Vol. IV.] No. 2.]

REPORTS

OF

CASES

ARGUED AND DETERMINED

IN THE

Supreme Court of New Brunswick.

By JOHN C. ALLEN, Esquire,

BARRISTER-AT-LAW.

CONTAINING THE CASES FOR THE YEAR 1859.

FREDERICTON, N. B.

PRINTED BY J. GRAHAM, "HEAD QUARTERS" OFFICE.

1862.

TABLE OF CASES CONTAINED IN THIS NUMBER.

CASES

1859.

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF NEW BRUNSWICK,

IN

HILARY TERM,

IN THE TWENTY-SECOND YEAR OF THE REIGN OF VICTORIA.

McLELLAN and WIFE *against* COUGLE.

February 1st.

THIS was an application on behalf of Mrs. *McLellan*, to set aside a plea of release pleaded *puis darrein continuance* in *Easter* term last, and that the release executed by the husband to the defendant, dated the 16th *February* 1858, should be given up to be cancelled, on the grounds of fraud and want of consideration.

The husband may release an action brought in the name of himself and his wife, to recover a debt due to the wife before marriage, though she is living separate from him, and the action is brought for her benefit, and no consideration was paid for the release.

Where a release is pleaded *puis darrein continuance*, the plaintiff cannot apply at the same time to set aside both the plea and the release — the first as being too late, and the latter as being fraudulent. *Per Parker*, J.

The action was brought on a promissory note given by the defendant to the female plaintiff before her marriage; and it appeared by the affidavits used on this application, that at the time the suit was brought and for about two years previously, the plaintiffs had been living separate from each other in consequence of the cruel treatment of the husband; that he had several times endeavored to get possession of this note and other property which his wife had before her marriage, and that he gave the release without any consideration, and merely to compel his wife to consent to a divorce.

S. R. Thomson, in support of the motion, contended — 1st, That the plea was too late; that it should have been pleaded in last *Hilary* term. [PARKER, J. You cannot take that

1859.

M'LELLAN *against* COUGLE.

that objection on this motion: your objection is to the release itself — not to the plea]. 2d, That the release was given to defraud the wife, and was void under the *Revised Statutes, Cap.* 114, § 2; which declared that "In case of desertion or abandonment by her husband, any married woman "in her own name, and for her own use, may recover and "receive from any person indebted or liable to her in her "separate capacity, for services performed by and debts "due to her, or damages for injuries to herself, or her separate property; and no receipt, discharge, release, or commutation thereof, given or made by her husband after "such desertion or abandonment, shall bar her claim; and "if any suit be brought by the married woman on such "account, she and her separate property shall be liable for "costs of suit as in other cases."

PARKER, J. This case is not within that act: it applies to cases where the wife is acting as a *feme sole.* This action is brought to reduce the property into possession, and the husband has a right to receive the money.

Per Curiam. Rule refused.

ALLISON *against* SMITH.

Where the plaintiff enters a *nolle prosequi* to one count of a declaration, the defendant cannot enter up judgment for his costs till the other counts are disposed of.

THE declaration in this case contained four counts, to three of which the defendant pleaded in bar, and demurred to the fourth. The plaintiff entered a *nolle prosequi* to the three counts, and gave a joinder in the demurrer, which was still pending.

A. L. Palmer, for the defendant, moved to enter judgment for the costs on the *nolle prosequi.* [RITCHIE, J. Can you make up a judgment before the cause is determined?] Yes: by the Act 12 *Vict., c.* 39, § 20 *(a)*, "Where any *nolle* "*prosequi* shall have been entered upon any count, or as to "part of any declaration, the defendant shall be entitled to,

(a) 2 *Rev. Stat.* 356.

"and

1859.

ALLISON *against* SMITH.

"and have judgment for, and recover his reasonable costs "in that behalf." The defendant had a right to make up a judgment roll, and the proceedings on the demurrer would be entered on it afterwards. [WILMOT, J. I never heard of such a proceeding before the cause was disposed of].

Per Curiam. Rule refused *(a)*.

(a) See *M'Laughlin* v. *Wilson*, 2 *Kerr* 626.

MILLS *against* VAIL — In Error.

A writ of error to remove a cause from the Court of Common Pleas into this Court should issue out of the Court of Chancery; and if issued out of this Court it is a nullity.

Quære, whether the facts stated in a bill of exceptions can be contradicted.

THIS was an application to set aside a bill of exceptions and writ of error for irregularity.

The cause was tried in the Court of *Common Pleas* in *Queen's* County in *January* 1858, before *William Foshay*, Esquire, one of the Justices of that Court, and a verdict given for the plaintiff contrary to the opinion of the Justice. The defendant having failed in a motion for a new trial (see *ante* page 82), a bill of exceptions was signed by the Justice alleging that he had improperly admitted evidence, and upon this a writ of error was sued out of this court on the 15th *April* last, tested in the name of the Chief Justice, and returnable in *Easter* term last.

D. S. Kerr, in support of the motion, proposed to read an affidavit of Mr. *Foshay*, stating that no bill of exceptions was tendered to him at the trial; and that he signed the bill of exceptions, believing it to be his duty to do so, but that it did not correctly state the proceedings.

S. R. Thomson, contra, objected to the affidavit being read.

RITCHIE, J. Can the Justice be allowed to stultify himself, and aver contrary to the record?

D. S. Kerr. It is not a record until the Justice acknowledges his seal, as was done by *Pratt*, C. J., in *Money* v. *Leach (a)*. The whole proceedings are irregular. According

(a) 1 *W. Bla.* 555.

to

1859.

MILLS *against* VAIL.

to the statute of 13 *Edw.* 1, the bill of exceptions must be tendered at the trial and before verdict; and in *Culley* v. *Doe (a)*, it was so held. [RITCHIE, J. If there has been any irregularity, it is in the Court below; and must you not apply to that Court to rectify its own proceedings?] In *Coffin* v. *Marsh (b)* the application was made to the Court of Error. The objection here is to the writ: that it is not an original writ; that it is issued out of the wrong Court, and is not properly tested. A writ of error is an original writ issuing out of the Court of Chancery, in the nature of a commission to the judges of a superior court to examine the record of an inferior court. *Bac. Ab.*, "*Error*;" *Jaques* v. *Cæsar (c)*; *Co. Litt.* 288 *b.*; 2 *Tidd* 1188. [PARKER, J. Assuming that the writ of error properly issues out of chancery in *England*; what has become of the common-law jurisdiction of the Court of Chancery in this Province since the Act of 17 *Vict.*, c. 18? If it has been taken away, has it been vested in this Court?] The jurisdiction of the Court of Chancery cannot be taken away without express words. Original writs were in force in this Province under the Governor's commission, and the Act 50 *Geo.* 3, c. 21, recognised the issuing of writs of replevin out of the Court of Chancery. [RITCHIE, J. In *Kinnear* v. *Gallagher (d)*, the writ was issued out of Chancery]. And also in *Coffin* v. *Marsh*.

The Court now called on *S. R. Thomson, contra.* He contended that if the writ was a nullity, the proper course would be to apply to the Chief Justice to rescind his *fiat;* and that if the proceedings were *coram non judice*, the affidavit on which this motion was made could not be read. That the application should have been made at the last term, and the defendant by the delay had waived any irregularity. [CARTER, C. J. It is a nullity, and not merely an irregularity. PARKER, J. The motion should have been to set aside the writ, *quia improvide emanavit*]. If the writ was improperly issued, it ought not to be set aside with costs, as the practice was very unsettled.

Per Curiam. Rule absolute to set aside the writ of error with costs.

(*a*) 11 *A. & E.* 1013. (*b*) 3 *Kerr*, 438. (*c*) 2 *Saund.* 100, *note* 1. (*d*) 1 *Kerr*, 424

1859.

GOOD *against* WINSLOW.

Plaintiff leased cattle to *T.* for ten years, at the end of which time *T.* was to give up the cattle, *or others in their stead*, in as good condition as at the date of the lease: Held, that the plaintiff had no absolute reversionary interest in the cattle, and could not maintain an action on the case against the Sheriff for selling the cattle under an execution against *T.* during the term.

ACTION on the case. The first count of the declaration stated that before and at the time of committing the grievances, the plaintiff was the owner of divers goods and chattels, to-wit, two cows, one heifer, and three pigs, which had been before that time leased or let by him to one *George Thomas* for a certain term then to come and unexpired, and the same were then in possession of the said *Thomas* under the said letting, to-wit, at *Woodstock*, &c. Yet the defendant, well knowing the premises, but contriving to injure the plaintiff in his reversionary interest in the said property, while the plaintiff was so the owner thereof, and while the same were so in *Thomas'* possession, on the 14th *September* 1857, wrongfully seized and took away the said cows, &c., and absolutely disposed of the same to his own use, whereby the plaintiff was greatly injured in his reversionary interest in the said cattle. There was also a count in trover. Plea—not guilty.

At the trial before *Ritchie, J.*, at the last *Carleton* circuit, the plaintiff claimed for an injury to his reversionary interest in two cows, a heifer, and three pigs, which he had leased to one *Thomas* in *October* 1856, and which had been seized and sold by the defendant in *September* 1857, under an execution against *Thomas*. The lease was for a term of ten years, expiring in *October* 1866, and it declared that at that time *Thomas* should deliver up the cattle, &c., *or others in their stead*, in as good condition as at the date of the lease. The property had belonged to *Thomas*, and was transferred by him to the plaintiff a few days before the execution of the lease. At that time, one of the cows was eight years old and the other seven, and the heifer between one and two years old. It was contended on the part of the defendant,—1st, That trover could not be maintained, because the plaintiff had not the right of possession. 2d, That an action on the case would not lie by a reversioner of personalty; but if it would, that the plaintiff had no reversionary interest

1859.

GOOD *against* WINSLOW.

interest in the cattle, because the lessee had the election of returning them or others in their stead. 3d, That the transfer to the plaintiff was made without any valuable consideration, and for the purpose of defrauding *Thomas'* creditors. The plaintiff's counsel abandoned the trover count, and the learned Judge reserved the second point, with leave to the defendant to move to enter a nonsuit, and left the question of fraud to the jury observing that he felt great difficulty in directing them on the question of damages, in case they found for the plaintiff. The jury gave a verdict for the plaintiff for £33 — the value of the property taken.

In *Michaelmas* term last, *Allen* obtained a rule *nisi* to enter a nonsuit on the point reserved; or for a new trial on the ground that the verdict was against law and evidence, and the damages excessive.

J. A. Street, Q. C., now shewed cause. An action on the case will lie for an injury to a reversionary interest in personalty. 1 *Chit. Pl.* 134. *Gordon* v. *Harper (a)*; *Dean* v. *Whittaker (b)*. [N. PARKER, M. R. But the plaintiff must have a reversionary interest first. What interest remained in the plaintiff under this lease? He has not an absolute reversion in the property, because *Thomas* has the option at the end of the term of returning the cattle, or others in their stead. The plaintiff has at most a contingent reversion. WILMOT, J. Would it have been any breach of the terms of this lease if *Thomas* had killed the cattle? At the end of the term, one of the cows would be eighteen years old, and the pigs eleven years old: they would be quite curiosities]. The defendant had no right to sell the property absolutely: he should only have sold *Thomas'* interest. [RITCHIE, J. That is in effect what he did. Admitting that the action will lie, how can you possibly sustain this verdict? I asked the plaintiff's counsel at the trial what damages he claimed, and he could not answer me very satisfactorily. I think a nonsuit will exactly meet the justice of the case]. The jury thought differently.

(*a*) 7 *T. R.* 11. (*b*) 1 *C. & P.* 347.

[RITCHIE,

[RITCHIE, J. Yes: but it is pleasant to reflect that a nonsuit will not do injustice]. 1859.

Allen, contra, was not heard.

Per Curiam. Rule absolute for entering a nonsuit *(a)*.

GOOD *against* WINSLOW.

(a) See *Hall* v. *Pickard*, 3 *Camp.* 187; *Ferguson* v. *Cristall*, 5 *Bing.* 305; *Smith* v. *Plomer*, 15 *East*, 607.

ATKINSON *against* McAULEY, SINNOTT, and CHRYSTAL *(a)*.

TRESPASS *de bonis asportatis;* tried before *Parker*, J., at the last *Kent* circuit.

In trespass against three defendants for taking away logs, which taking occupied several successive days, the plaintiff proved a joint trespass against all the defendants during the first two days, after which one of the defendants went away: a verdict having been found against the other two — Held, that the trespasses were not so separate and distinct as to require the plaintiff to abandon the joint trespass before giving evidence of the trespass by the two defendants. *Quære*, whether where the two defendants are clearly liable, the evidence of the trespass by the three, is ground for a new trial.

The action was brought for taking a quantity of logs lying in the *Buctouche* river. It appeared that one *Potts* owned a saw-mill on the river, and had several thousand logs, the principal part of which were in the stream above the mill, but 400 of them (being a part of what the plaintiff claimed) were below the mill-dam. It was admitted that all the logs belonging to *Potts* above the mill-dam had been sold under an execution, and purchased by *Daniel McAuley* in 1857, and he claimed that the 400 logs were included in that sale. The plaintiff claimed these 400 logs under a purchase from *Potts*, after the Sheriff's sale: the other logs which he claimed, had never belonged to *Potts*. It was proved that all the defendants were engaged in sluicing the logs over the mill-dam during the 20th and 21st *April*,—the defendant, *McAuley*, a son of *Daniel McAuley*, taking the principal direction; and that after the second day *Chrystal* went away, and the other two defendants remained several days longer, until all the logs, including those below the dam, were taken. Evidence was given on both sides to shew what logs were sold under the execution, and the Sheriff was called to contradict the evidence of *McAuley* as to what was said about the logs at the sale. One of the questions

Semble, that the practice on this point is not clearly settled.

(a) This case was accidentally omitted last term.

left

1859.

ATKINSON *against* M'AULEY.

left to the jury was whether the 400 logs were included in *McAuley's* purchase. The jury acquitted *Chrystal*, and gave a verdict against the other two defendants for £20.

A. L. Palmer, on a former day in this term, moved for a new trial on the grounds of the improper admission of evidence, and that the verdict was against evidence. He contended that having proved a joint trespass against the three defendants, the plaintiff had no right afterwards to prove another trespass by two of them, without abandoning the first, as it was impossible to say whether the damages were given exclusively for the trespass committed by the two defendants. *Solley* v. *Sutherland (a)*; *Tait* v. *Harris (b)*; *Hitchen* v. *Teale (c)*. The evidence in reply was also improperly admitted. [RITCHIE, J. Is it not entirely discretionary with the Judge, at what period of the case he will admit evidence? That rule was carried to a great extent in this Court some years ago *(d)*.] But the evidence here was cumulative, and not rebutting evidence. It was a question of law, and not a question of fact, what logs the Sheriff sold. He sold all that *Potts* had on the stream.

Cur. adv. vult.

CARTER, C. J., now delivered the judgment of the Court. It was objected by the defendants' counsel in this case, that the plaintiff having given evidence of a trespass committed by the three defendants, *McAuley*, *Sinnott*, and *Chrystal* jointly, had been allowed to go into evidence of other acts of trespass committed by two of the defendants only, namely, *McAuley* and *Sinnott*, without either abandoning the trespass proved against the three, or agreeing to the acquittal of the defendant *Chrystal*; and that although the jury, pursuant to the recommendation of the learned Judge, had found the verdict against *McAuley* and *Sinnott* only, and acquitted *Chrystal*, it cannot be now ascertained whether their verdict was for the first or for the subsequent trespass. Now, whether this would be a good ground for granting a new trial, when it is perfectly clear the two

(*a*) 3 *Esp.* 202. (*b*) 1 *M. & Rob.* 282. (*b*) 2 *M. & Rob.* 30.
(*d*) The case referred to is probably *Doe* v. *Connoly*, 3 *Allen*, 337.

defendants

defendants against whom the verdict has been given are liable, it is unnecessary to decide, for the trespasses proved in this case were not of that distinct and separate nature as would, in our opinion, bring this case within the rule sought by Mr. *Palmer* to be deduced from some of the cases cited; nor is the point of practice very clearly settled to our minds, even in those cases.

The action was brought to recover damages for the taking and carrying away a quantity of logs belonging to the plaintiff, in the *Buctouche* river. The three defendants appear to have been in the employ of *Daniel McAuley*, owner of a saw-mill, in the neighborhood, — the defendant *McAuley*, being his son, and taking the principal direction. A purchase, it appears, had been made at a sheriff's sale, upon an execution against one *Potts* of a large number (between two and three thousand) logs, in the *Buctouche* river. It was not disputed that *McAuley* had purchased all *Potts'* logs above the mill-dam belonging to *Potts'* mill; but he claimed also to have included in his purchase 400 logs belonging to *Potts*, lying below the mill-dam, which *Potts* had undertaken to sell afterwards to the plaintiff. Whether they were or were not so included, was a question left, and we think properly left, to the jury; and if they have found they were not included in the sheriff's sale to *McAuley*, no one who has heard the evidence can find fault with their decision. If their verdict was founded on the charge of taking away other logs of the plaintiff, which were above the dam and got mixed with those purchased by *McAuley* at the sheriff's sale, there is sufficient evidence to support the verdict on that ground. But whatever may have been their intention, it is clear the only acts of trespass proved in this case, related to logs taken on this occasion. The taking occupied several successive days: it is true that for the first two days the acts were confined to the place above the dam, but as the logs were passed through the mill they got intermingled with the logs below, and when they all got below were taken away as fast as they could be. *Chrystal* appears to have taken a leading part in the first two days, and had it not been shewn that he went away

1859.

ATKINSON *against* M'AULEY.

after the second day, and was not a principal in the transaction, but merely a servant of *McAuley's*, we will not say that it might not have been left to the jury to infer that he was a party concerned in the whole trespass. As however he has escaped altogether, and the verdict is against the two defendants who were clearly answerable for any wrong done to the plaintiff on either of the days, and the damages are certainly small, we should regret extremely to be compelled by any technical distinction to send this case, which has already occupied so much of the time of the country, to another jury. No such necessity is made apparent to our satisfaction, nor have we such doubts on the case as to delay the decision of it. We have no doubt that the rebutting evidence for the plaintiff was properly admitted. Rule refused *(a)*.

(*a*) See *Maloney* v. *Purdon*, 3 *Kerr*, 515.

8th February.

NEILL *against* REED and ANOTHER.

A ship-owner's lien for freight extends to every part of the goods belonging to each consignee; and the consignee cannot maintain trover for a part of the goods, which have been landed, on tendering the freight thereon, though the amount due on each package of the goods may be ascertained from the bill of lading.

As a general rule, a bill of lading, though containing different descriptions of goods belonging to the same person, is considered as an entire contract.

TROVER for nine cases of goods; tried before *Wilmot*, J., at the *St. John* circuit in *May* last.

The plaintiff was the owner of a number of packages of goods shipped at *Liverpool* on board a ship owned by the defendants bound for *St. John*, and for which the following bill of lading was signed:—

"Shipped in good order, &c., twenty-one packages of mer-
"chandise, being marked and numbered as per margin, and
"are to be delivered in the like good order and condition
"at the aforesaid port of *St. John* (all and every the dangers
"of the seas, &c., excepted), unto *Samuel Neill* or his as-
"signs, he or they paying freight for the said goods there
"as per margin," &c.

The marks and measurement of each package were stated

ir

1859.

NEILL against REED.

in the margin of the bill of lading, and the freight was charged at twenty shillings per ton.

Upon the arrival of the ship at *St. John*, and after part of her cargo (including the goods in question) had been discharged and landed upon the wharf, the plaintiff demanded these nine cases, and tendered the defendants with the freight thereof; but they refused to give them up unless he also paid the freight of the packages remaining on board the ship, which he objected to do, until they were landed and ready for delivery; whereupon this action was brought to try the right of lien. It appeared by the evidence of persons engaged in importing and shipping goods, that there was no difficulty in ascertaining by the bill of lading, the amount of freight due on each package; and the plaintiff endeavored to shew that by the usage of trade in *St. John*, the consignee of goods was entitled to receive any part of them that was landed on the wharf, on paying freight *pro rata*. The learned Judge told the Jury that if such a general usage as was claimed by the plaintiff was made out, he was entitled to recover; but that usage or custom was not admissible to vary the positive stipulations in a written contract. That he considered the contract by the bill of lading was entire, and that the consignee had not a right to receive a part of the goods at his pleasure, paying freight *pro rata;* that until delivery, the owner of the vessel was entitled to detain any part of the goods for the freight of the whole, and that the landing on the wharf could not be considered a delivery, so as to deprive the ship-owner of his lien, because as the freight was only then earned, the right of lien only then became of any value. Verdict for the defendants — the jury finding that the usage had not been proved.

In the following term, *D. S. Kerr* obtained a rule *nisi* for a new trial, on the ground of misdirection.

A. R. Wetmore shewed cause in *Michaelmas* term last. The question in this case is, whether the contract between the parties is entire. In *Abbott on Ship.* 406, it is said that the contract for the conveyance of merchandise is in its nature an entire contract, and that it must be completely performed

1859.

NEILL *against* REED.

performed by delivery of the goods before the ship-owner has any right to the freight. The same principle must apply against the consignee, it being clear that the ship-owner may retain the goods till the freight is paid, and he has a right to exercise his lien on the whole of the goods. [PARKER, J. Does not the landing of the goods make a difference?] No: he has a right to warehouse the goods, and hold them for the freight; *Abbott on Ship.* 300. If a part of the goods had been delivered, the ship-owner would have a right to hold the remainder of them till the freight on the whole of them was paid. The lien extends to every part of the goods on which the freight is earned. If it was otherwise, the consignee might take all the packages but one which was of small value, and tell the ship-owner to hold his lien on that; thereby virtually defeating the right altogether. The case of *Sodergren* v. *Flight*, cited in 6 *East*, 622, is a direct authority that the defendants' lien extended to the whole of the goods.

D. S. Kerr, contra. The contract is entire as to the destination of the cargo, but apportionable as to its contents. If it were not so, a ship-owner who had lost one package of goods belonging to a consignee, would be unable to recover any freight for a number of other packages belonging to the same person, which he had delivered. If the contract is apportionable, the lien must be so also; and it is so laid down in *Abbott on Ship.* 376, that the master is not bound to part with any part of his cargo, until the freight due in respect to such part, is paid. Had the goods been in bulk there might have been a question; but here the freight upon each package could be ascertained by the bill of lading: the plaintiff was therefore entitled to his goods as they were landed on paying freight *pro rata.* If the ship-owners' right to freight was capable of being apportioned, it settled the principle contended for: that point was expressly decided in *Ritchie* v. *Atkinson (a)*, where it was held that the ship-owner could recover freight in the proportion per ton of the goods delivered, where the freight was payable by the cask or bale. *Abbott on Ship.*, 411. The defendants here claimed

(a) 10 *East*, 295.

freight

1859.

NEILL *against* REED.

freight on the goods on board the ship, which they were not in a position to deliver; their refusal therefore to deliver the goods which had been landed was wrongful. The insurance ends when the goods are landed, and they are then at the consignee's risk. *Arnold Ins.*, 429, 437. The case of *Sodergren* v. *Flight* does not support the position for which it is cited.

Cur. adv. vult.

CARTER, C. J., now delivered the judgment of the Court. We are all of opinion that the principle upon which the verdict in this case proceeded, was laid down with perfect correctness by the learned Judge, and that the verdict cannot be disturbed.

Freight is a lien at law on the cargo so long as it remains in the ship-owner's possession, whether on board the vessel or on the wharf upon which it has been landed. The right of lien will follow the nature of the original agreement, and the inclination of courts of law is to support the right of lien to such an extent in all cases, as is not manifestly inconsistent with the contract of the parties. As a general rule, we think one bill of lading, though containing goods of different descriptions, yet shipped for the same person, must be considered as one agreement; and unless there is something on the face of it clearly shewing an intent that one parcel of the goods is not to be detained for the freight of another part, the lien is general over the whole, for all the freight stipulated to be paid by that bill of lading. This is indeed rather restricting than extending the rule to be gathered from the English authorities. In a late edition of the book which is of the highest authority—*Abbott on Shipping*—we find the law thus laid down in page 376, 5th *American* edition, from 7th *English* edition: "If goods are "conveyed in pursuance of a charter-party, the right of "detention for the freight may depend upon the terms of "the particular contract: where there is no special con- "tract, as in the case of a general ship, the master is not "bound absolutely to part with the possession of any part "of his cargo, until the freight and other charges due in "respect

1859.

NEILL *against* REED.

"respect of such part are paid. *Valin* informs us that the "entire contents of a single bill of lading are to be considered "as one part, although consisting of very different articles; "but that the contents of one bill of lading are not bound to "the payment due for the contents of another bill of lading, "although consigned to the same person. In this country, "however, it has been held, that the master may detain any "part of the merchandise for the freight of all that is con- "signed to the same person, which seems to be a more rea- "sonable and convenient rule. The master, however, cannot "detain the goods on board the ship, until these payments are "made, as the merchant would then have no opportunity of "examining their condition. In *England*, the practice is to "send such goods as are not required to be landed at any "particular dock to a public wharf, and order the wharfinger "not to part with them till the freight and other charges are paid, if the master is doubtful of the payment." The case of *Sodergren* v. *Flight* before Lord *Kenyon* at *Nisi Prius*, and quoted in 6 *East*, 622, is also again referred to with approbation by Mr. Justice *Bayley* in *Cock* v. *Taylor (a)*. Mr. *Montague* in his work on Lien, adopts as settled law that "The master may detain any part of the merchandise for "the freight of all that is consigned to the same person."

The goods in question in this case were all in one bill of lading, and we can see nothing in that instrument which will warrant us in taking it out of the ordinary rule; indeed we think that great inconvenience would follow, if the consignee of goods were to be at liberty to take away a part without paying the freight for the whole, merely because the particular charge for freight on each parcel was capable of being separately ascertained.

The rule for a new trial must be discharged.

Rule discharged.

(a) 13 *East*, 403.

1859.

COTHREN *against* KINNEAR and ANOTHER.

ASSUMPSIT for money had and received; tried before *Parker*, J., at the *St. John* circuit in *May* last.

It appeared that *Casewell & Co.*, of *New York*, having consigned goods to the defendants in *St. John* for sale, drew upon them in favor of one *Connolly* (from whom the goods had been purchased), for $480. The draft was dated the 14th *June* 1856, and was presented to the defendants soon afterwards, but they refused to accept it then, because they had not sold the goods, but said they would probably sell them before the maturity of the draft, and in that case they would pay it. *Connolly* protested the draft for non-acceptance, but did nothing more, believing from what the defendants said that it would be paid. The goods were sold on the 14th *August*, a few days before the maturity of the draft. On the 18th *June*, *Casewell & Co.* made a general assignment of their property to the plaintiff, notice of which was given to the defendants in *July*. The plaintiff claimed the proceeds of the goods from the defendants, but they refused to pay, on the ground that *Casewell & Co.* had appropriated them to pay *Connolly*, and therefore that they did not pass by the assignment. A letter from the plaintiff to the defendants, dated the 18th *August*, was given in evidence, in which the plaintiff admitted that the sum of $480 was so appropriated, and that he had nothing to do with it; but in *September* he wrote to them that he found they had refused to accept the draft, and therefore as the assignee, he claimed the goods in their hands. The learned Judge told the jury that as the sale of the goods took place after the defendants had notice of the assignment, the plaintiff had a right to the proceeds, unless there had been a previous appropriation of them to *Connolly*. That although the draft had been protested, still if the defendants promised to pay the amount to *Connolly* at maturity, and he, relying on this promise, held the draft over, they might retain the proceeds of

A having consigned goods to the defendants to sell, drew a bill for the amount in favor of *B*; the defendants refused to accept the bill till the goods were sold, and it was protested for non-acceptance. Soon after drawing the bill, *A* assigned his property to the plaintiff, who claimed the proceeds of the goods from the defendants, but afterwards wrote to them that he found the amount had been appropriated by *A* to pay a debt to *B*, and that he (plaintiff) had nothing to do with it. Held, —1. That the plaintiff had renounced his claim, and could not recover the proceeds. 2. That his subsequently claiming the goods in consequence of the defendants' refusal to accept the draft, did not destroy the effect of his previous admission.

1859.

COTHREN *against* KINNEAR.

of the goods for *Connolly;* and if the plaintiff, with a knowledge of the appropriation of the goods by *Casewell & Co.* to *Connolly*, had by his letter to the defendants recognised such appropriation, he could not recover. Verdict for the defendants.

A rule *nisi* for a new trial having been granted on the ground of misdirection,

S. R. Thomson shewed cause in *Michaelmas* term last, and contended, — 1st, That what was said by the defendants when the draft was presented to them, amounted to an acceptance — it being a foreign bill. *Mendizabal* v. *Machado (a); Billing* v. *Devaux (b).* 2d, That the goods did not pass to the plaintiff by the assignment, having been previously specifically appropriated to *Connolly;* and, 3d, That the plaintiff was estopped by his letter to the defendants from claiming the proceeds of the goods. *Pickard* v. *Sears (c).*

Jack, contra. The defendants were bound to pay the proceeds of the goods to the plaintiff, unless they were under a legal liability to pay to *Connolly*, and they could only create that liability by acceptance of the draft, or by some act which would amount to an extinguishment of their liability to *Casewell & Co. Connolly* was not bound to take a conditional acceptance of the draft; and the protest was a clear abandonment of any claim on the defendants, who from that time held the goods as the plaintiff's property. *Sproat* v. *Matthews (d); Bentinck* v. *Dorrien (e); Anderson* v. *Heath (f).* The plaintiff's first letter was written under a mistake of the facts, and when he discovered that the defendants had refused to accept the bill, he was no longer bound by his admission.

Cur. adv. vult.

CARTER, C. J., now delivered the judgment of the Court. The plaintiff seeks to recover against the defendants the value of certain goods consigned by *Casewell & Co.* to them for sale, which he alleges to have passed to him under a general

(*a*) 6 *C. & P.* 218. (*b*) 3 *M. & G.* 565. (*c*) 6 *A. & E.* 469.
(*d*) 1 *T. R.* 182. (*e*) 6 *East*, 199. (*f*) 4 *M. & S.* 303.

general assignment of the property of *Casewell & Co.*, and which goods the defendants have sold and been paid for. The defence set up is, that these goods did not pass under the assignment to the plaintiff, but were specifically appropriated by *Casewell & Co.* to another purpose, namely, the payment of the person from whom *Casewell & Co.* had purchased them prior to the assignment; and if this is established in evidence, it seems to us the plaintiff must fail.

What then is the evidence on this point? It is the clear declaration of the plaintiff himself, who in his letter addressed to the defendants on the 18th *August* 1856, declares — and apparently after investigating the matter with the advantage of the books and papers of *Casewell & Co.* to refer to, as well as the parties themselves — "We find that the sum "of $480 was specifically appropriated on the 14th *June* to "pay a debt due to *Connolly, and I have nothing to do with it.*" Here then is a distinct renunciation on the part of the plaintiff of any claim to that amount; and being addressed to the defendants, it must evidently refer to the proceeds of the goods in their hands. This is certainly good evidence against the plaintiff, and it does not seem necessary to go further, and to inquire how far the defendants have become liable to *Connolly*, or otherwise. No question of that sort at present arises, nor is it suggested that the defendants contemplate attempting to defeat the right of *Connolly* to payment. But it is said that the plaintiff was mistaken in point of law: that the only appropriation was through the drawing of the bill of exchange on the 14th *June*; and acceptance of that bill being refused by the defendants, that appropriation was at an end. To establish this, the only evidence is the letter of the plaintiff of 16th *September*. The declaration however of the plaintiff in his own favor at a subsequent period, cannot avail to destroy the effect of a prior admission against his interest, made upon a different occasion; and if it could, it seems to us that the letter of *September* has not that effect. The letter of *August* is a distinct announcement after examination had, that the plaintiff has no claim on the defendants to the extent indicated. It sets out no particular grounds for arriving at that conclu-

1859.

COTHREN *against* KINNEAR.

sion, but declares unhesitatingly that to the amount of $480, the consignment to the defendants had already been appropriated. We have no means of knowing what led the plaintiff to that conclusion, but we may well suppose he wrote advisedly. On the other hand, the letter of *September* merely *argues* from one particular fact, which may or may not have been the ground, or one of the grounds, for writing the previous letter, that the plaintiff had been mistaken in the conclusion at which he had arrived.

It was stated moreover that the original schedule, which formed a part of the assignment, was not put in evidence. It strikes us that, coupling this circumstance with the declaration of the plaintiff, it would have been difficult for the jury to have found, contrary to that declaration, that the right to recover the amount in question had ever passed to the plaintiff. The schedule itself, if produced, it might fairly have been inferred, would have furnished evidence in corroboration of the plaintiff's own view of the case announced in the letter of *August*. We do not think, therefore, that there is any ground for disturbing the verdict.

Rule discharged.

The BANK OF NEW BRUNSWICK *against* MILLICAN.

Defendant had resided and carried on business for several years at a place called *Brandy Point*, and was in the habit of receiving through the Post-office, letters addressed to him there: Held, that a notice of dishonor addressed to him at *Brandy Point*, was sufficient, though he had changed his residence about that time — the plaintiff not being aware of such change, and having applied for information as to his residence, to the payee of the note, with whom the defendant was in the habit of transacting his business in *St. John*.

ASSUMPSIT against the defendant, as the indorser of a promissory note for £100 7*s.* 7*d.*

At the trial before *Wilmot*, J., at the last *St. John* circuit, a verdict was taken for the plaintiffs by consent, with leave to move to enter a nonsuit, if the Court should be of opinion that there was no sufficient notice of dishonor. The facts are sufficiently stated in the judgment of the Court.

A rule *nisi* having been obtained for entering a nonsuit in *Trinity* term,

D.

1859.

The BANK OF NEW BRUNSWICK *against* MILLICAN.

D. L. Robinson shewed cause in *Michaelmas* term last, and *Allen* was heard in support of the rule. The following authorities were cited: *Story Prom. Notes*, § 314; *Beveridge* v. *Burgiss (a)*; *Robinson* v. *Duff (b)*; *Balloch* v. *Binney (c)*. *Cur. adv. vult.*

CARTER, C. J., now delivered the judgment of the Court. The only question is, whether the notice of dishonor to the defendant was properly addressed and sent. The notice was mailed on the proper day at *St. John*, addressed to "Mr. *James Millican*, *Nerepis Road*, *Brandy Point*."

It appeared that the defendant had for some years resided at *Brandy Point*, and carried on a milling business there; that he also had a lumber yard for the last three years at *Lower Cove* in *St. John;* and that about the time this note fell due, he was changing his residence from *Brandy Point* to *St. John;* but there was nothing to shew that this recent change of residence was known to the plaintiffs, (indeed such knowledge was denied by the Teller of the Bank) and nothing to lead them to suspect such change of residence, they having on former occasions addressed other communications to the defendant in a similar manner. The defendant admits that while he resided at *Brandy Point*, letters and papers were always directed to him in this way, and reached him through the Post-office. But what seems to us the strongest point in the case is, that the defendant states he was in the habit of going to *Roberts & Co.'s* to transact his business, and that they knew where his address was. *Roberts & Co.* were the persons who indorsed the note to him, and it was by their direction that the plaintiffs' addressed the notice to the defendant at *Brandy Point*.

Under these circumstances, we think the notice was sufficient. The point to be considered in such cases is, whether the holder of the note has used reasonable and prompt diligence to discover the residence or address of the previous party who is entitled to notice, as laid down in *Story on Bills*, § 299 and 300, and the note cited in the latter section from *Chitty on Bills*. Now, in the present

(a) 3 *Camp.* 262. (b) 2 *Kerr*, 206. (c) 3 *Kerr*, 440.

case,

1859.

The BANK OF NEW BRUNSWICK *against* MILLICAN.

case, the defendant had resided and carried on a business at *Brandy Point* for several years, and if his change of residence had been completed at the time this note fell due, (which is left in great doubt), there was nothing which could lead to a knowledge of this change on the part of the plaintiffs. They apply for information to *Roberts & Co.*, the parties who indorsed the note to the defendant, and in whose establishment he was in the habit of occasionally transacting his business, and who, according to his own evidence, knew his address. The most that the defendant could have required, would have been to have the question, whether the plaintiffs had used due diligence, submitted to the jury. It appears to us that the evidence was quite sufficient to prove this, and therefore it is abundantly clear that there is no ground for a nonsuit.

Rule discharged.

KELLY *against* DOW.

An order for change of attorney ought not to be made on the mere application of the attorney, on the ground that he is unable to proceed in the suit in consequence of non-payment of Court fees.

Where such an order had been made and acted upon, and it did not appear that the client was aware of the disability of the attorney at the time he commenced the suit, the Court refused to set it aside.

ON the first day of this term *Fraser* moved to rescind an order made by Mr. Justice *Wilmot*, to change the attorney for the plaintiff in this suit. The order was made on the application of Mr. *Miller*, the attorney by whom the action was commenced, alleging that he was in default for non-payment of Court fees, and therefore could not proceed in the action.

Allen opposed the motion, and produced an affidavit of the plaintiff stating that the change of attorney was made with his assent. He contended that the plaintiff had a right to change his attorney at any time; that the only objection could come from the attorney himself, and that the defendant had no right to interfere. The plaintiff was not to be deprived of his rights because the attorney he employed was in contempt.

Fraser in reply, argued that as the first attorney was in contempt, there could be no change, and all the proceedings were

were irregular; or if there could be any change of the attorney, the defendant should have had notice of the application. *Partelow* v. *Smith (a)*, and *Kerlin* v. *Baillie (b)*, were cited.

1859.

KELLY *against* DOW.

Cur. adv. vult.

PARKER, J., now said:—We are of opinion that the Judge's order for change of the attorney should not have been made on the mere application of Mr. *Miller*, the attorney, especially for the reason given; and we think the Judge would have been quite justified in rescinding the order when applied to for that purpose by the defendant's attorney. But inasmuch as the order was not rescinded, but Mr. *Allen* has acted under it, and entered the cause and filed the declaration, and there is no reason to suppose the plaintiff employed Mr. *Miller* to commence the action, with any knowledge that there was a bar to his practising as an attorney at the time, we do not feel called on to interfere, but shall dismiss the motion without costs.

Rule accordingly.

(*a*) 3 *Kerr*, 349. (*b*) 2 *Allen*, 115.

TISDALE *against* HARTT.

