not bringing an action within twelve months after cause of action arose, is a mere matter of evidence for the jury, conducing to the proof that no loss was sustained, but no estoppel to an action brought after the twelve months. 4thly. That the fifteenth condition applies only to such Courts as could have sustained an action at law *commenced* within the time specified; but as there was no mayor &c. or other person on whom service of process could have been made, whereby the plaintiff could have compelled the appearance of the defendants to any suit at law here; and as no Court of law in this Province could sustain action until appearance of the defendants after being served with process—therefore no action could have been sustained as to the cause of action in the second count; the plea being bad to that count, and being pleaded to the whole declaration, is bad. 5thly. That Courts of law here will administer the remedy within the time limited by the law of the Province for bringing actions, and as the time in this case has not elapsed, plaintiff may proceed here, notwithstanding the fifteenth

fifteenth condition. 6thly. That the fifteenth condition is repugnant to the body of the said policies, whereby the defendants agree to make good any loss by fire, to be paid within sixty days after notice and proof made in conformity to conditions; and as the conditions allow the assured to deliver in an account as soon after the fire as possible, and do not limit the time of that delivering within twelve months; if he could not do so within that time, and a longer time is reasonable, which may exceed the twelve months from the time the cause of action accrued, and as the defendants agree to pay within sixty days after delivery of the account, which may be after the twelve months, the fifteenth condition would prevent a Court of law sustaining an action; the fifteenth condition being repugnant to the body of the policies must be rejected; and therefore plea alleging action not commenced within the twelve months is bad. 7thly. That the defendants not having traversed the allegations in the several counts of the declaration, that the plaintiff did as soon as possible after the fire deliver in a particular account, have admitted it; the defendants should have shewn that the sixty days from the delivery of the account had elapsed within the period of twelve months after the fire, so as to shew that the plaintiff could have commenced an action within twelve months after cause of action accrued. 8thly. That the defendants not having traversed the allegation in the second count, that there was not at the time of the making of the said policies in that count mentioned and thence up to the commencement of this suit, any person upon whom process could be served to bring defendants into Court, they have admitted the same: then the defendants have *voluntarily appeared* in this Court to answer the plaintiff's claim, and by so doing have precluded themselves from pleading that this action was not commenced within twelve months after cause of action accrued—otherwise their appearing after the said twelve months voluntarily to answer the plaintiff's claim would be nugatory &c.; therefore the fifth plea setting up this defence to the whole declaration being bad as to the second count, is bad to the whole declaration. 9thly. The defendants not having traversed, that the

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the defendan's made policies in said third count as a foreign corporation, and that the defendants were not incorporated by any law of this Province, and that individual members were not liable to suit—these allegations are admitted; and then as there are no means by which an action at law in this Court against the defendants could be sustained on said policies in the said third count mentioned, unless by their own consent in appearing—the fifteenth condition cannot be applicable to any action in this Court on the policies in the third count, as the condition must be held to apply to such Courts of law only, where at the time of the policy being made, an action at law could have been sustained against the defendants; and the fifth plea being pleaded to the whole declaration, and being bad as to the third count, is bad to the whole. 10thly. The plea is bad as to the second and third counts, in the defendants not averring that they were always within twelve months after the cause of action accrued, ready and willing to appear to any action on the claim mentioned in the second and third counts. 11thly. The plea that the plaintiff did not exhibit his bill against the defendants in respect to the cause of action in the declaration mentioned, is bad—as the fifteenth condition only requires the plaintiff to commence an action within *one year;* and the defendants should have pleaded that the plaintiff did not commence an action within one year after the cause of action accrued. 12thly. That the defendants attempt to avoid the causes of action in the declaration without confessing them. The defendants also at the time of demurrer to the replication to the fifth plea gave notice of the following objections to the declaration: *To the first count*—1st. That it did not appear that *Whipple*, to whose order the loss (if any) was made payable, made any order on the defendants to pay loss to plaintiff, or for the plaintiff to receive the same from defendants. 2d. It did not appear that the plaintiff had any interest in the policies in the said first count mentioned, or in the amount payable thereon at *the time* of the loss, or that he sustained any damage by the loss. 3d. That it did not appear that at the time the plaintiff delivered into the company his particular account in writing, signed by his own hand and verified by his oath, to wit, on the 20th

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20th *August*, 1845, he did also declare on oath whether any or what other insurance had been made on the property therein mentioned, what was the value of the same, in what general manner (as to trade, manufactory, merchandize, or otherwise) the building containing the property insured and the several parts thereof were occupied at the time of the loss, and who were the occupants of such building, and when and how the fire originated so far as he knew and believed; and did also procure a certificate under the hand of a magistrate or notary public (most contiguous to the place of the fire, and not concerned in the loss as a creditor or otherwise, or related to the plaintiff or *Whipple)*, that they had made due inquiry into the cause and origin of the fire, and also as to the value of the property destroyed, and were acquainted with the character and circumstances of the person or persons insured, and did know or verily believed that the said plaintiff really and by misfortune, and without fraud or evil practice, sustained by such fire loss or damage to the amount therein mentioned, according to the tenth condition: plaintiff's compliance with the tenth condition was at a subsequent period, to wit, on the 27th *March*, A. D. 1846, contrary to the tenth condition. Also, it it did not appear that the notary giving the certificate was not related to *Whipple*, the payee of the amounts due on the said policies in case of loss. Also, it did not appear that the preliminary proofs required by the tenth condition were produced by the plaintiff to the defendants. Also, it did not appear that the action was commenced within the term of twelve months next after cause of action accrued. *Objections to the second count*—Same as the first and second objections to the first count. The averment that at the time of making the first policy, and from thence continually &c., the defendants had no mayor &c. on whom service of process could be made, was irrelevant and immaterial. Also, that the mode of waiver of the tenth condition as respects certificate was not shewn, or that the waiver was binding on defendants, being a corporation. Also, it did not appear that plaintiff had performed all the conditions &c. on his part previous to the commencement of this suit. Also, that it appeared that the

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the delivery of the particulars in writing, and the declaration on oath as set out therein, were not in accordance with the tenth condition of the policy. Also, that it did not appear that this action was commenced within the term of twelve months after cause of action accrued. Also, it did not appear that the preliminary proofs of loss required by the tenth condition, had been produced by the plaintiff to the defendants. *Objections to the third count*—Substantially the same as those to the first. *Objections to the fourth count*—Same as the first and second objections to the first count, and similar to some of the objections to the second count. *Objections to the fifth count*—Substantially the same as to the fourth. *(a)*

*(a)* The subjoined abstract exhibits the pleadings in the case.

| *Declaration.* | *Pleas.* | | | *Issues, Demurrers and Replications.* | *Joinders and Demurrers* |
|---|---|---|---|---|---|
| 5 counts. | To the whole declaration, Five pleas, viz. | 1st. | Non sunt facta. | Issue joined. | |
| | | 2d. | Refusal to permit extracts. | Demurrer special. | Joinder. |
| | | 3d. | No interest in goods. | Demurrer special. | Joinder. |
| | | 4th. | Goods not burnt. | Issue joined. | |
| | | 5th. | Action not commenced within twelve months. | Replication— plff. non potuit; deftt. absente. | Demurrer and Joinder. |
| 1st count. | To first count, Five pleas, viz. | 6th. | I. Tenth condition not complied with. | Demurrer special. | Joinder. |
| | | 7th. | II. Fraud in claim. | Demurrer special. | Joinder. |
| | | 8th. | III. False swearing in declaration on oath. | Demurrer special. | Joinder. |
| | | 9th. | IV. do. do. account in writing. | Demurrer special. | Joinder. |
| | | 10th. | V. Loss not estimated &c. &c. | Demurrer special. | Joinder. |
| 2d count. | To second count, Six pleas, viz. | 11th. | I. Loss not estimated &c. &c. | Demurrer special. | Joinder. |
| | | 12th. | II. Defendants did not waive compliance with tenth condition as to notarial certificate &c. | Issue joined. | |
| | | 13th. | III. Non compliance with tenth condition. | Demurrer special. | Joinder. |
| | | 14th. | IV. Fraud in claim within meaning of the tenth condition. | Demurrer special. | Joinder. |
| | | 15th. | V. False swearing in account in writing. | Demurrer special. | Joinder. |
| | | 16th. | VI. False swearing in declaration on oath. | Demurrer special. | Joinder. |
| 3d count. | To third count, Five pleas, viz. | 17th. | I. Loss not estimated &c. &c. | Demurrer special. | Joinder. |
| | | 18th. | II. Non compliance with tenth condition. | Demurrer special. | Joinder. |
| | | 19th. | III. Fraud in claim within tenth condition. | Demurrer special. | Joinder. |
| | | 20th. | IV. False swearing in account in writing. | Demurrer special. | Joinder. |
| | | 21st. | V. do. do. declaration on oath. | Demurrer special. | Joinder. |
| 4th count. | To fourth count, Seven pleas, viz. | 22d. | I. Loss not estimated &c. &c. | Demurrer special. | Joinder. |
| | | 23d. | II. Did not waive tenth condition as to notarial certificate &c. | Issue joined. | |
| | | 24th. | III. Did not waive fifteenth condition. | Issue joined. | |
| | | 25th. | IV. Non compliance with tenth condition. | Demurrer special. | Joinder. |
| | | 26th. | V. Fraud in claim. | Demurrer special. | Joinder. |
| | | 27th. | VI. False swearing in account in writing. | Demurrer special. | Joinder. |
| | | 28th. | VII. do. do. declaration on oath. | Demurrer special. | Joinder. |
| 5th count. | To fifth count, Six pleas, viz. | 29th. | I. Loss not estimated &c. &c. | Demurrer special. | Joinder. |
| | | 30th. | II. Defendants did not waive tenth condition as respects certificate of notary &c. | Issue joined. | |
| | | 31st. | III. Non compliance with tenth condition. | Demurrer special. | Joinder |
| | | 32d. | IV. Fraud in claim. | Demurrer special. | Joinder. |
| | | 33d. | V. False swearing in account in writing. | Demurrer special. | Joinder. |
| | | 34th. | VI. do. do. declaration on oath. | Demurrer special. | Joinder. |