In an action by a surviving partner, a verdict was given for the defendant, on proof of a deed of assignment from him to the plaintiff and *M.* in trust for the benefit of creditors, which had been executed by the deceased partner in the name of the firm, and released the debt due from the defendant. A new trial on the ground of surprise was refused, though the plaintiff was absent from the country at the time the deed was executed, and knew nothing of it till it was produced at the trial, and the deceased partner was shewn to be in a weak state of mind at the time it was executed.

THIS was an action for goods sold and delivered, brought by the plaintiff as the surviving partner of the firm of *Walker Tisdale & Son*. At the trial before *Ritchie*, J., at the last *St. John* circuit, the defendant obtained a verdict on proof of a deed dated the 23rd *July* 1856, purporting to be a trust deed of assignment from the defendant to the plaintiff and one *May*. The deed was executed by *Walker Tisdale*, the senior partner, in the name of the firm, and released all their claims against the defendant; and the

plaintiff's

1859.

TISDALE against HART.

plaintiff's name, as a trustee, was put in the deed by *Walker Tisdale's* direction. It did not appear that it had been executed by *May* or acted upon in any way by the creditors.

Jack moved for a new trial on the ground of surprise. An affidavit of the plaintiff was produced, stating that at the time the trust deed purported to be executed, he was absent from the Province, and had never heard of the deed till it was produced at the trial; that he was altogether taken by surprise by the production of the deed, and believed he should be able to shew that it was fraudulently obtained; and that for several years previous to the date of the deed, and up to the time of his death, *Walker Tisdale* was not acquainted with the business of the firm, and took no part in its management, the plaintiff being the managing partner. There was also annexed to the affidavit, a certificate of a physician, that *Walker Tisdale* had been attacked with appoplexy on the 20th *June* 1856, and from that time till the 8th *August* his mind was very much impaired and he was unfit to attend to business. It was contended that it should have been left to the jury to say whether the deed was delivered to, and accepted by the trustees; as unless it was so accepted, the release would not operate. The following authorities were cited:—2 *Byth. Prec.* 503; *Talbot* v. *Hodson (a)*; *Murray* v. *The Earl of Stair (b)*; *Pearse* v. *Morrice (c)*; *Teed* v. *Johnson (d)*; *Evans* v. *Bremridge (e)*.

Cur. adv. vult.

CARTER, C. J., now delivered the judgment of the Court. On consideration, we are all of opinion that no rule should be granted in this case. It may be very true that the action was brought by the plaintiff in ignorance of the circumstances, and in full belief that the debt which had been contracted by the defendant to the firm of *Walker Tisdale & Son*, remained unsatisfied and undischarged at the death of the senior partner; but there can be no doubt that the effect of the execution of the trust deed by *Walker Tisdale*,

(*a*) 7 *Taunt.* 251. (*b*) 2 *B. & C.* 82. (*c*) 2 *A. & E.* 84.
(*d*) 34 *Eng. R.* 545. (*e*) 35 *Eng. R.* 397.

and

1859.

TISDALE *against* HARTT.

and his own direction to place his son's name thereto as a trustee, was, that the debt was released by *Walker Tisdale* in his life time, while the plaintiff was absent in *England*, and (unfortunately for him) neither *Walker Tisdale*, nor his clerk, communicated to the plaintiff what had taken place in his absence; but the defendant is not to suffer from that omission. The release is very clear and comprehensive in its terms, and we cannot see anything in the evidence to impugn the validity of the deed containing it; nor do the affidavits afford any ground for disturbing the verdict.

Rule refused.

EX PARTE MULHERN.

The offence of wilfully injuring a fence, &c. under *Cap.* 153, § 11, of the *Rev. Statutes*, is not punishable by summary conviction.

An application for a *certiorari* should be made at the first term after the conviction; but where the Justice had no jurisdiction in the matter, a *certiorari* was granted though a term had elapsed.

MARGARET MULHERN was convicted before the Mayor of *Fredericton* on the 27th *April* last, of breaking down a fence, the property of *Timothy Driscoll*. The prosecution was under *Cap.* 153, § 11, of the *Revised Statutes*, which enacts that, "Whoever shall unlawfully cut and "take away any growing corn or grain; or shall rob any "orchard, garden, or other plantation of any fruit, vege- "tables, or other things therein growing; or wilfully injure "a part of any hedge, fence, or other enclosure; or shall "remove from the premises or injure any vehicle, sleigh, "or article belonging to any person, and on his premises, "shall be guilty of a misdemeanor, and be imprisoned for "any term not exceeding six months, or fined in a sum not "exceeding five pounds."

A Judge's order *nisi* for a *certiorari* to remove the proceedings, was granted in *July* last, returnable in *Michaelmas* term; against which

A. R. Wetmore now shewed cause. He contended: 1st. That the application was too late: it should have been made at the first term after the conviction. 2nd. That the case was within the jurisdiction of a Justice, by *Cap.* 161, § 32, of

1859.

Ex Parte Mulhern.

of the Statutes. [PARKER, J. The offence is a misdemeanor, and a Justice has no power to convict for a misdemeanor.] The section expressly declared "that wherever "offences punishable as a misdemeanor, imprisonment or "fine, the fine may be recovered in the manner herein men- "tioned, (that is, before a Justice of the Peace by a summary "conviction) instead of proceeding by indictment, at the "option of the prosecutor." [PARKER, J. A Justice has no jurisdiction in this case unless it is expressly given to him. Is he to decide before issuing the summons, whether the punishment is to be fine or imprisonment? RITCHIE, J. What possible object could there be in allowing this conviction to stand? The Justice could not act upon it.] The granting a *certiorari* was discretionary. [PARKER, J. That was for the Judge to determine in granting the order. I think I should not have granted it where the party had allowed a term to pass without applying to the Court.]

CARTER, C. J. It is quite clear the Justice had not the slightest jurisdiction; and in such a case I think we should not be very strict as to time.

Rule absolute for a *certiorari*.

The section under which this conviction was had, is the same as the Act 12 *Vict. c.* 29, sub-chapter XI, Art. 11, (see acts of 1849, page 42); and by the Act 12 *Vict. c.* 31, § 10, the fine imposed by that article was made recoverable before two Justices of the Peace on a summary conviction. There is no such special provision in the *Revised Statutes;* but it would seem that the intention of the 32nd section of chapter 161, was, to give the prosecutor the option of proceeding summarily before a Justice of the Peace in all cases where the fine did not exceed ten pounds, even though the offence was a misdemeanor.—*Reporter.*

1859.

M'CARROLL *against* REARDON and WIFE.

Defendant gave the plaintiff a promissory note for £150, because she thought a deceased brother (whose property she inherited) would have left the plaintiff as much if he had made a will: a verdict for the plaintiff for £20 was set aside, though there was evidence that the deceased owed the plaintiff about that amount, this debt being no part of the consideration of the note.

ASSUMPSIT on a promissory note for £150, drawn by the female defendant before her marriage, payable to e plaintiff. Plea—non assumpsit.

At the trial before *Ritchie* J., at the last *Charlotte* circuit, was proved that a few days before the note was given, *hn M'Carroll*, a brother of the female defendant, had died testate in *St. John*, and that the plaintiff (who was his usin) had attended him during his illness, and after his ath had brought his body to *Maguadavic*, where he had sided, and where his sister lived. *John M'Carroll* left operty to the amount of about £3,000, which descended his sister, the female defendant. Immediately after his ath she sent for the plaintiff and offered him her note for 200, saying that he was entitled to it, and that if her brother d settled his affairs, she knew he would have left the plain- f more. The plaintiff said he did not want as much as 200, and the note in question was then given. It was also oved that the plaintiff had been assisting *John M'Carroll* his business for about four months before his death, and at his services were worth about £25. The female defen- nt was called on the defence, and denied all knowledge of e note, and said that the plaintiff told her the paper she is signing was an order to get a monument for her brother. The learned Judge told the jury that if the note was given a mere gratuity, it would be void for want of considera- n; but if there was any consideration, the plaintiff was titled to recover to that extent. Verdict for the plaintiff damages £20.

In *Michaelmas* term last *J. A. Street*, Q. C., (pursuant to ve reserved) obtained a rule *nisi* for entering a nonsuit, the ground that the note, being a mere gift, was void for nt of consideration. *Story on Prom. Notes*, § 184, and *olliday* v. *Atkinson (a)*, were cited.

Allen now shewed cause, and said that although the note

(a) 5 *B. & C.* 501.

1859.

M'CARROLL *against* REARDON.

might not be sustainable as a gift, yet there was evidence of a partial consideration, and therefore a nonsuit could not be entered, but the verdict would stand for the amount proved to be due. *Chitty on Bills*, 74. That whether there was any consideration or not, was a question of fact for the jury, and they having found in the affirmative, the verdict ought to stand. A moral obligation was a good consideration for a promise. *Gibbs* v. *Merrill (a)*; *Lee* v. *Muggeridge (b)*.

J. A. Street, Q. C., *contra*, was not heard.

CARTER, C. J. There is no evidence that the debt from the deceased to the plaintiff, formed part of the consideration for the note; on the contrary, it is clearly proved that it was a mere gift.

N. PARKER, M. R. If there had been any conflict of evidence as to whether there was a consideration or not, I should not have been disposed to interfere with the verdict; but I think the plaintiff's own evidence shews that the note was a gift.

PARKER, J. There is an entire want of evidence to shew that the note was given for the debt.

WILMOT, J. I am of the same opinion.

RITCHIE, J. If I had been pressed at the trial, I should have ordered a nonsuit, as I had no doubt in the case. I was in hopes that as the jury had given a verdict for such a small amount, the defendants would have allowed the matter to rest, and thus settle all disputes; but as they have not done so, I am bound to agree with the rest of the Court that there is no evidence of consideration to support the verdict.

Rule absolute for a nonsuit.

(*a*) 3 *Taunt.* 311. (*b*) 5 *Taunt.* 36.

1859.

FERGUSON *against* SAVOY and OTHERS.

TRESPASS for taking the plaintiff's wheat and hay; brought against *Justinian Savoy*, *B. W. Weldon*, *Edward Govereau*, *Charles Basque*, *Isaiah Basque*, and *Oliver Basque*. Plea—not guilty: with a notice of defence, justifying the taking by the defendant *Weldon*, as the Sheriff of the county of *Gloucester*, under an execution against *Michael Ferguson* at the suit of *Justinian Savoy*, and that the other defendants were acting in his aid.

In trespass for taking hay and grain, it was proved that the land on which they grew belonged to the plaintiff's father, who, four years before the trial, gave it up to the plaintiff on condition that he should support his father and family; that the father continued to live on the land, but that the plaintiff took the management of the farm and sowed the grain and cut the grass: Held, that the jury were properly directed that this constituted a tenancy and gave the plaintiff the possession of the crops.

In trespass against several defendants, if they go upon the land with a common purpose they are jointly liable, though the acts of trespass are separate, and are committed on different parts of the land.

At the trial before *Carter*, C. J., at the last *Gloucester* circuit, the plaintiff proved that the land where the grain and hay were cut belonged to his father, *Michael Ferguson*, who, being sick and unable to work the farm, gave it up to him about four years before the trial, on condition that he was to support his father and take care of the family; that the plaintiff had since had the management of the farm, and that he purchased the seed from which the wheat was raised, and paid for reaping it and cutting the grass. The plaintiff's father lived with him on the farm, but was proved to have been insane for about three years before the trial. The wheat was taken out of the barn by the defendants *Charles Basque* and *Isaiah Basque*, who said it was seized under an execution against *Michael Ferguson* at the suit of *Savoy*. The hay was taken by the defendant *Savoy* from another part of the farm on the opposite side of the *Tracadie* river, and he said he intended to take everything. The defence opened was, that the property belonged to *Michael Ferguson*, and that it was taken by his consent under an execution against him at the suit of *Savoy;* but no judgment or execution was proved. The learned Judge directed an acquittal of the defendants *Weldon* and *Govereau*, and left it to the jury to say whether the other defendants were jointly concerned in taking the wheat and hay, and if they were, whether it was the property of the plaintiff or his father; telling them that if *Michael Ferguson* transferred the proceeds of the farm to the plaintiff in consideration of his supporting

1859.

FERGUSON *against* SAVOY.

porting the family, that would create a tenancy between them, which would vest the right to the crops in the plaintiff. But if they were not satisfied of this, the property in the land and the proceeds would remain in *Michael Ferguson*, and be in his possession at the time of the taking, and in that case the plaintiff could not recover. The jury gave a verdict for the plaintiff against the defendants *Savoy*, and *Charles* and *Isaiah Basque*, for £16 damages.

A rule *nisi* for a new trial having been granted on the grounds of misdirection, and that the verdict was against evidence,

J. A. Street, Q. C., now shewed cause, and contended that the questions of the plaintiff's possession and the joint trespass were both properly left to the jury, and that the evidence of possession alone was sufficient to sustain the verdict against parties who shewed no right.

Johnson, Q. C., *contra*. The agreement between the plaintiff and his father was for an interest in land, which not being in writing, was void by the statute of frauds. [RITCHIE, J. Are you not attempting to set up the *jus tertii*, which a wrong-doer cannot do? *(a)*] There was no actual possession in the plaintiff. The title was in his father, who occupied the land, and the plaintiff was absent when the property was taken. [CARTER, C. J. He proved that he paid for the seed, and for cutting the hay and grain.] He did nothing to reduce it into possession after it was severed from the land, and became a chattel. The right to the crop was in the owner of the land. [CARTER, C. J. Not if there was a tenancy.] There was no tenancy: the verdict is against evidence on that ground. [CARTER, C. J. If you had shewn a judgment and execution against *Michael Ferguson* there would have been some difficult points in the case.] There was no evidence of a joint trespass. There is nothing to connect the *Basques* with taking the hay. The only evidence against one of the defendants is, his declaration that he took the property under an execution against *Michael Ferguson*: the whole admission must be taken together. [PARKER, J. The jury might reject part of this admission:

(a) See *LeBel* v. *The Fredericton Boom Company*, *ante* page 198.

1859.

FERGUSON *against* SAVOY.

admission: it is constantly done.] The proof of the taking the hay by *Savoy*, was an abandonment of the trespass proved against *Basque*. *Sedley* v. *Sutherland (a)*; *Tait* v. *Harris (b)*; *Hitchen* v. *Teale (c)*; *Roper* v. *Harper (d)*; *Meloney* v. *Purdon (e)*.

N. PARKER, M. R. I see no ground for disturbing the verdict. There was *prima facie* evidence both of property and possession in the plaintiff, which the jury might believe or not, and they have given credit to the plaintiff's evidence. As to the joint trespass, I think it is clear these defendants were acting with a common purpose.

PARKER, J. The plaintiff's *prima facie* case was quite unanswered. I have no doubt the defendants went to the land with a common purpose, thinking they had a right to take the property of *Michael Ferguson*.

WILMOT, J. I am of the same opinion. The defendants did not show a shadow of right to take the property.

RITCHIE, J. I think the case was properly left to the jury, and that no ground has been shown for disturbing the verdict. It is clear the defendants went with a common purpose of taking the property.

CARTER, C. J. I am of the same opinion.

Rule discharged *(f)*.

(*a*) 3 *Esp.* 202. (*b*) 1 *M. & Rob.* 282. (*c*) 2 *M. & Rob.* 31.
(*d*) 5 *Scott*, 250. (*e*) 3 *Kerr*, 515.
(*f*) See *Atkinson* v. *McAuley*, *ante* page 243.

ATKINSON *against* M'AULEY and OTHERS.

February 12th.

Quære whether the indorsement on a writ by the Sheriff, of his fees for the service of it, is not conclusive of the amount in the taxation of costs.

H. B. ROBINSON, on behalf of the defendants, moved for a review of the taxation of costs in this case, on the ground that too much had been allowed for the Sheriff's fees on serving the writ.

The affidavit of *McAuley*, one of the defendants, stated that he had been served with the writ at *Kingston*, distant only

1859.

ATKINSON *against* M'AULEY.

only three miles from the Court House, and that the other two defendants resided at *Buctouche*, seventeen miles distant from the Court House, and were served with the writ there. This affidavit was read before the clerk on the taxation of costs, and it was contended that the Sheriff's fees could not amount to more than seventeen shillings and nine pence, but he allowed the sum of £2 2s. 9d.—being the amount of fees indorsed by the Sheriff on the writ, according to the direction of the rule of Court of *Michaelmas* term, 5 *Wm.* 4, *(Allen's Rules* 22).

Per Curiam.—Your affidavit is not sufficient, even if the Court can interfere in such a case. The affidavit does not shew conclusively that the clerk was wrong in allowing the amount.

Rule refused.

SMITH *against* SONEA.

Where the plaintiff's attorney had accidentally omitted to insert the amount of damages and costs in the judgment roll, but issued execution for the amount, the Court allowed the roll to be amended *nunc pro tunc;* though the defendant (relying upon the omission) had brought an action of trespass against the plaintiff for seizing his property under the execution.

A. L. PALMER moved, on a former day, to set aside the judgment and execution in this case for irregularity, on several grounds; one of which was that no damages or costs were mentioned in the judgment roll. A copy of the roll on file was produced, shewing blanks left where the amounts of the damages and costs respectively should have been inserted.

Smith opposed the motion, and obtained a rule *nisi* for the defendant to shew cause why the judgment roll should not be amended by adding the amounts of damages and costs. It appeared by the affidavit of the plaintiff's attorney, that he had accidentally omitted to fill up the blanks at the time he filed the judgment roll; that the damages had been assessed and the costs taxed, and the judgment duly docketed on the 1st *June* 1857, and execution issued for the correct amount, under which the defendant's property had been levied on and sold, and that he did not discover the omission

1859.

SMITH *against* SONEA.

omission until *January* last, when he was led to examine the judgment roll in consequence of the defendant having brought an action of trespass against the plaintiff for selling property under the execution.

A. L. Palmer now shewed cause against the rule, and contended that if the amendment could be made, it must be done as of this term.

But the Court (without hearing *Smith*) said that no injury had been done to the defendant by issuing the execution for a debt which he owed, and that the judgment roll should be amended *nunc pro tunc*.

Rule accordingly; and the motion to set aside the judgment and execution refused.

HAZEN *against* DRUMMOND.

February 15th.

DEBT on a bond given by the defendant to the plaintiff and *William Scovil*, conditioned for payment of £540 to the plaintiff and *Scovil* "or either of them." Plea —*non est factum*.

A bond conditioned for the payment of money to *A* and *B*, or either of them, cannot be sued in the name of one of the obligees, unless the other is dead.

At the trial before *Wilmot*, J., at the adjourned *St. John* circuit, the plaintiff proved the execution of the bond, and a verdict was given in his favor for the amount.

In *Michaelmas* term last, *A. R. Wetmore* obtained a rule *nisi* for a new trial on the ground of misdirection, contending that the action should have been brought in the name of the plaintiff and *Scovil*, or that proof should have been given of *Scovil's* death. 1 *Chit. Pl.* 4.

S. R. Thomson now shewed cause. For the purpose of this argument it must be assumed that *Scovil* is living; but by the words of the bond, the action may be brought in the name of either of the obligees. *Withers* v. *Bircham (a)*. [N. PARKER, M. R. Is not this one of those cases where the word "or" must be read as "and"? RITCHIE, J. Do the

(a) 3 *B. & C.* 254.

words

1859.

HAZEN *against* DRUMMOND.

words "or either of them" express anything more than the legal effect of the covenant, that a payment to either of the obligees satisfies the bond?] Where there is an express agreement, the parties must be governed by it. It is a joint and several bond.

The Court *(a)* (without hearing *Wetmore*) said that the case was too clear for argument, and that the verdict must be set aside.

Rule absolute.

(*a*) *Carter*, C. J., was at the *Nisi Prius* Sittings; *Parker*, J. being connected with the plaintiff took no part in the case; and *Wilmot*, J. was absent.

END OF HILARY TERM.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF NEW BRUNSWICK,

IN

EASTER TERM,

IN THE TWENTY-SECOND YEAR OF THE REIGN OF VICTORIA.

Ex Parte GEROW.

April 13th.

An application for a *certiorari* to remove an assessment, should be made promptly. Where a party had notice of an assessment in *December*, and his property was sold under execution for non-payment early in *February*, an application made in *Easter* term for a *certiorari* to remove the proceedings was refused, though the assessment appeared to have been improperly made.

A JUDGE'S order was granted in *March* last on the application of *George Gerow*, calling on the Trustees of Schools for the Parish of *Hampstead* to shew cause at this term why a *certiorari* should not issue, to remove into this Court a rate or assessment made under the Act relating to Parish Schools *(a)*, and all the proceedings on which the same was founded. The affidavit of *Gerow* on which the order was granted, stated that about the 14th *December* last, the collector of taxes demanded from him the sum of £1 12s. 7d. for a school tax assessed upon his property in the Parish of *Hampstead;* that never having heard of any meeting of the inhabitants of the Parish called to determine upon an assessment, he refused to pay the rate, and in the early part of *February* last his property was sold under an execution for the amount. The affidavit shewed that the Parish had not been properly divided into School districts before the assessment was made.

A. R. Wetmore now shewed cause, and objected that the application should have been made in *Hilary* term.

(a) 21 *Vict. c.* 9

1859.

Ex Parte GEROW.

S. R. Thomson contra, said that it was not necessary to apply at the first term after the party had notice of the assessment.

But the Court *(a)* said, that as the granting a *certiorari* was discretionary, it ought to appear that the application was made within a reasonable time. That by analogy to the law relating to County rates, which required an appeal to be made at the next Sessions after the assessment, this application should have been made in *Hilary* term; and that having allowed his property to be sold, and a term to elapse without taking any proceedings, the applicant was now too late, though if the application had been made in proper time, the assessment would have been set aside. That where there had been so much delay, the *certiorari* ought not to be granted, unless the law imperatively required it.

Rule discharged.

(*a*) *Carter*, C. J., was absent during the whole of this term, in consequence of illness.

ALLISON *against* The PRESIDENT, &c. of The CENTRAL BANK.

The holder of a Bank note payable to bearer, may maintain an action thereon for non-payment, though he has no beneficial interest in the note, and holds it merely as the agent of the owner for the purpose of demanding payment.

THIS was an action brought to recover the amount of several Bank notes issued by the defendants, payable to bearer on demand.

At the trial before *Ritchie J.* at the last *St. John* circuit, it appeared that *Fairbanks & Co.*, of *Halifax*, were the owners of the notes, and sent them to the plaintiff, as their agent, to demand payment, and that he had no interest in them. A verdict was found for the plaintiff—leave having been reserved to the defendants to move to enter a nonsuit on the ground that the plaintiff, being a mere agent, could not sue: accordingly a rule *nisi* having been granted for that purpose in *Hilary* term,

J. A. Street, Q. C., now shewed cause. It is not necessary that the plaintiff should have the beneficial interest in the notes:

1859.

ALLISON *against* The PRESIDENT, &c. OF THE CENTRAL BANK.

notes: it is sufficient that he is the holder. By the *Revised Statutes, Cap.* 116, § 2, a promissory note payable to order or bearer, is assignable in the same manner as an inland bill of exchange, "and the payee, indorsee, or *holder* thereof "may maintain an action thereon in his own name." A note payable to bearer is the same as an indorsed note, and any *bona fide* holder may sue upon it. *Grant* v. *Vaughan (a).* It is transferred by mere delivery; *Story on Notes,* § 116; and in order to defeat the right of the holder to recover, it must be shewn that he obtained it fraudulently. In *Bessy* v. *Stephens,* reported in The *Times* of the 13th *January* 1858, *Flowers* was the owner of a bill of exchange, and not wishing to bring an action in his own name, indorsed the bill in blank to the plaintiff as his agent: it was held that though the action was in substance *Flowers'*, yet that the plaintiff had a sufficient interest in the bill to maintain the action. If the plaintiff was only an agent, he appeared as the principal, because the principal was unknown to the defendants, and therefore he had a right to sue in his own name. *Story on Agency,* § 394; *Short* v. *Spackman (b).*

A. R. Wetmore contra. I admit that an agent may bring an action in his own name, and that *prima facie* the holder of a promissory note payable to bearer, may sue upon it; but it may be shewn that he obtained it by fraud, and consequently, that he has no legal interest in it. *Solomons* v. *The Bank of England (c).* If this can be shewn in case of fraud, why can it not be shewn in any other case? [RITCHIE, J. Was not the plaintiff the legal holder of the notes to demand payment? PARKER, J. Can the defendants say that he had no interest in the notes?] *Prima facie* he had a right to recover, but it was competent for the defendants to shew that he had no right, and they did shew it by his own declaration that he was a mere agent, and had no interest in the notes. An agent who makes a contract, but who has no beneficial interest in the transaction, cannot support an action thereon. 1 *Chit. Pl.* 7; *Story on Agency,* § 391. He also cited *Clerk* v. *Pigott (d); Adams* v. *Oakes (e); De La Chaumette* v. *The Bank of England (f).*

(*a*) 3 *Burr.* 1516. (*b*) 2 *B. & Ad.* 962. (*c*) 13 *East,* 135.
(*d*) 12 *Mod.* 193. (*e*) 6 *C. & P.* 70. (*f*) 9 *B. & C.* 208.

N.

1859.

ALLISON *against* The PRESIDENT, &c. OF THE CENTRAL BANK.

N. PARKER, M. R. I entertain no doubt in this case. It is admitted that *prima facie* the plaintiff is entitled to recover the amount of the notes; but the defendants rely on the fact that the plaintiff has shewn that the notes were sent to him as a mere agent to collect, and that he had no interest in them, and they contend therefore that he cannot recover, and that the case stands on the same footing as if the plaintiff had stolen the notes. Now the plaintiff's whole admission must be taken together, and it shows that though the plaintiff had no beneficial interest in the notes, he had the right to the possession of them to receive the money, and that is enough to enable him to maintain the action. It would be dangerous to allow a Bank to set up such a defence as this.

PARKER, J. I have not the slightest doubt about the correctness of the verdict. A Bank makes no personal contract with any person by its notes, and any lawful holder of a note who presents it for payment, has a right to receive the money. There is no analogy between this case and the case of a stolen note: there the Bank is setting up the right of a third party; but here the defendants do not pretend that they are defending by the authority of *Fairbanks & Co.*

WILMOT, J. I am of the same opinion. It cannot be disputed that the plaintiff is the lawful holder of the notes.

RITCHIE, J. If this defence could prevail, it would be a dangerous doctrine in the *lex mercatoria*, and would hamper exceedingly the law relating to bills of exchange, which, when payable to bearer, or indorsed in blank, are transferable by mere delivery, and may be sued upon by any person who has the lawful possession of them. The principle is much stronger in the case of Bank notes, which are intended to be circulated as money. I think that where the *bona fide* holder of a Bank note presents it for payment, the Bank is bound to pay it, whether he has a beneficial interest in it or not, and if payment is refused, he can bring an action.

Rule discharged.

1859.

EX PARTE ESTABROOKS.

April 16*th.*

GEORGE E. ESTABROOKS was charged before the General Sessions of the County of *Sunbury* in *January* 1858, as being the reputed father of a bastard child of which *Elmira Rathburn* was then pregnant: he appeared and denied the charge, and *Rathburn* having been sworn, it appeared to the Justices that she did not understand the nature of an oath and could not answer the simplest questions, the case was thereupon dismissed, and it was ordered that the recognizance entered into by *Estabrooks* to appear and abide the order of the Sessions should be discharged. In *March* following, after the birth of the child, *Estabrooks* was again arrested and entered into recognizance to appear at the last *June* Sessions to answer the same charge. He appeared and pleaded the former acquittal; but the Justices overruled the plea, and, after hearing the evidence of *Elmira Rathburn*, made an order of affiliation and maintenance.

A being charged as the reputed father of a bastard child of which *B* was then pregnant, appeared at the *January* Sessions and denied the charge; *B* was sworn as a witness, but it appearing to the Sessions that she did not understand the nature of an oath, the case was dismissed, and *A*'s sureties discharged. After the birth of the child, *A* was again charged before a subsequent Sessions with being the father, and pleaded *autrefois acquit*: Held,—(*Parker*, J., *dubitante*, and *Ritchie*, J., *dissentiente*), that the *January* Sessions had power to try whether *A* was the father or not, though they could not make an order of filiation till the child was born, and that having acquitted him of the charge, he could not again be tried for the same offence.

Held,—per *Ritchie*, J., that until the birth of the child, the Sessions had no power to hear evidence or make any adjudication; and that the order of the *January* Sessions discharging *A*, was void, and could not be pleaded as an answer to the charge made against him after the birth of the child.

A rule *nisi* for a *certiorari* having been granted to remove the proceedings into this Court,

S. R. Thomson shewed cause in *Michaelmas* term last. He contended that the Sessions had no power to make any order until the child was born and became chargeable, and therefore the proceedings in *January* were *coram non judice*, and did not prevent the Sessions from adjudicating after the child was born. 1 *Rev. Stat.*, *Cap.* 57, § 4 and 9. If the defendant could not have been lawfully convicted at the *January* Sessions—as he clearly could not, the child not being born—the plea of *auterfois acquit* was no bar to the second prosecution. *Arch. Crim. Pl.* 88.

Allen, contra, contended that though the Sessions had no power to compel the woman to give evidence, or to make an order of maintenance before the birth of the child, they had jurisdiction to hear the case; and if the woman appeared, and they went into the investigation and acquitted the defendant, that was conclusive, and he could not be tried

again

1859.

Ex Parte ESTABROOKS.

again for the same charge. The defendant did all that the law required of him: he appeared and traversed the charge, and the Court discharged him. They could determine whether he was the father, as well before the birth of the child as after. If they had postponed the case till a future time, and compelled the defendant to renew his recognizance, as they might have done by the 8th section of the act, the case would have been different. The question was, whether he had been already tried for this offence.

Cur. adv. vult.

The Judges differing in opinion, now delivered their judgments as follows:—

RITCHIE, J. As I understand this case, a complaint was made before a magistrate, that an unmarried woman was likely to be delivered of a bastard child, and that *George E. Estabrooks*, the applicant for the *certiorari*, was charged therewith, and entered into recognizance to appear at the next Sessions to abide the order; at which Sessions he and the woman appeared, she not having been delivered. The Justices in Sessions examined the woman, and finding she did not understand the nature of an oath, discharged the defendant. The woman having been subsequently delivered, and the defendant charged with being the father, the Sessions proceeded to hear and determine the matter, and being satisfied he was the father, made the order of affiliation. To get these last proceedings quashed, is the object of the present application; it being urged that the Sessions having adjudicated on the matter before the child was born, and discharged the defendant, it was *res adjudicata*, and therefore in the subsequent hearing after the child was born, they acted without jurisdiction. I cannot assent to this. I think all proceedings anterior to the birth of the child are simply preliminary; that the Sessions have no right to hear any evidence, or make any adjudication as to who is the father of an unborn child. I think they have no power to convict, neither can they acquit. They may neglect or refuse to require a person charged to renew his recognizance, but such neglect or refusal cannot relieve the party, if an illegitimate child is subsequently born, chargeable to any parish, and

1859.

Ex Parte ESTABROOKS.

and on complaint made and hearing duly had, the Sessions shall be satisfied the person so charged is the father, and they make the order directed by the Statute, any more than the neglect or refusal of a magistrate to commit or take bail from a party charged before him with a crime which he has no authority to try, but merely to receive the preliminary charge, will amount to an acquittal of such offence. The act is, no doubt, obscurely worded, but an examination of its different provisions will, I think, make this apparent.

By § 1, we have the examination of the woman, that she *has been*, or is likely to be delivered of a bastard child. Section 2 gives the Justice authority to commit to gaol, unless the party charged give security to indemnify the parish, (this applies, I think, to the first case, of the woman having been delivered) or enter into recognizance to appear at the Sessions and abide the order, &c. (This applies to either case). Section 3 provides for discharge of the party in certain cases. Section 4 is for the protection of the woman previous to delivery; and enacts that "no Justice shall send "for any woman until one month after she is delivered, to "take such examination, or to compel her to answer any "questions relating to her pregnancy, before she is deliv-"ered." Section 5. "If the person appear according to his "recognizance, and do not deny or traverse the charge, the "Sessions shall make an order of filiation and maintenance. "(L)." What charge? Not that of having got the woman with child, but of being the father of a bastard child; for the next section (the 6th) enacts that "If the person appear and "traverse the charge, the Sessions shall hear the evidence, "and if satisfied the person is the father of the child, they "shall make such order as to them may seem just." How can a man be the father of a child that is not, and never was in existence? *Rex* v. *DeBrouquens (a)*, shews that the child must be born alive; that a bastard is a child *born alive* out of lawful matrimony. Can the Sessions make an order of filiation and maintenance till the child is born? Clearly not. And yet section 5, which has been referred to, by itself, without reference to the form, would seem to imply this.

(*a*) 14 *East*, 277.

But

1859.

Ex Parte Estabrooks.

But what does form (L) therein mentioned say? "That *A.* "*B.* having appeared and denied the charge, and the Justi- "ces having found the said *A. B.* guilty," (of what? Of being "the father of the child,"—section 6) "we do adjudge "that the said *A. B.* is the reputed father of the bastard "child of which *C. D.* was delivered, and that he is charge- "able," &c. Where in the act is there any other adjudication provided for but this? I can find none. In section 3, which provides that if the woman marry, or die before she is delivered, or shall miscarry, or was not pregnant at the time of examination, (that is the first examination before the magistrate) he shall be forthwith discharged: clearly referring to a period anterior to any order being made. And the 4th section, which protects the female from public exposure before the birth, shews, I think, that the Legislature could hardly have contemplated that she might be exposed by other evidence in a public trial, which a variety of subsequent events, such as her marriage or death before delivery, miscarriage or non-pregnancy might render wholly unnecessary. Neither that the man should, on the one hand, be convicted when he was prevented from availing himself of the best testimony—that of the woman—if she chose to refuse, nor, on the other hand, that he should be acquitted and the parish made to bear the burthen of his lust, when there was no means of compelling the examination of the woman, and of thereby offering certainly the best evidence of which the nature of the case admited. And what might be the very singular and rather unpleasant consequences of a trial and adjudication before the birth? The Sessions, while the child is yet unborn, proceed to investigate, hear, and determine the matter on the best evidence they can get, the woman perhaps, refusing to say a word, or even, perhaps, denying her pregnancy. They, however, adjudge *A. B.* the reputed father of a bastard child, not of which *C. D.* was delivered, but of which *C. D.* may be delivered; that is, they adjudge that if *C. D.* is delivered, and the child, when born, is alive and is a bastard, then *A. B.* will be the father; for the adjudication under such circumstances, can certainly amount to no more than this. Now this hypothetical mode of adjudi-

cation,

1859.

Ex Parte ESTABROOKS.

cation, which strikes my mind as a great legal novelty, certainly seems to me opposed alike to the spirit, policy, and letter of the act. Let us see some of the consequences that might follow:—*C. D.* marries *E. F.* the day after this judgment, and a month after is delivered of a child. The law says, instead of its being a bastard child, and *A. B.* the father, it is not only legitimate, but *E. F.*, not *A. B.*, is the father, and in the eye of the law, as perhaps in fact, really is the father of the child. Or, what would be still more unpleasant, if subsequently, the woman should turn out not to have been pregnant at all—a contingency considered neither impossible nor improbable by the act—would not the record of the decision of the Sessions present itself in a somewhat curious antagonism to the real facts of the case, shewing, if nothing else, that, to use a familiar expression, the Court had rather jumped before coming to the stile? But section 9 says distinctly no such order, that is, form (L), which I have shewn by its own express words is the adjudication, shall be made until after the child becomes chargeable, which certainly cannot be while it is in its mother's womb.

The jurisdiction of the Sessions and its course of procedure seems to me very plain. If the child is not born before the next Sessions at which the party is under recognizance to appear, the time not having arrived when the Sessions have authority to hear or adjudicate, they should fall back on section 8, which says, "The consideration of, or making such "order, may be postponed from time to time upon sufficient "reasons, and the person shall renew his recognizance." In this case the non-delivery of the woman, or if delivered, her want of instruction in the nature of an oath, would be very good grounds for postponing the consideration of the matter; but if they do not choose to postpone, or to require a renewal of the party's recognizance, but discharge him; how can such discharge by parties having at that time no authority to hear, try, or adjudicate the matter, be subsequently pleaded (after the birth of the child, when the offence is perfect, and the period only for the first time arrived when the Court could adjudicate) as an acquittal? If the Sessions did, before the birth of the child, hear and determine the matter, whether

1859.

Ex Parte Estabrooks.

they acquitted or convicted, the proceedings would be alike *coram non judice*, and void, and could afford no answer to a charge made and tried when the Court had for the first time jurisdiction to hear, determine, and adjudicate it. Suppose after this, so called, acquittal, the woman had moved into another county, been delivered of the child, and wholly unable to support it, would not a magistrate be justified on application of an overseer of the poor, in sending for the woman and compelling her to say who the father was? And could the defendant, being charged, plead *autrefois acquit*, and sustain that defence by proceedings such as those that took place here? I think not. I am of opinion therefore that the *certiorari* should not go.

Wilmot, J. I am of opinion that the *certiorari* should be granted, as according to my reading of the act of Assembly under which these proceedings were had, the applicant was illegally convicted before the Sessions in *Sunbury* in *June*.

Sometime prior to the *January* Sessions of 1858, *Estabrooks* was arrested under a charge made by one *Rathburn*, of having gotten her with child, and thereupon entered into recognizance according to law, to appear at the next Sessions and abide the order. The condition of the recognizance, as prescribed in the form appended to the act, is to appear "to "answer a charge against him of being the reputed father "of a bastard child, likely to become chargeable," &c. At the following Sessions in *January* 1858, *Estabrooks* appeared according to his recognizance, and traversed the charge, and *Rathburn* was thereupon called and sworn. Now, what was the position of the case at that time? A charge made—according to the form which must be taken as if incorporated in the enacting part of the law—of being the reputed father of a bastard child, likely to become chargeable; a traverse of that charge; the accuser sworn; and a competent tribunal to try. It was open to the Sessions either to convict or acquit *Estabrooks*, or to postpone the hearing and have the recognizance renewed; but it appears from the entry in the minutes of Sessions, that "the said *Elmira Rathburn* being "called and sworn, and it appearing to the Court that she "does not understand the nature of an oath, and cannot "understand

1859.

Ex Parte ESTABROOKS.

"understand or answer the simplest question, the case was "dismissed as the unanimous opinion of this Bench," and *Estabrooks* and his sureties discharged from their recognizance. Now, I am of opinion that the Sessions had the power thus to dispose of the case, and also that they exercised that power properly. Here was a man charged with that which could only be proved by a witness who knew nothing of the nature of an oath, and yet upon whose oath alone he was brought before the Court; and further, a witness who was so imbecile as not to understand, or be able to answer the simplest question, and therefore whose testimony could not have led to the conviction of *Estabrooks*. I will not say that the Sessions might not have postponed the hearing and required *Estabrooks* to renew his recognizance, in order that, if possible, *Rathburn* might be instructed as to the nature of an oath, and educated to the humble intelligence of understanding and answering the simplest questions; but I will say that, in my opinion, they acted with a proper discretion in not doing so. Then, as the case against *Estabrooks* was dismissed, the question now arises, could he be afterwards charged with and convicted of being the father of the child, of which *Rathburn* was afterwards delivered. It is contended that as no order of filiation could be made until after the child was born and became chargeable, therefore there could be no adjudication until that event. In common parlance we would agree that a bastard child could not be such until it was born, and that no man could be called the father of a child before it was born; but it is quite within the limited omnipotence of the Legislature to attach other significations to those terms (as they have done) and to make a man answerable to the charge of "being the reputed "father of a bastard child, *likely* to become chargeable to "some parish," before it is born. Lord *Ellenborough* in *The King* v. *DeBrouquens (a)*, has said, "In order to come under "the denomination of a bastard, must not the child be born "alive?" By section 6 of the chapter on Bastardy, *(b)*, "If "the person appear and traverse the charge, the Sessions "*shall* hear the evidence, and if satisfied the person is the

(a) 14 *East*, 279. (b) 1 *Rev. Stat.* 137.

"father

1859.

Ex Parte ESTABROOKS.

"father of the child, they shall make such order as to them "shall seem just." Which clearly implies that if they are *not* satisfied the person is the father, they *may* make such order as to them may seem just. In the case before us, they were not satisfied, for the best of reasons—no proof and no means of obtaining it—and they dismissed the case. I cannot say that this was *coram non judice*. Had sufficient proof been adduced in *January* 1858, to satisfy the Sessions that *Estabrooks* was guilty, they should have so entered the conviction, adjudged him to be the reputed father, taken his recognizance to appear at the next General Sessions, and, if the child had become chargeable in the meantime, they should have then made the order of affiliation, as prescribed by the act. (See the repealed act, 2 *Vict. c.* 42, § 3 and 4.)

In case of plea of *autrefois acquit* to an indictment, the principle is well established, that unless the first indictment was such, that the prisoner might have been convicted upon it on proof of the facts contained in the second indictment, an acquittal on the first can be no bar to the second. *Hawk. P. C. c.* 35, § 3, *Foster's C. L.* 361, *Vandercomb's case (a).* The Legislature having made a man liable to the *charge* of being the father of a bastard child *before* it is born, and as the same facts would be necessary to establish the paternity *after* the birth as *before*, I do not see how the Sessions could legally arraign *Estabrooks* on a charge of being the father of the child *after* it was born, when they had on a former occasion dismissed the charge of his being the reputed father of that identical child, *before* it was born.

PARKER, J., said that he had not been able to make up his mind entirely on this case, but had been rather disposed to agree in the view taken by his learned brother, Mr. Justice *Ritchie*. As, however, the majority of the Court were agreed in opinion that the *certiorari* should be granted, he did not wish to be considered dissentient.

N. PARKER, M. R. This was an application for a *certiorari* to remove proceedings from the Court of General Sessions for the county of *Sunbury*, held in *June* last, when an order of filiation was made against *George E. Estabrooks* for the

(*a*) 2 *Leach*, 708.

support

1859.

Ex Parte ESTABROOKS.

support of a bastard child of which one *Elmira Rathburn* had been delivered, and which was alleged likely to be chargeable to the parish of *Maugerville* in the said county. It appears by the affidavits, that at the preceding *January* Sessions, the applicant, *Estabrooks*, appeared under recognizance to answer the same charge; that *Elmira Rathburn* was called and sworn; but that as it appeared to the Justices she did not understand the nature of an oath, and could not understand or answer the simplest question the case was dismissed, and the recognizances of *Estabrooks* and his sureties discharged. After this, and after the birth of the child, *Estabrooks* was arrested and bound over to appear at the *June* Sessions, and the order of filiation was made. From these facts, which are not disputed, it appears that the charges or offences for which *Estabrooks* was tried at the *January* and *June* Sessions are identical; that is, of being the father of the child with which *Elmira Rathburn* was pregnant in *January*, and of which she had been delivered previous to *June*. The Justices at the *January* Sessions did not postpone the case and respite the recognizances, but decided the case and acquitted the party charged. The case of *Rex* v. *Tenant (a)*, seems to settle this point: see also *Pridgeon's* case *(b)*. Previous to the *January* Sessions, *Estabrooks* must have been brought before a Justice, under the 1 *Rev. Statutes*, *Cap.* 57, § 1, charged with being the father of a child of which *Elmira Rathburn* was then likely to be delivered. Upon that, he entered into recognizance, (I), by which he was bound to appear personally at the next Sessions, to "answer a charge against him of being the reputed father "of a bastard child, likely to become chargeable to some "parish in said county." In fulfilment of this recognizance, he did appear at the *January* Sessions and traversed the charge (of being the reputed father of the child). The woman also appeared to support it, and the defendant retained counsel, who appeared in his defence. The matter came on to be heard, and under the 6th section, the Sessions went into evidence; the woman was sworn and examined, and the Sessions dismissed the case, on motion of the defendant's

(a) 2 *Stra.* 716; 2 *Ld. Raym.* 1423. (b) *Cro. Car.* 341, 350.

counsel,

1859.

Ex Parte ESTABROOKS.

counsel, and discharged the recognizances. If then the case could by law be heard, as I think clearly it might, this surely amounts to an acquittal of *Estabrooks* on the charge of being the reputed father of the child with which *Elmira Rathburn* was then pregnant. It is true, that by section 9, the Sessions in *January*, before the birth of the child, could not have made an order of filiation, but by section 8 they could have postponed the making of any such order and had the recognizances renewed. By section 6, had they been satisfied *Estabrooks* was the father of the child, they were not bound to make a final order, but they could have made such order as seemed to them just; doubtless by postponing a final adjudication, and directing the defendant to enter into new recognizance. The *January* Sessions then, in my opinion, clearly had jurisdiction to try the charge against *Estabrooks* of being the father of the child, and acquitted him of that charge. That the Sessions had the right to acquit, if not guilty, though not positively so expressed, is as clearly a matter of necessary implication, as the making the order of affiliation is positively expressed. The *June* Sessions tried the very same charge against him. If he were not the father of the child during the pregnancy, he could not be so after the birth. The offence which he had committed (if committed at all) was previous to his trial in *January*, and was the same offence for which he was tried in *June*, and having been acquitted of this in *January*, it seems to me he could not be tried for it again in *June*.

That what took place in *January* was clearly a "hearing" of the case, is evident from the case of *The Queen* v. *Stamper (a)*. There notice had been given to the defendant, by the overseers, of an application to the Sessions for an order in bastardy, and the application having been *entered*, was called on. The defendant appeared to resist the charge, but no one appeared to support the application. It was held notwithstanding that this amounted to a "hearing," and that the defendant was entitled to costs of resisting the application, as on a hearing. *The Queen* v. *The Recorder of Exeter (b)*, is to the same effect. On the whole then, whatever critical

(a) 4 *Per. & Dav.* 539. (b) 3 *G. & Dav.* 167.

objection

objection there may be to the use of the term "father" in reference to an unborn child, still it is language, the meaning of which is perfectly intelligible, and which the Legislature has made use of. The term "child" being relative, and implying parentage, they have not hesitated to speak of the father of a child before its mother has given birth to it. In consequence of the different view taken by one of my learned brethren, I have been led to examine the act with much care, as well as former acts on the subject, and have been much confirmed in the view which I have expressed, by a reference to the repealed act, 2 *Vict. c.* 42. In the 4th section of that act, the term "reputed father" of a child not born, is expressly used, and not merely by reference to a schedule. The section speaks of such father as being chargeable therewith; and as it enacts that in case the child be not born at the time of appearance to answer the charge, the Sessions shall be at liberty to postpone the consideration of the charge until the next General Sessions, it is impossible, as it appears to me, to escape from the conclusion that this enactment was thought necessary, because, without it, it was the duty of the Sessions to hear the matter whether the child was born or not; and further, that the Legislature carefully abstained from making postponement imperative, while rendering it permissive. If therefore that act, which, I think, has been in substance, though not in form, re-enacted in the *Revised Statutes*, authorised the case to be heard before the delivery of the woman, it is clear to my mind that the necessity of postponing the order of filiation till a child becomes chargeable, presents no obstacle to a hearing and acquittal, if the Sessions should be satisfied that the defendant is not guilty of the charge. This seems to me a reasonable construction, and one which meets the justice of the case. If the opposite view is to prevail, then a party conscious of innocence may, for want of the necessary security, be subjected to imprisonment for six months, or it may be nearly a year, before the case can come on, and then by a cloud of witnesses may be able to establish that the charge is groundless, and that his imprisonment has been altogether wrongful. This may be the case if the cause should come on

1859.

Ex Parte ESTABROOKS.

on at the first Sessions after the child is born; but as the order cannot be made until the child is not only born, but chargeable, it might so happen that the hearing, and consequently the release of the defendant might be postponed for a very protracted period. Under these circumstances, I am of opinion that the *certiorari* should be granted.

I am authorised by his Honor the Chief Justice to express his concurrence in this view of the act, and in this judgment.

Rule absolute for a *certiorari*.

KNAPP and ANOTHER *against* M'FARLAN and DIXON.

In an action for deceit, the declaration stated that the plaintiff bargained with the defendant to buy and take an assignment from him, for the sum of five shillings, of certain judgments in the defendant's hands, *inter alia*, a judgment in favor of the defendant recovered in the Supreme Court of *Nova Scotia*

CASE for fraudulent representation. The second count of the declaration, on which the verdict was taken stated, that whereas heretofore, to-wit, on the 19th *June* 1857, at *Dorchester*, the plaintiffs bargained with the defendants to buy of them and take an assignment from them of certain judgments, debts, and claims due the estate of one *Thomas Trenholm*, deceased, and remaining at that time in the hands of the defendants: that is to say, a certain judgment entered up in favour of the defendants in the Supreme Court at *Amherst*, in the Province of *Nova Scotia*, of the term of *June* 1845, against one *Thompson Brundage* for the sum of £81 13s. 8d.; also another judgment entered up in

against *J. C.* for £129, and that the defendant then and there falsely, fraudulently, and deceitfully represented to the plaintiff that the said judgment had been recorded in the book of registry of deeds, whereby *J. C.'s* lands were bound, and that an execution could issue thereon under which his lands could be sold, and that the judgment had priority over a mortgage on the land given to *A.* Averment, that the judgment had not been recorded, and that *J. C.'s* lands were not bound thereby, and that no execution could issue on the judgment under which *J. C.'s* land could be sold, and that the judgment had not priority over *A.'s* mortgage, as the defendant at the time of making the said false and deceitful representation well knew; whereby the defendant falsely deceived the plaintiff, and thereby the judgment against *J. C.* became of no value to the plaintiff, and he had sustained damage to the amount of £500, in not being able to issue execution and sell the land, and in consequence of the judgment not having priority over *A.'s* mortgage. It was proved that the defendant was the attorney on the judgment, that it was not recorded, and that by the law of *N. Scotia* land could not be sold under execution unless the judgment was recorded. Verdict for the plaintiff for £126. Held, that as the declaration did not show that the false representation was the inducement to the plaintiff to enter into the contract, but that the contract was only for the assignment of the judgment (which the defendant had given the plaintiff), and as the injury to the plaintiff depended on the consideration paid, and there was no allegation of the value of the judgment, or of *J. C.'s* land—the verdict could not be sustained.

the

1853.

KNAPP et al. v. M'FARLAN.

the said Supreme Court at *Amherst*, in favour of the defendants, of the term of *June* 1852, against one *James Costin* for the sum of £129 18s. 1d.; also a certain other judgment entered up in favour of the defendants in the said Supreme Court at *Amherst*, in the term of *June* 1852, against one *Peter McKay* for the sum of £42 10s. 8d.: the said plaintiffs to have and to hold the said judgments and all sum and sums of money that were then due or thereafter might accrue due or become payable thereunder; and to sue out executions on the said judgments, and to proceed thereon as they might deem necessary for collecting the amounts due, and on receipt thereof to give releases and discharges of the same, at a certain price or sum of money, to-wit, the sum of five shillings; and the defendants then and there falsely, fraudulently, and deceitfully pretending and representing to the plaintiffs that the said judgment against the said *J. Costin* had been recorded in the book for the registry of deeds in and for the county of *Cumberland*, whereby any lands of the said *J. Costin* in the said county were bound for the said judgment, and that an execution could be issued thereon against the lands of the said *J. Costin*, under which the said lands could be sold after the expiration of thirty days, and that the said judgment being so recorded had priority of a certain mortgage theretofore executed on the said lands to *Charles F. Allison* and *Joseph F. Allison*, and that the judgment against the said *Peter M'Kay* had been duly recorded in the books for the registry of deeds in and for the said county of *Cumberland*; then and there granted, bargained, sold, assigned, transferred and set over the said judgments to the plaintiffs, at and for the said sum of five shillings, and the plaintiffs afterwards, to-wit, &c., paid the defendants for the same; whereas in truth and in fact the judgment against the said *J. Costin* had not been recorded in the book for the registry of deeds in and for the said county of *Cumberland*, and the lands of the said *J. Costin* in the said county were not bound by the said judgment, and no execution could be issued thereon against the lands, under which the said lands could be sold after the expiration of thirty days; and the said judgment

1859.

KNAPP *against* M'FARLAN.

not being recorded, had not priority over the mortgage executed to the said *Charles F. Allison* and *Joseph F. Allison;* and whereas in truth and in fact the judgment against the said *Peter M'Kay* had not been recorded in the books for the registry of deeds in and for the said county of *Cumberland* in the said Province, as the defendants at the time of making the said false and deceitful representations well knew. And the plaintiffs further say that by means of the premises, the defendants on, &c., falsely and fraudulently deceived the plaintiffs, and thereby the judgment against the said *J. Costin* has become and is of no value to the plaintiffs, and they have sustained great damage and loss thereby, to-wit, the sum of £500, in not being able to issue execution against the lands of the said *J. Costin* and selling the same, and in the lands of the said *J. Costin* not being bound for the amount of the said judgment, and in the said judgment not having priority over the mortgage given to the said *Charles F. Allison* and *Joseph F. Allison;* and whereby also the judgment against the said *Peter M'Kay* has become and is of no value to the plaintiff, &c. Plea—not guilty.

At the trial before *Parker, J.*, at the last *Westmorland* circuit, it appeared that the defendants were the executors of *Thomas Trenholm*, and that the plaintiffs' wives were two of the devisees; that there was a dispute between the executors and devisees about the division of the property, and in order to settle it, the defendant *M'Farlan* proposed to assign to the plaintiffs several judgments which the defendants, as executors of *Trenholm*, had recovered against parties in *Nova Scotia*, on the plaintiff *Knapp* giving them a release of his claim against the estate, and an indemnity against the claims of some of the other devisees. The plaintiffs accepted this offer, and an assignment of the three judgments mentioned in the declaration was made to the plaintiffs on the 19th *June* 1857, and at the same time *Knapp* gave the defendants the release and indemnity. *M'Farlan* was an attorney of the Supreme Court of *Nova Scotia*, and was also the attorney in the several suits. *Knapp* swore that during the negotiation, and before the assignment, *M'Farlan* represented to him that these judgments were recorded according to

1859.

KNAPP *against* M'FARLAN.

to the law of *Nova Scotia*, so as to bind the debtors' lands; that the judgment against *Costin* was recorded in 1852, and before a mortgage given by him to Messrs. *Allison*; and that in consequence of being so recorded, the plaintiffs could issue executions on the judgments and sell the land after thirty days' notice. It appeared that *Allison's* mortgage was recorded in *January* 1856, and that the judgment against *Costin* had never been recorded, and therefore that no execution could issue against his real estate. The defendant *M'Farlan* denied any recollection of telling *Knapp* that the judgments against *Costin* and *M'Kay* were recorded, and expressly denied all knowledge of *Allison's* mortgage till after the assignment. He also stated that he told *Knapp* that the judgments against *Costin* and *M'Kay* were worthless, as they had no property that could be levied on, and that the principal object of the defendants in assigning them, was to get rid of them as assets in their hands.

The learned Judge left the following questions to the jury: —1st. Did *M'Farlan*, before the assignment, state to *Knapp* that the judgment recovered by the executors against *Costin* had been registered before *January* 1856, so as to be binding on real estate; and did *M'Farlan* by such representation, induce *Knapp* to accept the assignment of the judgments and give the release and guarantee? If they found this question in the negative, the verdict must be for the defendants; but if they found in the affirmative, then—2d. Had the plaintiffs sustained any damage in consequence of such representation? The measure of damages would be the difference between the sum that could have been recovered on an execution on that judgment if it had been duly registered, and the amount recoverable without such registry. The jury answered both questions in the affirmative, and gave a verdict against the defendant *M'Farlan* for £126.

A rule *nisi* for a new trial having been granted on the grounds of misdirection and that the verdict was against evidence;

A. L. Palmer shewed cause in *Hilary* term last. If the representation of *M'Farlan* that the judgment was recorded, and that it bound *Costin's* land, was fraudulent, the plaintiffs have

1859.

KNAPP against M'FARLAN.

have a right to maintain the action, and it is of no consequence what they could have recovered under the judgment. The plaintiffs released their claim against the executors in consequence of the representation. The getting these judgments was the inducement to the plaintiffs to alter their condition, and if they have sustained damage in consequence, the defendant is liable though he did not intend any fraud in making the representation. *Watson* v. *Poulson (a)*. [PARKER, J. In that case the representation was by parol; here there is a written agreement, which may make a difference.] In *Dobell* v. *Stevens (b)*, there was a written contract for the sale of a house, but it was held nevertheless that the vendee could maintain an action for a verbal deceitful representation by the vendor, in consequence of which the vendee was induced to give a larger price. *Pilmore* v. *Hood (c)*, and *Fuller* v. *Wilson (d)*, are to the same effect. And in *Cornfoot* v. *Fowke (e)*, it was expressly held that if a representation was fraudulent, an action for deceit could be maintained, though the representation was not embodied in the contract. Here the defendant entered up the judgment himself, and must have known whether it was recorded or not: his representation therefore was wilfully untrue. *Taylor* v. *Ashton (f)*, *Randell* v. *Trimen (g)*. The rule of *caveat emptor* does not apply in a case of fraudulent representation.

A. J. Smith, contra. The action is founded on a contract, and therefore if it fails as against *Dixon*, it fails altogether. 1 *Chit. Pl.* 99. The case arose out of a contract of sale, and is described in the declaration as such, and the action must fail on the ground of variance, unless a joint contract is proved. *Weall* v. *King (h)*, *Bretherton* v. *Wood (i)*, *Max* v. *Roberts (j)*. But assuming that the action might under certain circumstances be maintained against one defendant, it must be shewn that he knew the representation to be untrue,—that there was moral fraud—for if he believed the

(*a*) 7 *Eng. R.* 535; 15 *Jur.* 1111. (*b*) 3 *B. & C.* 623. (*c*) 5 *Bing. N. C.* 97.
(*d*) 3 *Q. B.* 58. (*e*) 6 *M. & W.* 358. (*f*) 7 *Jur.* 973.
(*g*) 37 *Eng. R.* 275. (*h*) 12 *East*, 452. (*i*) 9 *Price*, 408.
(*j*) 2 *New R.* 454.

judgment

1859.

KNAPP *against* M'FARLAN.

judgment was recorded when he made the representation, he is not liable, and the Judge should have so directed the jury. *Pasley* v. *Freeman (a)*, *Polhill* v. *Walter (b)*, *Taylor* v. *Ashton (c)*. The representation not being in the written agreement, the evidence of it should not have been admitted. *Rosc. Ev.* 95. The rule of *caveat emptor* applies in this case, because the non-registry of the judgment was a patent defect, which the plaintiffs might have ascertained by search.

Cur. adv. vult.

N. PARKER, M. R., now delivered the judgment of the Court. In this case, several important points were raised at the trial and on obtaining the rule. The verdict, which was against *M'Farlan* alone, was taken upon the second count of the declaration only; but as the evidence was produced and admitted in reference to the whole declaration upon which the case was opened, it is necessary in order to determine whether the plaintiffs are entitled to retain their verdict, to ascertain what is the cause of action set forth in the second count. That count is as follows:—"For that "whereas," &c., "the said plaintiffs bargained with the said "defendants to buy of them and take an assignment from "them of certain judgments, debts, and claims belonging to "the estate of one *Thomas Trenholm*, deceased, and remain-"ing at that time in the hands of the said defendants, that is "to say." Three several judgments are then described, recovered in the Province of *Nova Scotia*, the first for £81 13s. 8d.; the second, which is the only one which is particularly referred to afterwards, against one *James Costin*, recovered at *Amherst*, in the county of *Cumberland*, in *June* term 1852, for £129 18s. 1d.; and a third for £42 10s. 8d. To have and to hold the same, and the sums then due or that might thereafter accrue due thereon. The count also states that the defendants were, for the purpose of collecting and receiving the same, to constitute the plaintiffs their attorneys, and then sets out the consideration to be paid by the plaintiffs for this assignment, namely, "a certain price or "sum of money, to-wit, the sum of five shillings." This is

(a) 2 *Smith's L. C.* 70. (b) 3 *B. & Ad.* 114. (c) 11 *M. & W.* 401.

the

1859.

KNAPP *against* M'FARLAN.

the bargain alleged to have been made. The defendants were to give the assignment of these judgments, with the necessary power for recovering them, and the plaintiffs were to pay, as the price of such assignment, the sum of five shillings. The count then proceeds:—"And the defendants "then and there falsely, fraudulently and deceitfully pre- "tending and representing to the plaintiffs that the said judg- "ment against the said *J. Costin* had been recorded in the "book for the registry of deeds for the county of *Cumber- "land*, whereby any lands of the said *J. Costin*, in the said "county were bound for the said judgment, and that an "execution could be issued thereon, under which the said "lands could be sold after the expiration of thirty days; and "that the said judgment being so recorded, had priority "over a mortgage theretofore executed on the said land to "*C. F. Allison*," &c. Then after setting forth a further representation regarding another of the judgments, it alleges that the judgment against *Costin* had not been recorded in the registry book for the county of *Cumberland*, and that *Costin's* lands were not bound by the judgment, and that no execution could be issued thereon under which his land could be sold; and that it had not priority over *Allison's* mortgage, "as the said defendants at the time of making the said "false and deceitful representation well knew," and that by means of the premises, the defendants falsely and fraudulently deceived the plaintiffs, and thereby the judgment against *Costin* became of no value to the plaintiffs, and they have sustained damage and loss thereby to the amount of £500, in not being able to issue execution and sell *Costin's* land, and in consequence of the judgment not having priority over *Allison's* mortgage. On the evidence given, the jury found a verdict for the plaintiffs against *M'Farlan* for £126. What then is the grievance of which the plaintiffs complain? It is not alleged that these false representations were the inducement for the plaintiffs entering into the contract; but that the bargain was for an assignment of certain judgments for a certain consideration. It is not alleged that the defendants did not perform their part of the bargain by duly making the assignment; on the contrary, it is alleged that such assignment

1859.

KNAPP *against* M'FARLAN.

assignment was made. Nor is it alleged that there were no such judgments in existence. The plaintiffs then, on their own showing, got all they bargained for; and whatever representation the defendants may have made, unless they were the inducement for entering into the contract, they would not entitle the plaintiffs to recover damages. Had the plaintiffs' case been not only that these false representations had been made, but that they, relying upon them, (which was also necessary) had entered into the contract, the case might have been similar to *Polhill* v. *Walter (a)*. In that case, after the statement that certain false and deceitful representations were made, the allegation is, that the plaintiff relying on such pretended acceptance, and in consideration thereof, took the bill as payment of the sum therein specified. So also in *Weall* v. *King (b)*, the gravamen is, that the plaintiff, relying on the false representations, purchased the sheep. However material then the evidence given in regard to the rest of the declaration, as to the fact of the judgment against *Costin* not being recorded, we cannot see that under this count it could have entitled the plaintiffs to the damages given. Besides this, it is to be remarked that there is no positive allegation in any part of the declaration of the value of these judgments, nor of the value of *Costin's* land, nor indeed (except inferentially) that he had any lands; and as the injury to the plaintiffs from entering into this purchase, must depend upon the consideration paid, we do not see any ground upon which the verdict can be maintained. Therefore on this ground alone, and without entering on the various other questions which have been mooted, we think the rule must be made absolute.

Rule absolute.

(*a*) 3 *B & Ad.* 114. (*b*) 12 *East*, 452.

1859.

PATTERSON *against* TAPLEY.

In an action against the indorser of a note, the plaintiff must shew that it was presented at a reasonable hour.

Where a note was payable at a "store," and the only evidence was that when the holder went to present it the store was closed; and the defendant objected that the presentment was not shewn to have been at a reasonable hour; Held,—that in the absence of any evidence of the nature of the business carried on at the store, it might be inferred that it was closed in the due course of business, and therefore that the presentment was not made at a reasonable time.

Semble, If no question is raised at the trial about the hour of presentment, and it is proved to have been made on the day the note falls due, it might be presumed to have been made at a proper hour.

ASSUMPSIT by the indorsee against the indorser of a promissory note, payable at the store of *Henry E. Sage* in *St. John*.

At the trial before *Wilmot*, J., at the adjourned *St. John* circuit, the plaintiff proved that on the day the note fell due, a clerk in the Bank went to the place where it was made payable in order to present it, and found the store closed. The witness was not asked what hour in the day he went to make the presentment, and no motion was made for a non-suit, but the defendant's counsel in addressing the jury, objected that it should have been proved that the presentment was made at a reasonable hour. A verdict having been given for the plaintiff, and a rule *nisi* granted for a new trial on the ground of misdirection,

Gray, Q. C., shewed cause in *Hilary* term last, and *A. R. Wetmore* was heard in support of the rule.

Cur. adv. vult.

N. PARKER, M. R., now delivered the judgment of the Court. The burthen of shewing a due presentment, clearly lies on the plaintiff. It is equally clear that a presentment should be made at a reasonable time. *Bayley on Bills*, 211. And though the time when such presentment shall be considered reasonable or unreasonable, depends on circumstances, namely, the custom of the place, description of person to whom, or place where the note is made payable; is it not therefore necessary for the plaintiff to shew the place, time and manner of making the presentment, that the Court may judge whether it was proper and reasonable, or not, before an indorser can be fixed with liability, rather than the duty of the defendant to shew negatively that the presentment was not at a reasonable time? *Wilkins* v. *Jadis (a)*, shews clearly that as to bankers it is established with reference to a well known rule of trade, that a present-

(a) 2 *B. & Ad.* 188.

ment

1859.

PATTERSON *against* TAPLEY.

ment out of the hours of business is not sufficient: but in other cases the rule of law is, that a bill must be presented at a reasonable hour; that a presentment at twelve o'clock at night when a person had retired to rest, would be unreasonable; but that a presentment between seven and eight in the evening at a house in *London*, would be considered a presentment at a reasonable time. If any inference is to be drawn in the present case, we should rather say, in the absence of all proof of any usage or custom, or of the description of the place at which the note was made payable, (except what was expressed on the face of the note, that it was a "store") or of the nature of the business, or the person by whom it was carried on there, that the store was closed in the due and regular course of business, and that from its being so closed, the inference would be, that the time at which the presentment was made was unreasonable. It might indeed be sufficient for the jury to presume that a presentment proved to have been made on the proper day, was made at a proper time of day, if no question was raised in time to enable the plaintiff to give more specific proof; but when, as here, the objection is taken, and the plaintiff does not supply the proof, the presumption would be the other way. There must therefore be a new trial.

Rule absolute.

CORAM *against* WHETEN.

ASSUMPSIT. The first count of the declaration stated that whereas on the 29th *July* 1850, the plaintiff and defendant were tenants in common of certain buildings of the value of £200; that the plaintiff at the request of the defendant,

Plaintiff being lessee of land, assigned one half of it to the defendant, who entered into a bond to pay the plaintiff for half the buildings, such sum as two arbitrators should determine before a certain day: the arbitrators not having been appointed under the bond, the parties afterwards agreed verbally to refer the valuation to arbitrators, who made an award of the value: Held, that the referees were the agents of the parties to settle the value, and that the plaintiff might recover the amount awarded by them, as an account stated.

An estoppel arising from an admission in a conveyance of land, of the receipt of the purchase money, is opened by a bond from the purchaser to the vendor, conditioned to pay such sum for the property as arbitrators should determine.

1859.

CORAM *against* WHETEN

dant, sold the defendant his (the plaintiff's) undivided half of the buildings, and the defendant agreed to pay the plaintiff for the same on the 1st *September* 1852, and the plaintiff then, in performance of the said agreement, conveyed his half of the buildings to the defendant; that after the conveyance and before the ascertainment of the value of the buildings, to-wit, on the 22d *December* 1852, it was agreed between the plaintiff and defendant that the value of the buildings should be ascertained and appraised by two arbitrators to be chosen by the parties, and that the defendant would pay to the plaintiff one-half the sum so to be appraised, and the said plaintiff then and there agreed to accept the same in full satisfaction of his share of the buildings; that in pursuance of such agreement the plaintiff and defendant chose two arbitrators to make such valuation, namely, *J. V.* and *W. B.*, and that such arbitrators on the 23d *December* 1852, appraised the value of the buildings at £40, of which the defendant had notice: By means whereof the defendant became liable to pay the plaintiff the sum of £20, being the value of one-half of the said buildings. The second count after setting out the agreement in the same manner as in the first, averred that though the plaintiff was ready and willing to appoint an arbitrator to value the buildings, the defendant refused to do so by the 1st *September*, or to pay the plaintiff the value, though the defendant had ever since the sale, held and enjoyed the plaintiff's half of the buildings. The declaration also contained the common counts. Plea—*non assumpsit.*

At the trial before *Wilmot J.*, at the last *St. John* circuit, it appeared that the plaintiff, being the lessee for a term of years of land in *Carleton*, assigned one-half of it to the defendant by a deed which acknowledged the receipt of the purchase money, and the defendant on the same day gave the plaintiff a bond conditioned to pay him for his undivided half of the buildings on the land, such sum as two arbitrators to be appointed by the parties, should determine on or before the 1st *September* 1852. The defendant not having named an abitrator, no award was made under the bond; but the parties afterwards agreed verbally to refer the matter to two

1859.

CORAM *against* WHETEN.

two arbitrators, who valued the buildings at £40, half of which sum the plaintiff claimed. The defence was, that the defendant had paid the amount in work; and this question being left to the jury, they found in favor of the plaintiff for £20.

A rule *nisi* having been granted for a new trial on the ground of misdirection and the improper admission of the bond in evidence,

Gray, Q. C., shewed cause in *Hilary* term last. He contended that the bond was admissible to prove the recital of facts in the declaration and the defendant's admission of those facts; and said that it was not offered for any other purpose. The plaintiff was entitled to recover on the account stated. *Marryat* v. *Broderick (a)*, was cited.

S. R. Thomson, contra. The parties were not tenants in common at the time of the verbal agreement, for the defendant had become the legal owner of the buildings by a conveyance which acknowledged the payment; therefore there was no consideration for the agreement to refer, and the plaintiff should either have brought an action on the bond, or proceeded in equity. [RITCHIE, J. I do not see on what principle the plaintiff would be bound to go into a court of equity. The original consideration for the agreement to refer still remained.] The bond was not admissible in evidence. [N. PARKER, M. R. I cannot see why it was not admissible. It is the defendant's admission under seal, of the facts stated in the declaration.] It was not put in as an estoppel, but as evidence.

Cur. adv. vult.

PARKER, J., now delivered the judgment of the Court. This was an action of assumpsit brought to recover £20, the value of an undivided moiety of certain buildings on land which the plaintiff had held under a lease, since assigned by him to the defendant. We are clearly of opinion the plaintiff had a good cause of action to recover this £20, the only real defence being that it had been paid for by certain work, which was a question left to the jury, and which they

(*a*) 2 *M. & W.* 369.

have

1859.

CORAM *against* WHETEN.

have negatived. But we have been rather perplexed by the special counts, one of which was evidently not sustainable, the reference not being made, as there averred, under the bond, and we think the other count would require some amendment; but whether it would be right, in furtherance of justice under the late act, to allow this amendment, we are relieved from deciding, as we think the sum may be recovered on the count upon an account stated. It was objected, that the building being conveyed by the deed of assignment, which acknowledged that the consideration had been paid, the plaintiff was estopped from saying the value of the buildings remained unpaid. But we think the bond under which the value at that time was submitted to reference, being under the hand and seal of the defendant, opened the estoppel; for the rule is, estoppel against estoppel, sets the matter at large; and the bond is properly available for this purpose, although (and this was through the fault of the defendant) the time to make the award was allowed to elapse, so that the award was not under the bond. This, we think, removes the objection to the account stated; and we incline to think the award, so called, was not properly such, but an appraisement. There was no difference between the parties; the plaintiff claimed as due to him half the value of the buildings, and the defendant admitted this to be due: instead therefore of wrangling about the proper price to be paid, they both verbally agree that two of their neighbors shall fix the price, which they have done by valuing the buildings at £40. After this, what more remains to be done than for the defendant to pay the plaintiff £20 for his half? An unliquidated debt has been liquidated in the most unexceptional manner. The referees were not arbitrators, but agents of the parties to settle the amount of the debt. This is not an original view, but is supported by two cases we will cite—*Keen* v. *Batshore (a)*, and *Salmon* v. *Watson (b)*. In the first of these cases, *Eyre, C. J.*, said, "That as there were "no arbitration bonds," (and here it is the same thing, the award not being under the bond) "he should take the trans- "action respecting the reference as a statement of accounts

(a) 1 *Esp.* 194.

(b) 4 *B. Moore*, 73.

"between

1859.

CORAM *against* WHETEN

"between the parties, and an admission of the balance due "to the plaintiff; that it therefore could be given in evi- "dence under the common counts, and particularly as an "account stated." *Salmon* v. *Watson* was a case of a parol agreement respecting a house which the defendant took of the plaintiff, and with which he was to take the fixtures at a valuation to be made by two brokers. A valuation was made of fixtures and furniture at £137 — the furniture part being £20, and the defendant paid £30 on account. The declaration contained counts for goods sold and on account stated. At the trial before *Park*, *J.*, he non-suited the plaintiff, considering the value of the fixtures not recoverable on the count for goods sold and delivered, not turning his attention to the count on an account stated; but all the court were of opinion that the plaintiff was entitled to recover on the account stated. Mr. Justice *Richardson* said:—"I "am of opinion that the defendant has waived any objection "to the title by taking possession, and as he has also been "let into the enjoyment of the fixtures, he is liable to pay "the plaintiff for them according to the amount ascertained "by the appraisers in their valuation. The count as to the "account stated goes to the whole of the appraisment, and, "in point of fact, amounts to the same thing as if such valua- "tion had been made between the original parties; I therefore "think the plaintiff is entitled to recover on that count." The authority of these cases is recognised by *Watson* on Awards, and by *Starkie*, *Roscoe*, and *Chitty;* but a doubt is certainly thrown on them by the late case of *Bates* v. *Townley (a)*, where it was held, that an account stated means a settlement of accounts, in which both parties, or their agents, agree upon the amount due from one to the other; and that an arbitrator is not an agent for that purpose, for his decision is often adverse to the consent of both. It appeared, however, that the award had been made pursuant to articles of agreement in force at the time; the declaration contained a count on the award, which had been demurred to and judgment given for the defendant, and the plaintiff then sought to recover a sum awarded to him, on the common count. A

(a) 2 *Exch.* 152.

very

1859.

CORAM *against* WHETEN.

very different case from the present: and even there the court would not say that the case in *Espinasse* was wrongly decided; on the contrary, *Parke, B.*, says, "that Chief Jus-"tice *Eyre*, a very eminent judge, thought that as there was "no regular agreement to refer, constituting the arbitrator "a judge, he must be considered a delegate or agent for the "parties; and his decision proceeds solely on the ground "that the award in that particular case must be considered "as a settlement of account by an agent appointed by each "party; and it is clear that if regular bonds of submission, "or a regular submission to arbitration had been entered "into, he would not have admitted the award as evidence "of an account stated." On the strength of these authorities, and the reason of the thing, we are all of opinion the verdict should be entered on the count upon the account stated, and the rule for a new trial discharged.

Rule discharged.

ULTICAN *against* MOFFATT.

In trover for several articles, the plaintiff may give evidence of acts of conversion on several days, though there is but one count in the declaration, alleging one conversion.

TROVER for a bull and cow, tried before *Carter*, C. J., at the last *Restigouche* circuit. The declaration contained only one count, and the question was, whether the plaintiff, after having given evidence of the conversion of the bull at one time and place, had a right to give evidence of the conversion of the cow at another time and place. The Chief Justice rejected the evidence, and a rule *nisi* for a new trial was granted on that ground.

J. A. Street, Q. C., shewed cause in *Hilary* term last, and contended that the plaintiff having confined himself by his declaration to one day, was bound by it. 1 *Chit. Pl.* 161, 386. The taking might have been laid with a *continuando*. 2 *Chit. Pl.* 846.

J. M. Johnson, Q. C., *contra*, argued that the demand and refusal

refusal were evidence of a prior conversion, not of a conversion on that particular day. No authority could be found to support the defendant's objection.

1859.

ULTICAN *against* MOFFATT.

Cur. adv. vult.