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The case was argued in *Easter* term last, by *Jack* and *Kaye* for the plaintiff. It will be convenient to discuss—1st. The objections to the declaration; 2dly. The demurrers to the pleas; and 3dly. The demurrer to the replication to the fifth plea, and the exceptions to that plea. *First count.* The first objection to the declaration is, "that "*Whipple*, to whose order the loss under the two policies "was made payable, has made no order to the plaintiff to "receive the loss." This objection is clearly untenable. *Whipple* is no contracting party, no right of action is vested in him, and it would upon the most obvious rules of pleading be impossible to sustain a declaration in which he was made a plaintiff. The first count negatives the fact of a payment either to the plaintiff or to *Whipple*, which is quite sufficient. If the defendants had paid *Whipple*, it would be a matter of defence. Second objection—"That the plaintiff had no "interest in the policies." This objection is merely an amplification of the first objection, and like it based upon the assumption that *Whipple* is clothed with the right of action, and not the plaintiff. The law is so plainly opposed to this view, that gravely to argue the question would be a mere waste of time. Third objection—"That it does not "appear by the count that the plaintiff delivered into the "company his particular account in writing, signed with his "own hand and verified by his oath &c., according to the "tenth condition." The tenth condition requires that the assured shall as soon as possible after a fire deliver in a particular account in writing to the company of such loss, signed with his hand and verified by his oath; yet that part of the tenth condition which requires the assured to declare on oath that no other insurance was made on the same property &c. is not limited as to time, and need not be made simultaneously with that respecting the fire. Fourth objection—"That it does not appear that the action was com-"menced within twelve months next after the cause of action "accrued." This objection is the subject matter of a plea, to which the plaintiff might have replied any matter which he deemed proper. The first count it will be recollected differs from the fourth. In the latter a special averment is introduced,

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introduced, setting forth the reasons why the action was not commenced within the twelve months. The matter of the special averment in the fourth count might have been the subject of a good replication to the plea, but the objection cannot be urged against the first count. The first and second objections to the second count are the same as those to the first count, and have been already answered. The third objection to the second count is addressed to the averment—"That at the time of the making of the policies &c. the cor-"poration (the defendants) had no mayor &c. upon whom pro-"cess could be served." This is a material, and of course a traversable averment. It was not in the power of the plaintiff to prosecute his action until there was some person upon whom process could be served, and it was competent for him either to allege this in his declaration, and thus anticipate the ground of defence which the defendants might set up, or the plaintiff could make it the subject of a replication in the event of a plea requiring such a reply. Fourth objection to the second count—"That the plaintiff has not shewn how "the defendants waived the tenth condition." This is clearly matter of evidence, and may be proved either expressly or impliedly from the conduct of the parties. It is like the preliminary proof in an action upon a marine policy—the waiver of which in all the precedents, is stated as it is here. As to the fifth objection, the plaintiff has averred performance of all the tenth condition except that portion of it which he alleges to have been waived. The sixth objection is so vague that it is impossible to see distinctly what the defendants mean by it. The exceptions to the third count are all open to the same remark. Then with respect to the objection to the fourth count, as to the waiver of the fifteenth condition—the same arguments that have been advanced in support of the allegation of waiver of the tenth condition apply here. In fact the precedent is taken from *Chitty*, and is continually used without objection. *Demurrers to the pleas.* Second plea—"Refusal to "permit extracts." This plea sins against the principle of the rule that the issue must be single. The tenth condition contains a variety of stipulations, each distinct in its nature.

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nature. The defendants have alleged two refusals—1st. A refusal by the plaintiff to deliver in an account in writing of his loss; 2d. A refusal to permit extracts to be made from his books. This plea would therefore raise two issues, either of which if found in favour of the defendants would decide the cause. The matters are quite distinct. In the first instance, all that is necessary is an account of the loss verified by the plaintiff's oath, and then, "if required," there must be further proof by the books; but the request to furnish the further proof is a condition precedent on the part of the defendants. The word "permit" implies a request, but until such request is made there is no breach of the condition. The defendants should have stated their plea in clear and unambiguous language; if there is any ambiguity in it, the construction must be against the party pleading. The word "then" in a plea has been held to be ambiguous. *Stead* v. *Poyer* (*a*). It should have appeared that the request to deliver an account from the books was made to the plaintiff before action brought. By the eleventh condition, payment is to be made within sixty days after proof of the loss, and the defendants should have shewn that they made the application for further proof within that time; because after the expiration of the sixty days, without any request of further proof, the plaintiff had a right of action which could not be divested. The plea is also bad for not stating positively that the plaintiff had books of account: it only appears by inference. *Demurrer to the third plea.* The traverse here is, that the plaintiff is not interested to the whole value of the goods insured; a mere negative of the language of the declaration: and it goes to this extent—that if the plaintiff's interest in the goods, or rather if the goods were not of the full value described in the policies, if they fell one shilling below it, the action could not be sustained. But if he was interested in any part of the goods, he is entitled to recover *pro tanto:* the traverse is therefore clearly too large. If a plea traverses more of an allegation than is material, it is bad as being too large. *Tempest* v. *Kilner* (*b*). The averment of

(*a*) 3 *Doul.* & *L.* 309. (*b*) 3 *D.* & *L.* 407.

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interest at the time of effecting the policy, is satisfied by proof of interest at the time of the loss. *Hammond on Ins.* 71. *Demurrer to the sixth plea.* This plea is almost unintelligible; it is also open to the objections urged against the second plea; in addition to which it traverses the time, which being laid under a videlicit is not material. *Anderson* v. *Thornton (a).* The policy has reference to three descriptions of proof: 1st. Examination under oath &c.; 2d. Vouchers; 3d. Delivery of a particular account. By this plea the defendants attempt to put all these in issue. If they wished to put all these distinct and independent matters in issue, they should have pleaded to each separately. The consequent prolixity of the pleadings is an objection of no force. *Demurrer to the seventh plea.* The allegations in this plea are too general. It first states that the plaintiff did not as soon as possible after the loss deliver in a particular account of such loss, signed &c., and then goes on to state that there appeared to be (not that there was) fraud in the claim. The expression "as soon as possible" is very vague and uncertain: it lacks that precision which the language of pleading requires. The phrase "there appeared fraud" is loose and objectionable: there ought to have been a positive allegation that there was fraud. Strictly speaking, the words would almost imply the absence of actual fraud. The plea is also bad upon the ground of duplicity, and because it does not confess and avoid; for if there was no fraud, there is not sufficient admitted on the face of the plea to entitle the plaintiff to judgment if there was a verdict in his favour. *Demurrer to the eighth plea*—False swearing in the declaration. It does not appear that there was any statement marked A. The charge of false swearing ought to be so clear and specific that perjury might be assigned upon it. It ought to appear when and where the oath was made, in order that the Court might judge of the charge of false swearing. *Reg.* v. *Nott (b).* In *Thurtell* v. *Beaumont (c)*, which was an action on a policy, to which the defence was that the plaintiff had wilfully set fire to the property, it was held that in order to justify a verdict for the defendant, the

(a) 3 Q. B. 277. (b) 4 Q. B. 678. (c) 1 *Bing.* 339.

evidence

evidence must be such as would support a criminal charge against the plaintiff for the same offence. Will it be contended on the other side that if there had been an untruth as to five yards of cloth, a hat, or a pair of gloves, all right of action was gone? The meaning of the condition is, that he shall not swear wilfully and corruptly false in any material point. *Demurrer to the ninth plea*—False swearing in the account in writing. This plea is bad upon some of the grounds urged against the eighth plea; and in some respects it is more objectionable, because it does not confine the false swearing to any particular day. *Demurrer to the tenth plea*—Loss not estimated. The allegation of loss is divisible: if the plaintiff proves a partial loss, he is entitled to recover; the traverse is therefore too large, and raises an immaterial issue. The case of *Tempest* v. *Kilner (a)* is an authority against the validity of this plea. This plea comprehends not singly a traverse of the loss by fire, but also asserts that there was no estimate. There might have been a loss by fire for which the plaintiff was entitled to recover, although no estimates were made. *Demurrer to the eleventh plea*—Fraud in the claim within the tenth condition. This plea ought to have concluded to the country, and not with a verification, because it does not introduce any new matter; there was therefore a complete issue. *Bentley* v. *Goldthorp (b)*. If the plea does more than deny the allegation of loss, it is double; so that in either event the plea is bad. *Summers* v. *Ball (c)*. These demurrers cover all the pleas demurred to, not only the pleas pleaded to the whole declaration, but those pleaded to the several counts of the declaration. *Demurrer to the replication to the fifth plea*. The replication shews that the defendants are a foreign corporate body, and that they within twelve months after the cause of action accrued, refused to appear to any action which the plaintiff might commence. Our law provides no remedy to *enforce* the appearance in our Courts of law, of foreign corporate bodies. The issuing of a writ, where the defendants refused to appear, would in such case be unnecessary and useless; for the plaintiff could not after such refusal antici-

(a) 3 *Doul. & L.* 407. (b) 1 *C. B.* 377. (c) 8 *M. & W.* 596.