PARKER, J., now delivered the judgment of the Court. This was an action of trover for the conversion of a bull and a cow, tried before His Honor the Chief Justice. The declaration contained but one count, and the plaintiff after giving evidence of the conversion of the bull at a particular time and place, proposed to give evidence of the conversion of the cow at another time and place; this evidence was objected to by the defendant's counsel, and His Honor rejected it, as there was but one count alleging one conversion. Conversion being the gist of the action of trover, and the time and place immaterial, we can see no good reason for confining the evidence to proof of one conversion of all or any part of the articles set out in a single count; nor has any authority been cited for this position. We have never known the distinction contended for here, taken at a trial before, nor can we see what purpose it would serve, other than the needless multiplication of counts in the declaration, and it would soon probably lead to a separate count for every separate article. In *Chitty's* Forms every description of goods is contained in one count, where it would seem next to impossible that there was a joint conversion of all; and where other counts are recommended, it is on account of the parties rather than the articles. A conversion is not generally proved by one act, unless there be a destruction of the goods, but the jury are left to judge from various acts proved to have been done at different times, whether a conversion has taken place; and as decided in an *American* case cited in the notes to *Starkie's* Evidence, page 1164, "Where evi- "dence is offered of a conversion at different times, if the "plaintiff had a right to the possession at either of those "times, it is sufficient." The alleged loss by the plaintiff and finding by the defendant of various articles, is capable of division and must be taken distributively, and so the verdict would be entered. There can be no doubt if there was

1859.

ULTICAN *against* MOFFATT.

a necessity for pleading specially, the defendant might plead separate pleas to the separate articles, and so raise separate issues upon each, whether there be one count or more in the declaration. For these reasons, we think the ruling of the Chief Justice—excluding the evidence tendered—was incorrect, and that the rule for a new trial must be made absolute. *Wilton* v. *Girdlestone (a)*, *Morris* v. *Pugh (b)*, *Brown* v. *Hedges (c)*, *Fouldes* v. *Willoughby (d)*, *Williams* v. *The Great Western Railway Company (e)*, may be referred to.

Rule absolute.

(*a*) 5 *B. & A.* 847. (*b*) 3 *Burr.* 1243. (*c*) 1 *Salk.* 290.
(*d*) 8 *M. & W.* 540. (*e*) 1 *Dowl. N. S.* 16.

SWEENY *against* GODARD.

Plaintiff agreed to sell land to the defendant for £40, and the defendant agreed to pay the money on a certain day, *for the consideration above named*. Held,—1. That the word "sell" necessarily included an agreement to convey. 2. That the defendant's promise to pay the money was a dependent promise, and that the plaintiff could not maintain an action therefor without tendering a conveyance of the land.

It is the duty of the seller of land to prepare the conveyance; and if he has a wife who would have a right of dower in the land in case she survived him, she should be a party to the conveyance.

ASSUMPSIT on an agreement to purchase land. The first count of the declaration stated, that whereas by an agreement in writing dated the 8th *December* 1856, made between the plaintiff and the defendant, the plaintiff agreed to sell the defendant a certain lot of land in the parish of *St. Martins (describing the land)* for the sum of £40, to be paid in the month of *July* then next, and that the defendant, in consideration of the premises and that the plaintiff had undertaken to perform all things in the agreement mentioned on his part to be performed, then and there promised the plaintiff to pay him the said sum of £40 in the said month of *July*. Averment,—that though the plaintiff has always been ready and willing to make a good title of the land to the defendant, and though during the month of *July* and since, until the commencement of the action, the plaintiff had always been ready and willing, and offered to the defendant to make a good title to him by deed duly executed of the said land on being paid the said sum of £40, according to the

agreement,

1859.

SWEENY *against* GODARD.

agreement, whereof the defendant had notice, yet that the defendant had refused to pay, &c. The second count set out the agreement verbatim, and averred a request to the defendant to pay the £40 and receive a conveyance of the land. Plea, the general issue—with a notice of defence, that no conveyance of the land was prepared by the plaintiff and tendered to the defendant.

At the trial before *Wilmot* J., at the last *King's* county circuit, the following agreement between the parties, dated the 8th *December* 1856, was proved:—

"*Daniel Sweeny* agrees to sell to *John F. Godard* a lot "of land in the parish of *St. Martins*, known as lot No. 86, "*Mount Theobald* settlement, for £40, to be paid to the said "*Daniel Sweeny* in the month of *July* 1857; also all right "and title of said *Daniel Sweeny* to lot No. 84, lying west of "No. 86. And the said *John F. Godard* agrees to pay the "said *Daniel Sweeny* £40 for the consideration above men- "tioned, in the month of *July* next."

It was admitted that the plaintiff had demanded payment, and that the defendant was not ready to pay at the time stipulated, but the plaintiff had never tendered him a conveyance of the land, though he said he would have given the defendant a deed if he would have paid the money. There was some evidence that the plaintiff's wife had refused to execute any deed. The learned Judge held, that under the pleadings, the only question was whether the defendant had paid the money, and as there was no dispute about that, the plaintiff was entitled to recover. Verdict accordingly.

A rule *nisi* for a new trial having been granted on the ground of misdirection,

S. R. Thomson shewed cause in *Hilary* term last. The plaintiff proved all the allegations in the declaration: if the averments were not sufficient the defendant should have demurred, and cannot take the objection on a motion for a new trial. But the declaration is sufficient, for according to the *English* rule the purchaser is bound to prepare the conveyance, and there is no decision to the contrary in this country. *Rippinghall* v. *Lloyd* (*a*). It is sufficient for the

(*a*) 5 *B. & Ad.* 742.

1859.

SWEENY *against* GODARD.

plaintiff to allege that he was ready and willing to execute the conveyance. 2 *Saund.* 352 *a*; *Poole* v. *Hill (a)*; *Laird* v. *Pim (b)*; *Phelps* v. *Prothero (c)*. There is nothing in the agreement making a tender of the conveyance a condition precedent to the right to recover the money, and the defendant was bound at all events to pay in *July*. It would have been useless to tender a deed to him when he was not able to pay the money.

George G. Gilbert, contra. This case falls within the rule laid down in the notes to *Pordage* v. *Cole (d)*, according to which, a tender of the deed was a condition precedent to the plaintiff's right to recover the money. The defendant was not bound absolutely to pay the money in *July*, but in consideration of the land to be conveyed to him in *July*, he was to pay; therefore till the conveyance was made, or offered to be made, the plaintiff could not recover the money. Where promises are dependent, as here, no action can be brought by either party unless he has performed, or offered to perform, his part of the agreement. *Goodisson* v. *Nunn (e)*, *Jones* v. *Barkley (f)*, *Glazebrook* v. *Woodrow (g)*, *Roberts* v. *Brett (h)*. If neither party was ready at the day appointed, the contract is rescinded and no action will lie.

Cur. adv. vult.

PARKER, J., now delivered the judgment of the Court. This was an action of assumpsit brought by the plaintiff to recover the price of land which defendant had agreed to buy of him. By the agreement in writing, dated 8th *December* 1856, the plaintiff agreed to sell certain land to the defendant, in the parish of *St. Martin's*, for the sum of £40, to be paid to the plaintiff in the month of *July* 1857, and the defendant agreed to pay the £40 for the consideration above named in the month of *July* 1857. Nothing was stipulated about the conveyance, or who was to prepare it, but the word "sell" would necessarily be construed to include "convey," and the words "for the consideration above named"

(*a*) 6 *M. & W.* 835. (*b*) 7 *M. & W.* 474. (*c*) 32 *Eng. R.* 474.
(*d*) 1 *Saund.* 320. (*e*) 4 *T. R.* 761. (*f*) 2 *Dong.* 684.
(*g*) 8 *T. R.* 366. (*h*) 36 *Eng. R.* 358.

would

1859.

SWEENY *against* GODARD.

would make the promise to pay a dependent promise. There are two counts in the declaration, one setting out the contract in substance, the other in terms; the first averring a readiness and willingness to convey, and offer to make a good title by deed duly executed on being paid the £40, whereof defendant had notice; the second count further alleging a request to pay the £40 and receive the conveyance: but neither count avers the tender of a conveyance actually executed, or prepared for execution, nor even a draft of conveyance. The defendant, in addition to the general issue, has given notice of defence that no conveyance was prepared and tendered. Under the later English authorities and the rule existing in England, the averments in the declaration would probably be considered sufficient. The defendant does not raise the question of the sufficiency of the declaration on demurrer, but relies on the omission to tender a conveyance, as a defence to a demand for the price of the land; and had there been evidence of a waiver of the conveyance, this might have aided the plaintiff: but it would be for the jury.

The question, and that an important one, is whether it be the duty of the vendor or the vendee to prepare the conveyance in this country. It is undoubtedly the general rule in England now, that unless the contrary is specified in the agreement, it is the vendee's duty to prepare and tender the conveyance for execution, unless it be dispensed with by the vendor. But when the origin of this rule is considered; that it does not arise from any principle of the common law or any statutory provision, nor did prevail in early times, and was not until very recently uniform, but has grown out of the practice of conveyancers and the intricacy of titles, and necessity of abstracts of titles and various inquiries, and that not in general aided by a registry of deeds to refer to; and that it partly depended on another rule, never recognised in this Province—that the expense of the conveyance is to be borne by the vendee—we are all of opinion that the rule forms no part of the law of this Province, where the same reasons do not exist, where there is a registry of deeds in every county, where the forms of conveyance are simple, and

1859.

SWEENY *against* GODARD.

and where it has been the almost universal practice for the vendor to prepare the conveyance, and at his expense. We have all of us (the Judges present) in our day had considerable practice in conveyancing, and our own experience supports the statement. This was alluded to also in *Ansley* v. *Peters (a)*, by the late learned Chief Justice, and Mr. Justice *Street*, both being conversant with this subject.

It may not be amiss to quote a few sentences from a book of the highest authority, 1 *Sugden on Vendors and Purchasers*, 10th ed., 372. "In agreements to purchase, the coven- "ants are to be construed according to the intent of the par- "ties, and they are therefore always considered dependent "where the contrary intention does not appear." 1 *Saund.* 320 *note* (4) 2 *New R.* 233; 10 *East*, 555; 2 *Doug.* 684; 2 *H. Bla.* 123; 3 *East*, 443. * * * * "If therefore, either "vendor or vendee wish to compel the other to observe a "contract, he immediately makes his part of the agreement "precedent; for he cannot proceed against the other without "an actual performance of the agreement on his part, or a "tender and refusal. Thus a vendor cannot bring an action "for the purchase money, without having executed the con- "veyance, or offered to do so, unless the purchaser has "discharged him from so doing." * * * * "On the "other hand, a purchaser cannot maintain an action for "breach of contract, without having tendered a conveyance, "and the purchase money. This last position has, how- "ever, been rendered doubtful by some recent *dicta* of the "Judges, (4 *Bro. C. C.* 332; 3 *Anst.* 877; 1 *East*, 627; 7 *Ves.* 278), "that it is incumbent on the vendor to prepare "and tender a conveyance, which as a general rule, cer- "tainly seems to have prevailed when the simplicity of the "common law prevailed, and possession was the best evidence "of title; but upon the introduction of modifications of estates "unknown to the common law, and which brought with "them all the difficulties which surround modern titles, it "became necessary to make an abstract of the numerous "instruments relating to the title, for the purpose of sub- "mitting it to the purchaser's counsel, and it then became

(a) 3 *Kerr*, 549.

"usual

1859.

SWEENY *against* GODARD.

"usual for him to prepare the conveyance. This practice "has continued, and is now the settled rule of the profes- "sion: the rule is indeed sometimes departed from, but this "seldom happens except in the country, and it always arises "from consent or express stipulation." *Baxter* v. *Lewis*, 1 *Forrest's Ex. R.* 61; but see 6 *Taunt.* 561. * * * "It is "settled that if a conveyance is to be prepared at the expense "of the purchaser, he is bound to tender it. 5 *East*, 198. "Now it is admitted on all hands, that the expense of the "conveyance must be borne by the purchaser, if there be "no express stipulation to the contrary. Therefore, where "there is no such stipulation, the purchaser is bound to ten- "der the conveyance." These extracts, and the cases to which they refer, shew the grounds of the practice in England, and how little applicable they are to this Province. Another reason suggests itself in this case, why the deed of conveyance should have been prepared and tendered before the money was demanded; viz., that the plaintiff had a wife living, who would be entitled to dower if she survived her husband, and who therefore ought to be a party to the conveyance. 2 *Sugd. Vend. & Pur.*, 218.

For these reasons, we are all of opinion that the direction of the learned Judge cannot be supported, and that there must be a new trial.

Rule absolute.

HASTINGS *against* O'MAHONEY.

ASSUMPSIT on a promissory note for £95 13s. 9d., dated the 18th *December* 1854, made by the defendant in favor of *M. O'Mahoney*, or order.

Defendant gave a negotiable note to *G.*, who agreed to hold it as security for a liability he had incurred for the defendant; *G.* in violation of this agreement, indorsed and transferred the note to *C.* in order to raise money for *G.'s* benefit, *C.* got the note discounted at a bank, and was obliged to take it up at maturity, and two years afterwards, he transferred it to the plaintiff. *G.* never paid the money for the defendant, which formed the consideration for the note. Held,—that unless *C.* knew the circumstances under which *G.* got the note, or was implicated in *G.'s* fraud, he would have had a right, on taking up the note from the bank, to recover the amount from the defendant, and that the plaintiff claiming under *C.*, had the same rights.

Semble, that if *C.* had taken up the note with *G.'s* money, it would have been extinguished, and he could not have recovered on it.

At the trial before *Wilmot*, J., at the last *King's* circuit,

it

1859.

HASTINGS *against* O'MAHONEY.

it appeared that the note was given under the following circumstances:—The defendant, who resided in this Province and owned a vessel, effected an insurance upon her in *New York* through the agency of one *Gordon*, an insurance broker residing there. The practice of the Insurance Office was to take a note for the premium at the time of insuring, which, if unpaid, the insurers reserved the right to deduct from any loss they were called upon to pay on the policy; but as notes of non-residents were not accepted, *Gordon* undertook to furnish the premium-note, on the defendant giving him the note in question, which included the premium and broker's commission. The note was drawn by the defendant in favor of his brother, who indorsed it and gave it to *Gordon*, who agreed to deposit it in a bank at *St. John*, as an indemnity for the note he was to give the Insurance Office; but instead of doing so, he indorsed it and transferred it to one *Crane* to enable him to raise money to pay a liability of *Gordon's*; *Crane* indorsed it to *Allison* who got it discounted at a bank in *St. John*, and it was taken up at maturity by *Crane*, who held it upwards of two years before he transferred it to the plaintiff. While *Crane* held the note, he demanded payment from the defendant, who refused to pay, stating that *Gordon* had defrauded him by transferring the note. *Gordon* did not pay the premium, and the vessel having been lost, the amount was deducted by the office out of the sum payable to the defendant on the policy.

The learned Judge directed the jury, that as the plaintiff received the note over-due, he took it subject to all the equities which existed between the defendant and *Gordon*, who was virtually the payee; he therefore thought the plaintiff was not entitled to recover. Verdict for the defendant.

A rule *nisi* for a new trial having been granted on the ground of misdirection,

Hazen, Q. C., shewed cause in *Hilary* term last, and *S. R. Thomson* was heard in support of the rule.

Cur. adv. vult.

1859.

HASTINGS *against* O'MAHONEY.

PARKER, J., now delivered the judgment of the Court. This was an action by the indorsee against the maker of a promissory note dated the 18th *December* 1854, payable in four months after date. The note was made payable to *M. O'Mahoney*, or order, and indorsed by him in blank and delivered to one *Gordon*, by *Gordon* to *Crane*, and by *Crane* to the plaintiff. This was the plaintiff's *prima facie* case, which entitled him to recover if it was not sufficiently answered. Now, without doubt, *Gordon* having received the note from the defendant as an indemnity for the note which he (*Gordon*) had given to the Insurance Office, ought not to have transferred the note to *Crane*, but should have retained it according to his agreement. But, unfortunately for the defendant, instead of giving a note payable to *Gordon* alone, or expressing on the face of it the purpose for which it was given, he, having confidence in *Gordon*, gave a note payable to order and indorsed in blank, which left it entirely in the power of *Gordon* to set it afloat in the market. *Gordon* instead of retaining it, as he should have done, indorsed it and transferred it to *Crane*, and *Crane* indorsed it to *Allison* who got it discounted at a bank in *St. John*. It was not paid at maturity by the defendant or *Gordon*, and *Crane* was obliged to take it up at the bank. The note did not thereby become a discharged obligation, but was an available security as against the maker in the hands of *Crane*, or any *bona fide* holder receiving it from him, unless he can be implicated in, or shewn to be privy to what may be called the fraud committed by *Gordon*. There is no doubt *Crane* received the note in order to raise money to pay a bill of *Gordon's*, and may therefore be considered as the agent of *Gordon*, but without knowledge of the circumstances under which the note was given to *Gordon;* but in order to raise money on it for *Gordon*, he indorsed it and gave it to *Allison* to get discounted. When the bank discounted the note, the bank became the *bona fide* holder, and so remained when it became due, and for aught we see could surely have looked to the maker for payment. The maker having refused payment, and *Crane* being obliged to take the note up with his own money, he therefore stood in the shoes

1859.

HASTINGS *against* O'MAHONEY.

shoes of the bank. Had it appeared that he had taken the note up with *Gordon's* money the case would be very different, but that did not appear; and if there was evidence from which that could be inferred, it should have been left to the jury.

The circumstance of *Crane's* having retained the note over two years before transferring it to the plaintiff, and of his having some time before such transfer, demanded payment of the defendant, who refused to pay, alleging as a reason, the fraud committed on him, is no doubt very suspicious, but would not of itself take away *Crane's* right to recover from the defendant as the maker of the note. Neither would the fact that *Gordon* had never paid the premium of insurance, but that it was deducted by the office from the defendant's money, be a defence to an action by *Crane* on the note, unless *Crane* can be implicated, or was in privity with *Gordon*. It may be admitted that *Gordon*, though not a payee named in the note, must be treated as an original party, and also that if the action had been brought by *Gordon*, his right to any part of it as commission for his agency in effecting the insurance would be very questionable, he having failed in part of his duty to the defendant; but we cannot perceive in the case, sufficient evidence to warrant the learned Judge in directing the jury that the plaintiff took the note subject to all the equities existing between the maker and payee, allowing that *Gordon* was virtual payee. He took it subject to all the equities, and clothed with all the rights existing between *Crane* and the defendant; and *Crane*, for aught we see, might have recovered on it. At least, the question for the jury was not that which was laid down to them by the learned Judge. *Chalmers* v. *Lanion* (*a*), in which the Court of *King's Bench* supported Lord *Ellenborough's* ruling, seems clear on the point, and to be confirmed by the subsequent case of *Cripps* v. *Davis* (*b*). We think therefore the rule for a new trial should be made absolute.

Rule absolute *(c)*.

(*a*) 1 *Camp.* 383. (*b*) 12 *M. & W.* 159.

(*c*) See *Burrough* v. *Moss*, 10 *B. & C.* 558; *Whitehead* v. *Walker*, 10 *M. & W.* 696; *Oulds* v. *Harrison*, 28 *Eng. R.* 524.

1859.

ATKINSON *against* SMITH and OTHERS.

The defendant has not a right on the cross-examination of the plaintiff's witness, and before the defence is opened, to prove a justification of which he has given notice, and the affirmative of which lies on him—no question leading to it having been asked on the examination in chief.

TRESPASS for breaking and entering the plaintiff's close and cutting down a mill-dam. Plea—not guilty; with a notice of defence, that the *locus in quo* was a branch of the *Buctouche* river, which was a public navigable river for driving logs and lumber; that it was obstructed by a mill-dam built across it, and that the defendants having occasion to pass down the river with their lumber, were obliged to remove a part of the dam to enable them to pass. There was another notice stating the river to be a public highway and navigable stream, and that the defendants removed the dam to enable their lumber to pass down.

At the trial before *Parker, J.*, at the last *Kent* circuit, the defendants' counsel proposed on the cross-examination of one of the plaintiff's witnesses, to ask certain questions connected with the justification, which had not been enquired into on the examination in chief, and were not available on the general issue; but the learned Judge ruled that the evidence could not be gone into till the defendants had opened their case. In leaving the case to the jury, the learned Judge said he did not think the evidence proved that the river was a navigable river, and consequently it was not a public highway within the rules of the common law, and therefore the justification had not been proved; but in the event of his being wrong on this point, he asked the jury to find whether there had been more damage done to the plaintiff's mill-dam than was necessary to make a passage for the defendants' logs, if they had a right to the free use of the stream for that purpose. The jury found that the justification was proved, but gave a verdict for the plaintiff for £25, for the excessive damage in cutting the dam.

A rule *nisi* for a new trial having been granted on the ground of the improper rejection of evidence,

D. S. Kerr shewed cause in *Hilary* term. He contended that since the case of *Browne* v. *Murray* (*a*), the rule was,

(*a*) *R. & M.* 254.

1859.

ATKINSON *against* SMITH.

that the plaintiff might either go into his whole case in the first instance, or merely prove his *prima facie* case and leave the defendant to answer it. That case was confirmed in *Shaw* v. *Beck (a)*, which shewed that the particular period of the cause when evidence should be received, was in the discretion of the Judge. The defendant had no right to prove a justification until the plaintiff's case was closed, unless the plaintiff went into the whole case in the first instance.

A. J. Smith, contra. It was a matter of right for the defendant to extract from the plaintiff's witnesses on cross-examination, all they knew about the case. The witness was sworn to tell the whole truth, and he was bound to answer all questions put to him, if when answered they would be legal evidence. It was not a matter in the Judge's discretion at all, but a matter of right. [PARKER, J. I thought the defendants had no right to go into evidence on cross-examination, of any matter that did not constitute a defence under the general issue.] The recent alteration in the law, allowing the parties to give evidence, required that the old practice should be relaxed, and that the defendant should be allowed to prove his case by cross-examination of the plaintiff's witnesses.

Cur. adv. vult.

PARKER, J., now delivered the judgment of the Court. The only point on which the rule was granted in this case was, the rejection of evidence—the rejection not amounting to an exclusion, but a postponement of the evidence tendered, until a later stage of the trial. No injustice seems to have been done by the ruling, even if wrong, for the defendants, though somewhat irregularly, have had the benefit of their justification of which they went into proof, damages having only been given for the excess; but as the point has now come distinctly up, it is very important for our future guidance that it should be settled, especially as there has not hitherto been an entire uniformity of practice, though the deviations from what we all believe to be the true rule, have not been frequent. The question is, has the defen-

(*a*) 20 *Eng. R.* 309; 8 *Exch.* 392.

dants'

1859.

ATKINSON *against* SMITH.

dants' counsel a right on the cross-examination of the plaintiff's witnesses, and before he has opened the defence, to prove a special justification of which notice has been given under the act of Assembly, and the affirmative of which, if pleaded and traversed, would lie on the defendant—a right not to be controlled by the discretion of the Judge, and where the plaintiff's counsel has carefully and advisedly abstained from leading to it by the examination in chief? It appears to the Judges present (and I should add we have not been able to confer with His Honor the Chief Justice on the point) that the defendant has no such right, and that the ruling at the trial was quite correct; indeed, we think it would be almost impossible fairly to try causes if a right existed to the extent claimed. The difficulties attendant on trials at *Nisi Prius* by the generality of pleading, and which it has been the policy of the Legislature of the mother country of late years to contract, have been much enhanced by recent legislation in this Province, to compensate for which, whatever the benefits may be in other respects, certainly relief to the Judges is no part of the equivalent. It would be impossible for the Judge to decide on the relevancy of many questions put by the defendant's counsel, and it would be in the power of an ingenious counsel to multiply discussion to almost any extent. It would be most inconvenient, and often positively unjust, to interrupt the course of the examination of the plaintiff's witnesses while constantly recurring arguments were gone into on the admissibility of proof under the notice of defence, to be at once heard and decided on, which would be found afterwards when the real defence, if any, was opened, to be utterly useless, except for the purpose of making difficulties and causing ruinous delay. The Judge's notes would become a mass of confusion; and no better illustration could he given than a case before us at the last term, where, in an action of slander, charging theft and false swearing, the defendant justified under a notice of over a dozen larcenies in different places, and half a dozen perjuries. Until the defendant's case was opened, what question could a Judge say might not be directly or indirectly applicable to some part of such matter?

1859.

ATKINSON *against* SMITH.

ter? The discretion which is exercised by the Judge would in reality be shifted to the defendant's counsel, who, under the prompting of a crafty client, would find his duty much more arduous than it is at present.

We do not find any case in which the point has been expressly decided: none was cited, and we have not had time for much research; but the text writers, we think, so far as they go, support our opinion. In 1 *Starkie on Ev.* 3rd ed. 188, it is said—"The witness cannot be cross-examined as "to the contents of a written document which is not pro- "duced, nor as to the contents of a written document which "is in the hands of his adversary, and which he has had notice "to produce; for this is part of the case of the party who "cross-examines, which cannot be gone into until that of his "adversary has been concluded." And in *Greenl. Ev.* § 447 —"A party, however, who has not opened his own case, "will not be allowed to introduce it to the jury by cross-ex- "amining the witnesses of the adverse party, though after "opening it, he may recall them for that purpose." Mr. *Phillips*, after observing that the cross-examination as to the contents of a lost or destroyed paper would not fall within the objection, observes—"It may, perhaps, be suggested that "since the proof of the loss or destruction of the writing is "strictly necessary before the counsel can cross-examine as "to its contents, the introduction of such antecedent proof "might occasion great inconvenience, by disturbing the re- "gular progress of the cause, and distracting the attention. "But when this inconvenience is likely to be felt in any great "degree, it will be always in the power of the Judge, if he "shall think proper, either to admit in the first instance the "witness' statement of the contents of the writing, or to "reserve the power of cross-examining as to its contents, "until the time has arrived when the counsel on the oppo- "site side shall enter upon his case." 1 *Phill. Ev.* 283. There was also a case of *The Dean and Chapter of Ely* v. *Stewart (a)*, in which Lord *Hardwicke*, a very eminent Judge both at law and in equity, inclined to draw the line closer than we have done. He says—"Where at law a witness is pro-

(a) 2 *Atk.* 44.

"duced

"duced to a single point by the plaintiff or defendant, the "adverse party may cross-examine as to the same individual "point, but not to any new matter."

Two rules have been long established and acted on generally:—1st. That the defendant cannot go into evidence of a set-off on cross-examination of the plaintiff's witnesses; and we are aware of no distinction whether the set-off be on notice or plea. 2nd. That the defendant is not entitled to put any deed or paper in evidence on cross-examination; although for convenience sake this is sometimes allowed, but always on the understanding that it is to be considered part of the defendant's evidence. Neither of these rules are entirely analogous, although the reason for them almost equally applies. It is quite obvious that if on cross-examination, the defendant be allowed to prove a justification, the re-examination by the plaintiff's counsel will unavoidably assume the shape of a cross-examination, on which the defendant's counsel would require to re-examine.

As to the argument raised on the form of the witness' oath, it is hardly necessary to say more than that, so far as the conscience of the witness is concerned, the extent to which he is allowed to state matters which he may himself deem part of the whole truth, and which may be very properly stated in due order, and ought then to be fully stated, must be, and always has been under the regulation of the Judge. His conscience is absolved when the Judge requires him to be silent.

For these reasons, the rule will be discharged.

Rule discharged.

1859.

DOE on the demise of VERNON and OTHERS *against* WHITE.

The estate of a mortgagee in fee, who has not taken possession of the land, is not seizable in execution on a judgment against him.

The fact of there being no bond or covenant to pay the money, does not affect the question.

SPECIAL Case. The defendant mortgaged land in fee to *Moses Welling*, who afterwards left the Province, (never having been in possession of the land); proceedings were taken against him under the Absconding Debtors' Act, and trustees appointed. *Joseph A. Crane* had recovered a judgment against *Welling*, upon which execution was issued, and *Welling's* interest in the land was sold, and purchased by *Crane*, who conveyed to the lessors of the plaintiff. The mortgage contained no covenant for the payment of the money and recited no bond given by the mortgagor. The defendant held under the trustees of *Welling's* estate. The question for the opinion of the Court was, whether the legal estate which *Welling* had in the land as mortgagee, could be seized and sold under the execution.

The case was argued in *Hilary* term last by *A. L. Palmer* for the plaintiff, and *S. R. Thomson* for the defendant.

A. L. Palmer for the plaintiff. The sheriff's deed conveyed all the estate of *Welling* in the land, both at law and in equity, and the purchaser took both the legal interest in the land and the equitable interest in the debt. By the *Revised Statutes*, *Cap.* 113, § 7, "The right of a party beneficially interested in land held in trust for him, may be "taken in execution for payment of his debts, in the same "manner as if he was seized or possessed of such lands, and "his legal and equitable estate shall vest in the purchaser." *Martin* v. *Mowlin (a)*, and *Doe* v. *Bennett (b)*, shewed that there was no difference between the estate in the land and the money due on the mortgage. In the former case, Lord *Mansfield* said, the estate in the land was liable to debts. The intention of the Legislature was, that all the interest a party had in land should be seizable in execution. The sixth section of the act authorized "a right of entry" to be seized and sold. A mortgagee had both the legal estate and

(*a*) 2 *Burr.* 969. (*b*) 5 *Eng. R.* 536.

the

1859.

DOE dem. VERNON *against* WHITE.

the right of entry. In *Doe* v. *Donnelly (a)*, there was no intention to pass the debt.

S. R. Thomson, contra. The mortgage was only a security for the debt; and as the debt could not be taken in execution, neither could the estate of the mortgagee in the land. *Doe* v. *Donnelly* shewed that the legal estate did not pass by a deed, unless the debt passed. The sheriff did not profess to assign the debt in this case. [N. PARKER, M. R. If the legal estate is transferred by the sheriff's deed, see the position of the mortgagor when he comes to redeem: he finds the legal estate in the hands of one party, and the debt in another. Is he to redeem against both?] The interest of a mortgagee in the land was not such a "right of entry" as was authorised to be seized and sold by the sixth section of the act (1 *Rev. Stat.* 291), nor did this case come within the seventh section of the act, which authorised the sale of lands of a *cestui que trust* for payment of his debts. The mortgagor was the real owner of the land; the debt being the principal, and the land the accessory. *Cruise's Dig.* Title XV. *Mortgage. Ch.* I. § 14.

Cur. adv. vult.

PARKER, J., now delivered the judgment of the Court. The question submitted by the special case is, whether the legal interest which a mortgagee has in land conveyed by a deed of bargain and sale in fee by way of mortgage, can be seized in execution by a judgment creditor of the mortgagee, and the estate of the mortgagee transferred by the sheriff to a purchaser under the execution, where on the one hand the mortgage contains no covenant for the repayment of the money, nor recites any bond as given by the mortgagor; and on the other, it does not appear that the mortgagee has ever taken possession of the land. The circumstance of there being no bond nor covenant to pay the money lent, would not seem to affect the question; as it was decided in *Yates* v. *Aston (b)*, that the money loaned on security of a mortgage without bond or covenant to pay, might be recovered under the common *indebitatus* count in debt: and see

(a) 3 *Kerr*, 238. (b) 4 *Q. B.* 182.

Allenby

1859.

DOE dem. VERNON *against* WHITE.

Allenby v. *Dalton (a)*. Lord *Denman* in giving judgment says—"The mortgage does not appear to have been taken "in satisfaction, but as a security collateral to the contract "raised by the request and the advance in consequence."

The mortgage then being but collateral and accessory to the debt, if the debt cannot be taken in execution, can the mortgage estate? In *Cooper* v. *Gardner (b)*, the question was raised whether the estate which the defendant had of a term in lands as mortgagee, could be extended, the mortgagor remaining in possession. The sheriff of *Anglesea* had extended the land, and delivered to the plaintiff a moiety thereof, according to the statute. The question came before the Court on an application by the mortgagor to set aside the inquisition, and also by the executrix of the mortgagee. It was argued that the mortgagor was not prejudiced: that as to legal rights, the elegit only put the judgment creditor into the situation in which the defendant was before, according to the observation of *Gibbs*, C. J., in *Rogers* v. *Pitcher (c)*, and all the present equities between the mortgagor and mortgagee would still subsist. Sir *J. Campbell* for the application, said—"The mortgagor and Mrs. *Hatton* "(executrix) are entitled to contend that an interest such "as this, in a mortgage term, cannot be taken under an *elegit*." The Court refused to decide the question on the summary motion: *Coleridge*, J., observing—"As the case is put on "behalf of the mortgagor, there is only a false finding, "(namely, on the inquisition under the *elegit*) by which he "need not be bound."

As it seems clearly settled that the judgment creditor cannot get possession of lands extended under an *elegit* where there is a resistance—*Hillary* v. *Gay (d)*—without bringing ejectment, the question would properly arise on the trial of that action, and therefore there was no necessity for the summary interference of the Court; and we should probably decide in the same way, if this had been a mere summary application on behalf of the mortgagor or his assigns or trustees. The Statute 1 & 2 *Vict.* c. 110,

(a) 5 *Law Jour.* 312.
(b) 3 *A. & E.* 211.
(c) 6 *Taunt.* 206.
(d) 6 *C. & P.* 284.

§ 11,

1859.

DOE dem. VERNON *against* WHITE.

§ 11, extends the right of creditors, and allows the *elegit* to operate on lands, tenements, and hereditaments held in trust for a debtor, or over which he had any disposing power which he might, without the assent of any other person, exercise for his own benefit; with a proviso that as against purchasers, mortgagees, or creditors who shall have become such before the time appointed for the commencement of the act, such writ of *elegit* should have no greater force than an *elegit* would have had before the act passed. By the Statute 17 & 18 *Vict. c.* 125, § 61 and 64, styled "*The Common-Law Procedure Act*, 1854," power is given to a Judge to allow the attachment of debts of the judgment debtor, and to order the garnishee to appear, and to pay to the judgment creditor the debts he owes to the judgment debtor, and the Judge may allow the judgment creditor to bring an action against the garnishee if he dispute the debt. Now it would be somewhat curious if a judgment creditor could, on *elegit*, seize and extend the mortgage which is security for the debt, while the debt itself could not be touched except under a Judge's order, and might be attached at the suit of another creditor. It was decided in *Taylor* v. *Cole (a)* that the exact interest which an execution debtor had in a term of years need not be stated: Lord *Kenyon* saying—"It is impossible "to suggest any possession of a certain term that is not the "subject matter of a seizure by the sheriff under a *fi. fa.*"

It may be doubted whether the mortgagee of a term has any legal interest which can be seized until he enters and takes possession, nor do we find any instance in which it has been held, that on a *fi. fa.* against a mortgagee of a term of years, his interest in the term may be sold. In *Bac. Abr.* "*Execution*" (C), it is said—"Nor can the sheriff take in execution "goods pawned or gaged for debt, nor goods demised or let- "ten for years, nor goods distrained." *Farr* v. *Newman (b)*, decided, that goods of a testator in the hands of his executor could not be seized in execution of a judgment against the executor in his own right. And yet the property in the goods was clearly in the executor, therefore property is not the only criterion; and the executor could clearly have

(*a*) 3 *T. R.* 292.

(*b*) 4 *T. R.* 621.

1859.

DOE dem. VERNON *against* WHITE.

transferred them, therefore the right to transfer does not alter the matter, or give the sheriff a right to seize. The Court here has held that, under the act of Assembly, an equity of redemption may be seized and sold under *fi. fa.*: that is, the Court considers the equity of redemption to be an estate in the land which may be seized; as therefore the estate of the mortgagee would only be a concurrent estate, it would not be right to treat the land as seizable both on an execution against the mortgagor and mortgagee. The mortgagor's estate is put on the same footing as that of a pawner of goods, whose right is sold subject to the lien. If then this may be done, would it not follow that if a mortgagee's right could also be seized, it would not be confined to the first mortgagee, but that the right of a second, third and fourth might also be seized; for they each hold an interest in the equity of redemption? And if the mortgagee's right can be seized, the mortgagor might be sued for the debt by the creditor after he had been turned out of possession by the vendee of the sheriff. If a mortgagee's interest in land could be seized and sold, what is the criterion of value of the thing sold? Not the value of the land, nor the value of the estate in the land, for the whole legal estate is vested in the mortgagee, but the amount due on the mortgage. The law not providing for any registry of part payments, the whole legal estate remains in the mortgagee, though but a very small part of the debt remains unpaid, (indeed the whole may be paid, and the estate remain until a discharge is signed on the record). The amount due on the mortgage, which is the whole value of what could be sold, is the debt from the mortgagor to the mortgagee, and yet that debt cannot be seized and sold; neither if the mortgage contained a power of sale, would that power pass by the sheriff's deed. The sheriff cannot evidently take the mortgage deed in execution and assign that.

In 2 *Fonblanque on Equity*, in a note to page 257, it is said—"As to the nature of the estates of the mort-"gagor and mortgagee, it seems to be at length settled, that "as the mortgagee is considered as holding the estate merely "in the nature of a pledge or security for payment of his "money,

1859.

DOE dem. VERNON *against* WHITE.

"money, a mortgage though in fee (the legal estate in which "descends to the heir at law) is considered in equity only "as personal estate." And in page 258—"As to the estate "of the mortgagor, though formerly doubted whether he had "more than a right of redemption, it is now established that "he hath an actual estate in equity, which may be devised, "granted, and entailed." In 1 *Maddox Chan.* 512,—"It is "a rule in equity that a mortgagee is only considered as a "trustee, and that a mortgage, as in the civil law, is but a "security for the money lent. * * * * Nothing real "passes to the mortgagee, and the mortgage conveys nothing "in the land, neither dower nor tenancy by the curtesy. "* * * * The equity of redemption is considered as "an estate in the land." In 2 *Sugd. Vend. & Pur.* 10*th ed.* 215—"The wife of a trustee in fee, or of a mortgagee in fee "of a forfeited mortgage, is at law entitled to dower, but a "fine was on that account never required by a purchaser; "because if the wife were to be so ill-advised as to prose- "cute her legal claim, equity would at this day undoubtedly "saddle her with all the costs." 2 *Freem.* 43, 71. It is said in *Cruise's Dig. Title* XV. "*Mortgage*" *Ch.* I. *s.* 14,—"As "money borrowed on mortgage is seldom paid on the day "appointed, mortgages are now become entirely subject to "the Court of Chancery, where it is an established rule that "the mortgagee holds the estate merely as a pledge or secu- "rity for the repayment of the money; therefore a mortgage "is considered in equity as personal estate. The mortgagor "is held to be the real owner of the land, the debt being "esteemed the principal, and the land the accessory." And in *Ch.* II. § 11, of the same book—"As long as the right of "redemption exists, the mortgagee is considered merely as "trustee for the mortgagor, and that none of his charges or "incumbrances attach on the estate." [Therefore a judgment against a mortgagee does not become a charge or incumbrance on the mortgaged land.] If leasehold estate is assigned by way of mortgage, the lessor cannot sue the mortgagee as assignee, even after the mortgage has been forfeited, unless the mortgagee has entered into possession. In *Martin* v. *Mowlin (a)*, Lord *Mansfield* said—"A mortgage

(a) 2 *Burr.* 979.