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pate that they would appear if he issued a writ against them. It is true they have eventually appeared, but they have done so it seems only to raise a technical objection, as to the action not having been commenced within the twelve months; whether, except to raise this point, they would have appeared at all is very questionable. The fifteenth condition must mean that the plaintiff was to prosecute his action, and that he was limited to a certain time to commence the action thus to be prosecuted. But the defendants' refusal to appear put it *out of the plaintiff's power* to prosecute the action. It is by the *act* of the defendants' refusal that the plaintiff was prevented from doing what the fifteenth condition required him to do. Then surely under such circumstances the defendants will not now be permitted to take advantage of their own act, to bar the plaintiff of his remedy. The case of *Douglas* v. *Forrest* (*a*) shews, in a case where the plaintiff had not had power to prosecute his action, the construction put upon the statute of limitations, that the action shall be brought "within six "years next after the cause of such actions or suits, and not "after:" wherein it was held that the statute did not commence to run while the plaintiff was not in a situation to prosecute his action with effect. So in the construction of the fifteenth condition, it must be held to contemplate a case where the plaintiff would have *power to prosecute* the action which was to be commenced within the year—this power to *effectually* prosecute he clearly has not in our Courts as against a foreign corporate body, unless the defendants appear to the action voluntarily by their attorney. And it is contended, that if he has not such power as to his claims on the policies in question in any given case, in suits in our Courts of law, the fifteenth condition is not applicable to them. The objection to duplicity in the replication is untenable. The matters replied constitute *one* point. But assuming the replication to be faulty, the fifth plea is bad in substance, on several grounds: 1st. The fifteenth condition is only applicable to actions in Courts where, if an action were commenced within the time limited by the condition,

(*a*) 4 *Bing.* 686.

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the plaintiff would have *power* to prosecute the same without any act of the defendants to enable him to do so. The condition implies that there is a cause of action; a Court in which the plaintiff has power to prosecute his claim, and in which it would be sustainable; and it then provides that no action shall be *sustainable* unless the same be commenced within the time limited. Would the action be *sustainable* in our Courts of law unless the defendants voluntarily appeared? It is contended that it would not. The condition assumes that *it is in the power of the plaintiff* to do what it requires to be done. This it certainly was not in this case, as regards *our* Courts of law, whatever it may have been as respects Courts *elsewhere*. If the plaintiff had the power and did not prosecute in our Courts, then there might be reason to deem his claim invalid; but not otherwise. The plaintiff may be barred of his remedy elsewhere, but it is contended that there is nothing in the fifteenth condition which deprives him of his action in our Courts, whether it were commenced before or after the twelve months. 2d. The contract in the policies being that of a foreign corporate body in *Connecticut*, and made in that state, the fifteenth condition must have intended to limit the time for bringing actions within the Courts of that state, and those Courts only; as that state was the place of performance (namely payment) contemplated by the parties. 3d. The fifteenth condition is void as being repugnant to the tenth condition. By the latter, no specific time is limited for the delivery by the plaintiff to the defendants of the particular account; it must be within a reasonable time. This under particular circumstances may be more than twelve months from the plaintiff's loss: cases may be supposed in which it would be unreasonable, nay impossible to deliver the particular account within the twelve months; yet by the fifteenth condition the action must be commenced within twelve months after the cause of action accrued; that is from the *fire* which *occasioned* his loss, and the damage sustained at which constitute his *cause* of action: so that taking the fifteenth condition as imperatively requiring the commencement of the action within the

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the twelve months, it might in some cases require this when by reason of the necessity on the plaintiff's part of fulfilling the requirements of the tenth condition, he would not be in a situation to sue, and he would without any fault or *laches* on his part be barred of his remedy. The one condition cannot stand with the other. 4th. The fifth plea goes to affect the *remedy*, and this must be governed by the law of the place where an action is brought and a contract is sought to be enforced. It affects the time within which the action must be brought. Our own statute of limitations regulates this. If these policies had been silent as to the time for bringing the action, still if they were made in the state of *Connecticut* they would in construction of law have incorporated into them the law of the place, as explanatory of the contracts in matters not provided for by them. Yet this would not have affected the remedy on it in our Courts. Neither should the fact of the policy containing a prescription within itself alter the case. In seeking the remedy, our own prescription must be looked to and none other. 5th. The fifteenth condition is bad upon the broad ground that it is contrary to the policy of the law; its effect is to oust the Courts of law and equity of their jurisdiction by an unreasonable restraint. In the *Earl of Mexborough* v. *Bower* (*a*), the Master of the Rolls says, "that parties can-"not contract themselves out of the right to have their dis-"putes settled in Courts of justice." Causes which *tend* to oust the jurisdiction of the Courts, are not binding on the parties. 6th. Another objection to the fifth plea is, that the not bringing the action within the twelve months is merely *evidence* of the invalidity of the claim. The fifth plea attempts to set up the non commencement of the suit within that time as an estoppel to the plaintiff's claiming at all; it is therefore bad. 7th. But the most obvious objection to this plea is, that it is pleaded to the whole declaration, and is clearly bad as to the fourth count, which alleges that the defendants waived and *discharged* the plaintiff from the performance and observance of and compliance with the fifteenth condition. The defendants by pleading

(*a*) 7 *Beav.* 132.

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over have admitted this allegation to be true, and they are thereby estopped from now complaining that the action was not brought within the twelve months; they having in effect admitted by the pleadings that they had *discharged the plaintiff from the necessity* of bringing it within that time. The plea of non compliance with the fifteenth condition is therefore bad as to the fourth count; and if so, as the plea is pleaded to the whole declaration, and is not divisible, it is bad in *toto*. *Powdick* v. *Lyon* (*a*), *Chit. Pl.* (5th ed.) 703.

*J. W. Chandler* and *Gray* contra. The proposition that the only mode of assigning a chose in action, so as to vest in the assignee a right of action in his own name, is by a bill of exchange or promissory note, is not entirely accurate. *Wilson* v. *Coupland (b)*, *Farilu* v. *Denton (c)*. But even if it were, the proposition would not reach our first and second objections to the declaration. In the case of a marine policy of insurance, it was decided that if *D.* be insured, and loss (if any) to be payable to *F.*, the latter may in the event of a loss maintain an action in his own name. 2 *Phillips on Insur.* 595. The contracting parties here agreed that the loss should be payable to *Whipple*, "*modus et conventio vincunt legem.*" It seems then that *Whipple* was clothed with the right of action; the legal interest by agreement vested in him, and if he could maintain an action in his own name upon the policies, the plaintiff *(Ketchum)* could not. At any rate there is no averment of an order from *Whipple* to *Ketchum*, to receive the money; which it is contended is essential—he having by agreement between the parties been constituted the recipient. As to the third objection to the declaration, viz.: That the plaintiff has not shewn that at the time he delivered in his particular account in writing of his loss, he also delivered in the declaration and proofs required by the tenth condition; that he did not declare on oath whether any or what other insurance had been made on the property &c. As no time is limited for the performance of these acts, the law would imply a reasonable time; and therefore the declaration should have contained an averment that these acts were performed within a

(*a*) 11 *East.* 566. (*b*) 5 *B. & Ald.* 228. (*c*) 8 *B. & C.* 395.

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reasonable time. The time in this case is laid under a videlicet, the effect of which would be to give the plaintiff an indefinite latitude in his evidence, and thus postpone an investigation of the acts until all proof of them should be lost; thereby rendering the expiration of a reasonable time a question which could not be raised. With regard to the allegation of waiver of the fifteenth condition, as stated in the fourth count; it will be recollected that the defendants are a corporation, and sued as such, then an act of waiver of the fifteenth condition not being incidental to the exercise of their functions, or rather not being an act of such frequent occurrence that the affixing of the corporate seal would be attended with intolerable inconvenience, the waiver would require the authentication of the common seal. 8 *T. R.* 280, 7 *Jurist* 656, *Bing. N. C.* 265 *et seq.*, *Mayor of Ludlow v. Chalton (a)*. The precedent is taken from *Chitty*, and he subjoins a *quære.* But further observations now are unnecessary on this part of the case: they will more properly arise when the exceptions to the fifth plea come on to be discussed. We will now proceed to the demurrers to the pleas. *Demurrer to the second plea.* This plea is objected to upon the ground of duplicity; that it attempts to put several matters in issue, namely, a refusal to deliver in account of loss, and also a refusal to permit extracts &c. It is certainly a rule in pleading that the issue must be single, but a variety of facts, all constituting one entire proposition or ground of defence, may be pleaded if they be dependant and connected; *Chitty on Plead.* (1st vol.) 637; and it is another rule equally well established, that whereever it is incumbent upon the plaintiff to aver the performance of several acts, the performance of all or any of these acts may be denied. But it is contended on the other side, that this general traverse has a tendency to multiply the issues; but the remedy proposed, that is, to traverse by a separate plea the performance of each act, does not remove, but increases the difficulty. Again, if the defendants were confined to the traverse of a single act, they would be obliged to admit the performance of the acts not traversed, upon the principle

(a) 6 *M. & W.* 615.

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that whatever is not denied is admitted. As the rules of pleading are founded in good sense and sound reasoning, any system of pleading by which a party is prohibited from putting in issue the performance of an act which the plaintiff ought to prove, seems to be in direct conflict with those rules. *Demurrer to the third plea.* The object of this plea was merely to put in issue the fact whether the plaintiff were interested in the goods or not; the averment of that interest under this issue would be matter of evidence for the jury. *Demurrer to the sixth plea.* The arguments already advanced in support of the second plea may be applied in favour of the sixth, and it is not necessary to repeat them again. But this plea may be sustained upon the ground that all the allegations in it, which precede the word *nevertheless*, are in the nature of a *protestando*, which means an admission—an admission of the facts as therein stated—but not of the legal consequences sought to be attached, or their compliance with the terms required. The issuable part of this plea therefore would be that portion of it which alleges, that the plaintiff did not reasonably prove his loss according to the tenth condition; that is to say, that the proof required by the tenth condition was not furnished by the plaintiff. In this view then the issue is single, or to speak more correctly, the plea tends to produce an issue which would be single. The plea is taken from a precedent in *Chitty*, and there is no note subjoined suggestive of a doubt of its validity. 1 *Chit. Pl.* 648, 651. *Demurrer to seventh plea.* The form of this plea is also given by *Chitty;* the objection to it is duplicity: 1st. because it denies the delivery of the account of loss; 2dly. because it alleges that "there appears to be "fraud in taking the account:" the language of the tenth condition is "if there appear any fraud, the assured shall "forfeit all claim under this policy." Now the material issuable part of this plea is, that there appeared to be fraud in taking the quantity of teas, ribbons &c. The defendants have been more specific here than the rules of pleading require: a general allegation of fraud would have been quite sufficient. Fraud most generally is a compound of facts and intents, and it never can be necessary to enume-

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rate all the facts and motives which constitute the crime. 1 *Chitty's Plead.* 613, 9 *Rep.* 110, *Hill v. Montagu (a).* *Demurrer to the eighth plea*—False swearing. It was not necessary in this plea to state before whom the false swearing took place, as no person had a right by law to administer the oath; in fact it would be unlawful to do so, and the person administering the oath might be liable to a criminal information, and perjury could not be assigned even if the oath were wilfully false. The false swearing which the policy contemplates, is not perjury in the legal acceptation of the term: it intended that the oath should be a statement of the truth according to the party's own knowledge; and therefore we should maintain the position (did it become necessary), that if the plaintiff swore to a state of facts which he believed to be true, and he were mistaken, for instance—if he chose to swear without due inquiry or certain knowledge as to the value or loss of an article, and he was mistaken, that *would be false swearing within the tenth condition*, and would defeat the policy, while at the same time it would *not* be perjury in law: unless the construction were such, it would give the assured great facilities for the commission of fraud. We contend that the object of this plea is to make the insured use every precaution to give a fair and just account of his loss, not to speculate upon the probability that he may escape detection. The same arguments apply to the demurrer to the ninth plea. *Demurrer to the tenth plea.* This plea is demurred to upon the same grounds that the third plea is, to which our answer has already been given. *Demurrer to the eleventh plea.* The objection to this plea is, that it ought to have concluded to the country. It is addressed to the second count of the declaration, which omits the allegations that the loss was estimated; therefore this new material fact having been introduced by the plea, it is rightly concluded with a verification. Then with respect to the *fifth plea*, the *replication* to it, the *demurrer* to that *replication*, and the *exceptions* to that plea: these may be all considered together. The leading exception to the fifth plea is, that it

(*a*) 2 *M. & S.* 378.

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sets up the fifteenth condition as an answer to all the counts of the declaration; and that as the fourth contains an averment of waiver of the fifteenth condition, the plea ebing inapplicable to that count, is therefore bad in that particular; and being entire, is bad in *toto*. Another ground of exception against the plea is, that the subject matter of it is not pleadable in bar at all, that if the action had not been commenced against the defendants until after the lapse of twelve months from the time the cause of action accrued; this is merely a matter of evidence to be submitted to the jury upon an issue raising the question of loss. Another ground is, that the fifteenth condition is contrary to the policy of the law, and that it is repugnant to the tenth condition. In the first place it becomes necessary to consider the objection that the fifteenth condition is contrary to the policy of the law. The proposition is rather startling. The general rule of the common law certainly is that parties may enter into any kind of contract they please, provided that its object be not immoral, nor have a tendency to wound the feelings of individuals, nor contrary to legislative enactments, or the policy of the common law. In *Mitchell* v. *Harris* (*a*), Lord Chancellor *Eldon* says, referring to "*Halfhide* v. *Fenning*. In that case there "was an express agreement that there should be no suit in "law or equity. Parties may so agree; and it is every day's "practice that if they do, they cannot proceed contrary to "the agreement. In that case the covenant would be a "bar; here the only effect of it would be to give damages, "but could not be pleaded in bar to the action. Has there "been any instance of a bill to compel parties to name "arbitrators." Here then we have the very highest authority in favour of the legality of the fifteenth condition, and it is of no consequence what form the contract assumes whether it be called an agreement, a proviso, stipulation or condition—the substance of all is the same. The fifteenth condition is a reasonable one also for the defendants to introduce into their policies, as a guard against fraud. The parent institution is situated in a foreign

(*a*) 2 *Vesey Jun.* 129. 132.

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country, at *Hartford* in the state of *Connecticut*, removed to a great distance from the place where the insured property is. The premiums of insurance are very small, and it would certainly be an extremely imprudent act on the part of the defendants to contract a liability, which might be enforced against them after a lapse of fifteen or eighteen years, when accident or death had removed out of the way all the witnesses, by whom an available defence might have been proved if the action had been promptly brought. The exceptions in the statute of limitations apply to natural persons only, and not to corporations: they are not locomotive bodies travelling from one jurisdiction to another, so that the defendants could not protect themselves by a plea of the statute. *Faulkner* v. *Delaware and Raritan Canal Company* (*a*). Having established the validity of the fifteenth condition, we pass on to the consideration of the other grounds. This case has been compared to one falling under the statute of limitations, with respect to which it has been decided that there can be no cause of action until there be some person upon whom process can be served. But statutes of limitation or prescription only take away the remedy; they leave the debt or demand untouched. So that Courts of law pay no regard to the statute of limitations of a foreign country, and when parties invoke the aid of their jurisdiction, they apply the remedy according to their own forms of proceeding. But in the case of a contract *extinguished* by the law of the place where made, or by an original term or stipulation in the contract itself, whether by mere lapse of time or otherwise, the law is different—the contract cannot be *revived* by a suit in a foreign country. *Story on Confl. of Laws* (2d edit.), 223. It is contended on the other side, that although the contract disclosed by the fifteenth condition would be extinguished at *Hartford*, where it is made or was to be performed, yet when the remedy is sought here a different rule ought to prevail. But the law is in direct opposition to this position. *Story*, J., in his *Confl. of Laws*, p. 272, says "The general rule is that a defence "or discharge good by the law of the place where the con-

(*a*) 1 *Denio. N. Y. Rep.* 441.

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" tract is made or is to be performed, is held to be of equal " validity in every other place where the question may " come to be litigated." It seems to be admitted on the other side that if the policies had been made in this Province, and the plaintiff had suffered twelve months to elapse after the cause of action arose without commencing an action, the fifteenth condition would have been a bar. Now it is clear the policies were made in this country at the city of *Saint John.* In *Pattinson* v. *Mills* (*a*), before the House of Lords, the Lord Chancellor said, " If I, residing in *Eng-* " *land*, send down my agent to *Scotland*, and he makes " contracts for me there, it is the same as if I myself went " there and made them." The same rule has been held to apply even to an *English* corporation contracting by its agent in *Scotland*, for the contract takes effect as a contract in *Scotland*. *Story's Conflict of Laws* 237, *Albion F. and L. Insurance Company* v. *Mills* (*b*). Here the defendants, by Mr. *Balloch*, their agent, made the policies in the city of *Saint John.* The plaintiff says he could not bring an action; in other words, he could not prevent the lapse of twelve months, the running of time against him, as the defendants resided out of the jurisdiction of the Court; but surely there is nothing in this argument: he might have sued out a writ at any time after his cause of action accrued, and thus have commenced his action; or he might have taken proceedings in the Courts of the country where the company is incorporated, within the term prescribed. He also takes another ground, that the fifteenth condition is repugnant to the tenth condition, but to this the answer is plain: the fifteenth and tenth conditions must be read together, or with reference to each other, and the obvious interpretations of both is, that as soon as possible after the fire and before the expiration of twelve months after the loss, the assured is to deliver in a particular account of such loss or damage &c. The stipulation that no action shall be brought after the lapse of twelve months from the time the cause of action accrues, over rides this portion of the tenth condition, and *limits* the construction to be given to the period referred to in the tenth.