"is

1859.

DOE dem. VERNON *against* WHITE.

"is a charge upon land, and whatever would give the money, "will carry the estate in the land along with it to every "purpose. The estate in the land is the same thing as the "money due upon it. It will be liable to debts; it will go "to executors. The assignment of the debt, or forgiving it, "will draw the land after it as a consequence." The observation of Lord *Ellenborough* in *Scott* v. *Scholey (a)*, has also much force:—"The degree of inconvenience which would "attend the sale of such interests by the Sheriff, although it "would in strictness afford no argument against an ascer- "tained legal power of the Sheriff on such a subject, is a "sufficient reason why the Court should anxiously watch "the extension of such power in a case in any respect doubt- "ful. What means, in any degree adequate, has the Sheriff "of taking an account of the actual amount of the incum- "brances thereupon? The sale, if made by the sheriff, must "necessarily be made under circumstances of still greater "ignorance and uncertainty as to its value, than attend sales "of any other description of property."

In the absence, therefore, of any authority in favor of the sale of the mortgagee's interest; considering that the principles which govern mortgages, although arising in equity, are part of the law of the land; that the maxim of law being "*accessorium non ducit, sed sequitur suum prin-* "*cipale;*" that the debt being the principal and the mortgaged estate accessory, and the debt being clearly not seizable on execution, the estate ought not to be; that when land is made by law seizable, the Court has held the mortgagor's estate is seizable as land; that the mortgagee's incumbrances do not affect the estate he has in mortgage, nor is it subject to dower; that there is no instance cited either from *England*, the *United States*, or any of the *Colonies*, where such a principle has been established, and the only case occurring in *England* (*Cooper* v. *Gardner*) shewed it to be certainly not recognized there; that if a law is passed making debts liable to execution, the debt will be seizable, and not the security for it; and that the Sheriff cannot seize and assign the mortgage deed, or any power for

(a) 8 *East*, 484.

sale

1859.

DOE dem. VERNON *against* WHITE.

sale therein contained; we think we shall be fully justified in holding that the estate of a mortgagee in fee who has not taken possession, is not seizable in execution.

This case is perhaps a very striking instance in support of the *argumentum ab inconvenienti*, as we are called upon to decide between the respective rights of the Trustees under the Absconding Debtor's Act, who stand in the place of the mortgagee, and the execution creditor of the mortgagee; for if the money due on the mortgage belongs to the Trustees, to be divided rateably among the creditors, and as no preference is given to a judgment creditor, it would be rather extraordinary if he could, by his execution, dispose of the mortgagee's title to the land, while the Trustees under the Absconding Debtor's Act recover the money for which the mortgage was given as a security.

We need not advert to the cases cited in *Doe* v. *Donnelly (a)*, where on the construction of a deed, the same doctrine was substantially maintained. We think therefore the defendant is entitled to the judgment of the Court.

Judgment for the defendant.

(*a*) 3 *Kerr*, 238.

AITON *against* BALLOCH.

The plaintiff agreed to advance money to *D. T.* to enable him to get logs, on receiving security for the delivery of the logs: the defendant having agreed to become security, an agreement for the delivery of the logs by *T. D.*, and payment therefor by the plaintiff was signed by them, and the defendant then wrote upon the agreement and signed the following memorandum:—"I guarantee the performance of this contract on the part of *D. T.*;" and the agreement was then delivered to the plaintiff. Held, that no consideration for the defendant's promise could be inferred from the terms of the guarantee; and that the same rule would apply, whether the guarantee was written on the same paper with the agreement, or on a separate paper referring to it.

ASSUMPSIT on a guarantee. The first count of the declaration stated, that whereas on the 20th *December* 1856, in consideration that the plaintiff, at the special instance and request of the defendant, would enter into a certain agreement in writing with one *David Tapley*, as follows:—[setting out an agreement by *Tapley* to deliver to the plaintiff, three hundred thousand superficial feet of spruce saw-logs in *June* then next, and an agreement by the

plaintiff

1859.

AITON *against* BALLOCH.

plaintiff to pay *Tapley* therefor at the rate of thirty shillings per thousand on delivery, after deducting the amount he might have advanced on the logs, with interest and commission]; the defendant promised the plaintiff to guarantee the performance of the agreement on the part of *Tapley*. Averment, that the plaintiff confiding in the defendant's promise, did then and there enter into the agreement with *Tapley*, and did afterwards advance and pay to *Tapley* on the contract and on account of the logs so to be delivered by him to the plaintiff, and on the faith and in consideration of the defendant's promise, the sum of £325; and though the plaintiff had always been ready and willing to receive and pay for the logs at the rate mentioned in the agreement, yet that *Tapley* did not deliver them, of which the defendant had notice; and though he had been requested, &c., he had not delivered the logs nor paid the plaintiff the amount advanced to *Tapley*. The second count stated that in consideration that the plaintiff at the request of the defendant would accept the delivery by *Tapley* of the spruce logs, as before mentioned, and would pay *Tapley* therefor, &c., the defendant promised the plaintiff that *Tapley* would deliver the logs, &c. Averment, that neither the defendant or *Tapley* would deliver the logs.

At the trial before *Carter*, C. J., at the Sittings after last *Trinity* term, the plaintiff proved that *Tapley* had applied to him to make advances upon logs; that he agreed to do so upon getting security for the delivery of the logs, and that the following agreement was then prepared:—

"Memorandum of agreement made this 20th day of *De-*
"*cember* 1856, between *David Tapley* of the one part, and
"*James Aiton* of the other part, witnesseth that the said
"*Tapley* agrees on his part to furnish and deliver to the
"said *Aiton* at the usual places of delivery above *Indian-*
"*town*, in all the month of *June* next, three hundred thous-
"and superficial feet of good merchantable saw-logs, to be
"cut by his own men and hauled by his own teams; said
"logs to be surveyed by a surveyor mutually chosen. The
"said *Aiton* on his part agrees to take the logs and to pay
"*Tapley* at the rate of thirty shillings per thousand super-
"ficial

"ficial feet, to be paid in cash on the right delivery of the "logs, after first deducting the amount he may have ad- "vanced upon the logs, together with interest and the usual "commission of five per cent."

The defendant agreed to become security, whereupon the plaintiff and *Tapley* signed and sealed the agreement, and the defendant witnessed it, and then wrote upon it and signed the following memorandum:—

"I guarantee the performance of this contract on the "part of *David Tapley*."

The agreement was then delivered to the plaintiff, who made advances to *Tapley* to the amount of £374, but he failed in the delivery of the logs. It appeared that the price of logs in the market was less than thirty shillings per thousand in *June*, when the logs were to have been delivered according to the agreement.

A verdict was found for the plaintiff for £415, the defendant having leave to move to enter a non-suit on the ground that the guarantee was not binding for want of consideration; and that in consequence of the fall in the price of logs, the plaintiff had sustained no damage by the non-delivery. A rule *nisi* for entering a non-suit on these grounds having been granted in *Michaelmas* term last,

Jack shewed cause in *Hilary* term. He contended that the contract between *Tapley* and the plaintiff, and the defendant's guarantee, must be taken to be one instrument, the original contract being, as it were, incorporated with the guarantee, and forming the consideration for the defendant's promise. That the plaintiff had shewn that the defendant's promise was not a *nudum pactum*, but was the true consideration on which the plaintiff advanced his money; and that the meaning of the guarantee might be ascertained by reference to the surrounding circumstances. *Bainbridge* v. *Wade (a)*; *Colbourn* v. *Dawson (b)*; *Goldshede* v. *Swan (c)*; *Haigh* v. *Brooks (d)*; *Caballero* v. *Slater (e)*; *Taylor* v. *Harris (f)*. He also contended that the true measure of damages in this case was, the money advanced, and interest.

(*a*) 15 *Jur.* 572. (*b*) 15 *Jur.* 680; 10 *C. B.* 765. (*c*) 1 *Exch.* 154.
(*d*) 10 *A. & E.* 309. (*e*) 25 *Eng. R.* 285. (*f*) 2 *Kerr*, 343.

1859.

AITON *against* BALLOCH.

2 *Greenl. Ev.* § 261. *Bush* v. *Canfield (a); Startup* v. *Cortazzi (b).*

A. R. Wetmore, contra, contended that the guarantee shewed no consideration, and was therefore void by the statute of frauds. *Hawes* v. *Armstrong (c).* If the language of a guarantee was ambiguous, extrinsic evidence of the surrounding circumstances might be received, but not otherwise. There was no ambiguity in the language of this guarantee, and therefore no evidence could help the plaintiff. If the guarantee was sufficient, the plaintiff had not sustained any damage, and the verdict should be reduced to nominal damages.

Cur. adv. vult.

RITCHIE, J., now delivered the judgment of the Court. We think it clearly established that though the consideration must appear on the face of the instrument, it need not be in express words; it may be collected or implied from the instrument, but it must be with certainty, not by conjecture however plausible; there must be a well grounded inference to be necessarily collected from the terms of the guarantee, that the consideration stated in the declaration, and no other, was intended by the parties to be the ground of the promise. *Hawes* v. *Armstrong (d).* If, in the present case, we look merely to what the defendant says in the memorandum he signed, there is not a fact, circumstance, or statement set forth, from which any inference can be drawn as to even the probable consideration or motive that led him to sign the guarantee. The only inference to be drawn is, that at the time he wrote the memorandum, the agreement was signed and perfect; for he says "this contract," that is, the contract as we now see it, signed, sealed, and complete, and upon which he simply wrote the memorandum. This case differs entirely from *Taylor* v. *Harris,* cited at the argument. There the guarantee was actually incorporated in the agreement, and formed part of it: only one instrument was signed, and that in the same way and at the same time,

(a) 2 *Conn.* 485.
(b) 2 *C. M. & R.* 165.
(c) 1 *Bing. N. C.* 761.
(d) 1 *Bing. N. C.* 761.

time, by the principal and surety, (the surety's name appearing first); both thus being parties to the original and only agreement. Here, on the face of the document, everything is opposed to the idea of the defendant's being, or intending to be, an original party to the sealed agreement.

We are at a loss to understand how the plaintiff could be better off in this case by having the memorandum written on the same paper with the agreement, than if it was written on another paper and annexed to it, or written on another paper and not annexed at all, but simply referring to it. The case of *Semple* v. *Pink (a)*, is a strong authority on this point. Inasmuch then, as we cannot form the most remote idea from the instrument itself, as to the consideration or inducement which operated on the defendant, or that there was any at all, we think it wants an essential ingredient under the statute of Frauds to make it a binding contract on the defendant.

In the second count, the plaintiff treats the defendant's guarantee as a primary engagement, whereby he undertakes that *Tapley* shall deliver the logs according to the terms of the contract, without setting out any contract between the plaintiff and *Tapley;* and the covenant of the plaintiff to pay *Tapley* for the logs, is treated as a promise to the defendant to pay *Tapley*. But it is clear that it was not intended that the defendant should be liable in the first instance, but only for the default of *Tapley;* and where such is the nature of the contract, although the giving the guarantee by the defendant might be the inducement to the plaintiff to enter into the contract, and that without it he would not have done so, or made advances on it, still as *Tapley* was to be liable, the defendant's engagement is but secondary, and the consideration must appear by the writing; as in *Anderson* v. *Hayman (b)*, where it was held, that if a tradesman delivered goods to *A.* at the request of *B.*, and on the credit of *B.*, if *A.* is liable, *B.'s* promise is only a guarantee, and void by the statute of Frauds if the agreement is not in writing. The cases are collected in the notes to 1 *Saund.* 211. It is clear this

(*a*) 1 *Exch.* 74. (*b*) 1 *H. Bla.* 120.

 count

1859.

AITON *against* BALLOCH.

count cannot be sustained. If *Balloch* was to be a party to the original contract, there was a very simple method of effecting it, by making him a surety for *Tapley* in the contract itself, as was done in *Caballero* v. *Slater (a)*, and in the case of *Taylor* v. *Harris (b)*; and see also *Bushell* v. *Beavan (c)*.

The rule therefore will be made absolute for entering a nonsuit.

Rule absolute *(d)*.

(*a*) 25 *Eng. R.* 285; 14 *C. B.* 300. (*b*) 2 *Kerr*, 343. (*c*) 1 *Bing. N. C.* 103.

(*d*) By the Act 29 *Vict. c.* 31, § 1, "No special promise to be made by any person after the passing of this Act to answer for the debt, default or miscarriage of another person, being in writing and signed by the party to be charged therewith, or some person by him thereunto lawfully authorized, shall be deemed invalid to support an action, suit, or other proceeding to charge the person by whom such promise shall have been made, by reason only that the consideration for such promise does not appear in writing, or by necessary inference from a written document." And see *Holmes* v. *Mitchell*, 6 *Jur. N. S.* 73.

PETERS *against* IRISH.

Defendant indorsed a note for the accommodation of *S.*, who gave it to *B.* to raise money on it; *B.* applied to the plaintiff who discounted the note, deducting more than the legal interest. Held, that it was a loan by the plaintiff, and not a purchase of the note, and therefore the transaction was usurious.

Where a witness called to prove that the consideration of a note was usurious, declined to state what amount he gave on discounting the note, because his answer might render him liable to a penalty, but on cross-examination said that he gave what he thought it was worth. Held, that he was bound on re-examination to state what he gave.

ASSUMPSIT on two promissory notes for £100 each, payable three months after date, drawn by *G. & J. Salter* in favor of the defendant and endorsed by him.

At the trial before *Wilmot*, J., at the last *King's* circuit, the defence was that the plaintiff had obtained the notes by an usurious discount. It appeared that the notes were indorsed by the defendant for the accommodation of Messrs. *Salter*, who, in order to raise money, gave them to one *George M. Burns*, and received from him the amounts, less a discount of about 20 per cent. *Burns* was called as a witness for the defendant, but stated that he could not say whether he had ever had the notes in his possession or not, as he made no marks on notes so as to be able to identify them. The plaintiff was then called as a witness for the defence, and said that his impression was that he had bought the notes from

Burns

1859.

PETERS *against* IRISH.

Burns. He was then asked what he had paid for them; but his counsel objected to his answering the question, and the learned Judge told him that he need not answer it unless he pleased. The witness then said "I will not say what I paid "for the notes. I paid the party what satisfied him. I "refuse to answer whether I paid the amount, less legal "interest." On cross-examination he said—"The notes were "sold to me in the market, and I gave what I thought the "value of them. I gave what *Burns* asked for them." In answer to a question on the re-examination, whether he did not get more than six per cent., the plaintiff said—"I decline "answering that question. I will swear I did not get 25 "per cent. on the discount. I can't say what I got." The jury having found a verdict for the plaintiff for the amount of the notes;

A. R. Wetmore obtained a rule *nisi* for a new trial in *Michaelmas* term last, on the ground of the refusal of the learned Judge to compel the plaintiff to answer questions, also that the verdict was against law and evidence. 1 *Rev. Stat.* 266; and *East* v. *Chapman (a)*, were cited.

D. S. Kerr now shewed cause. The question is whether the plaintiff claimed his privilege as a witness in time, for if the answer would shew that he was liable to a penalty, he had a right to refuse. 2 *Rev. Stat.* 364. [RITCHIE, J. Can you find any case where a witness can tell one part of a transaction, and shelter himself from telling the rest by claiming his privilege? It seems to me, that when he went into the transaction on the cross-examination and told how he got the notes, and said he gave what he thought they were worth, he was bound to tell on re-examination what he did give.] *East* v. *Chapman* has been overruled, and it is now held that a witness may claim his privilege at any time. *Garbett's* case *(b)*, *Rosc. Ev.* 144. The transaction was not usurious. A man may buy a note in the market for any sum he pleases, and it is valid unless there was usury in the inception of the note; 2 *Saund. Pl. & Ev.* 1135; therefore it is quite immaterial what the plaintiff gave for the notes. [RITCHIE, J. But the witness is not to decide whether the

(a) *M. & Mal.* 46.

(b) 1 *Den. C. C.* 236.

question

1859.

PETERS *against* IRISH.

question is material or not: that is for the Judge at the trial to determine. WILMOT, J. If it is immaterial what the plaintiff gave for the notes, then you must establish that he had a right to refuse answering a question, which you say would not subject him to the penalty of usury.] There was no loan of money, which is essential to constitute usury. It was a fair purchase in the market. *Ex parte Lee (a).* [RITCHIE, J. Then all a party has to do to evade the law is, to say—"This is a purchase,—not a loan." But what is the real transaction? The plaintiff lends *Salter* £80, for which he expects to get £100 in three months. There was an advance of money and a promise by the note to return it. If the statute can be evaded by the flimsy pretext that it was a purchase, and not a loan, it is a mere delusion.] What is there to shew that the notes were not good in their inception? [RITCHIE, J. Why this: that the maker of the notes by his agent, *Burns*, took them to the plaintiff and got them discounted. I think the words of Lord *Mansfield* in *Lowe* v. *Waller (b)*, "That it is impossible to wink so hard, as not "to see that the intention of the parties was a loan of money" —will apply to this case.] The law with regard to usury has been much changed since Lord *Mansfield's* time.

A. R. Wetmore, contra, was stopped by the Court.

N. PARKER, M. R. I have no doubt about this case. Whatever the policy of the law relating to usury may be, so long as it remains, we are bound by it. There is one singular feature in this case: all the witnesses were afflicted with an unfortunate forgetfulness of the facts connected with the notes. The plaintiff's counsel objects to the plaintiff's telling what he gave for the notes, but he nevertheless takes the advantage of telling the jury on the cross-examination that he gave what he thought they were worth. Surely then the defendant had a right to ask what that was. It was the legitimate sequence of his previous answer, and I think he had no right to refuse to state it. As to the usury; the plaintiff was concerned in the concoction of the notes. If he had been a *bona fide* purchaser in the market, the case would have been different.

(*a*) 1 *Pr. Wms.* 782.

(*b*) 2 *Doug.* 736.

PARKER,

1859.

PETERS *against* IRISH.

PARKER, J. It was evidently the intention of the parties to conceal the facts; but no one who heard the evidence could doubt that the plaintiff got twenty per cent. on the discount. It is said that there was no usury because the plaintiff purchased the notes in the market; but this was not a case of purchase. The notes did not go into the hands of a third party in payment of a debt; for *Burns* was the mere agent of *Salter* to raise money on them, and *Salter* was to pay £100 at the end of three months for about £80 which he got from the plaintiff. As to the other point: the rule very properly is, that if a witness claims his privilege he must do so at once. If he answers to part of a transaction, he must answer the whole.

WILMOT, J. I am of the same opinion. I think it is impossible to say there was not usury in this case, and I am satisfied I went too far in protecting the plaintiff from answering questions relative to the notes. When he answered part, I should have compelled him to answer the whole.

RITCHIE, J. No law has exercised man's ingenuity so much as the usury law; but whatever devices the parties may resort to to conceal the real transaction, if the Court can see that there was a loan of money upon usurious interest, the law must prevail. When the plaintiff calls this transaction a sale, he uses a misnomer: it was a clear loan of money, and he has taken usurious interest—twenty per cent. at least, according to the evidence—therefore I think the rule must be made absolute. I have already stated my opinion on the other point.

Rule absolute for a new trial *(a)*.

(a) By the Act 22 *Vict. c.* 21, contracts on which more than six per cent. is reserved, are no longer void, but the excessive interest may be deducted.

1859.

DEVEBER *against* BRITAIN.

The acknowledgment of a deed in *Great Britain*, was in the following form:—"Be it remembered that on, &c., before me *T. G.*, Mayor of the town of *Southampton*, in *England*, personally appeared, &c. Given under my hand and seal the day and year first above written," and signed by the Mayor, with a seal affixed, having the words "*Southampton Villa*" inscribed round what appeared to be the city arms. Held, that it imported to be the corporate seal of *Southampton*, and not the private seal of the Mayor, and therefore the acknowledgment was sufficient under the 1 *Rev. Stat. c.* 112.

TRESPASS *quare clausum fregit*, tried before *Wilmot*, J., at the last *King's* circuit.

The plaintiff claimed under a deed dated in *August* 1856, from *John Townsend Coffin* and *Henry E. Coffin*, the devisees under the will of the late General *Coffin*. The deed was executed by an attorney under a power given by *John Townsend Coffin* and *Henry E. Coffin*, and acknowledged before the Mayor of *Southampton* in the following form:—"Be it remembered that on the fourth day of *October*, in "the year of our Lord one thousand eight hundred and forty-"five, before me, *Thomas Griffiths*, Esquire, Mayor of the "town of *Southampton* in the Kingdom of *England*, person-"ally appeared, &c. Given under my hand and seal the "day and year first above written."

Thomas Griffith, Mayor, { Seal. }

The words "*Southampton Villa*" were inscribed upon the seal, around what appeared to be the city arms.

The defendant had been in the occupation of the land since 1840, and claimed that it was contained in the description of a deed from General *Coffin*, dated in 1817, under which he claimed. There was a good deal of conflicting evidence about the possession and the boundaries of the land described in the deeds, upon which the jury found in favor of the plaintiff.

A rule *nisi* having been granted for a new trial on account of the improper admission of the power of attorney, and that the verdict was against evidence,

S. R. Thomson now shewed cause. He contended that the plaintiff having got the verdict, it must stand unless the defendant could shew that it was wrong. If there was any vagueness in the description, that was a question entirely for the jury. As to the acknowledgment of the power of attorney: the seal spoke for itself, and appeared by inspection

1859.

DEVEBER against BRITAIN.

inspection to be the seal of office of the Mayor of *Southampton*, and not his private seal. It was sufficient according to the act 52 *Geo.* 3. *c.* 20; and 1 *Rev. Stat.* 286.

Jack, contra, contended that the words "my hand and seal" shewed that it was not the corporate seal of *Southampton*, as required by the act, but the private seal of the Mayor; and that where it was left doubtful whether the land was included in the description of the deed, there ought to be a new trial. *Bull* v. *M'Cready (a)*.

N. PARKER, M. R. I think the question was clearly one for the jury, and was left favorably for the defendant. As to the question about the seal: the Mayor was doing an official act when he took the acknowledgment of the deed; and when he says "Given under my hand and seal," I think it imports that it was his seal of office.

PARKER, J. I see no ground for disturbing the verdict. The Courts have recognised that the seal of the City of *London* proves itself. Here are the arms of *Southampton* apparently, on the seal, and the official signature of the Mayor. It would shake a number of titles if this was not held a sufficient acknowledgment.

WILMOT, J. I am of the same opinion. There is a mystery about the case, which it is the defendant's duty to clear up,—the plaintiff being in possession. In order to get rid of the verdict, the defendant must shew that the land in dispute is contained in his deed.

RITCHIE, J. It is a very doubtful case, and as it appears that the defendant has brought an action of ejectment he will have an opportunity of shewing that the land belongs to him. As to the seal: I think the evidence is more satisfactory than it generally is. It appears by the acknowledgment that the Mayor was doing an official act, and that the seal is his official seal.

Rule discharged.

(a) 2 *Kerr*, 228.

1859.

CARVILL *against* McLEOD.

The declaration in an action of slander stated that the defendant spoke of the plaintiff as a clerk of *H.*, the following words:—"That miserable fellow *C.* (the plaintiff) has just robbed *H.*, he has taken money from him and put his hand in the chest. I could see it all along. *C.* is a robber. You don't know him,—he deceived my poor boy, and has robbed *H.* of seventy pounds, and I can prove it:"—meaning that the defendant intended to charge the plaintiff with theft. The defendant was *H.'s* father-in-law, and used the words to *H.'s* attorney. Held, 1. That as the defendant had no interest in *H.'s* business, the communication was not privileged, though it was made confidentially to the attorney alone. 2. That though the words might amount to a charge of embezzlement, they were not intended to impute larceny.

SLANDER. The second count of the declaration, on which the verdict was given, stated that the plaintiff had been a clerk in the employ of certain persons carrying on business under the style and firm of *Holderness & Chilton*, and afterwards in the employ of Messrs. *Holderness & McLeod*, and of one *John W. Holderness*, and that the defendant intending to injure the plaintiff and to cause it to be believed that he had acted dishonestly in his capacity as clerk, and was guilty of robbery and theft, in a discourse which the defendant had with one *T. W. Bliss* concerning the plaintiff as such clerk, spoke the following words:—"That miserable fellow *Carvill* has just robbed Mr. *Holder-*"*ness*. Why, he has taken money from him, and put his "hand into the chest. I could see it all along. *Carvill* is "a robber. You don't know him. He deceived my poor "boy, and has robbed Mr. *Holderness* of seventy pounds, "and I can prove it." Meaning thereby that the plaintiff had been guilty of the crimes of robbery and theft, and that he had stolen seventy pounds from Mr. *Holderness*. Plea—not guilty.

At the trial before *Parker*, J., at the last *Kent* circuit, the speaking of the words was proved by Mr. *Bliss*, who had been the legal adviser of Mr. *J. W. Holderness* at *Richibucto*, in the business of *Holderness & Chilton*, and afterwards of *Holderness & McLeod*. The plaintiff was their cashier and book-keeper, and had the principal management of the indoor business. The defendant was the father-in-law of *Holderness* and the father of the other partner, *McLeod*, and at the time of the conversation with Mr. *Bliss*, was living in the house of *Holderness*, who was absent from the Province, and from his relationship to them, took a good deal of interest in their business, but was not concerned in it in any way, nor acting as their agent. He stated that he had frequently conversed with Mr. *Bliss* about the business, and considered that the conversation in which the words complained

1859.

CARVILL *against* M'LEOD.

plained of were spoken was confidential, and that the words were only used in reference to improper entries made by the plaintiff in *Holderness & McLeod's* books, and to his falsifying the cash balances.

A non-suit was moved for on two grounds:—1st. That the words did not mean to impute robbery or larceny in their legal sense, but at most fraud and a breach of duty; and 2nd. That it was a privileged communication. The learned Judge overruled the motion, being of opinion that though the words did not mean to charge the plaintiff with robbery in the legal sense of the word, it would be a question for the jury whether they did not mean to impute larceny, and not merely fraud or embezzlement; and that though the defendant might have considered the communication to Mr. *Bliss* confidential, there was nothing in the connexion between them to make it a privileged communication.

Verdict for the plaintiff—damages £35.

In *Michaelmas* term last, *A. L. Palmer* moved for a new trial on two grounds:—1st. That the words having been spoken only to *Holderness'* attorney, in reference to what the defendant believed was a breach of trust on the part of the plaintiff, should be considered as a confidential communication; and 2nd. That the *innuendo* stating that the words imputed felony had not been proved. A rule *nisi* having been granted on the second ground,

Johnson, Q. C., shewed cause in *Hilary* term last. He contended that the words were *prima facie* actionable, and that the jury had found that they were spoken in the sense imputed in the declaration. After a verdict, everything was intended in its favor. Any person who heard another charged with taking money out of a chest, could only understand it as a charge of larceny, and not merely embezzlement. [N. PARKER, M. R. What is the meaning of those words when spoken of a clerk?] They meant larceny. *Rex* v. *Francis (a)*. By the 1 *Rev. Stat.* 422, "Any clerk or servant who shall steal anything belonging to, or in possession, "or under the power of his master, shall be guilty of "felony." [RITCHIE, J. The word "rob" is a common mode

(a) 2 *Stra.* 1015.

1859.

CARVILL *against* M'LEOD.

mode of expression when it is not intended to charge a crime. When one man has cheated another, it is very common to say, "He has robbed me." WILMOT, J. Or, where one party has over-reached another.] The objection appeared on the face of the declaration, and if the defendant intended to insist that the words charged embezzlement, and not felony, it was ground of demurrer or motion in arrest of judgment.

A. L. Palmer, contra, contended that the words being spoken of the plaintiff in his capacity of a clerk, were not used with an intention to impute felony, but at most, embezzlement or breach of trust, and were therefore not actionable. *Thompson* v. *Bernard (a).* The plaintiff had not proved the *innuendo* in the declaration, that the words imputed felony; 1 *Chit. Pl.* 437; and the circumstances under which they were spoken, shewed that the defendant was acting *bona fide* and without malice.

Cur. adv. vult.

N. PARKER, M. R., now delivered the judgment of the Court. On a careful consideration of this case, although the words may be in themselves actionable, we are unable to satisfy our minds that the evidence warranted the jury in finding, as they have done, that the defendant intended to impute the crime of larceny. Robbery, in its legal sense, was not pretended to be imputed. Perhaps the words might amount to a charge of embezzlement, and the evidence have supported such an *innuendo,* but that is a distinct offence from larceny, and it is not alleged in any count that this was the meaning of the words. We therefore feel bound to allow a new trial on payment of costs, and with leave to the plaintiff to amend his declaration. Here we might stop; but we feel some further remarks not uncalled for. Under the very peculiar circumstances of this case, being satisfied that the defendant, (considering how he was situated in regard to Mr. *Holderness,* and the position Mr. *Bliss* and the plaintiff also held in the employ of that gentleman,) might reasonably have expected, without any positive injunction

(a) 1 *Camp.* 48.

of

of secrecy, that the private conversation he had with Mr. *Bliss* relative to *Holderness'* affairs, and the plaintiff's management of them in his absence, would be considered confidential; and as we cannot but join in the regret expressed by the learned Judge at the trial, that Mr. *Bliss* having taken a particular note of the words without the knowledge of the defendant, not while he was speaking them, but after they had separated, did not communicate what he had written down to the defendant, and ascertain from him exactly the nature of the charge, which was open to different constructions, and inform him if the charge was not withdrawn or explained in some other than a criminal sense, he should feel it his duty to acquaint both the plaintiff and Mr. *Holderness* with it; seeing also that whatever malicious intent the defendant might have had—and we have no desire to palliate this—no injurious impression was produced on the mind of Mr. *Bliss*, the only person to whom it was proved the defendant had spoken on the subject; seeing moreover that the plaintiff's character has been fully vindicated by the trial and verdict of the jury; we cannot but hope that some mutual understanding will be come to, whereby on payment of the costs, the suit may be discontinued.

Rule absolute on payment of the costs *(a)*.

(*a*) See *Hea* v. *M'Beath*, 2 *Kerr*, 301.

WHITE *against* SMITH.

April 19th.

TRESPASS for entering on the plaintiff's land and cutting down trees—tried before *Parker*, J., at the last *Westmorland* circuit.

The defendant in an action of trespass justified under *A.*, and in order to shew title in him, offered evidence of a conversation between *A.* and *B.*,—not made upon the land, but several miles distant from it, in which *A.* gave *B.* permission to build a mill on the land in dispute. *B.* built the mill more than twenty years before the action, but did not further recognise *A.'s* right to the land. Held, that this was not sufficient evidence of *A.'s* possession, and that the justification was not proved.

Where in an action of trespass on two distinct lots of land, to one of which the defendant proved title, the jury gave a verdict for the plaintiff without any apportionment of the damages, the Court ordered a new trial unless the plaintiff consented to accept nominal damages.

The land on which the alleged trespasses were committed, was

1859.

WHITE against SMITH.

was contained within the bounds of a grant from the Crown to *Joseph Le Blanc*, in 1835, under which the plaintiff claimed, but the same land (being the rear part of the *Le Blanc* grant) had been previously granted in 1809, in two lots—number one to *Humphrey Gilbert* and others, and number two to *Nathaniel Gilbert*. The *Le Blanc* grant was founded on an actual survey of the land, and the plaintiff gave evidence of acts of possession under the grant for upwards of twenty years. The defendant shewed title to lot number one by deeds from the grantees, but failed in proving a title to lot number two—no conveyance being shewn from *Nathaniel Gilbert*, the grantee. It was attempted to be proved that *Humphrey Gilbert*, under whom the defendant claimed, had title to lot number two by twenty years possession; and in order to make out this possession, evidence was offered of a conversation between *Humphrey Gilbert* and one *Underwood* about thirty years ago, in which *Underwood* asked and obtained permission from *Gilbert* to build a mill upon a stream near the line of the *Gilbert* grant, and at the place where *Underwood* soon afterwards built the mill. There was some question whether the mill was built within the *Gilbert* grant or outside of it; but if within the grant, it was upon lot number two. The learned Judge rejected the evidence offered—the alleged conversation not having taken place upon the land in dispute, but at *Gilbert's* house in *Dorchester*, several miles distant.

In leaving the case to the jury, the learned Judge directed them that the defendant had shewn a documentary title to lot number one, and had justified that part of the trespass unless the plaintiff had made out a title under the statute of limitations; but on this point he thought the evidence was slight. That as to lot number two: he did not think the defendant had shewn any title either by deed or possession, and therefore if the plaintiff was in actual possession of the land, he was entitled to recover, though his title to this part of the land under his grant was defeated by the prior grant. Verdict for the plaintiff—damages £5—the jury saying they found for the trespasses on both lots.

A rule nisi for a new trial having been granted, on the ground

1859.

WHITE against SMITH.

ground of the improper rejection of the evidence of the conversation between *Gilbert* and *Underwood*, and that the verdict was against evidence,

A. J. Smith shewed cause in *Hilary* term last, and *A. L. Palmer* was heard in support of the rule. *Greenleaf's Ev.* § 108, 109, and *Doe* v. *Arkwright (a)* were cited.

Cur. adv. vult.

N. PARKER, M. R., now delivered the judgment of the Court. There is no doubt that all the land on which the alleged trespasses were committed, was situate within the bounds of a grant made by the Crown to *Le Blanc* in 1835, under which the plaintiff claims. It is equally clear that the *locus in quo* is contained within the true bounds of a previous grant to *Humphrey Gilbert* and others, made in 1809, although the contrary was assumed by the Crown officers when the grant of 1835 came out. There was sufficient evidence also to warrant the jury in finding that the plaintiff was in possession when the trespasses were committed. The grant to the *Gilberts* does not appear to have been preceded by any actual survey and marking of lines, but the grant to *Le Blanc* was predicated on an actual survey and marking of lines, made by *Philip Palmer*, the Deputy Crown Surveyor, in 1829, or thereabouts, he supposing (to use his own language) that "he was far enough above the *Gilbert* grant," and not remembering, or not ascertaining the extent to which he had previously carried the lines of the *Gilbert* tract. The reason of this mistake seems obvious enough. Measuring the true distance of the tract in the *Gilbert* grant from the place which *Humphrey Gilbert* claimed as his front line, would throw nearly the whole of the *Le Blanc* tract outside of the *Gilbert* grant; and although Mr. *Palmer* was induced by the importunity of Mr. *Gilbert* to add ten per cent. to the length of the lines in making the survey, (thus increasing the extra allowance in the grant from ten to over thirty per cent.), he was quite conscious it was wrong, and he could not have ventured to make a return of this to the Crown Land Office, so as to base

(a) 6 *C. & P.* 575.

other

1859.

WHITE *against* SMITH.

other grants on a line so incorrectly fixed. It was not until the trial of *Brevier* v. *Govang* in 1857, (ante page 144) that the true position of the front line of the *Gilbert* grant, and the consequent true position of the rear line were ascertained, whereby the interference of the *Le Blanc* grant with the *Gilbert* grant was manifested, and the *locus in quo* shewn to be within the *Gilbert* grant. Now the *Gilbert* grant is divided into two lots—lot number one granted to *Humphrey Gilbert*, *Robert Keech* and others, to which the defendant, through various mesne conveyances shews title; lot number two granted to *Nathaniel Gilbert*, to which the defendant has failed in shewing title—and had the trespasses been confined to one or the other of these lots, or the damages as to each separately ascertained, we should have had little difficulty in dealing with the case; but the jury have found, and properly so under the evidence, that the trespasses were on both lots, and they have assessed damages at £5 for the whole: a very small sum, no doubt, if the plaintiff was entitled to recover for the whole. So far as regards lot number one, the justification was established, unless the defendant's title has been defeated under the statute of limitations; but we think a continuous possession of twenty years is by no means satisfactorily proved, although there was some evidence which required to be left to the jury: this, however, should be open to a further inquiry. As regards lot number two, the defendant sets up title, not derived from *Nathaniel Gilbert* (whom he, himself, has shewn to be the owner, and has not proved to be connected with *Humphrey Gilbert*, beyond being in the same grant) but under twenty years possession in *Humphrey Gilbert* and his assigns. There were none of the ordinary acts of possession shewn to have been done by *Humphrey Gilbert* in the occupation and settlement of land, but his possession is sought to be made out, chiefly by the survey of *Philip Palmer* forty-eight years ago, and by the mill erected by *Underwood* about thirty years ago. Now *Palmer's* survey was made for all the grantees of the grant — not for *Humphrey Gilbert* alone—and the dividing line between lots numbers one and two was run, and as distinctly marked out

1859.

WHITE against SMITH.

out as were the exterior lines, thus distinguishing and not blending the possession of the two lots; and though Messrs. *Humphrey Gilbert* and *Keech* were the principal persons, it can never be contended that a survey so made, was an ouster of the grantee of lot number two by an adverse entry and holding of the grantees of lot number one. Here, then, comes up the propriety of rejecting the evidence of *Samuel Gay Gilbert* as to the alleged conversation between *Humphrey Gilbert* and *Underwood*. Although the mill was not built on the land within the plaintiff's grant, and there was no connexion between him and *Underwood*, still, under the circumstances, this would not have justified the rejection of the evidence, if admissible in itself for the purpose for which it was tendered. The defendant's counsel proposed to shew that in a conversation had between *Humphrey Gilbert* and *Underwood*, not on the land but at a distance from it, namely, in Mr. *Gilbert's* house at *Dorchester*, *Underwood* applied for and got leave from Mr. *Gilbert* to build the mill at the place where he afterwards built it; and it is contended that it was proper and material evidence of *Humphrey Gilbert's* being in possession at the time of the conversation. We are not aware that the rule has ever been carried so far as this. The Legislature have wisely limited the effect of verbal declarations as to the holding of land, and it would be strange indeed if *Underwood* had commenced and continued in his occupation as tenant to *Humphrey Gilbert*, that there should be no proof whatever of such tenancy, except this conversation. Without doubt, the declarations of persons in possession of land as to the nature of that possession, or of persons having title, as to the nature of the occupation, may be received, at least in many cases. It was decided in *Peaceable* v. *Watson (a)*, that the declarations of a deceased occupier of land, of whom he held the land, are evidence of the seisin of that person, but it must first be shewn that the land occupied was the land in the tenant's possession. *Mansfield*, C. J., there said—"Possession is *prima facie* evidence of seisin "in fee simple: the declaration of the possessor that he is "tenant to another, makes most strongly therefore against

(a) 1 *Taunt.* 16.

"his

1859.

WHITE *against* SMITH.

"his own interest, and consequently is admissible, but it "must be first shewn that he was in possession of the pre- "mises." What is contended for here really amounts to this: —that a verbal permission given thirty years ago by *A.* to *B.*, neither of whom have at the time, title or possession of the land, is evidence of *A.'s* possession if *B.* enters on the land, though he never subsequently recognises *A.'s* right. In other words—if I, having neither title nor possession of land, say to another he may go on it, it is evidence of my possession if he goes there. It is the first time, we believe, the possession of land has been sought to be affected by verbal admissions to this extent, and we think the evidence was properly rejected. The acts of trespass therefore on this part of the lot are not justified, and the plaintiff's right of action is sustained. But as we are unable to say how much of the damages the jury have allowed for this part of the trespass, and we have no sufficient materials for apportionment, we shall feel bound to make the rule for a new trial absolute on payment of costs, unless the plaintiff consents to accept nominal damages. The deduction is not very great, and as the plaintiff will be entitled to a certificate for full costs, cannot be very material: however, the option is with him. If his consent to reduce the verdict to one shilling, is not given before the end of the term, the rule will be absolute for a new trial on payment of costs.

The consent was afterwards given and the rule discharged.

1859.

DEMILL *against* The HARTFORD INSURANCE COMPANY *(a)*.

The assignee of a policy of insurance and of the property insured, does not by such assignment, acquire any right of action against the insurer on the original contract, though the assignment is made with his consent, and in accordance with one of the conditions of the policy; but a new promise by the insurer, supported by a valid consideration, to give the assignee the benefit of the insurance, will support an action.

ASSUMPSIT on a policy of insurance. The first count of the declaration stated, that the defendants on the 1st *October* 1847, by a certain policy of insurance then made in consideration of $100 to them paid, did thereby agree to insure certain persons by the style and firm of *Short & Estey* against loss or damage by fire, to the amount of $2000, on a steam saw-mill and machinery, for one year ending on the 1st *October* 1848. Provided *(inter alia)* that if the assured or their assigns should thereafter make any other insurance on the property, and should not with all reasonable diligence give notice thereof to the defendants, and have the same indorsed on the policy, or otherwise acknowledged by them in writing, the policy should cease and be of no further effect; and if any subsequent insurance should be made on the property, which with the sum already insured, should in the opinion of the defendants amount to an over-insurance, the defendants reserved the right of cancelling

The declaration in an action by the assignee of a policy of insurance made by the defendant with *A.*, after setting out the policy, the payment of the premium by *A.*, and his assignment to the plaintiff with the defendant's consent according to one of the conditions of the policy, whereby the defendant was released from liability to *A.*, stated, that in consideration that the plaintiff, at the request of the defendant, had undertaken and promised the defendant to perform all things on the policy contained on the plaintiff's part to be performed in pursuance of the consent to assign, and in consideration of the assignment of the property from *A.* to the plaintiff, and the release thereby of all liability of the defendant to *A.*, and of the assignment of the policy with the defendant's consent, and in consideration of the payment of the premium so received as aforesaid, the defendant promised the plaintiff to be the insurer to him, &c. **Held**, that there was not a sufficient consideration shewn to support the defendant's promise.

The receipt of a renewal premium on the policy by the insurer from the assignee, is a sufficient consideration for a new promise by the insurer to the assignee.

One of the conditions of a policy declared that if the insured should thereafter make any other insurance on the property, and should not with all reasonable diligence give notice thereof to the insurer, and have the same indorsed on the policy or otherwise acknowledged in writing, the policy should cease and be of no further effect; and if any subsequent insurance should be made, which with the sum already insured, should in the opinion of the insurer amount to an over-insurance, he should have the right of cancelling the policy by paying to the insured the unexpired premium *pro rata*. In an action on a policy where there was a subsequent insurance, the declaration averred that notice thereof was forthwith given to the insurer (the defendant), and it thereby became his duty to indorse such subsequent insurance on the policy or to acknowledge the same in writing, but that he neglected and refused so to do. **Held**, on demurrer, that the declaration was sufficient, and that a tender of the policy to the insurer for indorsement, or a request to him to indorse or acknowledge it in writing was not necessary.

Quære, whether the defendant could be charged with a breach of duty in not indorsing the subsequent insurance, unless the policy was tendered to him for that purpose; but held—that the averment that it was the defendant's duty to indorse it, might be treated as surplusage.

(a) This judgment was given in *Hilary* term, but the publication was unavoidably delayed.

1859.

DEMILL *against* The HARTFORD INSURANCE Co.

celling the policy by paying to the plaintiff the unexpired premium *pro rata*; and in case of any other insurance upon the property, whether prior or subsequent to the date of the said policy, the assured should not in case of loss or damage, be entitled to demand or recover 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. A number of conditions annexed to the policy were then set out, among which were the following:—"7th. Policies of insurance subscribed by "this company, shall not be assignable without the consent "of the company expressed by indorsement made thereon. "In case of assignment without such consent, whether of "the whole policy or of any interest in it, the liability of the "company in virtue of such policy shall thenceforth cease; "and in case of any sale, transfer or change of title in pro- "perty insured by this company, such insurance shall be "void." * * * "13th. Insurance once made, may be "continued for such further term as may be agreed on, the "premium therefor being paid and a renewal receipt being "given for the same, and it shall be considered as con- "tinued under the original representation in so far as it may "not be varied by a new representation in writing, which "in all cases it shall be incumbent on the party insured to "make, when the risk has been changed either within itself "or by the surrounding or adjacent buildings." The declaration then averred that on the 1st *October* 1856, by a renewal receipt made by the defendants and delivered to *Short & Estey* in pursuance of one of the conditions of the policy, the defendants acknowledged to have received from *Short & Estey* $140, the premium on the policy, which was thereby continued in force till the 1st *October* 1857; that *Short & Estey* were at the time of making the renewal receipt, and from thence till the time of the assignment afterwards mentioned, interested in the property to the amount insured; and that on the 9th *October* 1856, *Short & Estey* sold and conveyed to the plaintiff all their right, title, and interest in the property insured, and the defendants were thereby released from all liability to *Short & Estey* in

case

1859.

DEMILL *against* The HARTFORD INSURANCE Co.

case of loss; that on the 17th *October* by an indorsement on the policy pursuant to the conditions thereof, the defendants consented that the interest of *Short & Estey* should be assigned to the plaintiff, subject to the conditions of the policy, and that in pursuance of such consent, *Short & Estey* by another indorsement on the policy, assigned and transferred to the plaintiff all their right and interest in the policy, and all benefit and advantage to be derived therefrom, whereof the defendants afterwards, &c., had notice. And thereupon afterwards, &c., in consideration that the plaintiff at the special instance and request of the defendants had undertaken and promised the defendants to perform all things in the policy, and the conditions thereof contained on the part of the plaintiff in pursuance of the consent so indorsed, and in consideration of the assignment of the property from *Short & Estey* to the plaintiff, and the release thereby of the defendants from all liability to *Short & Estey*, and also of the assignment of the policy with the defendants' consent, and in consideration of the payment of the premium for such insurance so received as aforesaid, the defendants undertook and promised the plaintiff to become and be the insurers to the plaintiff for the said sum of $2,000 on the property, for the remainder of the time mentioned in the policy, and to perform to the plaintiff all things in the policy on their part to be performed; and that the plaintiff at the time and after the said indorsement on the policy, and from thence and until the loss, was interested in the property mentioned in the policy and intended to be insured, to the amount of $2,000. It then averred the loss and notice, the preliminary proof, &c., and the breach. The second count was substantially the same as the first.

The fourth count stated that the defendants on the 23rd *February* 1853, by a certain other policy of insurance then made, in consideration of $300 to them paid, thereby agreed to insure *Short & Estey* against loss and damage by fire to the amount of $6,000, in addition to the $2,000 already insured by the first mentioned policy, on their steam saw-mill and machinery, for one year ending on the 23rd *February* 1854 (the provisos and conditions of the policy were then set

1859.

DEMILL *against* The HARTFORD INSURANCE CO.

set out, as in the first count.) It then averred, that on the 23rd *February* 1856, by a renewal receipt made by the defendants and delivered to the plaintiff in pursuance of one of the conditions of the policy, and in continuance thereof, the defendants acknowledged to have received from *Short & Estey* $420, being the premium on $6,000 insured by the policy, which was thereby continued in force for one year till the 23rd *February* 1857. That afterwards, on the 9th *October* 1856, *Short & Estey* assigned and conveyed to the plaintiff all their right and interest in the property insured, and the same thereby became vested in the plaintiff, and the defendants were thereby released from all liability to *Short & Estey* in case of loss; that on the 17th *October* in the year aforesaid, by indorsement on the policy, the defendants consented that the interest of *Short & Estey* in the policy should be assigned to the plaintiff subject to the conditions therein contained; and that on the same day, in pursuance of such consent, *Short & Estey* by another indorsement on the policy, assigned and transferred to the plaintiff all their right and interest in the policy and all benefit and advantage to be derived therefrom; that afterwards, on the 9th *March* 1857, by another renewal receipt made by the defendants and delivered to the plaintiff in pursuance of the conditions of the policy and in continuance thereof, the defendants acknowledged to have received from the plaintiff $280, being the premium on $4,000 insured under the policy, which was thereby continued in force for one year from the said 9th *March*, of all which premises the defendants had notice. And thereupon afterwards, &c., in consideration that the plaintiff at the special instance and request of the defendants, had then and there undertaken and promised the defendants to perform all things in the said policy, and the conditions thereof contained on the part and behalf of the plaintiff, in pursuance of the said consent to be performed, and in consideration of the assignment of the property from *Short & Estey* to the plaintiff, and the release to the defendants of all their liability to *Short & Estey* for such insurance, in case of loss from want of interest, and also of the policy with the consent aforesaid, and in consideration

1859.

DEMILL *against* The HARTFORD INSURANCE CO.

consideration of the premium so paid by the plaintiff to and received by the defendants, the defendants undertook and promised the plaintiff to become the insurers to him for the said sum of $4,000 on the property, and to perform to the plaintiff all things in the policy contained on their part. It then averred the plaintiff's interest in the property, and the destruction by fire, and alleged that at the time of making and delivering the renewal receipt, nor at any time since, the property mentioned in the policy was not insured in any other office, or with any other person or company except for the sum of $2,000 with the defendants, and a further sum of £1,000 in *The Times Insurance Company of London*, on the 20th *May* 1857, of which last mentioned insurance notice was given by the plaintiff to the defendants on the day and year last aforesaid; and it thereby became the defendants' duty under the terms of the policy, to indorse such insurance on the policy, or to acknowledge the same in writing, but the defendants wholly neglected and refused so to do. Averment of the performance of the conditions of the policy by the plaintiff, and the refusal by the defendants to pay the money.

The defendants demurred to these counts, and assigned the following grounds, among others which are not material:—

1. That the contract being made with *Short & Estey*, the plaintiff as assignee could not sue thereon.

2. That there was no sufficient consideration stated in the first and second counts, to support a promise by the defendants to pay the plaintiff.

3. That the policy set out in fourth count was void, because the insurance effected in *The Times Insurance Company* was not indorsed thereon, or acknowledged by the defendants in writing.

4. That it was the plaintiff's duty to have the second insurance indorsed on the policy or acknowledged in writing; and that it did not appear that the plaintiff had tendered the policy to the defendants for that purpose, or requested them to indorse it, or acknowledge it in writing.

C. W. Weldon in support of the demurrer, (in *Michaelmas* term

1859.

DEMILL *against* The HARTFORD INSURANCE Co.

term last). The contract on a policy of insurance is merely a *chose in action*, which cannot be assigned so as to give the assignee a right of action at law in his own name. *Angell Ins.* § 211. It is only in cases of bills of exchange and promissory notes, that the assignee of a contract can sue in his own name. *Dixon* v. *Bovill (a)*. In the *American* cases, where it has been held that the assignee can sue, it seems to depend upon the charters of the companies; but otherwise it is only an equitable right. *Powles* v. *Innes (b)*; *Carpenter* v. *Washington Insurance Company (c)*. The case of *Wilson* v. *Hill (d)*, is the only one where it has been held that the assignee can sue in his own name, but that is not sufficient to overturn the general principle of the common law. It is the plaintiff's duty to shew that this case does not fall within the general doctrine that a *chose in action* is not assignable. 2. There is no consideration to support the defendants' promise. Payment of the premium by *Short & Estey* will not sustain a promise to pay the plaintiff. *Eastwood* v. *Kenyon (e)*. 3. It was the plaintiff's duty to have the subsequent insurance indorsed on the policy: it is a substantial provision in the contract, which he was bound to have performed. *Angell Ins.* § 91. If it could be waived, the declaration should have averred that the defendants dispensed with the performance of it; but it is consistent with the averment, that the defendants refused to assent in writing.

S. R. Thomson and *Frith, contra.* There is no case to shew that the assignee of a policy of insurance cannot bring an action in his own name, where the company has assented to the assignment; for by doing so, they are estopped from saying that the policy is void. Their assent makes it a new contract with the assignee. *Parsons' Merc. L.* 407, 534. If *A.* gives a bond to *B.*, which *C.* agrees to purchase, and *A.* assents to *C.'s* purchase, what is to prevent *C.* from maintaining an action against *A.* on the bond? [PARKER, J. I don't think he could, unless there is forbearance, or some new consideration.] In marine assurances the assent of

(a) 39 *Eng. R.* 47. (b) 11 *M. & W.* 10. (c) 2 *Amer. L. C.* 519.
(d) 3 *Metc.* 66. (e) 11 *A. & E.* 438.

the

1859.

DEMILL *against* The HARTFORD INSURANCE CO.

the insurers to the assignment is not necessary, because such policies are made for the benefit of all whom it may concern: here the policy contemplates that there may be an assignment with the consent of the insurers, and when they consent they make themselves liable. *Wilson* v. *Coupland (a).* As this is an *American* contract, the *lex loci* ought to apply. 2. A very slight consideration is sufficient to support a promise. *Chit. Con.* 30 If the assured sells the property and assigns the policy to the purchaser with the assent of the insurer, this constitutes a new promise to the assignee to indemnify him, and the exemption of the insurer from further liability to the vendor and the premium already paid are a good consideration for the promise, and create a new and valid contract between the insurer and the assignee. *Angell Ins.* § 194, 212. The fourth count alleges an express contract with the plaintiff on the 9th *March* 1857. The payment of the premium by the plaintiff was a new contract, which estops the defendants from saying the plaintiff was not the contracting party and had no interest in the policy. 3. The declaration avers notice of the second insurance with due diligence. That is all the plaintiff was obliged to do: and if the defendants do not elect to declare the policy void under the proviso, it is a waiver of the necessity of the indorsement on the policy. If due notice is given, it is enough, according to the case cited in *Angell Ins.* § 91. It is not necessary to allege in pleading matter that is necessarily implied. *Steph. Pl.* 398.

C. W. Weldon in reply.

Cur. adv. vult.

CARTER, C. J., now delivered the judgment of the Court. This is an action of assumpsit brought by the plaintiff on a policy of insurance against fire, originally made between the defendants and *Short & Estey* on the 1st *October* 1847, for one year, and renewed by a renewal receipt between the same parties on the 1st *October* 1856, for one year ending the 1st *October* 1857. The plaintiff claims a right to bring this action as assignee of *Short & Estey*, by an

(a) 5 *B. & Ald.* 228.

assignment

1859.

DEMILL *against* The HARTFORD INSURANCE Co.

assignment of the insured premises dated the 9th *October* 1856, and by an assignment of the policy of insurance by *Short & Estey* on the 17th *October* 1856, to which last mentioned assignment the assent of the defendants was given and indorsed on the policy. The case comes before us on demurrers to the first, second and fourth counts of the declaration. We have only to deal with the declaration as it stands, and as regards the first and second counts, we are of opinion that the plaintiff has not shewn any cause of action. It is quite clear that if an action at law can be maintained by the plaintiff on the present declaration, it cannot be founded on the assignment of the policy, as transferring the right of action from *Short & Estey* to the plaintiff on the original contract; but it must rest on a new promise, express or implied, made by the defendants to the plaintiff, supported by a valid consideration, whereby the defendants have undertaken to give to the plaintiff, as the owner of the property, the same benefit of indemnity which they had contracted for with *Short & Estey*. As the consideration and undertaking alleged in the declaration are admitted by the demurrer, we have to examine what the alleged consideration is. The first and second counts set it out as follows:—"1st. In consideration that the plaintiff at the "request of the defendants, had undertaken to perform all "things in the policy and conditions thereto annexed on the "part of the plaintiff, in pursuance of the consent to assign "indorsed on the policy to be performed." 2nd. "In con-"sideration of the assignment of the insured property from "*Short & Estey* to the plaintiff, and the release thereby of "the defendants' liability to *Short & Estey*, and also of the "assignment of the said policy with the consent of the de-"fendants." 3rd. "In consideration of the payment of the "premium for such insurance so received as aforesaid." Now admitting that if any of these be a good consideration, it would support the promise: is any of them good? As to the first, we can see nothing in what the plaintiff promised to do, or was bound to do in pursuance of the assignment, which would make a consideration, supposing he had promised to do all that *Short & Estey* had engaged to do. The assignment

1859.

DEMILL *against* The HARTFORD INSURANCE Co.

assignment is subject to all the conditions contained in the policy, but not subject to the performance of any engagements for the benefit of the defendants. There was nothing that *Short & Estey* were bound to do, which if left undone would subject them to an action. The non-feasance might cause a forfeiture of the right to recover on the policy, but nothing further. This, therefore, would not be a case in which a promise from *A.* to *B.* would be a good consideration for a promise from *B.* to *A.* As to the second alleged consideration: the assignment of the property was no good consideration, unless it were alleged that the plaintiff had accepted the assignment at the request of the defendants, or upon their undertaking that in case he did become assignee of the property, they would give him the benefit of the premium paid by *Short & Estey.* The assignment was on the 9th *October;* the alleged promise on the 17th *October.* It was an executed consideration, and would not avail unless moved by a precedent request, express or implied, by the defendants. *Eastwood* v. *Kenyon (a); King* v. *Sears (b).* Neither would the assignment of the policy avail. All that is alleged to have been assigned on the 17th *October*, is "the right, title and interest in the said policy, and all "benefit and advantage to be derived therefrom;" *i. e.*, all the right, title, interest, benefit and advantage which, on the 17th *October*, *Short & Estey* had or could have from the defendants' contract—which was nothing—as by virtue of the seventh condition all ceased on the 9th *October*, when they transferred the property. It is not alleged that the defendants had any notice or knowledge of the assignment of the property until the 17th *October*, therefore it may be presumed, when they gave their consent to the assignment, they supposed *Short & Estey* to be still entitled to the benefit of the insurance; and in such case they, the defendants, could not be estopped by their consent, from alleging that the insurance was at an end by the transfer on the 9th *October.* Then as to the release of liability to *Short & Estey*, alleged to be effected by the assignment: that is not so. The assignment created a forfeiture, not a release;

(a) 11 *A. & E.* 451. (b) 2 *C. M. & R.* 48.

1859.

DEMILL *against* The HARTFORD INSURANCE Co.

but even if a release, it was an executed consideration, requiring a previous request. 3rd. As to the consideration set out as arising from the payment of the "premium so received as aforesaid." The only premiums alleged to have been paid and received in the first and second counts, were paid by *Short & Estey* long before the alleged promise to the plaintiff, and could form no consideration for such promise, (at least as these counts are framed) unless *Short & Estey*, or the plaintiff, were entitled to a rateable proportion of the premium for the part of the year unexpired, which they certainly were not. Besides, there is here the same objection as before, that it is an executed consideration. Whatever relief there may be in equity, we can see no valid contract in law set out in these two counts. The alleged consideration will not support the promise; and on this ground we think the demurrers to the first and second counts are sustained, and there must be judgment for the defendants.

The fourth count stands on a different footing from the first and second. In addition to the other averments, it avers that the defendants on 9th *March* 1857, made a certain other renewal receipt and delivered it to the plaintiff, in pursuance of one of the conditions, and thereby acknowledged to have received from the plaintiff $280, being the premium for $4,000 insured under the policy, which was thereby continued in force for one year, viz., from the 9th *March* 1857, to the 9th *March* 1858. Here is a good consideration in money from the plaintiff to the defendants, sufficient to support the defendants' promise. The defendants then knew that the plaintiff had become the owner of the insured property by assignment from *Short & Estey*; (notice of this to the defendants on the 17th *October* 1856, is averred and admitted by the demurrer) they knew moreover, *valeat quantum*, that *Short & Estey* had assigned the policy of insurance to the plaintiff, with their consent endorsed. And although all this might not be sufficient if *Short & Estey* had ceased to have any interest when they made the assignment, the nature of the contract seems to be such, that the defendants could give thus much vitality to it, as to make the contract of indemnity, as therein set out, for the benefit of *Short & Estey*

1859.

DEMILL *against* The HARTFORD INSURANCE Co.

Estey for a time which had expired, available to the plaintiff, for a time then to begin. The Insurance Office had the power of refusing their assent to the assignment of the policy to the plaintiff; of thus saying to him—we will not contract with you; we will not receive from you the premium, and if we receive no premium from you, we engage for no indemnity. The receipt of the premium from the plaintiff, in addition to the consent previously given to the assignment, would estop the defendants from setting up that the policy was void and at an end, beyond the power of resuscitation. There remains, however, another important point to consider in regard to the fourth count, viz., the effect of the subsequent insurance of £1000, effected by the plaintiff with *The Times Fire Insurance Company of London*, on the 20th *May* 1857. The provision of the defendants' policy on this subject is set out as follows:—"And if the said *Short* "*& Estey*, or their assigns, should thereafter make any "other insurance on the said property, and should not with "all reasonable diligence give notice thereof to the said "defendants, and have the same endorsed on the said policy, "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 upon the property "thereby insured, which, with the sum or sums already in-"sured, should in the opinion of the defendants amount to "an over-insurance, the said defendants reserved to them-"selves the right of cancelling the said policy, by paying to "the insured the unexpired premium *pro rata*." It is averred that notice of this subsequent insurance was given to the defendants, and that it thereby became their duty, under the terms of the policy, to endorse the said insurance on the policy, or acknowledge the same in writing, but the said defendants wholly neglected and refused so to do. No tender of the policy for endorsement, nor special request to endorse or acknowledge in writing is alleged; and we do not think such allegation was necessary. The refusal by the defendants is alleged and admitted by the demurrer. Such refusal must either have been given on an application to endorse

1859.

DEMILL *against* The HARTFORD INSURANCE Co.

endorse or acknowledge in writing, or have been given before any such application, which would render the application unnecessary. The Insurance Company, who, in making the contract, had the power to impose what conditions they pleased, (a power very freely exercised) do not restrict the insured from making further insurance, nor do they require that any previous or subsequent consent should be asked or given. In truth the subsequent insurance is rather for their benefit; it may diminish their loss in case of fire: it cannot increase it. The only way in which it could be objectionable is as an over-insurance, and that the company provide for, by reserving the right to put an end to their contract by repaying the rateable proportion of the premium for the unexpired term. This is undoubtedly reasonable, and would seem to be the real and legitimate object of the provision in the policy. Now, all that the insured is really required to do, or can do, is to give the notice of a subsequent insurance, with reasonable diligence, for though the terms are that "he shall have the same endorsed or acknow-"ledged in writing," it is clear he cannot have this done if the company refuse to do it. When notice is given to them, they may endorse or acknowledge, or not, as they choose, and if they wish to put an end to the contract, on the equitable terms of repaying that which was the consideration of the contract for its unexpired term, they can do so; but it would seem most unreasonable and unjust that, avoiding this repayment, they could, by refusing to do an act which they alone could do, retain the whole consideration of the contract, and yet get rid of all liability thereon. It may be doubted whether the averment that it was the duty of the defendants to endorse or acknowledge in writing, is strictly correct, or whether the defendants could be properly charged with a breach of duty in not endorsing, unless the policy was tendered to them for that purpose, or even if it had been so tendered. But this averment may be treated as surplusage, and the distinct averment of notice to them and refusal by them either to endorse or acknowledge in writing, will be sufficient to prevent the forfeiture.

There

There will be judgment for the defendants on the demurrers to the first and second counts, and for the plaintiff on the demurrer to the fourth count.

Judgment accordingly.

1859.

DEMILL *against* The HARTFORD INSURANCE Co.

END OF EASTER TERM.

GENERAL RULE.

(Notice of Defence.)

IT IS ORDERED, That when a notice delivered under the Act of Assembly 13 *Victoria, c.* 32, includes several distinct grounds of defence, which would before such act have required separate pleas, such separate grounds of defence shall be numbered consecutively and placed in separate clauses; and any objection to the form of the notice, on the ground of duplicity, must be made to a Judge within fourteen days after the same is delivered, who will, upon summons, make such order for allowance or disallowance of the notice, or amendment of the same, and on such terms as the case may require; and no objection to the notice on the ground of duplicity, will be allowed at the trial of the cause.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF NEW BRUNSWICK,

IN

TRINITY TERM,

IN THE TWENTY-SECOND YEAR OF THE REIGN OF VICTORIA.

MILLS *against* LEACH. *June 15th.*

Where a cause has been taken down to trial and made a *remanet*, either by special order of the Judge, or for want of time to try all the causes on the docket, the defendant cannot obtain judgment as in case of a nonsuit for a subsequent default.

D. S. KERR moved for judgment as in case of a nonsuit, the plaintiff not having proceeded to trial pursuant to notice. The cause had been entered for trial at the *St. John* circuit in *May* 1858, but was not reached on the docket, and was made a remanet; notice of trial was again given for the *November* circuit in 1858, but the cause was struck off, and a further notice of trial given for the last *May* circuit. The affidavit of the plaintiff's attorney stated that the last notice was given by mistake, and that the defendant's counsel had moved the court and obtained costs of the day for the default in not going to trial at the *November* circuit.

S. R. Thomson opposed the motion, and referred to *Bennett* v. *Stockford (a)*.

Per Curiam. The motion must be dismissed with costs. We cannot distinguish this case from the numerous decisions on the point in this Court: it makes no difference whether the case is made a remanet by the distinct order

(a) 1 *Kerr*, 300.

of

1859.

MILLS *against* LEACH.

of the Judge, or whether it is ordered to stand over among a number of other cases, because there was not time to try them.

Motion refused with costs.

June 20th.

WETMORE *against* DESBRISAY.

An offer under the Act 18 *Vict.* c. 9, to suffer judgment by default, must be signed by the defendant in the cause, and not by the attorney.

A. R. WETMORE shewed cause against a rule calling on the plaintiff to shew cause why he should not bring the postea into Court and file the judgment roll, and why the defendant should not have leave to enter a suggestion on the roll for his costs, pursuant to the Act of Assembly, 18 *Vict.* c. 9. The defendant's attorney had filed an offer, signed by himself, to suffer judgment by default for £20, and gave notice thereof to the plaintiff's attorney, who did not accept it. The cause was afterwards tried and a verdict given for the plaintiff for £18 18s. 10d. He objected that the offer could only be signed by the defendant.

Steadman, contra, contended that a consent under the act was part of the proceedings in the cause, which, like other notices, might be signed by the attorney. If it was otherwise, part of the proceedings would be conducted in the name of the client, and others in the name of the attorney.

Cur. adv. vult.

N. PARKER, M. R., now delivered the judgment of the Court. We are called upon on this motion to give a construction to the Act 18 *Vict.* c. 9, relating to tenders in actions at law and suits in equity; and the question is, whether an offer and consent filed in the clerk's office according to the provisions of this act in other respects, is insufficient if signed by the defendant's attorney, and not by the defendant himself. The act, in terms, only authorises this to be done by the defendant. It says, "whenever any "defendant in any action at law or suit in equity, wherein "debt

1859.

WETMORE *against* DESBRISAY.

"debt or damages only are sought to be recovered, shall file "in the office of the clerk of the Court in which such suit is "pending, an offer and consent in writing, to suffer judgment "by default," &c.; while on the other hand, it expressly provides that the offer may be accepted by the plaintiff or his attorney. From this marked distinction, we are of opinion that the signature, as in the present case, of a person who is merely the attorney in the cause, is not in compliance with the act, and therefore that the offer has not been made by the defendant, and that he is not entitled to the benefit which the act is intended to give. This motion therefore must be dismissed.

From the facts of the case, as reported by the learned Judge who tried the cause, we may add that the plaintiff is only entitled to summary costs.

Rule accordingly.

HASTINGS *against* HENNIGAR.

In an action by the indorsee against the indorser of an accommodation note, to which the defence was, that the plaintiff in discounting the note had taken usurious interest, the maker of the note proved that he gave it to *B.*, a broker, to get it discounted. *B.* could not identify the note as the one discounted for him by the plaintiff, but said if it was so, the transaction was usurious. A verdict having been found for the defendant, a new trial was refused — there being no evidence of any other note between the parties, and the plaintiff failing to shew that he had not obtained it from *B.*

ASSUMPSIT by the indorsee against the indorser of a promissory note for £35, drawn by *G. & J. Salter* in favor of the defendant.

At the trial before *Carter*, C. J., at the Sittings after last *Trinity* term, it appeared that the note had been indorsed by the defendant for the accommodation of Messrs. *Salter*, who gave it to one *Burns*, a bill broker, for the purpose of being discounted, and received from him the proceeds, deducting the discount of about 20 per cent. *Burns* was called as a witness for the defendant, and stated that the plaintiff had discounted notes for Messrs. *Salter* on his application; that he had no recollection of having negociated the discount of this note with the plaintiff, but if he did so, it was at an usurious rate of interest. The plaintiff gave

1859.

HASTINGS *against* HENNIGAR.

no evidence of the mode in which he obtained the note. The Chief Justice directed the jury that if the note was put into the market and sold for what it would bring, it would not be usury though the plaintiff might have given much less than the value of it; but if *Burns*, as *Salters'* agent, discounted it with the plaintiff at a higher rate than six per cent., it would be usury, and the plaintiff could not recover. Verdict for the defendant.

In the following term, *S. R. Thomson* obtained a rule *nisi* for a new trial, on the ground that the verdict was contrary to evidence, there being no sufficient proof that the note was discounted by the plaintiff; or if it was, that the rate of discount was usurious.

A. R. Wetmore shewed cause on a former day in this term, and *S. R. Thomson* was heard in support of the rule.

Cur. adv. vult.

CARTER, C. J., now delivered the judgment of the Court. The only question in this case was, whether the liability of the defendant on the note was extinguished on the ground of usury. It appeared that the defendant signed the note for the accommodation of *Salter*, and that *Salter* placed the note in the hands of one *Burns*, a bill broker, for the purpose of being discounted. *Burns* will not swear to the identical note as having been passed by him in discount to the plaintiff, but he does swear that if that transaction did take place, it was at an usurious rate of interest. It is evident from his sueing on the note, that it came to the hands of the plaintiff after it had been handed to *Burns* to be discounted. There are no subsequent indorsements on the note, nor does the plaintiff by his own evidence or that of other persons, shew, as he might have done had the fact been so, that he did not procure the note from *Burns*. There was no evidence of any other note between these parties. It was left to the jury to say upon the evidence, whether they were satisfied that this note was discounted by *Burns* as the agent of *Salter*, to the plaintiff, at a rate beyond six per cent. They have found it was so, and we think the evidence, uncontradicted as it was, sufficient to warrant

such

such finding, and therefore that the rule for a new trial should be discharged. 1859.

HASTINGS *against* HENNIGAR.

Rule discharged *(a)*.

(a) See *Peters* v. *Irish*, *ante*, *p.* 326.

LANG *against* GILBERT.

A notice of defence in an action for a libel, stating that the allegations contained in the writing complained of are true; is sufficient under the Act 13 *Vict. c.* 32 — there being no affidavit of the plaintiff that he was misled by the generality of the notice.

THIS was an action for a libel, alleged to be contained in a letter written by the defendant to one *Charles D. Archibald*, relative to a statement made by the plaintiff about the service of a writ by the defendant as Sheriff of the county of *Albert*, in a case of *Layton* v. *Archibald*. The defendant pleaded the general issue, and gave the following notices of defence under the Act 13 *Vict. c.* 32. 1st. That the defendant being Sheriff of the county of *Albert*, did on the 31st *October* 1857, personally serve the plaintiff as the agent of *Charles D. Archibald*, with the writ mentioned in the declaration. 2nd. That the allegations and statements contained in the defendant's letter, as set forth in the declaration, are true.

In *Easter* term last, *A. L. Palmer* moved to set aside the notices, as being too general. He referred to 2 *Rev. Stat.* 372; *Dowling* v. *Trites (a)*; *LeGal* v. *Duffy (b)*.

A. R. Wetmore, contra, contended that as the plaintiff had not shewn that he was misled by the generality of the notices, they must be considered sufficient under the act.

Cur. adv. vult.

N. PARKER, M. R., now delivered the judgment of the Court. This was a motion to set aside certain notices of defence in an action for a libel alleged to be contained in a letter written by the defendant to one *Charles D. Archibald*. The occasion of writing the letter appears to have been the receipt of a letter from *Archibald*, informing the defendant

(a) 2 *Allen*, 520. (b) 3 *Allen*, 57.

(who

1859.

LANG *against* GILBERT.

(who was Sheriff of the county of *Albert*) that *Lang* had sworn that the defendant had never served the plaintiff, who appears to have been the agent of *Archibald*, with a writ at the suit of *John G. Layton*, which the defendant affirmed that he had done. This seems to be the main charge which the letter contains, though it is of great length and contains strong animadversions on the conduct of *Lang* as the agent of *Archibald*, and personal reflections of a not very complimentary character. In addition to the general issue, the defendant has given notice of the following grounds of defence:—1st. That he, the defendant, being Sheriff of *Albert*, did, on a day named, personally serve the plaintiff, being the duly authorised agent of *Archibald*, with the writ referred to. And 2nd. That the allegations and statements are true. The generality of this notice is objected to; and it is alleged that the defendant should have set forth more fully and precisely the grounds of defence. The Act 13 *Vict. c.* 32, § 4, which authorises the notice, enacts: "that it shall be in a general and brief form, and "shall be deemed sufficient, unless the plaintiff shall make it "appear that he has been misled by the defect or generality "of such notice." The general principle in libel is, that the defendant may plead the truth of the libel in justification. He has here, in compliance with the act, given a brief and general notice of a defence which would have been clearly a good defence if pleaded, and there is no affidavit to shew that the plaintiff has been misled. We think that this notice is in conformity with the requirements of the act, and that the motion having been made with costs, must be dismissed with costs.

Rule accordingly.

1859.

ROURKE *against* McCULLOUGH.

TRESPASS *quare clausum fregit*, tried before *Ritchie*, J., at the last *St. John* circuit.

If a tenant defends an action for rent, and a reduction is made in the amount claimed, on the ground that he has been evicted by the landlord from part of the premises, he cannot afterwards maintain trespass against the landlord for the same act which he relied on as an eviction in the former action.

It appeared that the plaintiff was tenant to the defendant, of a house with a yard in the rear, at a certain rent; that the defendant had brought an action for the rent, which was defended on the ground of eviction; that it was proved that during the term for which the rent was claimed, the landlord had entered on the land and removed a part of the fence and buildings, so that the plaintiff had no beneficial occupation of that part of it; that the Judge directed the jury to find for the plaintiff a reasonable sum for the occupation of that part of the property which the tenant had actually occupied, and they gave a verdict for the amount of the rent up to the time of the eviction. This action of trespass was afterwards brought against the landlord for the same act which was complained of as an eviction in the former suit. The learned Judge directed the jury that the same matter having been adjudicated upon between the parties in the former action, the plaintiff could not recover. Verdict for the defendant.

A rule *nisi* having been granted for a new trial on the ground of misdirection,

Watters, S. G., shewed cause, contending that the act complained of as a trespass was *res judicata*, and that the judgment in the former action was conclusive. 3 *Phill. Ev.* 962. If it was otherwise, the plaintiff would recover twice for the same injury.

A. R. Wetmore, contra. The eviction was an answer to the whole rent. The tenant was not bound to pay the whole rent, and then bring trespass against the landlord for his entry, but he might resist the claim for rent and bring an action for the damage besides. *Hunt* v. *Cope (a).*

Cur. adv. vult.

(a) *Cowp.* 242.

CARTER,

1859.

ROURKE *against* M'CULLOUGH.

CARTER, C. J., now delivered the judgment of the Court. This was an action of trespass *quare clausum fregit*. The land on which the alleged trespass took place, was land which the plaintiff had held as tenant to the defendant for a period which had not expired. It appeared that in a former action brought by the defendant against the plaintiff for the rent of the premises, the plaintiff had, in order to prove an eviction, given the same evidence by which, in the present action, he seeks to prove a trespass, and that he succeeded on that ground in relieving himself from any rent subsequent to such eviction. Having adopted that course, it is contended he cannot recover in trespass for the same act. This appears to us the correct view of the case. By his defence in the first action for rent, he treated the acts of the plaintiff as an eviction, and claimed, and by the verdict of the jury received compensation therefor, in reduction of rent which he was otherwise liable to pay. He cannot, therefore, now again claim and recover damages for the very same acts in an action of trespass, because the matter has been once adjudicated on between the parties, and a judgment between the same parties upon the same cause of action is conclusive, although the form of action be different.

Rule discharged.

WILLIAMS *against* WOOD & DIXON.

The defendant having advanced money to *D.* to build a ship, became the registered owner of three fourths of the ship, as a security for his advances, with an agreement that she should be sold in *England* and his debt paid out of the proceeds of the sale. The ship being at *St. John* and requiring repairs to enable her to go to *England*, *D.* and the master of the ship employed the plaintiff to do the work, directing him to charge it to the owners. The ship was sent to *England* and sold, and the defendant got the proceeds. Held, that he was liable for the repairs.

ASSUMPSIT to recover the value of repairs done upon a ship, of which the defendants were the registered owners. The defendant *Wood* pleaded *non-assumpsit*, and *Dixon* suffered judgment by default.