(*a*) 1 *Dow. & C.* 332. (*b*) 3 *Wils. & S.* 218. 233. 234.

Then

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Then with respect to the averment of waiver set out in the fourth count. Before discussing the doctrine upon this point, the nature of the stipulations in the tenth and fifteenth conditions may be briefly adverted to. Those contained in the tenth conditon are conditions *precedent;* that in the fifteenth is a condition *subsequent:* it therefore becomes the subject of a plea, or matter of defence. The plea in such a case would necessarily admit, that the plaintiff once had a cause of action which was well founded, but which had since been divested by lapse of time. *Hotham* v. *The East India Company* (*a*). It therefore became unnecessary for the plaintiff to notice in his declaration the fifteenth condition, and it is difficult to see how with propriety he could make any allegation respecting it; but he has thought proper to do so. He alleges that the defendants waived the performance by the plaintiff of the fifteenth condition, and that as the defendants have not traversed the allegation, they have admitted the truth of it, and that the fifth plea having been pleaded to the whole declaration, which makes it applicable to the fourth count in which the allegation of waiver is contained, the whole plea is bad. The rule is this: whatever is *traversable* and not *traversed*, is *admitted*. *Hudson* v. *Jones*, note to *Pim* v. *Grazebrook* (*b*). This allegation of waiver in the fourth count is mere surplusage, extraneous matter, and *not traversable;* therefore the defendants were justified in leaving it unnoticed—they were compelled to pass it by. This new fangled doctrine of waiver, as Chief Baron *Joy*, in the case of *Donnelly* v. *Howie*, in the *Irish* Exchequer, calls it, is comparatively of modern date, and even as applied to the indorsers of promissory notes and bills of exchange, as dispensing with the necessity of presentment or notice of dishonour, is latterly going out of fashion. *Campbell* v. *Webster* (*c*). What were the defendants to waive in this case. The waiver of preliminary proof in a marine policy is an event of frequent occurrence, and may be either express or implied; it is always of an act or acts the plaintiff is bound to perform, prior to his cause of action attaching—something in the shape of

(*a*) 1 *T. R.* 638. (*b*) 2 *C. B.* 445. (*c*) 2 *C. B.* 258.

a condition precedent. But the question again recurs, what act was the plaintiff here obliged to do, the performance of which the defendants waived. There was no compulsion upon the plaintiff to bring his action within twelve months, or at any time. It is impossible to imagine in what form an instrument of waiver in this case could be conceived—what would be the language of it. No man can describe it. The cause of action was *extinguished* by lapse of time: how could it be revived by *waiver*? The only possible way in which the object could be achieved would be this: the defendants might enter into a covenant with the plaintiff that if he should bring an action on these policies after the lapse of twelve months after the cause of action arose, they (the defendants) would not plead thereto the fifteenth condition. If under such circumstances an action were brought, and the fifteenth condition pleaded, then this covenant might be replied by way of estoppel. It seems then that the allegation of waiver in the fourth count was mere surplusage, that the defendants were not bound to answer it, and that the fifteenth condition set up as a bar in the fifth plea to all the counts was properly pleaded. The result therefore is, that the fifth plea, which is pleaded to all the counts, would entitle the defendant to a general judgment on the whole record.

*Jack* in reply.

*Cur. adv. vult.*

CHIPMAN, C. J. now delivered the judgment of the Court. This is an action for breach of covenant upon two policies of insurance, made under the corporate seal of the defendants. The one, dated the 27th *January*, 1845, whereby for the premium therein mentioned the defendants covenanted to insure the plaintiff against loss by fire to the amount of $4000, on his general stock of merchandize as therein stated, from 27th *January*, 1845, unto 27th *January*, 1846, and in case of loss the amount *to be ascertained according to the true value of the goods at the time of the loss*, and to be paid by the defendants within sixty days after notice and proof thereof made by the assured, in conformity to the conditions annexed to the policy. This policy *was indorsed* by the defendants on the 13th *May*, 1845, whereby *they consented* that

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that it should cover merchandize either owned by the plaintiff, consigned to him on commission, or in trust; *and that the loss, if any, was to be made payable to the order of Augustus W. Whipple.* The other policy, made under the seal of the said defendants to the plaintiff, was dated the 13th *May*, 1845, and was also for $4000, in addition to the previous policy against fire, on the general stock of goods &c. of the plaintiff, either owned by him, consigned to him on commission, or in trust, contained in the building therein mentioned, in *Saint John*, from the said 13th *May*, 1845, to the 13th *November* then next. The other terms of the policy are the same as the first mentioned, with the same reference to the conditions annexed thereto. This policy was also indorsed by the defendants, whereby it was declared by the defendants that the loss, if any, was to be payable to the order of the said *Augustus W. Whipple. Objections to the declaration.* The declaration contains five special counts, in each of which both policies are declared on, and in the first of which the conditions annexed to the policies are set out in full, and it is therein alleged that the said policies were made "and accepted *in* reference to the conditions thereto annexed, which were to be used and resorted to *in order to* "*explain the rights and obligations of the parties thereto in all* "*cases not therein otherwise specially provided for;*" and it is alleged in each of the other counts that the policies therein set forth were made with reference to the same terms and conditions annexed, as in the first count is mentioned. Thus the plaintiff has by his own shewing made the conditions in question part of the policies, just as if they were included in the instruments, and is estopped by his own declaration from now contending that they are mere matters of form, not intended as part of the contract; and he was bound so to declare, and to set out those conditions as part of the contract, as they are necessary, having the effect of explaining and controling the terms of the covenants contained in the deed, and the doctrine laid down in the case of *Worsley* v. *Wood (a)*, clearly makes them part of the deed. This being so, and several exceptions having been taken to each of the

(a) 6 *T. R.* 710.

counts

counts in the declaration, as not containing sufficient averments to shew the plaintiff's right to recover; we will first dispose of these exceptions. In order to do this it will be necessary to advert to the conditions, to see what is required of the plaintiff (in case of loss) to give him the right of action; for it is clear that he must shew by his declaration that he has fulfilled all conditions that are precedent to that right. In the first place, he has in all the counts shewn the deeds in full with the conditions, and has averred the loss by fire, the interest in the goods destroyed, and the amount of the loss, together with sundry other averments, which we shall hereafter advert to in reference to the exceptions taken. The first exception to each of the counts is, that he has not averred that *Whipple* gave any order for the payment of the loss, and it is contended that under the terms of the indorsement on the policies the defendants were not bound to pay any loss, without *Whipple's* order; but the plaintiff has in the breach assigned to each count alleged that the defendants had neither paid him the loss, or replaced the goods &c., or paid the same to *Augustus W. Whipple*, and in the first and third counts it is added "*or to his order*," but in the second, fourth and fifth counts, the words "or to his order" in the assignment of the breach are left out; but there is no objection taken to the assignment of the breach in either count: it is only for the want of an averment that *Whipple* gave an order; and on this point we are clearly of opinion that this averment was not necessary. *Whipple* was no party to, nor was his name mentioned in the contract. He could maintain no action except as assignee; and no assignment of the policies to *Whipple* is alleged, consequently he could have no legal right to recover in his own name the money insured, and there is nothing in the record to shew he had any legal interest in the property insured: the indorsement amounts only to a consent on the part of the defendants that the loss (if any) might be made payable to *Whipple's* order; but if *Whipple* gave no order, and never had any right transferred to him by the plaintiff to do so, then the loss still remained payable under the contract to the plaintiff; and therefore

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we think there is nothing in this exception. If the defendants had paid *Whipple*, that fact might have been a good answer to the present action, and so pleaded by the defendants. As to the second exception, "*that it does not appear that the* "*plaintiff was interested in the goods destroyed at the time of* "*the loss, or that he had sustained any injury by the fire.*" This was not much urged by the defendants' counsel, and we think there was nothing in it, and the interest is sufficiently averred in all the counts. The third exception to the first count is, *that the plaintiff has not shewn that at the time he delivered in his particular account in writing of his loss, he also delivered in the other declaration and proofs required by the tenth condition*—contending that they should all have been delivered in at one time, or it should have been averred that the proofs were delivered in within a reasonable time, and as soon as possible, and some reason shewn for delay. Now all the tenth condition requires as to time, is that notice of the loss shall *be forthwith given*, and that, it is averred was done; and all that the condition afterwards requires to be done is merely that it should be done *as soon after the notice* as possible, and the plaintiff avers that "as soon after as "possible," that is, on the 20th *August*, he did deliver in a particular account of the loss under oath, and did after the said fire, according to the said condition, that is, on the 27th *March*, 1846, do all the other acts that the tenth condition requires to be done by the assured—detailing what he did in compliance therewith *prima facie* to make the loss payable; and as this is not required to be done within any specified time, we think this objection cannot be sustained. The next and fourth objection is, *that it does not appear that Scovil, the notary who gave the certificate, was not related to Whipple;* but this is answered by there being nothing to shew that *Whipple* was in any way interested in the insurance. The next objection, which is the fifth in number, is already disposed of in our remarks on the third—the performance of such parts of the tenth condition as are only required to be done on request, need not be averred by the plaintiff in the declaration. As to the sixth objection to the first count, *that it does not appear that the action was commenced*