At

1859.

WILLIAMS *against* WOOD.

At the trial before *Ritchie*, J., at the last *St. John* circuit, it was proved that *Wood* was the registered owner of three fourths of the ship, and *Dixon* of the remainder; that the work was done at *St. John* by the direction of *Dixon* and the master, without the knowledge of *Wood*, and that it was necessary to enable the ship to go to sea. The plaintiff stated that he would not have done the work on the credit of *Dixon* alone. The defence was, that *Wood* never authorised the work to be done, and had no interest in the ship, except as security for a debt due him from *Dixon*. It appeared that the ship was built by *Dixon* at *Sackville*, under an agreement with *Wood*, who furnished the money, and that he was registered as a part-owner in order to secure himself for his advances; that the ship was sent to *England* and sold, and that he got the entire benefit of the proceeds. It also appeared that he had been consulted by *Dixon* on the appointment of the master.

The learned Judge told the jury that *prima facie* the registered owners of a ship were liable for repairs; but though the registry was not conclusive as to liability, it was a material circumstance in this case, where the repairs were done by the direction of the master, appointed with the defendant's consent, and were necessary to enable the ship to be sent to *England*, by which the defendant was enabled to get the proceeds into his own hands, and get his debt paid. The question was whether *Dixon* or the master had any implied authority to pledge *Wood's* credit for the repairs; if they had, the plaintiff was entitled to recover. Verdict for the plaintiff — £23 3s. 11d.

A rule *nisi* having been granted for a new trial on the ground of misdirection,

Dole shewed cause on a former day in this term. Registered ownership is *prima facie* evidence of liability for repairs. *Story Part.* § 419; *Cox* v. *Reid (a)*; *Samsun* v. *Bragington (b)*. In all that concerns the repairs and necessaries of a ship, one part-owner is the agent for the others, and may by ordering repairs, render the other part-owners liable. *Abbot on Ship.* 105; *Coll. Part.* 687. *Story Part.*

(a) *Ry. & M.* 199. (b) 1 *Ves. Sr.* 443.

1859.

WILLIAMS *against* WOOD.

§ 456. Where a ship is under the management of the master, and the owners divide the profits, the master is *prima facie* agent for them all. *Briggs* v. *Wilkinson (a)*; *Robins* v. *Power (b)*. In *Jennings* v. *Griffiths (c)*, the defendant had no beneficial interest in the vessel though he was the registered owner, nor had he anything to do with the appointment of the captain: here *Wood* not only appointed the master, but received the proceeds of the sale of the ship. A part-owner may make himself liable by adopting the repairs and receiving the benefit of a ship after she has been repaired. *Brodie* v. *Howard (d)*. It is not contended that the registry is conclusive of ownership, but it is a material fact, and coupled with the other circumstances, was sufficient to justify the jury in finding that the master had authority to bind *Wood*. In *Mitcheson* v. *Oliver (e)*, the defendant had given no authority to the master.

A. L. Palmer, contra. The fact of a party being the registered owner of a ship is not sufficient to constitute the master his agent, so as to bind him for repairs done to the ship; *Mitcheson* v. *Oliver (e)*; and the proper question for the jury is—not on whose credit the work was done—but who was the contracting party. Neither *Dixon* or the master had any authority to pledge *Wood's* credit; and without some authority, express or implied, he cannot be made liable, whatever the plaintiff may have considered when he did the work. It must depend upon whether the relation of principal and agent existed between *Wood* and the persons who ordered the work. *Myers* v. *Willis (f)*. According to the present doctrine, the fact of a person being the registered owner of a ship, is not even *prima facie* evidence of his liability for repairs: the liability depends on the contract, and not on the ownership of the vessel. *Mackenzie* v. *Pooley (g)*.

Cur. adv. vult.

PARKER, J., now delivered the judgment of the Court. We think this case too clear to call for any further delay in

(a) 7 *B. & C.* 35. (b) 4 *Jur. N. S.* 810. (c) *Ry. & M.* 42.
(d) 33 *Eng. R.* 146. (e) 32 *Eng. R.* 219; 5 *E. & B.* 419.
(f) 33 *Eng. R.* 204. (g) 34 *Eng. R.* 486.

deciding

deciding it. The demand is but £23, and is the fair price of necessary work honestly done by the plaintiff, of which the defendant has had the benefit, under such circumstances as fully warranted the jury in considering that he was liable to pay for it. The only complaint made against the verdict is, that the jury might have been misled by the Judge's charge: that they were so, is not at all apparent. Now without doubt, as an abstract unqualified proposition, to say that the registered owners of a ship were *prima facie* liable for the price of repairs or outfit, in the port to which she belongs, where they have not personally contracted, and irrespective of the persons who have contracted, would at the present day be going too far; but to say that the defendant, *Wood*, as a registered owner, would be liable in a case like the present, would be quite correct, when accompanied, as it was here, by an instruction to the jury as to the ground of liability, and leaving it to them to draw the inference on which such liability would depend. It is admitted that *Wood* did not personally order the work to be done by the plaintiff, but that the plaintiff did it trusting to *Wood's* liability as well as *Dixon's;* he had previously done work on another vessel of the defendant's somewhat similarly situated, for which he had been paid, as he might naturally suppose, with *Wood's* knowledge. It is possible *Wood* may not have known it, and therefore the fact would have but little weight, further than to shew why, when the work was done under the direction of the master and the part-owner *Dixon*, upon the ship belonging to *Wood & Dixon*, and he was told to charge it to the owners, *Wood & Dixon*, he should not have mistrusted the authority of the master and *Dixon* to give such order. Suppose he had made further inquiries, and could have ascertained the real state of the case, what would he have discovered? That though *Dixon* was to have the benefit, if the ship turned out a good speculation; that she was built by the means furnished by *Wood*, who was to be first paid in full, before *Dixon* could get anything; that *Wood*, instead of securing himself by mortgage, designedly became the registered owner for by far the larger share of the vessel; appointed, or was privy to the

1859.

WILLIAMS *against* WOOD.

appointment of the master; was at *St. John* himself when the vessel was fitting out; and that the work the plaintiff was employed to do was indispensable for getting the ship to sea, without which *Wood* could not get paid for his large advances already made, and that he had ordered the sails which were on the ship. And if he could have gone a little further and foreseen the result, he would have found that the whole beneficial interest in the ship was in *Wood*—his advances exceeding her value; that he got all the proceeds of ship, freight and cargo when sold in *Liverpool*, and thus had put in his pocket the price of the plaintiff's work. Without doubt there may be cases where a registered owner, even though he had the benefit, would not be liable, and where no authority from him ought to be implied, and where there is no other liability than that of the person ordering the work, who may have no interest in the ship. For instance, the workmen employed by the plaintiff might have done all the work, and would look to him alone for payment; and many other cases of the sort might be suggested. This case is clear enough.

The rule will be discharged.

SEARS *against* ROBINSON.

By an agreement between plaintiff and defendant, therein described as Province Treasurer, for and on behalf of the Queen, the plaintiff agreed to procure to be coined in *England* and delivered to the defendant, a certain amount of copper coin for the use of the Province. The Crown having refused to authorise the coining, the plaintiff made application to the Legislature for compensation, and a grant of money was made to him "to reimburse him expenses incurred in endeavouring to execute a contract entered into with the Provincial Government for a supply of copper coin: the same to be in full." Held, in an action against the defendant for falsely representing that he had the authority of the Queen to make the contract—1. That the defendant having acted under the direction of the Provincial Government, which represented the Crown, had the authority of Queen.

2. That by accepting the grant of money from the Legislature, the plaintiff had acknowledged that the contract was made with the Provincial Government, and therefore that the defendant was not liable.

Quære, whether the words of the agreement amounted to a representation that the defendant had the Queen's authority to make the contract.

CASE for false representation. The declaration stated that before and at the time of committing the grievances, &c., the defendant was Treasurer of the Province, and proposed to the plaintiff to agree with the defendant on

behalf

1859.

SEARS *against* ROBINSON.

behalf of the Queen, to procure to be coined in *England* and shipped to this Province, copper coin to the value of £3,000, in manner thereinafter mentioned, and that the defendant did thereupon, on the 22nd *December* 1852, wrongfully and falsely represent to the plaintiff that the defendant was authorised by the Queen to enter into the agreement with the plaintiff; whereupon the plaintiff relying on the pretended authority, and believing that the defendant was authorised by the Queen to enter into such agreement, did agree with the defendant on such behalf, in consideration of fifteen shillings and tenpence per pound for each pound currency of copper coin to be supplied, amounting to £2,375 to be paid to the plaintiff, to procure to be coined in *England* and shipped to the Province, copper coin to the extent of £3,000, to be agreeable to the dies furnished to the plaintiff at the time of making the agreement—the coin to be delivered to the Province Treasurer at *St. John* in the month of *April* then next; and the defendant did by the said agreement, as Treasurer aforesaid and on behalf of the Government of the Province, agree to pay the plaintiff on delivery of the coin, the said sum of £2,375. Averment—that the plaintiff was ready to perform the agreement, but that the defendant at the time of making the agreement and representation, was not authorised by the Queen to enter into such agreement, but on the contrary, the said agreement was made by the defendant without the authority of the Queen; and for want of such authority the plaintiff was prevented from procuring the copper to be coined in *England*, and from performing his part of the agreement. By means whereof the plaintiff lost divers great gains and profits, &c. Plea—not guilty.

At the trial before *Ritchie*, J., at the last *St. John* circuit, it appeared that the defendant, acting under the direction of the Executive Government of the Province, entered into the following agreement with the plaintiff:—

"Articles of agreement made this 22nd day of *December* "1852, between *John Sears*, of the City of *St. John*, in the "Province of *New Brunswick*, Merchant, of the one part, and "*Beverley Robinson*, of the same place, Province Treasurer, "for

1859.

SEARS *against* ROBINSON.

"for and on behalf of Her Majesty, of the other part, witness "that the said *John Sears* for and in consideration of the "payment hereinafter mentioned, doth hereby agree to pro- "cure to be coined in *England* and shipped to this Province, "copper coin to the extent of £3,000, lawful money of the "said Province, nominal value, such coin to be agreeable to "the dies furnished him at the time of this agreement, or in "case of loss, other dies of the like description to be pro- "vided by the said *John Sears;* two-thirds of the said coin "to be in penny pieces, and one-third in half-penny pieces; "the whole to be of pure copper. Twenty-six pence "and fifty-two half-pence shall respectively weigh one "pound avoirdupois. The coin to be put in rouleaus of "five shillings value of pence, and two shillings and six- "pence value of half-pence; and packed in good strong "boxes, to contain £10 each of the said nominal value, and "to be delivered to the Province Treasurer for the time "being, at the Customs' Wharf in the said City of *St. John*, "in good order and condition, fit for immediate circulation, "in the month of *April* next, unless hindered by marine "disaster or other such detention. And the said *John Sears* "doth further agree that no other coin shall be made from the "dies from which the said coin shall be made, than the "quantity and amount of coin hereinbefore mentioned; and "that he will return the dies herewith delivered, or such as "shall be used in case of the loss of those delivered, to the "said Treasurer at the same time as the delivery of the "coin. And the said *Beverley Robinson*, as Province Trea- "surer as aforesaid, and on behalf of the Government of this "Province, doth hereby agree, on the delivery of the "said copper coin in all respects according to the terms and "conditions hereinbefore specified, to pay to the said *John* "*Sears* the sum of fifteen shillings and tenpence per pound, "for each pound currency of such copper coinage so supplied, "amounting in the whole to the sum of £2,375, lawful money "aforesaid. In testimony whereof the parties have hereunto "set their hands the day and year first above written.

"*John Sears,*
"*B. Robinson.*"

The

1859.

SEARS *against* ROBINSON.

The plaintiff went to *England* for the purpose of obtaining the coin, but was refused the authority from the Crown, and was therefore unable to perform the contract. He afterwards applied to the Legislature of the Province for compensation for the loss he had sustained, and in 1854 a grant of £90 was made to him by the Legislature, to reimburse him expenses incurred in "endeavouring to execute a contract "entered into with the Provincial Government for a supply "of copper coin for the use of the Province; the same to "be in full." He accepted this money and gave a receipt for it.

A verdict was entered for the plaintiff, subject to a motion for a nonsuit on the following grounds:—

1. That the contract was made with the Government, and not with the defendant.

2. That if the contract was made by the defendant, it was in his capacity as a public officer, and therefore he was not personally liable.

3. That assuming the representation of the Queen's authority in the contract to have been unauthorised, if the defendant believed that it was correctly inserted in the contract, no action could be maintained against him.

4. That the contract did not shew that it was the duty of the defendant or the Provincial Government to obtain the Queen's assent, and if the contract was illegal without such assent, the plaintiff's ignorance of the law was no excuse.

5. That the plaintiff's acceptance of the grant from the Legislature precluded him from bringing any action.

A rule *nisi* for entering a nonsuit having been granted in *Hilary* term last,

S. R. Thomson shewed cause. Though assumpsit might not lie against the defendant on the contract, an action on the case for false representation can be maintained. *Polhill* v. *Walter (a)*. The defendant represented that he contracted for and on behalf of the Queen; and not having authority to make such a contract, he is liable in this form of action. *Randell* v. *Trimen (b)*, *Lewis* v. *Nicholson (c)*. The profit which the plaintiff might have realised by the contract is a proper

(a) 3 *B. & Ad.* 111. (b) 37 *Eng. R.* 275. (c) 12 *Eng. R.* 430.

1859.

SEARS against ROBINSON.

proper measure of damages. *Wilson* v. *The York and Berwick Railway Company (a)*. All the allegations in the record were proved, and therefore a nonsuit cannot be entered.

Gray, Q. C., contra. The allegations in the record were not proved, as the defendant made no representation beyond what is contained in the contract. If a party makes a representation which he believes to be true, and had no means of knowing to be untrue, no action on the case will lie against him. *Polhill* v. *Walter* lays down this principle, and it is confirmed in *Collins* v. *Evans (b)*, and *Smout* v. *Ilbery (c)*. The defendant only acted as the agent of the Government, and therefore is not liable. 1 *Chit. Pl.* 42. The acceptance of the money from the Government, which was declared to be in full, is an answer to any action for damages. The contemplated profits which the plaintiff might have made by the contract, could not be recovered as damages. *Peterson* v. *Ayre (d)*, *Hadley* v. *Baxendale (e)*.

Cur. adv. vult.

CARTER, C. J., now delivered the judgment of the Court. This was an action on the case to recover damages from the defendant, who is the Provincial Treasurer, for false representations alleged to have been made by him, that he was authorised by the Queen to contract with the plaintiff for the supply of a certain amount of copper coin; whereas the plaintiff on proceeding to *England* for the purpose of carrying out the contract, was refused that authority from the Crown, without which such coinage could not legally be effected. The plaintiff sought in this action. to recover from the defendant the amount which he alleges would have accrued to him as profits by the transaction, if carried out. There is not a particle of evidence of any representation made by the defendant to the plaintiff, apart from the written contract signed by both. It is at least doubtful whether the words of the contract itself, would amount to a representation by the defendant to the plaintiff, that he (the defendant) had

(a) 18 *Eng. R.* 557. (b) 5 *Q. B.* 820. (c) 10 *M. & W.* 1.
(d) 24 *Eng. R.* 382. (e) 26 *Eng. R.* 398.

the

1859.

SEARS *against* ROBINSON.

the authority of the Queen to make that contract in her behalf. But apart from this, the evidence clearly shewed that the defendant had the express authority and order of the Executive Government of the Province (which in all matters of local administration represents the Crown) to sign this contract, an order which the defendant, as a subordinate officer of the Government, could not well gainsay or resist. In this way, therefore, the defendant had the authority of the Queen to sign this contract. The plaintiff has moreover received, and acknowledged the receipt of, a grant of public money, under the Act 17 *Vict. c.* 4, (1854) which grant is as follows:—

"To *John Sears* of *St. John*, the sum of £90, to reimburse "him expenses incurred in endeavoring to execute a contract "entered into with the Provincial Government for a supply "of copper coin for the use of the Province; the same to "be in full."

This grant and the plaintiff's receipt, is a clear recognition by the Government and the plaintiff, that the contract was between them. For these reasons, we are all clearly of opinion that the rule for entering a nonsuit should be made absolute.

Rule absolute.

CRONE, Assignee, &c., *against* GOODINE and OTHERS.

If one of several defendants in a summary action dies before interlocutory judgment, the plaintiff should make a suggestion of the death in the memorandum of judgment and subsequent proceedings, or the judgment will be set aside for irregularity.

Where such suggestion was omitted, the plaintiff was allowed to amend on payment of costs.

THIS was a summary action brought by the assignee of a replevin bond, against *Madeline Goodine*, *Felix Mulheron* and *George Turner*, in which interlocutory judgment by default was signed on the 30th *November* last, and final judgment on the 24th *December*. *Mulheron* died on the 22nd *November;* but the plaintiff's attorney had the damages assessed, signed judgment and issued execution against the three defendants, without noticing the death of *Mulheron*.

The

1859.

CRONE *against* GOODINE.

The execution was indorsed to levy on the goods and chattels of the defendants *Goodine* and *Turner* only, and the Sheriff returned that he had levied on the goods and chattels of *Turner*, which remained in his hands for want of buyers; it appeared, however, that the officer who had the execution, knowing that *Turner* only signed the bond as security for *Mulheron*, had made a formal levy on property belonging to his estate, in the possession of his widow, in order to induce her to pay the amount, but that nothing was done under that levy.

In *Easter* term last, *Needham* moved to set aside the interlocutory judgment and all subsequent proceedings for irregularity; contending that the suit had abated as against *Mulheron*, and that his death should have been suggested in the subsequent proceedings.

Dibblee, contra, contended that in a summary action there was no mode of entering on the record a suggestion of the death of one of the parties; that the judgment was therefore regular, and as the execution must follow the judgment, it was regular also. The Act 12 *Vict. c.* 40; 2 *Chit. Arch.* 1407, were referred to.

Cur. adv. vult.

N. PARKER, M. R., now delivered the judgment of the Court. In this case, which is a summary action brought against *Madeline Goodine*, *Felix Mulheron* and *George Turner*, the second named defendant died before interlocutory judgment was signed. That judgment however was signed against all three defendants, and the plaintiff proceeded to assess his damages and sign final judgment in like manner, without in any way noticing the death of *Mulheron*. After this, a writ of *fieri facias* issued and a levy was made on property in possession of *Margaret Mulheron*, though the execution was indorsed to levy on the goods of the other two defendants only. It is objected that these proceedings are irregular, the action having abated as against *Felix Mulheron*, against whom therefore the plaintiff could not sign judgment; and we are of opinion that the objection is well founded, and that the execution is also irregular.

A

1859.

CRONE *against* GOODINE.

As the case is not provided for in the act of Assembly, and there is no rule of Court on the subject, we think the plaintiff should be allowed to amend his proceedings by altering the interlocutory and final judgment, as well as the assessment docket, to a judgment as against the two surviving defendants—"*Madeline Goodine* and *George Turner*, im-"pleaded with *Felix Mulheron*, who, the plaintiff suggests, "has died since the commencement of this suit"—upon payment of the costs of this motion, and of the previous application at Chambers for stay of proceedings.

Rule accordingly *(a)*.

(*a*) See Rule 2, post page 380.

GRAHAM *against* WETMORE.

When a defendant in replevin pleads property in himself or a third person, and issue is taken thereon, the *onus* of proving property is on the defendant, and if he fails in doing so, the plaintiff is entitled to recover.

REPLEVIN for two horses. Pleas—1. Property in the defendant; 2. Property in *Hector M'Donald;* 3. Property in *Hector M'Donald*, and seizure by the defendant, as Sheriff of *Kent*, under an execution against *M'Donald.* Replication, denying the pleas and alleging property in the plaintiff.

At the trial, *Parker*, J., held that the *onus* of proving property as stated in the pleas, was on the defendant, and that he was bound to begin. The defendant having failed to prove his pleas, a verdict was given for the plaintiff; and in *Michaelmas* term last, *A. L. Palmer* obtained a rule *nisi* for a new trial on the ground of misdirection.

Weldon, Q. C., shewed cause in *Easter* term last. The affirmative proof was on the defendant to shew that the horses were the property of *M'Donald. Colstone* v. *Hiscolbs (a).* But if the Judge's ruling on this point was incorrect, it is no ground for a new trial, unless it appears that injustice has been done to the defendant by it. *Burrell* v. *Nicholson (b); Edwards* v. *Matthews (c); Leete* v.

(*a*) 1 *M. & Rob.* 301. (*b*) 1 *M. & Rob.* 304. (*c*) 11 *Jur.* 398.

1859.

GRAHAM *against* WETMORE.

The Gresham Life Insurance Society (a); Brandford v. *Freeman (b).* In *Ashby* v. *Bates (c)*, where the wrong party was allowed to begin, and a new trial was granted, it appeared that injustice had been done by the verdict. No injustice was done to the defendant here, by requiring him to prove his plea.

A. L. Palmer, contra. The plea of property is the only traverse the defendant can take when he wishes to deny the plaintiff's right. A plaintiff has no right to bring replevin unless the property is his; for if the property is in the defendant or a stranger the plaintiff must fail. *Presgrave* v. *Saunders (d).* If a defendant pleads in bar affirmatively, the *onus* is on him; but if he pleads negative matter, the *onus* is on the plaintiff. The plea of property is in substance only a denial of the allegation in the declaration that the property was the plaintiff's, and throws the *onus probandi* on the plaintiff. 2 *Greenl. Ev.* § 563; *Com. Dig.* "*Pleader*" (3 K. 12). In 2 *Stark. Ev.* 969, it is said: "If issue is joined on the right of property, the plaintiff "must prove either a general or special property in the "goods at the time of the taking." An incorrect ruling as to the right to begin, is ground for a new trial. *Doe* v. *Brayne (e).*

Cur. adv. vult.

N. PARKER, M. R., now delivered the judgment of the Court. This was an action of replevin for two horses, and the defendant pleaded: 1st. Property in himself; 2nd. Property in *Hector M'Donald.* Replication, denying the pleas and alleging property in plaintiff. The only ground on which the rule was obtained was, that the learned Judge directed the jury that the *onus* of proving property lay on the defendant. We are quite satisfied the direction was right. The plaintiff in his declaration alleges that the property in question was taken out of his possession by the defendant. The defendant does not deny the taking, but, on the contrary, admits and justifies it; and for what reason? Because he alleges by the first plea, that the property is

(*a*) 15 *Jur.* 1161. (*b*) 5 *Exch.* 734. (*c*) 15 *M. & W.* 589.
(*d*) 1 *Salk.* 5. (*e*) 5 *C. B.* 655.

his

1859.

GRAHAM *against* WETMORE.

his own; by the second, that of another person. Now, as possession is *prima facie* evidence of property, and the plaintiff is admitted to have been in possession, where the defendant admitting this, justifies the taking by setting up an adverse title to rebut the *prima facie* title of the plaintiff, it lies upon him to prove it. If he fails, the plaintiff's *prima facie* right which he had at the beginning, necessarily entitles him to recover without further proof on his part. The plea raises but one issue, and the effect of the replication is nothing more than to deny the plea. If this were not so, the same plea, though unexceptionable in form, would in effect raise a double issue. One consideration appears decisive on the point. A plea of property found in the defendant, entitles him to a return of the goods replevied. If, according to the defendant's argument, the *onus* is on the plaintiff, and the defendant is entitled to a verdict unless the plaintiff proves property in himself, then the defendant would be entitled to a return of the goods, not because they are his own, but because they are not the goods of another. There is a certain advantage accruing to the defendant on the plea of property, as entitling him to the opening, and consequently to the reply, which in this case he had the benefit of. The late case of *Colstone* v. *Hiscolbs (a)* establishes the defendant's right in this respect.

This rule therefore must be discharged.

HORNER *against* CROOKSHANK.

June 25th.

A Judge's certificate that there was no reasonable cause for bringing an action in the Supreme Court, cannot be made a rule of Court.

THIS was an action of assumpsit in which the plaintiff recovered a verdict for less than £5, and the Judge certified under *Chap.* 137, § 43, of the *Revised Statutes (b)*, that there was no reasonable cause for bringing the action in the Supreme Court.

C. W. Weldon now moved to make the Judge's certificate

(a) 1 *M. & Rob.* 301. (b) *Vol.* 1 *p.* 370.

1859.

HORNER *against* CROOKSHANK.

a rule of Court, in order to recover the costs of the suit from the plaintiff. [CARTER, C. J. Can a Judge's certificate be made a rule of Court?]. That would seem to be the proper mode in order to recover the costs.

CARTER, C. J. If the certificate could be made a rule of Court, as it does not order the payment of costs, there would be no order of the Court, for the disobedience of which an attachment would issue. I do not say what your proper course would be to get the costs, but this is certainly not the mode.

N. PARKER, M. R. The act says the costs shall be recovered by attachment; but I cannot understand how a Judge's certificate can be made a rule of Court.

Per Curiam, Rule refused.

EX PARTE THE NEW BRUNSWICK & CANADA RAILWAY and LAND COMPANY.

Corporations are liable to be assessed under the Parish School Act, 21 *Vict. c.* 9.

J. A. STREET, Q. C., moved for a *certiorari* to remove an assessment made upon the land belonging to *The New Brunswick and Canada Railway and Land Company* in the Parish of *Manners-Sutton*, under the Parish School Act, 21 *Vict. c.* 9, § 15. He contended—1st. That a corporation was not liable to be assessed under the act. 2nd. That only residents in the Parish could be assessed.

The Court, referring to the 16th section of the act, said, that the assessment and mode of collection were regulated by the general act for the recovery of County and Parish rates *(a)*, under which the real estate of corporations was subject to assessment, and therefore the property of this Company was liable.

Rule refused *(b)*.

(*a*) 1 *Rev. Stat.* 130.

(*b*) See *Ex parte Yeates*, post page 381.

1859.

GRAHAM *against* WETMORE.

Defendant in replevin pleaded property in *M.*, and a seizure as Sheriff under execution against *M.* Replication—property in the plaintiff. On the trial, the defendant failed to prove property in *M.* and a verdict was given for the plaintiff. Held, that the defendant was bound to prove the whole plea, and was not entitled to judgment *non obstante veredicto* on the ground that the replication had admitted that the property was in custody of the law, and was therefore not repleviable.

FRASER moved for judgment for the defendant, *non obstante veredicto*. [The substance of the pleadings is stated, ante, p. 373.] Replevin will not lie for goods in the Sheriff's hands under an execution. *Bac. Ab.* "*Replevin*" (C). [PARKER, J. What part of the third plea was proved?] That the horses were in the defendant's custody as Sheriff. That is admitted by the replication, which traverses only the property in *M'Donald*, and it is an answer to the action. 2 *Chit. Arch.* 1349. [N. PARKER, M. R. The defendant himself raised the issue that the horses were *M'Donald's* property. PARKER, J. He choose to make it part of the same plea, that the horses were in his possession as Sheriff, and that he took them as *M'Donald's* property: he was bound to prove the whole plea. If part of the plea is found against him, how can he say that he is entitled to judgment on the rest of it? If replevin is not the proper remedy it may be a ground of summary application to the Court; but it is no justification that the property was in his hands as Sheriff.] The defendant was not bound to make a summary application: if he proved his plea that the goods were in his custody under the execution, the action must fail. *Wilson* v. *Weller (a)*. [WILMOT, J. Why did the defendant put such an issue on the record?] It is an immaterial issue. 1 *Chit. Pl.* 655. In *Pritchard* v. *Stephens (b)*, the Court refused to quash the proceedings in replevin on a summary application, and required the defendant to put his objection on the record. [PARKER, J. We do not decide that replevin is the proper remedy where goods are in custody of the law; but that the question cannot be raised by pleading. If the defendant chooses to put this defence on the record he must stand by it.] If a portion of the plea, which would be a good defence to the action, is unanswered, the Court can award a repleader. *Atkinson* v. *Davies (c)*. [N. PARKER,

(*a*) 1 *B. & B.* 63. (*b*) 6 *T. R.* 522. (*c*) 11 *M. & W.* 236.

M.

1859. M. R. A repleader is not granted in favor of the party who made the first fault in pleading.]

GRAHAM *against* WETMORE.

Per Curiam, Rule refused.

END OF TRINITY TERM.

GENERAL RULES.

(Entry of Judgment after tender under the Act 18 *Vic. c.* 9.*)*

1. IT IS ORDERED, That in any case (not summary) where, under the provisions of the Act of Assembly 18 *Vict. c.* 9, an offer and consent in writing has been filed by the defendant to suffer judgment by default for a certain specified sum as debt or damages, (as the case may be), and the plaintiff has not, after due notice thereof, filed his acceptance of such offer, but has taken the case down to trial and recovered a verdict, but not for a greater sum than the sum so offered, the entry or suggestion on the judgment roll shall be as follows: —

"And now, pursuant to the Act of Assembly passed in "the eighteenth year of the Reign of Queen *Victoria*, "entitled 'An Act concerning tender in actions at Law and "'suits in Equity,' on the day of , in the year of our "Lord , the said defendant *C. D.* filed in the office of the "Clerk of the Pleas of this Court, an offer and consent in "writing in the words following: — [*insert the offer*] — "which offer and consent the said plaintiff *A. B.* has not "accepted; therefore the issue joined between the parties "remains to be tried. Therefore let a jury thereupon "come, &c." [*as in ordinary cases to the conclusion of the postea,*] and then proceed as follows: —

"And inasmuch as it appears by the said return, that the "debt [*or damage*] was not greater in amount than the sum "for which the said *C. D.* offered to suffer judgment by "default, it is considered that the said *A. B.* do recover his "said debt [*or damages*] so assessed at the sum of , "together with his costs and charges by him about his suit "in this behalf expended, up to the said day of , and "for those costs and charges to , which said debt [*or* "*damages*], costs and charges in the whole, amount to , "and that the said *A. B.* have execution thereof. And it is "further considered that the said *C. D.* do recover against "the

" the said *A. B.* for his costs and charges by him incurred " after the said day of , and that he have execution " thereof."

(Proceedings in Summary Actions after death of a joint plaintiff or defendant.)

2. In summary causes, when one of several plaintiffs or defendants shall die after the commencement of the action, the subsequent proceedings shall be in the name of or against, the surviving plaintiff or plaintiffs, or defendant or defendants, as the case may be; describing him or them respectively, as survivor or survivors of *A. B.*, who hath died since the commencement of this suit, and who was a joint plaintiff or defendant therein.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF NEW BRUNSWICK,

IN

MICHAELMAS TERM,

IN THE TWENTY-THIRD YEAR OF THE REIGN OF VICTORIA.

EX PARTE YEATS and ANOTHER.

October 19th.

A majority of the Trustees of Schools have power to divide a Parish into School Districts.

An application to Trustees to divide a Parish into School districts, and to call a meeting of the inhabitants to determine upon an assessment under the Parish School Act, 21 *Vict. c.* 9, may be made at the same time; and if, on the division of the parish, three or more of the applicants are found to be resident freeholders in the district for which the assessment is required, the Trustees may call the meeting without any new application.

A poll-tax may be levied under the Parish School Act.

FISHER, Attorney General, shewed cause in *Trinity* term last, against a rule *nisi* for a *certiorari* to remove an assessment and all proceedings on which it was founded, made under the Parish School Act, 21 *Vict. c.* 9. The grounds on which the rule was obtained, and the substance of the affidavits, are fully stated in the judgment of the Court.

C. W. Weldon in support of the rule.

Cur. adv. vult.

CARTER, C. J., now delivered the judgment of the Court. A rule *nisi* for a *certiorari* was granted in this case, to bring up the proceedings of the School Trustees in District number 6, in the Parish of *Lancaster*, and the assessment made under the provisions of the act 21 *Vict. c.* 9, the act relating to Parish Schools. Several objections were taken to these proceedings.

1. That this district was laid out by only two of the Trus-

1859.

Ex Parte Yeats.

tees, instead of three. This objection was founded on the case of *Ex parte Jocelyn, (a)*, decided under the previous School act, 15 *Vict. c.* 40. This point has, however, been settled by subsequent legislation. By the 1 *Rev. Stat.* 461, § 3, "Authority to three or more persons jointly "empowered to act, shall enable a majority of them to act." The laying out the district by two, who form a majority of the Trustees, would now therefore be valid.

2. That no hour was named in the notices of meeting. It is, however, shewn by the affidavits used on shewing cause that in two at least of the notices, the hour was named.

3. That the Trustees called the public meeting, without the written application of three or more resident freeholders or householders in that district.

It appears that on the 18th *September* 1858, about a month before the district was laid out, seven persons made a written application to the Trustees to lay off a School district in *Manawagonish*, and to call a public meeting for the purpose of raising money for school purposes by assessment. In compliance with this application, the Trustees laid off this District number 6, and filed the description thereof with the Clerk of the Peace on the 22d *November* last, and after having done so, issued the notices for the public meeting. It appeared that at the time the District number 6 was laid out, all the seven persons who had signed the written application, were resident freeholders or householders in that district; therefore when the Trustees issued the notices for the public meeting, they had the written application of three or more resident freeholders in the district for that purpose. It is moreover obvious that it must have been the intention of the persons who signed that written application, that such meeting should be called; for they first require the Trustees to lay off the district as the preliminary step, without which nothing could be done, and they then require a public meeting of the rateable inhabitants of the district, when laid out, to be called to determine on the propriety of assessment. If, when the first part of their application is complied with, it turns out

(a) 2 *Allen*, 637.

they

1859.

Ex Parte YEATS.

they are qualified to make the second part, why should it be necessary for them to go through the form of making a duplicate? Under a fair and reasonable construction of the act, we think the written application was sufficient to authorise the Trustees to call the meeting.

The only remaining point relates to the assessment, which, it is contended, is bad, because it includes a poll tax upon all residents who have no rateable property, and is assessed in addition upon those who have. Much stress was laid upon the 31st section of the School act, which says "Ratepayers, in this "act shall mean ratepayers upon real or personal property or "income." That is, wherever the word "ratepayers" occurs in the wording of the act, it shall be confined by that definition of its meaning. Now, putting aside the section just cited, the word "ratepayers" occurs only five times in the whole act, and in all those cases, in parts of the act which refer to the decision as to the principle and objects of assessment, the amount to be assessed, and the election of a School committee. One may readily infer that the object of the Legislature in thus limiting the meaning of the word "ratepayers" in these matters, was to place them, as being of great importance for the success of the measure, in the hands of those who, having a more permanent interest in the district, would be likely to manage them with consideration and prudence; but inasmuch as the benefits to be derived from the act were to be shared at least equally by those not rateable for property, they did not intend to relieve the latter class from contribution to the support of that from which they were to derive benefit. The word "ratepayers" is never used in connection with the assessment. Had it been said in the 11th section "such assessment shall be levied "upon the ratepayers," then the 31st section would have given a meaning to the word, which would have exempted all persons who were not rateable for real or personal property, or income. So far, however, from anything like this occurring, that section provides expressly, that it shall be levied and collected in the same manner in all respects as other County or Parish rates; and we find where provision is made in the 15th section for carrying out the assessment, the

1859.

Ex Parte YEATS.

the form by which the assessors are required to act, merely says, "You are required to levy and assess the sum of—— "pounds," &c., "not to levy and assess *upon the ratepayers.*" By the 16th section the assessors are directed to make out the assessment lists as near as may be in the form prescribed for County or Parish rates. The assessors would therefore look to the form given in the act for the local government of Counties, Towns and Parishes, 1 *Rev. Stat.* 150, form (B), and making their assessment as near as may be in conformity with that, they would have merely to alter the heading, by substituting the words "in pursuance of a resolution of a "public meeting," &c., for the words "in pursuance of a "warrant of the sessions," &c., and would then assess individuals according to the columns given in the form, which embraces a poll tax upon those who have property and income, and upon those who have neither. The Legislature having given this form in the County and Parish act as the guide and model for assessment under the School act, had they intended to exempt a whole class of persons, clearly rateable under the former, from the operation of the latter act, we should certainly look for some clearer indication of that intention than is to be found in the 31st section of the Parish School Act, the meaning and object of which is perfectly plain and reasonable, without throwing on it the forced and somewhat unnatural construction contended for. For these reasons we think the rule for a *certiorari* should be discharged.

Rule discharged.

1859.

CUNNINGHAM, Executrix, &c., *against* SCOULLAR.

COVENANT. The declaration stated that on the 13th *April* 1841, by an indenture of bargain and sale made between the defendant, of the one part, and *William Cunningham*, (testator) of the other part, the defendant in consideration of the sum of £38 10s. did grant, bargain and sell to the said *William Cunningham*, his heirs and assigns, a certain piece of land; [the description followed] and the defendant did by the said deed for himself, his heirs, executors and administrators, covenant with the said *William Cunningham*, his heirs and assigns, that the defendant was, at the time of executing the said deed, seized of the said lands as a good and indefeasible estate of inheritance, free from all incumbrances whatsoever, and that the defendant had good right and full power to sell the same. Averment — that the deed was afterwards duly acknowledged and registered in the County of *Sunbury*, according to the act of Assembly. Breach — that at the time of executing the deed, the defendant was not seized in fee of the lands free from incumbrances, but that before making the said deed, to wit on the 27th *November* 1839, the defendant mortgaged the said land to *John Robertson*, his heirs and assigns; by reason of which, the said *William Cunningham* not only acquired no title in the land, and lost the sum of £38 10s. paid to the defendant, but was afterwards obliged to pay the said *John Robertson* the sum of £100, in order to get a title to the land, and was also obliged to expend £50 in endeavoring to defend himself in an action of ejectment brought by the said *J. Robertson* to obtain the possession of the land under his mortgage. Plea — that after making the covenant and after the breach thereof, the defendant became bankrupt and obtained a certificate, and that the supposed cause of action accrued before the defendant's bankruptcy.

At the trial before *Wilmot, J.*, at the last *Sunbury* circuit, it was proved that the defendant's covenant was broken by the

The defendant conveyed land to A. with a covenant for title, which was broken by the existence of a prior mortgage, which A. was obliged to pay. Held, that the amount so paid was liquidated damages, and was a claim provable under a fiat in bankruptcy afterwards granted against the defendant, and was discharged by his certificate under the Bankrupt Act, 5 *Vict. c.* 43.