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*menced within the term of twelve months next after the cause of action accrued.* On this point we are clearly of opinion it was not necessary that the plaintiff in his declaration should shew this, and that it is a matter of defence for the defendants to plead. This indeed was admitted by the defendants' counsel, Mr. *Chandler*, in argument, on the authority of *Hotham* v. *The East India Company (a)*; for the fifteenth condition is clearly a condition subsequent, and the right of action having once fairly vested, it could only be divested under this condition by subsequent lapse of time, and therefore becomes a matter of defence; *prima facie* however it would seem by this count that the action was brought within the twelve months—for the declaration is entitled of *Hilary* term 1847, and it is alleged that the proofs were furnished in *March* 1846, and sixty days from that time would have to elapse before action could be brought; for we think it clear that the twelve months do not begin to run until the right of action accrues, and that is only after the expiration of sixty days from time of proof. There is nothing in the seventh objection. As to the objections to the second count of the declaration, the first and second are disposed of by the decision on the objection to the first count. As to the third objection to the second count: supposing this objection to be right, that the averment objected to is immaterial, yet that would not make the count bad in substance, as it shews no defect in the plaintiff's right of action, and if it is immaterial the defendants should not traverse it in their plea, and it might be struck out as surplusage, and yet the count be good; and therefore the objection cannot avail. The fourth objection to this count is, that the plaintiff has not shewn how the defendants waived the performance by the plaintiff of that part of the tenth condition therein alleged to have been waived; but we think this averment is well enough, and it is a fact to be proved before a jury, and if the evidence does not make out such a waiver in law as will bind the defendants in such a case, then the plaintiff would fail in establishing this very material allegation. In cases of insurance a waiver of certain preliminary proofs required by the strict letter of the

(a) 1 *T. R.* 638.

condition,

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condition, may be effected by acts of the assurers even without a deed under seal; a train of circumstances may amount to such a waiver, so as to release the assured from the necessity of procuring such proof: this is shewn in *Phillips on Insurance*. As to the fifth objection to this count, it appears to us that the plaintiff has averred performance of all the other parts of the tenth condition that he was required to perform (except so much as he says was waived); and if so, this objection is not sustainable. The sixth objection to the second count does not sufficiently point out in what respect the acts therein mentioned are not in accordance with the tenth condition, nor did the counsel in argument shew this. We do not see any thing to sustain this point. No further observations are necessary as to the other objections to this count, which, where not immaterial, are already answered. As to the objections to the third count, some questions might possibly arise whether the averment of the performance of the conditions precedent are sufficiently particular, but we deem it unnecessary to examine it very minutely: the case does not turn on it, and all that we need now say is, that we are not satisfied as to the validity of this one objection, and the others have been already disposed of. There is only one other objection indeed to the declaration which we deem it material to dwell on, and that is certainly an important one: it is that to the fourth count, which applies to the alleged waiver of the fifteenth condition. The averment itself we consider quite an unnecessary one for the plaintiff to have made in his declaration—there is no admission to render it necessary except that implied from the averment itself. It has been inserted in one count only, and we will not say imprudently, as the plaintiff might not be quite sure from what time the twelve months would be held to run; and if aware that the objection existed and would be insisted on, might think it as well to anticipate it himself, and meet it in one of the counts. The fifteenth condition is as follows: "It is "furthermore hereby expressly provided, that no suit or "action of any kind against said company for the recovery "of any claim upon, under, or by virtue of this policy, shall "be sustainable in any Court of law or chancery unless such "suit

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" suit or action shall be commenced within the term of twelve " months next after the cause of action shall accrue; and in " case any such suit or action shall be commenced against " said company after the expiration of twelve months next " after the cause of action shall have accrued, the lapse " of time shall be taken and deemed as conclusive evi- " dence against the validity of the claim thereby so at- " tempted to be enforced." Thinking as we do that the cause of action did not accrue until the alleged default in payment was committed by the defendants—namely, at the end of sixty days after the fulfilment of the precedent requisites of the tenth condition—it would not appear by the other allegations of the count that the action was brought after the year: the declaration is entitled of *Hilary* term 1847, which is within twelve months of the time when the proofs required by the tenth condition are alleged to have been presented, which is stated as the 27th day of *March*, 1846. It is true this day is alleged under a videlicit, and the plaintiff would not be tied down to proving the exact day, but still there is nothing in the count to render an averment of the waiver necessary, and we have great doubts whether the averment itself is not immaterial. The averment is in the following terms: " And the said plaintiff avers that afterwards, to wit, on the " day and year last aforesaid (which was on the 27th *March*, " 1846), to wit, at &c. the said defendants waived and " discharged the said plaintiff from the performance and ob- " servance of and compliance with the fifteenth condition, " number fifteen, annexed and referred to respectively by " the said policies in this count mentioned." Although it is there alleged that the defendants waived the compliance with the fifteenth condition, it does not appear in the declaration that the plaintiff was under the necessity of availing himself of the waiver, though the plaintiff was of course aware thereof, and that it would so appear in his evidence. The averment seems indeed put in for the purpose of meeting a defence which the plaintiff might have been apprehensive would be relied on, without distinctly pleading this condition, on other issues not referring to it; for instance, on an issue involving the question of loss or

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no loss by fire within the terms of the policy, part of the condition being that in case of action brought after the expiration of the twelve months, the lapse of time shall be taken and deemed as *conclusive evidence* against the validity of the claim thereby so attempted to be enforced. Indeed it is one part of the plaintiff's own argument, that the fifteenth condition was not pleadable in bar, but only matter of evidence as to the validity of the claim. It may be, but we are not informed on the point, that the strict rules of the *English* Courts in regard to the division of actions and the pleadings therein, especially in actions of covenant, do not prevail to the same extent in *Connecticut*, where the company was incorporated, or in other states or places where these policies might be put in suit, which may account for the peculiar terms of the condition just recited. The plaintiff however having made such an averment, whether necessary or not, it would seem to follow that the defendants might traverse it, and that an issue joined thereon, if found for the defendants, would defeat the action on this count, on the rule that though the issue be immaterial, yet a repleader would not be granted in favor of the plaintiff who chose to insert such an averment in his count—*Steph. on Pl.* 110, "The Court never grants a repleader in favor of "the person who made the first fault in pleading." On this question however, or any which might arise as to a judgment *non obstante veredicto*, it is unnecessary to enter further, as we are all of opinion that if the action was not brought until after the expiration of twelve months (in which case only, looking at the whole declaration, the point would be material to the result of the action, brought up as it is in the proper way by one of the defendants' pleas), the averment of waiver is quite insufficient to take the case out of the operation of the fifteenth condition. The condition is evidently a condition subsequent, not precedent, operating by way of defeazance (going to defeat a cause of action once existing), and notwithstanding the words in the latter part of it, declaring that the lapse of time shall be deemed *conclusive evidence* against the validity of a claim sought to be enforced after the expiration of the twelve months, we

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are clearly of opinion that in an action of covenant at least the bar should be pleaded. It is true that the condition is evidently framed with a view to a more effectual operation than that produced by the statute of limitations, which is held to bar the remedy only, not the debt—not to extinguish the plaintiff's right of action, but merely to suspend it; which may be the reason that advantage can only be taken of the statute by pleading specially, although there be a general issue, and it appears on the face of the declaration that the action was not brought within due time. How it might be if a similar condition were annexed to a policy not under seal, on which assumpsit might be brought, and where the defendants might plead the general issue—whether the defendants could have the benefit of this condition upon the general issue as conclusive evidence against the validity of the claim, we are not called on to determine, as in the case before us there is and could be no general issue, and every matter in bar must be specially pleaded. The objection we feel, is not merely one of form but of substance: if the plaintiff could in any manner avail himself in pleading of a waiver of the condition, he would be bound in his averment to shew how and when such waiver was made, and that in the manner alleged it was binding on the defendants. The averment of dispensation with a condition subsequent by way of waiver, is something new to us in pleading, for which no precedent has been cited. It is true we find the expression in familiar use, that the defendant has waived the defence given by the statute of limitations, where the statute is pleaded and a subsequent promise proved; but we have never met with the term in any form of declaration or replication in order to take the case out of the statute. If the demand or undertaking *prima facie* barred by the statute of limitations, be revived by a new promise in assumpsit or debt on simple contract, it is not necessary or usual to reply the new promise, but to rely on it as reviving the old; and all the other forms of replication to the statute go to shew the case to be within one of the exceptions, or that the action was brought within the proper time. By the old statute of limitations there was no limit prescribed

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prescribed for an action on a specialty, but in the present *English* statute for the further amendment of the law, 3 & 4 *Wm.* 4, *c.* 42 (and in our Act of Assembly 6 *Wm.* 4, *c.* 51), where the time for bringing such actions is limited to twenty years, with a proviso that in case of written acknowledgment &c. the action might be maintained within twenty years after such acknowledgment, it is enacted that such acknowledgment might be stated by way of replication; that is, the plaintiff sets out the acknowledgment relied on as an answer to the statute when the statute is pleaded. We cannot understand in what manner a waiver, properly speaking, of the fifteenth condition could be made except by not pleading it: and if the defendants have given any binding undertaking not to take advantage of the condition, if it was not of such a nature as to revive the original covenant, we do not see how such undertaking could avail except by way of motion to set aside a plea of the fifteenth condition, on the ground of fraud or by way of action for the breach of it. If however it could avail in this action as a dispensation of that condition, without doubt the proper mode of setting it up would be by way of replication when the condition was pleaded. How after the expiration of the twelve months, if the bringing the action was not delayed by any fault of the defendants or unavoidable cause, the defendants (a corporation) could be held liable unless by some new instrument under seal, of which *profert* should be made, is not very apparent; but if so, the when and how should appear on the record. We do not wish it to be understood as our opinion, that the plaintiff might not and ought not to have alleged in his declaration any valid contract or obligation, if any such were made, whereby the defendants agreed to hold themselves liable to an action on the policies, though brought after the twelve months, notwithstanding the terms of the fifteenth condition: without doubt, if any such contract or obligation was made in reference to the former contracts on the policies, the whole might form one cause of action, and be properly declared on as such; but the objection is, that the declaration *sets out no binding contracts as the cause of action, but the policies themselves*

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*selves with the conditions thereto appended.* The averment is therefore insufficient or superfluous. If the former, and it be essential, the count is bad. If either insufficient or superfluous, we do not on consideration see that it could prevent the defendants from setting up the fifteenth condition as a plea to this as well as the other counts, if the condition itself be binding: this point however more properly arises on the special demurrer to the replication to the fifth plea, where the objection is taken to the plea on this ground. As to the argument that was used by the plaintiff's counsel, that the fifteenth condition is against the policy of the law, and therefore not binding, this can never be sustained. There are many and good reasons in cases of insurance against fire, why the assurers should introduce such a condition into their policies; they are always liable to fraud being practised upon them, and it is very often extremely difficult to detect the fraud, or to get evidence to substantiate it in a Court of justice, and the greater the lapse of time the more difficult would that be. If there is no dispute, the assured is entitled to the amount of his loss immediately it becomes payable. If there is a dispute, and he lays by for more than a year after this right of action accrues without commencing a suit, that in itself would in the minds of the assurers create a strong suspicion that something was wrong, and that the assured was fearful of trying the question while all the circumstances were fresh in the recollection of witnesses, or while witnesses were on the spot and could be had: we therefore think it a wise and provident precaution to take—such as the assurers are legally justified in—to limit in the terms of their policies the time within which actions shall be brought, as a necessary protection to themselves against fraud; and they have as much right to make such a stipulation as the terms upon which only they will take the risk, as they have to introduce any other condition; for the contract is voluntary, and they have a clear right to stipulate their own terms. Another argument used against the binding effect of the condition was, that the defendants are a foreign company, and the printed conditions are merely applicable to their own

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country, and can be put in force only by their own Courts of justice, but are not binding here—if contrary to the policy of our laws; but this is a fallacious argument, and founded upon false premises. In the first place, the record does not establish in which country the policy was made: some of the counts allege it to have been made in *Saint John*, and some in a foreign country, but in which country it was actually made is not shewn. Nor do we think it can make the slightest difference in this case, unless it could have been clearly shewn that it was made in a foreign country, and that the laws of that country in respect to its operation were different from ours, and that by the laws of that country this condition was held not binding. In that case there might have been something in the argument, but as nothing of that kind was shewn or pretended, we must look at it as if made in *Saint John* by an agent of the company; and if so, we must deal with it in every respect as if both parties were *British* subjects contracting in this Province. In this view of the case then we are of opinion, if the fourth count be not bad on account of the insufficiency of the averment in regard to the fifteenth condition, the defendants were not bound to traverse this averment, but might notwithstanding the averment plead thereto the bar arising on that condition. *Fifth plea and replication thereto:* Having gone through the exceptions taken to the different counts in the declaration and disposed of them, we will advert to the defendants' fifth plea, the replication thereto, the demurrer to that replication, and the exceptions taken to the plea in answer to the demurrer; for if the fifth plea is good, and is not sufficiently answered by the replication, it is a complete bar to the whole action, and judgment for the defendants on this plea will dispose of the whole, and make it unnecessary to go through all the various points raised on the other pleas, except as to the question of costs. The fifth plea is to the whole declaration, and in substance sets up the fifteenth condition of the policy as a bar to the action; that is, it first sets out the fifteenth condition, and then goes on to say that the said several supposed causes of action (if any) did not nor did any of them accrue to the plaintiff

plaintiff at any time within the term of twelve months next before the exhibiting the bill of the said plaintiff against the said defendants &c. Now if on the view we have taken of the fifteenth condition this plea stands good, and not sufficiently traversed or avoided, it is a clear bar to the plaintiff's recovery. Then let us see what are the objections taken by the plaintiff to this plea. The first is, that it is to the whole declaration, and has not traversed the averment in the fourth count, that the defendants waived the fifteenth condition here set up as a bar to the action; and there is no doubt this objection would be good if that averment in the fourth count could be sustained, but for the reason we have already stated this objection fails. The second objection is predicated altogether upon the construction of the fifteenth condition contended for by the plaintiff's counsel in the argument; that is, that it applies only to actions brought in any Court in the foreign state where the policy was made; and is already answered. The third objection is, that the fifteenth condition does not amount to an estoppel to bringing the action, but is merely a matter of evidence for a jury against the plaintiff that no loss has been sustained, but we think it is clearly pleadable as an effectual bar to the action itself as much so as the statute of limitations is in any case. The fourth objection is founded upon the allegation in the second count of the declaration, that there was no person representing the defendants in this Province upon whom process could have been served, which not being traversed by the plea is admitted; but this admission does not shew any reason or cause whatever why the plaintiff could not commence his action, and have continued it until the defendants did appear; for until the action was commenced they had nothing to appear to, and as the second count alleges the contract to have been made in the foreign state where the defendants are incorporated, there is nothing to shew why the plaintiff should not have sued them there within the time, and if they would be protected there where the contract was made, by the condition after the lapse of time, they would be equally so here. The fifth, sixth, seventh, ninth, tenth and twelfth objections require

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require no further remarks: they cannot be sustained. The eighth objection is founded on the voluntary appearance of the defendants to this action, which it is contended estops them from pleading the lapse of time, after admitting (by not traversing) the allegation in the second count, of there being no one in this Province upon whom process could be served for the defendants; but nothing can be made of this. The eleventh objection is, that the plea should have stated that the cause of action did not accrue within a year before the *commencement of the action* and not *before the exhibiting of his bill;* but there is clearly nothing in this—the exhibiting the bill is on the record *prima facie* the commencement of the action, but where time is material the plaintiff may reply the process issued before the first day, or the defendants might show process issued after the first day of the term, and have a special entry on the record to that effect: we are therefore of opinion that the plea is good. And this brings us to the replication of the plaintiff to this plea, and the demurrer thereto. This replication commences by an admission in fact, that the action was not brought until after the expiration of twelve months from the time of the causes of the action accruing as stated in the plea, and it then goes on to allege that no action could have been sustained within the twelve months against the defendants, unless the defendants had voluntarily appeared, they being all the time a foreign corporation, having no person in this Province upon whom service of process could have been made, and there being no means by which the defendants could have been brought into Court; the plaintiff then avers that although he was ready and willing to have prosecuted his claim within the twelve months, yet the defendants refused to appear, by means whereof no action could have been sustained. The plain answer to this replication is, that the premises do not warrant the conclusion drawn from them, or that the conclusion is not sufficient. Notwithstanding all that is alleged, process might have been issued within the twelve months and duly returned, which would have been a commencement of the action in this Province: whether duly served or not was nothing to the purpose.

purpose. The plaintiff could never have contemplated maintaining this action and recovering in this Province, unless the defendants consented to appear. This replication therefore we think bad on this ground alone, independent of the other grounds of demurrer taken; and if so, and the plea stands good, judgment must be for the defendants upon this demurrer. In which case, as we have before observed, it is only necessary to go into the questions arising upon the other pleas as a matter of costs, as it seems to have been admitted on both sides that the action was not commenced within time, according to the fifteenth condition; and if so, the plaintiff could not get rid of the difficulty by any amendment he could make. We will however state the opinion we have formed on the other pleas and demurrers, on the best consideration we have been enabled to give to them. *Demurrers to defendants' pleas*—As to second plea: the defendants in this plea to the whole declaration say, that after the fire, that is, on the 26th *August*, 1845, the plaintiff was required by the defendants to deliver in an account in writing under his hand, verified by his oath and by his books of accounts and other proper vouchers, and to permit extracts and copies to be taken respecting the loss, but the plaintiff neglected and refused so to do. Now the plaintiff in his declaration has not averred in any of the counts, that he verified the account he delivered in of his loss *by his books of accounts and other proper vouchers*, or that he permitted extracts and copies to be made, because this was not a necessary averment for him to make in the first instance, the tenth condition only requiring such proof to be furnished in case it *should be required*, and therefore the neglect or refusal of it in such a case made it a matter of defence to be pleaded; and this is just the course the defendants have pursued. But the plaintiff by his demurrer says the plea is double, because it puts in issue two facts: first, that he refused to deliver the accounts &c.; and secondly, that he refused to permit extracts &c. to be taken from the books. But these are only two facts tending to establish the same one point—the second follows from the first, and what do they both amount to? Why, that the plaintiff has not, although

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although requested, performed that part of the tenth condition which he was bound to do if requested—namely, to deliver in an account verified by his books of accounts and other vouchers, and permit copies and extracts of such books and vouchers to be taken,. The plaintiff might if he pleased have traversed the whole request as broadly as it is laid, and the defendants would be bound to prove it; or the plaintiff might plead performance of what it is alleged he was requested to do, and the proof would lie on him. If the proof in both cases lay on the defendants there might be some reason in the objection, but not as the matter stands. Suppose the request were put in two pleas instead of one, the finding of an issue on either in favor of the defendants would defeat the action; but the finding of one for the plaintiff would not be important if the other was found against him. True, he might have different issues on the two pleas—he might plead performance as to the verification of his account by his books and vouchers, and traverse the request to permit copies and extracts; but this would impose a less burthen of proof on the defendants than is now done, and would be rather advantageous to the defendants than otherwise. The permitting copies and extracts to be made seems so intimately connected with the exhibition of the books and vouchers by way of preliminary proof, that we can hardly suppose one would be required and the other omitted, or one performed and the other refused: they appear to us properly to form the matter of one plea, and the plea therefore not objectionable on the ground of duplicity. We think also there is nothing in the second ground of demurrer, as the requirement is alleged to have been made after the fire, with a day and place mentioned when and where the request was made, under a videlicit (which is according to the form of such a plea, given in *Chitty*). The third, fourth, fifth and sixth grounds of demurrer, appear to us equally unsustainable, as not founded upon any precedent or authority in pleading. We therefore think this plea is good, and judgment should be for the defendants on this demurrer. As to the third plea, which is also to the whole declaration, it is simply that the plaintiff was not interested in the goods &c. insured

insured *to the whole amount insured thereon*, and we think this plea bad in not adding after the words, "to the amount of "monies insured thereon," the words "or any part thereof," for if the plaintiff was interested in any part of the goods insured, he was entitled to recover to the amount of loss he sustained by virtue of such interest. The traverse therefore by this plea is clearly too large, and is in fact immaterial; and therefore we think that judgment should be for the plaintiff on this demurrer. As to the sixth, thirteenth, eighteenth, twenty fifth and thirty first pleas, pleaded respectively to the first, second, third, fourth, and fifth counts of the declaration separately—they are all similar to each other, and the questions arising on the demurrers to each of them are the same, and the decision of one will govern all. The first count in the declaration avers a performance by the plaintiff of all the acts (stated in detail) which the tenth condition requires to be performed by the plaintiff to give him a right of action, without any request by the defendants, and the sixth plea, which is to this count, in the first place traverses the performance of all those acts, detailing them in the very language of the declaration; and this, it is contended by the plaintiff, in support of the first ground of demurrer, to be duplicity, because a traverse of any one of those acts would be in itself an answer to the action, the plaintiff being bound to perform the whole to give him the right. Now this is true; but what is the main point that all those separate acts are to establish? It is the right of action by a fulfilment of the tenth condition. The defendants say to plaintiff, You are bound to perform all the acts which the tenth condition requires, and our defence is, you have not done any of them; but as this is an action of covenant under seal, we cannot plead the general issue as in other actions, and so put the whole at issue; but we have a right to say by traversing them in detail, you have not performed any of them, by which we will put you to prove them all. And this the defendants have a clear right to do; for if they pleaded the non performance of only one or two of those acts, they would admit by such a plea the performance of all the rest, and their defence would then turn only upon the

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the performance of those one or two acts, when in fact the plaintiff is bound to shew that he has performed the whole before he brings his action; and it is no answer to say, the defendants may traverse them all separately in separate pleas, for by the common law he is not entitled to plead several pleas—it is only under the statute this right is given, and then only with the leave of the Court; but at common law the defendants have a right to put in issue by the same plea every thing that is necessary to the plaintiff's *prima facie* right of action, which in other actions the plea of the general issue does, but in covenant, as there is no general issue admissible, the defendants must separately traverse all the allegations in the plaintiff's declaration which are requisite to shew their right—if they mean to put them all in issue. We at first had some doubts on looking at this plea, whether the objection for duplicity was not sustainable, but on looking into the authorities we incline to think it is not. The defendants then, after traversing all the allegations in the first count of the declaration as to the performance of the tenth condition, go on to state that although the plaintiff did deliver in an account and declaration on oath, and a certificate of *Scovil*, yet he did not duly, properly or reasonably prove his loss &c. according to the tenth condition; and this the plaintiff contends, in the second ground of demurrer, is ambiguous, as it does not shew in what respect the proof was defective; but the defendants have, in the previous part of the plea, in express terms denied in the language of the condition itself, that the plaintiff delivered in such an account, declaration and certificate as that condition requires, and the subsequent part of the plea merely amounts to an admission that some account, declaration and certificate were delivered, but not conformable thereto; and this raises the question to be tried, whether they were according to that condition or not, upon which there is nothing to prevent the plaintiff taking issue. If indeed the plaintiff was at liberty to reply a waiver or other excuse for not performing any of these particulars required by the tenth condition as preliminary to the action, there might be some reason for separate pleas, but as he alleges performance of the whole,

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a waiver or excuse of any part would be a departure, and vitiate the replication. The form of the plea is certainly singular, but it is copied exactly from *Chitty*, and when examined seems free from the objection taken: we think therefore the judgment should be for the defendants on this demurrer, and also on the demurrer to the thirteenth, eighteenth, twenty fifth and thirty first pleas. Then as to the seventh, fourteenth, nineteenth, twenty sixth and thirty second pleas, pleaded respectively to the first, second, third, fourth and fifth counts of the declaration separately, they being all the same, the decision upon the demurrer to one will dispose of all. The ground of demurrer is duplicity, in this, that it first traverses the allegation in the declaration of the delivery of the account of loss; second, it also sets up fraud: either of which would be a good defence; but the gist and point of this plea is fraud only, and the traverse of the delivery of the account of loss is in conjunction with and in support of the charge of fraud; for this allegation in the declaration is intended to shew a compliance in that respect with that part of the tenth condition. Now the account required by that condition is a true and correct account, and if there is any fraud in taking it, it is not a delivery of an account according to the terms of that condition. If therefore the defendants had not traversed that allegation in the declaration in order to set up fraud, it would have stood as admitted in the pleadings that the plaintiff had complied with that part of the condition, which would have been inconsistent with the subsequent part of the plea alleging fraud in making up that account. The defendants therefore have very properly traversed the delivery of such an account as is alleged in the declaration, which they explain by saying that in the claim made for the loss by the plaintiff, there appeared fraud in taking the account &c. within the true intent and meaning of the tenth condition; and this plea agrees with the forms given in *Chitty*, although it is true no case has been cited, nor can we find any, where these particular forms have undergone any judicial investigation. As to the eighth plea, which alleges false swearing in the declaration made by the plaintiff on oath, to wit, in the statement A. annexed to the

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declaration, without expressly averring that any such statement was annexed, or saying when, where, and before whom the oath was made, or in what particular part of the statement; we think, to say the least, that it is so very doubtful, that we are not prepared to pronounce in its favour; probably had it been material, we should have suggested an amendment, as the defects are all such as could probably have been supplied: as now advised our judgment will be for the plaintiff on the demurrer to this plea, and also on the demurrer to the sixteenth, twenty fourth, twenty eighth and thirty fourth pleas, which are similar. For the same or similar reasons, the ninth, fifteenth, twentieth, twenty seventh and thirty third pleas are objectionable, and our judgment also must be for the plaintiff on the several demurrers to these pleas. The tenth, seventeenth, twenty second and twenty ninth pleas, pleaded respectively to the first, second, third, fourth and fifth counts separately, are, we are clearly of opinion, all bad, for the reasons mentioned in the first ground taken in support of the respective demurrers to these pleas. The issue tendered by each is certainly too large, and does not go to the whole cause of action, but merely to the amount of the plaintiff's loss, which is a matter of evidence for a jury, and though the plaintiff may not have sustained a loss to the extent alleged in the declaration, yet he is entitled to recover to the extent he may prove; and therefore we think judgment must be for the plaintiff on these demurrers also. This disposes of all the demurrers to the several pleas; and the result is, that judgment will be entered for the plaintiff on the demurrers to the third, eighth, ninth, tenth, eleventh, fifteenth, sixteenth, seventeenth, twentieth, twenty first, twenty second, twenty seventh, twenty eighth, twenty ninth, thirty third, and thirty fourth pleas; and for the defendants on the demurrers to the second, sixth, seventh, thirteenth, fourteenth, eighteenth, nineteenth, twenty fifth, twenty sixth, thirty first, and thirty second pleas. This case, which has been argued on both sides with much ability, and we may add also with much precision and conciseness, has presented a number of points on a very interesting subject; in regard to which there are many

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many similar contracts continually entered into in this and other countries. It is therefore of great importance in its general result, as well as in its effect on the present claim. It may serve, and we hope it will, to draw attention to the very particular clauses and conditions contained in fire insurance policies, which are often not thought of until a case arises which calls them into action. We should have felt much aided had any decision occurred or been brought under our notice, where similar questions had come under discussion in any of the Courts of the *United States*, as those Courts generally are governed by the same principles of pleading and evidence as ours are. The point on which the case mainly rests, namely, as to the time in which the action must be brought, seems to us abundantly clear. There may perhaps be doubts as to some of the other points—to which, had the validity of the claim depended on them, we might have thought a longer consideration advisable; but we have not felt justified in delaying our judgment when we are satisfied the action cannot be supported, especially as there are several issues in fact on the record, the trial of which is thereby rendered unnecessary.

END OF TRINITY TERM.