A fiat in bankruptcy, under the Acts of Assembly, 5 *Vict. c.* 43, and 6 *Vict. c.* 4, may be proved by a certified copy thereof, without producing the *Royal Gazette*, except where title is to be shewn in the assignee.

Where the breach of a covenant for title and the damage arising therefrom, both occurred in the lifetime of the testator, the action for such breach should be brought by the executor.

1859.

CUNNINGHAM *against* SCOULLAR.

the existence of a prior mortgage, as stated in the declaration, and that about two years before the defendant's bankruptcy, the testator had been obliged to pay the mortgagee £100 to get rid of the mortgage. There was some question about the bankruptcy being proved by a certified copy of the fiat; but the principal question was, whether the demand was barred by the defendant's certificate under the act 5 *Vict. c.* 43; and a verdict having been given for the plaintiff, subject to points reserved,

A. R. Wetmore obtained a rule *nisi* for a new trial, and also gave notice of motion in arrest of judgment.

S. R. Thomson shewed cause in *Trinity* term last. 1. The bankruptcy was not proved. The act 6 *Vict. c.* 4, § 28 declares that the *Royal Gazette* containing notice of a fiat in bankruptcy shall be evidence; and the 8 *Vict. c.* 88, § 6, after enacting how a fiat may be proved, declares that nothing shall dispense with the proof of the fiat by production of the *Gazette*. 2. If the bankruptcy was proved, this claim is not barred by the certificate: it merely sounds in damages, and is not a claim provable under the fiat by the 5 *Vict. c.* 43, § 14. It is only liquidated debts that can be so proved. *Hammond* v. *Toulmin (a)*, *Warburg* v. *Tucker (b)*. 3. As to the arrest of judgment—no doubt, as a general rule, it is true that an action for a breach of covenant real should be brought by the heir or devisee; but if the damage has arisen in the lifetime of the testator, the executor may sue. Here the personal estate was reduced by the payment of the money by the testator, and the land went to the devisee free of charge. If *Robertson* had done nothing on his mortgage till after *Cunningham's* death, then I admit the devisee would have been the person to bring the action. *Kingdon* v. *Nottle (c)*, settles this point.

A. R. Wetmore, contra. The bankruptcy may be proved by the *Gazette*, but it is not the only mode of proof under the act. If this claim existed during *Cunningham's* lifetime, it was discharged by the defendant's certificate. The words of the act are "all claims and demands" provable under the fiat. 5 *Vict. c.* 43, § 14, and 6 *Vict. c.* 4, § 24. These

(*a*) 7 *T. R.* 612. (*b*) 4 *Jur. N. S.* 1142. (*c*) 4 *M. & S.* 53.

words

words include unliquidated demands. The executor has no right to sue. This was a covenant running with the land, and the action should have been brought by the devisee who was injured by the defective title.

Cur. adv. vult.

CARTER, C. J., now delivered the judgment of the Court. This was an action to recover damages for breach of a covenant for good title. The breach was clearly proved by the existence of a previous mortgage which the testator had to pay, and the question is, whether this claim is barred by the certificate of the defendant, obtained under the bankrupt laws. It was objected the bankruptcy was not proved, and if it was, this claim was not barred by the certificate.

1. As to failure in proving bankruptcy. The Act 5 *Vict. c.* 43, § 7, divested the bankrupt of his property, and vested it in the assignee from the time of the receipt of the fiat by the commissioner. The 6th *Vict. c.* 4, § 28, substituted the publication in the *Gazette* of notice of the fiat having been granted, instead of the receipt of the fiat by the commissioner, and made the production of the *Gazette* evidence of such publication without other proof thereof. The production of the *Gazette* was not made any proof of the bankruptcy or the fiat, but merely proof of the publication of the notice, to shew at what time the property of the bankrupt vested in the assignee. Then comes the 8 *Vict. c.* 88, § 6, which, Mr. *Thomson* contended, makes the production of the *Gazette* necessary to prove the bankruptcy. The first part of that section enacts: "That the fiat may be proved by "the production thereof, or a copy certified by the commis- "sioner, on the ordinary proof of the hand-writing of such "commissioner." This proof was given in this case; but Mr. *Thomson* contended that in addition to this, the production of the *Gazette* was necessary, under the proviso contained in the same section:—"Provided always, that "nothing herein contained shall be construed to dispense "with the proof of the fiat by the production of the *Royal* "*Gazette*, as now provided by law." Now, we do not find any provision in the law, which made the production of the *Royal*

1859.

CUNNINGHAM *against* SCOULLAR.

Royal Gazette proof of the fiat. The 6 *Vict. c.* 4, § 28, does make the production of the *Royal Gazette* proof of the publication of notice of the fiat, and makes such publication divest the bankrupt of his property. In a case, therefore, where it was necessary to shew title in the assignee, it would be requisite, in addition to proof of the bankruptcy by the fiat or a certified copy thereof, to produce the *Royal Gazette* to shew at what time the property of the bankrupt vested in him. The expression: "Proof of the fiat by the "production of the *Royal Gazette*, as now provided by law," when read in connection with the bankrupt laws then in force, must, we think, mean "proof of the publication of the "notice of the granting of the fiat." If it does not mean this, it can mean nothing; as in no other way had the existing law provided for proof of the fiat by the production of the *Royal Gazette*. Independent of all this, we think the saving clause in 12 *Vict. c.* 43, which repealed all the bankrupt laws, gives the bankrupt the full benefit of his certificate in the same manner as if the acts had not been repealed. As the bankruptcy may be proved by the production of the fiat or a certified copy, under the repealed act 8 *Vict. c.* 88, § 6, so under the repealed act 7 *Vict. c.* 31, § 5, the certificate alone would be "sufficient evidence of the bankruptcy, fiat "and other proceedings precedent to the obtaining such "certificate."

The next question is, whether this was a claim or demand provable under the commission, and barred by the certificate? The 5 *Vict. c.* 43, § 14, discharges every bankrupt who shall have duly surrendered and conformed, "from all debts due by him at the time of the issuing of the "fiat, and from all claims and demands against him, in case "he shall obtain a certificate," &c. The words of this section are similar to those of the English bankrupt act, 6 *Geo.* 4, *c.* 16, § 121, with this exception, that the latter has the words "all claims and demands hereby made provable "under the commission;" and the Provincial act 6 *Vict. c.* 4, § 24, confines the discharge to claims and demands provable under the fiat. The authorities in reference to the English act 6 *Geo.* 4, *c.* 16, will therefore be applicable to our

1859.

CUNNINGHAM *against* SCOTLAR.

our bankrupt acts. In the edition of *Archbold's* treatise on Bankruptcy, published when the 6 *Geo.* 4. *c.* 16 was the act relating to bankrupts, at pages 69 and 70, in speaking of the debts provable under the commission, it is said, "It "must be a debt, of an amount either actually ascertained "or which may readily be ascertained by computation with- "out the intervention of a jury; * * * not simply a claim "sounding merely in damages, and those damages unliqui- "dated; as for breach of an agreement to deliver goods, for "mesne profits, or for a tort, or in trover, or for breach of "covenant (unless it be a covenant for the payment of "money) or the like, even although such covenant, &c., be "secured by a penalty." The claim of the plaintiff in the present action is, for damages arising from the breach of a covenant for good title. The defect in the title appears to have been, a mortgage previously given by the defendant. In order to get rid of this mortgage, the testator, between two and three years previous to the defendant's bankruptcy, paid the mortgagee £100. Before the bankruptcy of the defendant, therefore, this was a claim due for damages, which damages had been liquidated and the amount ascertained. It was a claim which, under the provisions of our bankrupt acts, might have been proved against the bankrupt's estate, and is therefore barred by the certificate. This case is clearly distinguishable from *Hammond* v. *Toulmin (d)*, which was relied on by Mr. *Thomson* to shew that the debt was not barred. There, the covenant was for good title of a ship, and the breach alleged was, that a claim had been put in on the part of the Crown, in consequence of which the plaintiff had been obliged to pay £2,000. The defendant became bankrupt 27th *February* 1796, and the payment was not made until after 30th *May* 1797. So, although the cause of action for some damages accrued before, those damages were not liquidated till after the bankruptcy; and this was relied on by the plaintiff's counsel. Here, the money paid to relieve the estate from the mortgage, was paid long prior to the bankruptcy. The case of *Hammond* v. *Toulmin* occurred under the act 5 *Geo.* 2, *c.* 30, and Lord *Kenyon*

(*a*) 7 *T. R.* 612.

1859.

CUNNINGHAM *against* SCOULLAR.

says, the Legislature only meant that those demands which were incurred before the bankruptcy, and were liquidated debts, should be proved; and *Grose*, J., says, the word in the statute is "debt." The case of *Goddard* v. *Vanderheyden (a)*, seems to shew by implication, that the demand of the plaintiff in this action was provable; and if so, the law says it is barred. The terms of our bankrupt acts went further than any of the English acts, in making uncertain as well as contingent demands, provable under the fiat, though we do not think these provisions necessary in the decision of the present case.

As to the ground taken in arrest of judgment; namely, that this being a covenant running with the land, the action should be brought by the heir and not by the executor, it is as well to state our opinion now, though it is not necessary. We think the answer given by Mr. *Thomson* is conclusive, viz., that inasmuch as the damage arising from the breach of covenant, as well as the breach itself, having occurred in the lifetime of the testator, the action lies at the suit of the executor, and not the heir or devisee. The distinction is stated thus, in 2 *Saund.* 181 c. note *(h)*. "It is laid down generally in *Com. Dig. Tit. Cov.* "*B.* 1, that if *A.* covenant with *B.* upon a grant or convey- "ance of the inheritance, his executor may have covenant "for damages upon a breach committed in the lifetime of "the testator. But it was remarked by Lord *Ellenborough*, "C. J., in *Kingdon* v. *Nottle*, 1 *M. & S.* 362, that the "authority cited in support of this position, *Lucy* v. *Lev-* "*ington*, 2 *Lev.* 26, will be found not to bear it out in "its generality. For in that case, there was an eviction "in the lifetime of the testator; and therefore the damages "in respect of such eviction, for which the action was "then brought, were properly the subject of suit and "recovery by the executor, and nothing descended to "the heir." In the case before us, the breach and the actual damage arising therefrom, both occurred in the lifetime of the testator, and therefore the action is properly brought by the executor.

Rule absolute for a new trial.

(*a*) 3 *Wils.* 262.

1859.

KINNEAR and ANOTHER *against* FERGUSON.

The defendant placed timber in the plaintiff's hands as security for the payment of a promissory note, under an agreement that the timber was not to be sold before 1st *November* without defendant's consent, but after that day, the plaintiff to be at liberty to sell, after giving the defendant fourteen days' notice: the plaintiff sold the timber after the 1st *November*, but without giving the notice. Held, (*Ritchie, J., dubitante*), that though the defendant might be entitled to damages in an action of trover or on the agreement, for a wrongful sale of the timber, he was not entitled to credit as a payment, in an action on the note, for more than the proceeds of the sale, though that was less than the highest market value of the timber.

THIS action was brought to recover the amount of two promissory notes drawn by the defendant — one for £300, and the other for £150.

At the trial before *Ritchie*, J., at the last *St. John* circuit, the only question was, as to the amount the defendant was to be allowed for some timber which he had put in the plaintiffs' hands as security for the payment of the notes, and which they had sold, under the following agreement:—

"*St. John*, 25*th July* 1857.

"Received from *Kinnear & Howard* £450, being an "advance on 447 tons of timber now lying in *South Bay;* "and in consideration of such advance, I am to allow *Kin-* "*near & Howard* five per cent. commission, and interest at "six per cent., they agreeing not to sell the timber before "the 1st *November* next, without my consent. If not sold "on or before that time, they are to give me notice that they "want the amount so advanced; and if not paid by me "within fourteen days from such notice, the timber then to "be sold by them at their discretion.

"*John Ferguson.*"

"We, *Kinnear & Howard*, agree that upon *J. Ferguson* "paying us the above advances, interest and expenses, to "give up a note we hold of his for £300, dated *October* 17th, "1856, and another note dated 25th *July* 1857, for £150.

"*Kinnear & Howard.*"

The plaintiffs proved, that on the 2nd *November* they put a letter in the post office, addressed to the defendant, notifying him that the timber would be sold at the expiration of fourteen days. They sold the timber at auction pursuant to this notice, and the net proceeds of the sale amounted to £254. The defendant swore that he never received the notice, and that he had been offered 20s. per ton, cash, for the timber. The learned Judge directed the jury that the notice was insufficient; that it should either have been served personally on the defendant, or it should have been shewn that

1859.

KINNEAR *against* FERGUSON.

that he received the letter; and the sale not having been made in accordance with the agreement, the plaintiffs were chargeable with the highest market value of the timber on the day of sale. The jury found that the defendant had not received the notice, and gave a verdict for the plaintiffs for £60 12s. 6d.—the balance due on the notes after deducting the market value of the timber.

A rule *nisi* for a new trial having been granted on application of the plaintiffs, on the ground of misdirection,

A. R. Wetmore shewed cause in *Trinity* term last, contending that the jury having found the sale to have been made without the notice required by the agreement, it was a wrongful sale, and the plaintiffs were chargeable with the highest value of the timber.

S. R. Thomson, contra, contended that there was evidence of a verbal notice of sale; but whether there was, or not, the direction was wrong. The defendant was bound either to adopt the sale, or to repudiate it altogether as illegal. In the former case, he was only entitled to credit for the actual proceeds of the sale. In the latter case, he should either have brought trover, or an action for damages on the agreement. If the sale was wrongful, it was no answer to this action.

Cur. adv. vult.

CARTER, C. J., now delivered the judgment of the Court. This was an action brought on two promissory notes made by the defendant, on which his liability was proved. By the defendant's evidence it appeared that a quantity of timber had been placed by him in the plaintiffs' hands, as security for the amount of these promissory notes, under an agreement that the plaintiffs were not to sell the timber before 1st *November* 1857, without the defendant's consent, and that if not sold before that time, the plaintiffs were to have the right to sell it at their own discretion, on giving the defendant notice that they wanted the amount of the notes, and that amount not being paid by defendant within fourteen days from such notice. The plaintiffs attempted to prove a written notice, which, however, was not in time to make the sale good under

1859.

KINNEAR *against* FERGUSON.

under the agreement. Assuming the notice required by the agreement was not proved, the learned Judge told the jury that the defendant would be entitled to be allowed for the highest market value of the timber sold by the plaintiffs, and would not be confined to the actual proceeds of the sale. This is argued by Mr. *Thomson* as a misdirection, and in the opinion of the Master of the Rolls, Mr. Justice *Wilmot* and myself, it was so.

Suppose a debt is due from *A.* to *B.*, payable on the 1st *November*, and that *A.* places a quantity of timber in *B.'s* hands as collateral security for such debt, without any agreement as to the sale of such timber, and the debt is not paid by the 1st *November*, *B.* would have the right to sell the timber; and if the sale was made in a fair, open, *bona fide* manner, *A.* would not be entitled to credit for more than the proceeds of such sale, even though the timber might not have brought the highest market value. Now, admitting that in the case before us, the plaintiffs were not, in consequence of the agreement, justified in selling the timber, and that if the defendant has sustained damage by the sale so made, he might have recovered that damage in an action of trover, or in an action for breach of the agreement; can he avail himself of such damage in the present action? The defence he here sets up is, a partial payment of the debt; and that payment is only the amount received by the plaintiffs on the sale of the timber. There was nothing to shew fraud in the manner in which the plaintiffs sold the timber, and whatever damage the defendant may have sustained, arises from either an improper conversion, or a breach of agreement by the plaintiffs, which would not amount to a payment of the debt *pro tanto*, nor could be available as a set off to the plaintiffs' claim in this action.

As for this reason, there must be a new trial, we do not think it necessary to go into the other question, as to the evidence of a verbal notice.

Parker, J., not having heard the argument, gave no opinion; and *Ritchie*, J., said, that having doubts about the case, he concurred in the judgment delivered by the Chief Justice, with great hesitation.

Rule absolute.

1859.

SEWELL *against* OLIVE and ANOTHER.

Where a Justice of the Peace has jurisdiction to try a complaint, and there has been a regular information, but the conviction and warrant of commitment are defective, he is not liable in trespass for anything done prior to the conviction.

Where special damage is claimed in consequence of an unlawful imprisonment by a Justice of the Peace,—*e. g.*, the costs of obtaining the plaintiff's discharge from prison,—it should be stated in the notice of action; otherwise the plaintiff cannot give evidence of it.

An information and other proceedings before a Justice of the Peace, returned to the Supreme Court with a *certiorari* and filed with the Clerk of the Crown, becomes a record, and may be proved by an examined copy, taken before the original was filed.

A new trial refused to the plaintiff in an action against a Justice for false imprisonment, where the verdict was for nominal damages, though the conviction and warrant of commitment were illegal—the case having been fairly left to the jury.

TRESPASS for false imprisonment, tried before *Ritchie*, J., at the last *St. John* circuit.

The plaintiff had been convicted before the defendants, who were Justices of the Peace, for a violation of the Act to prevent the importation and traffic in intoxicating liquors, — 18 *Vict. c.* 36 — and had been imprisoned for non-payment of the penalty imposed. He was brought before a Judge on *habeas corpus*, and discharged, on the ground that the warrant of commitment was defective; and the conviction was afterwards brought before the Court by *certiorari*, and quashed. Evidence was offered of the costs of obtaining the plaintiff's discharge from prison on the *habeas corpus*, but was rejected on the ground that no such claim for damages was stated in the notice of action served on the defendants. The defendants gave in evidence examined copies of the information and other proceedings connected with the conviction — the originals having been returned with the *certiorari*, and filed with the Clerk of the Crown. The learned Judge was of opinion, that as the defendants had jurisdiction over the matter for which the plaintiff was prosecuted, and the proceedings prior to the conviction were regular, they were not liable in trespass for anything done up to that time, and that the damages must be confined to the imprisonment under the warrant of commitment, which was illegal; and he directed the jury that for such imprisonment, the plaintiff was entitled to reasonable damages. Verdict for the plaintiff — damages, one penny.

A rule *nisi* for a new trial having been granted to the plaintiff, on the grounds of misdirection, improper admission and rejection of evidence, and inadequacy of the damages,

D. S. Kerr shewed cause in *Easter* term last. The evidence of special damage was properly rejected, not having been stated in the notice of action, which varied from the declaration.

1859.

SEWELL *against* OLIVE.

declaration. 1 *Rev. Stat.* 338; 2 *Chit. Gen. Prac.* 65; *Stringer* v. *Martyr (a)*; 2 *Saund. Pl. & Ev.* 266. The copies of the information and other proceedings were properly admitted, the originals having become records of the court. The direction was favorable to the plaintiff. In an action of tort, a new trial is seldom granted on account of the smallness of the damages. *Gibbs* v. *Tunaley (b)*.

S. R. Thomson, contra. The notice of action is only required to state the cause of action—not the damages. It is sufficient if it directs the attention of the Justice to the general nature of the injury complained of. *Mason* v. *Barker (c)*. The original information and other papers should have been produced: the mere filing the proceedings with the Clerk of the Crown, did not make them records. When Justices are acting judicially, they must shew jurisdiction on the face of their proceedings. *The Church Wardens &c. of Staverton* v. *The Church Wardens &c. of Ashburton (d)*. The plaintiff was entitled to adequate damages for the imprisonment. The verdict is wilful.

Cur. adv. vult.

N. PARKER, M. R., now delivered the judgment of the Court. This was an action for trespass and false imprisonment brought by the plaintiff against the defendants, who are both Justices of the Peace for the City and County of *St. John*. The proceeding which gave rise to the imprisonment was, a proceeding before the defendants under the repealed Prohibitory act, 18 *Vict. c.* 36, in which the plaintiff was convicted and sent to gaol. He thereupon sued out a *habeas corpus*, on which he was brought up before Mr. Justice *Parker*, and discharged on the ground that the warrant under which he was committed was defective. The conviction was afterwards quashed upon *certiorari*, and the present action thereupon brought against the Magistrates, and upon the trial, a verdict was found for the plaintiff for one penny damages. On the motion to set aside the verdict on the part of the plaintiff, in *Hilary* term last, the rule was granted on four grounds. The first objection was, to the

(a) 6 *Esp.* 134.
(b) 1 *C. B.* 640.
(c) 1 *C. & K.* 100.
(d) 1 *E. & B.* 526.

reception

1859.

SEWELL *against* OLIVE.

reception of a copy of the information and other papers returned with the *certiorari*. It appeared that these copies had been duly examined and compared with the originals, before the latter were filed. It was urged that the originals were not records of the court. But, as it was proved that they were filed with the Clerk of the Crown by the person who had himself compared and examined the copies, they must be taken *prima facie* to have then become records of the court, and after such filing, the papers tendered became copies of a record, and we think, were properly receivable as such. The second objection was, the rejection of the evidence of the costs of getting the plaintiff out of gaol by *habeas corpus*. The plaintiff in his declaration had claimed these costs, but there was no such ground for damages alleged in the notice of action. Now, looking to the object of the notice, which is to allow persons acting in the capacity of Magistrates, if they think proper so to do, to tender amends, we think the plaintiff should have specially set forth what was in the nature of special damage; and not having done so, he was not entitled to give evidence of these costs. The third ground was, misdirection in instructing the jury that case, and not trespass, was the proper remedy for any thing done in the course of the proceedings prior to the conviction. A regular information had been laid, and the case was clearly within the Magistrates' jurisdiction; we think therefore, that in the previous proceedings, the defendants, acting in the capacity of Justices, could not be held liable in trespass. With regard to the damages, which is the only remaining point, the case was left to the jury very favorably for the plaintiff; but as the learned Judge declared, it was a question peculiarly for a jury, who, looking to the evidence of both plaintiff and defendants, and weighing all the circumstances of the case, arrived at the conclusion that the plaintiff was not entitled to a verdict for more than nominal damages. After maturely considering the case, we do not think that there is sufficient ground for disturbing the verdict on this point. The rule, therefore, for a new trial must be discharged.

Rule discharged.

1859.

BENNETT *against* JONES.

THIS action was brought to recover for fifty-six weeks' board and lodging, furnished to the defendant's wife by the plaintiff, her brother.

The defendant turned away his wife without cause, and afterwards offered to take her back and provide for her, but she refused to return. The jury were directed that this offer did not relieve the defendant from liability to a third person, who had afterwards supplied the wife with necessaries. Held—per *Williams*, J., and *Patteson*, J., (*Parker*, J., *hesitante*, and *N. Parker*, M. R., *dissentiente*,) a misdirection; and that the question for the jury should have been, whether the defendant made a *bonâ fide* request to his wife to return, and if so, whether she had refused on a well-founded belief that his ill-treatment to her would be renewed.

Held, also—that the liability of the husband depended upon the implied authority of the wife, as his agent, to bind him; and that when the necessity for the authority ceased, her right to bind him ceased also.

Held—per *N. Parker*, M. R., that a husband who wrongfully turns away his wife, continues liable at law for her support, except in case of her misconduct; and that the question whether she was bound to return to his house on his offer to take her back, could only be determined in the Spiritual Court, in a suit for the restitution of conjugal rights.

At the trial before *Parker*, J., at the last *Westmorland* circuit, it appeared that the defendant and his wife had been living somewhat unhappily together for several years—he complaining that she neglected the management and work of the house, and she alleging that she was ill and did as much work as she was able to do. He had also charged her with adultery, but without any apparent cause; and she said that he had attempted to take improper liberties with a maid servant. In *April* 1850, the defendant told his wife that he would give her a month to make up her mind whether she would do the work of the house, or be turned out of doors. She told him that she was ill and required attendance, but if he would hire a servant, she would do what she could; to which he replied, that if he was obliged to hire a servant, she (his wife) should not be mistress of the house. At the expiration of the month he asked her what her decision was, and she told him that she was unable to do the work without assistance. He then told her to pack up her clothes and leave the house; and when she had packed up some of her clothes, he pushed her out of the door, and gave her a slight kick, saying "Take that, damn you, and go." She went to her father's house for a short time, and endeavored to get possession of her children, but the defendant refused to give them up to her. She then left the country and supported herself by dress-making until 1855, when she was compelled by ill health to give up business, and return to the Province, and went to reside with the plaintiff. Soon after her return, she applied to the defen-

1859.

BENNETT *against* JONES.

dant to make an allowance for her and her children, but he refused, unless she would go and live with him, which she objected to do. He soon afterwards sent a message to her, that he would give his son (who was then about 20 years of age) a deed of a farm; that she might live there with her children, and he would not go there without her consent: but she refused to do this, unless he would give her security for a peaceable and comfortable living—not believing that he was sincere in his offer. He then gave notice to the plaintiff that he would not be responsible for any debts contracted by his wife.

The learned Judge directed the jury, that if the defendant had turned away his wife without sufficient cause, he was liable for necessaries supplied to her, according to her state and circumstances; and that the offer he had afterwards made to provide for her, would not relieve him from liability, as she was not bound to return to his house. The jury found a verdict for the plaintiff for £27.

In *Michaelmas* term last, *A. L. Palmer* obtained a rule *nisi* for a new trial on the ground of misdirection.

B. Botsford shewed cause in *Hilary* term last. The question is, whether where the husband has wrongfully turned his wife out of his house, he can determine his liability for her support by offering to take her back. *Emery* v. *Emery (a)*, decides that his liability cannot be determined in that way. [RITCHIE, J. Is there no *locus pœnitentiæ?*] He must sue in the Spiritual court for a restitution of conjugal rights. A court of law has no jurisdiction to compel the wife to return to him; for when his liability for her maintenance has once attached, by conduct on his part which justified her in leaving his house, he cannot determine his liability by an offer to maintain her if she would return to him. The court will not subject the wife to a repetition of ill-treatment, for she has the right to set up the cruelty of her husband, to avoid being compelled to live with him again. *Cartwright* v. *Cartwright (b)*. In *Emmet* v. *Norton (c)*, and several other cases which will be relied on by the defendant,

(*a*) 1 *Y. & J.* 501. (*b*) 19 *Eng. R.* 46. (*c*) 8 *C. & P.* 506.

the

1859.

BENNETT *against* JONES.

the question was, whether the wife could exceed the amount allowed by the husband for her maintenance.

A. L. Palmer, contra. The right to maintain this action depends upon the implied agency of the wife to pledge her husband's credit for necessaries. If there was no necessity for the plaintiff supporting the defendant's wife, he is not liable. *Seaton* v. *Benedict (a)*, *Montague* v. *Benedict (b)*, *Emmet* v. *Norton (c)*, *Renaux* v. *Teakle (d)*, *Read* v. *Teakle (e)*. Where a wife is living separate from her husband, any person who trusts her does so at his own risk. *Mizen* v. *Pick (f)*. Nothing short of actual terror and personal violence will justify a wife in leaving her husband and pledging his credit. *Horwood* v. *Heffer (g)*. Here, the wife admitted that she had no fear of violence. But at all events, the defendant offered to provide for her, and that put an end to any implied agency which might have existed before. [WILMOT, J. You say he can call her back to his house one day, and kick her out the next, and so *toties quoties*.] I say it ought to have been left to the jury, whether her refusal to return to her husband was the fear of personal violence. *Houliston* v. *Smyth (h)*. That was the reason it was held in *Emery* v. *Emery* that the wife was not bound to return. [PARKER, J. I thought it was not a question for a jury.] It is a simple question of agency, and if it can be tried in a court of law, all the questions must be investigated by the jury. When a wife claims a right to live apart from her husband and to be supported by him, she must shew that she has not been in fault. *Evans* v. *Evans (i)*, *Oliver* v. *Oliver (j)*, *Reed* v. *Moore (k)*. And where a husband is bound to support his wife apart from him, he may do it in his own way, and it is a question for the jury whether he has provided her with reasonable support.

Cur. adv. vult.

(*a*) 5 *Bing.* 28. (*b*) 3 *B. & C.* 631. (*c*) 8 *C. & P.* 506.
(*d*) 20 *Eng. R.* 345; 8 *Exch.* 680. (*e*) 24 *Eng. R.* 332; 17 *Jur.* 841.
(*f*) 8 *C. & P.* 373. (*g*) 3 *Taunt.* 421. (*h*) 3 *Bing.* 127.
(*i*) 1 *Hagg.* 38. (*j*) 1 *Hagg.* 364. (*k*) 5 *C. & P.* 200.

The

1859.

BENNETT *against* JONES.

The Court, differing in opinion, now delivered judgment as follows:—

RITCHIE, J. I think there is a fallacy in the plaintiff's argument, and in the decision on which he mainly relies, viz., *Emery* v. *Emery (a)*, (I shall hereafter more particularly refer to this case), and that it arises from mixing up the jurisdiction of the Spiritual court, with the consideration of the case in this court, which, with great deference, I think will be found on a careful consideration of the principles that should govern the case, to have no bearing whatever; that it is simply governed by the principles of the common law, and is matter of contract, with which this court is specially competent, and is now called upon to deal, without reference to the peculiar jurisdiction, principles, or modes of proceeding of the Spiritual, or any other court. My proposition is, that the right to maintain this action is not based on, or affected by, what a Spiritual court might or might not do, if a case for restitution of conjugal rights between the husband and wife was before it, though growing out of the same circumstances; but on a contract between the plaintiff and the defendant, made by the wife on behalf of the husband, by virtue of an authority in law, whereby she is authorised from necessity to contract on her husband's behalf. The principles which govern actions of this kind are clearly enunciated in the late case of *Johnston* v. *Sumner (b)*, in which *Pollock, C. B.*, delivering the judgment of the court, says—"On the present occasion we have not to inter-"pret a positive law, but to ascertain the principle on which "a husband has been held liable for goods furnished to his "wife, and see how far, or whether at all, it applies to this "case. The principle seems to be merely that of agency; "the wife is spoken of as the husband's agent, as having "his authority; and the declaration is as upon a contract by "him through his wife, as an agent. The question to be "resolved, then is, had the wife authority to pledge the "husband's credit?" The very question before us in this case. After remarking that authority may be express, implied, or from necessity, the learned Chief Baron proceeds:

(a) 1 Y. & J. 501. (b) 4 *Jur. N. S.* 462; 3 *H. & N.* 261.

"If

1859.

BENNETT *against* JONES.

"If the husband turns his wife away, it is not unreasonable "to say she has an authority of necessity; for she by law "has no property, and may not be able to earn her living; "but we should hesitate to say, that if a laboring man turned "his wife away, she being capable of earning, and earning "as much as he did, or if a man turned his wife away, she "having a settlement double his income in amount, the wife "in such cases could bind the husband." And again—"The "burthen of proof is on the person who has trusted the "wife." * * * "We think an authority must be shewn, "and shewn in one or other of the ways we have mentioned. "This rule puts the burthen of proof on the right person. "It gives the husband that to which he is fairly entitled, "viz., to have the authority affirmatively shewn; conse- "quently involving the shewing of the wife's wants, includ- "ing her allowance or other means." * * * "We think, "therefore, authority must be shewn in all cases where the "husband is sought to be made liable for his wife." If then the principle involved is, nothing more nor less than simple agency, and such agency constituted, in a case like the present, by necessity alone, if you remove the necessity, is not the authority and agency likewise removed? Must there not, to sustain a continuing agency, be a continuing necessity? When the necessity ceases, what supports the authority? If in this case the husband did wrong, (as most certainly he did) and turned the wife out of doors, and thereby of necessity clothed her with authority to contract in his name, because he sent her abroad without the means of support, is there no *locus pœnitentiæ* for him? Is it, as between him and the plaintiff or person supplying the wife, an authority at law irrevocable? I can find no principle to sustain such a doctrine. The present was certainly a very premeditated, gross case of misconduct on the part of the husband. But try the principle out on a case not aggravated in its circumstances. Take the case of a man with several young children, who, in a moment of irritation, produced perhaps by tantalizing conduct on the part of the wife, closes his door against her, but without any circumstances of indecency or personal violence, and thereby of necessity gives

1859.

BENNETT *against* JONES.

gives her the authority spoken of. In a few weeks, heartily repenting of his misconduct, he tenders her *bona fide* expressions of deep contrition, with a full apology and kind invitation to return to her family, and to his bed and board, where ample provision would be found for her comfort and support. She, ill advised, (perhaps by the very person seeking to charge the husband with the board, and whose interest it was to keep them separate) refuses. After such an offer, the *bona fides* of which could not be doubted, could any one say she remained from necessity apart from her husband, and that he had not provided reasonable and proper means, in a proper place, for her maintenance? The question being one of authority, would the creditor shewing these facts, have made out affirmatively, in the concluding language of *C. B. Pollock* in *Johnston* v. *Sumner*, "that the wife, living "separate, did so under circumstances from which an "authority might be implied;" and this in face of the fact that she could at any moment have returned to her home, and ought to have done so? Take what may perhaps be considered as the converse of this case. The wife leaves her husband of her own accord, without reasonable cause: having no authority, she could enter into no contract to bind the husband. After a time she offers to return, but the husband refuses to receive her: it seems assumed in the cases, that from the time of such refusal a liability arises. Chief Justice *Raymond*, in *Child* v. *Hardyman (a)*, says—"If a "woman elopes from her husband, though she does not go "away with an adulturer, or in an adulterous manner, the "tradesman trusts her at his peril, and the husband is not "bound. Indeed, if he refuses to receive her again, from "that time it may be an answer to the elopement." Chancellor *Kent*, in the 2d volume of his Commentaries, page 147, quoting these words, says—"Lord *Eldon* subscribed to that "case, and the same doctrine has been declared in *New* "*York*." He cites *McGahay* v. *Williams (b)*, *McCutchen* v. *McGahay (c)*. If this is so, what becomes of the case of *Emery* v. *Emery?* Why would not the principles of that case equally apply? Why should not the husband be permitted

(a) 2 *Stra.* 875. (b) 12 *Johns.* 293. (c) 11 *Johns.* 281.

1859.

BENNETT *against* JONES.

mitted to say—as the leaving was the wife's own wrongful act, no legal obligation exists at law, till she obtains a restitution of conjugal rights by a decision of a Spiritual court?

The first duty of a husband is to provide for his wife, in his family. While willing to provide her a home and all reasonable necessaries there, I cannot understand on what principle he is bound to furnish them elsewhere. When he turns her out without a cause, he does so wrongfully, and clothes her with authority. When he opens his door to her, makes proper provision for her, and requests her to return to her home and family, and she, having no fear of ill treatment or want of care, refuses to enter, does she not then become the wrong doer? Is she not then living apart from her husband without compulsion, without fear, without his consent, and consequently without cause? And if so, is not her conduct in direct violation of her marriage vow? And is not her remaining away under such circumstances, not only contrary to her duty, but tantamount to a voluntary departure? And upon such facts being brought to the notice of a third person, on application by her for assistance on her husband's credit, instead of supplying her with necessaries at his expense, and thereby practically encouraging her to continue apart from her family, should not his reply be, "I can't make you the advances you ask on your husband's credit. You have not his authority, because you are really not in want, he having made proper provision for you in the proper place, there being no impediment to your return to your own home, but your own obstinacy or self-will, and therefore no necessity to create an agency." Or, in the language of *Bac. Ab.*, *Vol.* 1, *p.* 721—"As the husband's liability "is grounded on an implied authority to the wife to contract "the debt, it is removed when the circumstances rebut the "presumption of such an authority." Or, if he chooses to take the contrary course and make her advances, ought he not to do so at his peril? And who, I think it may be fairly asked, is injured or aggrieved by such a view of the legal rights and duties of the parties, or what principles does it impugn? On the other hand, is not the contrary at variance with a well recognised principle of public policy governing the

1859.

BENNETT *against* JONES.

the marriage contract; and if it does not directly infringe the divine command against putting asunder those whom God hath joined together, does it not indirectly do so by assisting to keep them asunder? Is it not discouraging, rather than encouraging, a re-union? Is it not in fact establishing a divorce *a mensa et thoro*, which has never been pronounced, and which a court of law has no power to grant? We find it well established, that though the law allows provision to be made for a separation already determined on, it will not sanction any, the most solemn agreement, the effect of which is, to provide for the contingency of a future separation at the pleasure of the parties. Why? Because this has "a tendency to promote that event, contrary to the policy of the law." 2 *Steph. Com.* 310; *Durant* v. *Titley*, *(a)*, *Hindley* v. *Marquis of Westmeath (b)*.

These impressions have not been adopted without a careful consideration of the case of *Emery* v. *Emery*—an authority certainly opposed to the views now expressed—an authority in itself, to my mind, very unsatisfactory. It was really only the decision of two judges out of four, the Chief Baron not concurring in it; and though he had not sufficiently investigated the case to give a directly contrary decision, he expressed such doubts as, I think, shew that though he was unable fully to make up his mind, his impressions were against the judgment delivered. The fourth judge *(Vaughan*, B.*)* did not hear the argument, and on that account, though expressing "the strong impression on his mind" in favor of the decision, abstained from entering into the grounds upon which that opinion was formed. Barons *Garrow* and *Hullock*, who decided the cause, do not appear to treat the question as one of contract at all, but rather as a question of jurisdiction between the Spiritual and the common law courts. But I can see no conflict of jurisdiction, nor any practical difficulty likely to arise. Supposing the two courts take the same view of the facts; all well. Suppose they should differ in the conclusion they arrive at; all that can be said is, that another court competent to deal with the facts for the purpose for which they were presented, took another

(*a*) 7 *Price*, 577. (*b*) 6 *B. & C.* 200.

another view of them. Suppose a jury in an action for *crim. con.* should not be satisfied that the offence was proved; they would find for the defendant, and the court of common law would give judgment accordingly; but the same facts might be submitted to the Court of Marriage and Divorce, and it might think the charge of adultery fully sustained, and pronounce a divorce. Here would be two courts differing on the same facts, on substantially the same issue. But where is it propounded that the Court of common law would hesitate to deal with the case before it, or be influenced in any way, by what a Court of Marriage and Divorce might or might not do? And certainly there is nothing like the conflict that arises in the same court in *England*, under the recent decisions, which allow the confession of a wife to be evidence against her of adultery, but refuse to receive it against the alleged adulterer, though a co-respondent: making the Court in the same suit, and in the same breath say, as to *A.*, "*A.* and *B.* committed adultery together," and as to *B.*, "*A.* and *B.* did not commit adultery together." There is one position of *Garrow*, B., in which I heartily concur. After stating a possible conflict between the Spiritual court and a court of common law, he says—"In this state of difficulty "the strong impression on my mind, and which upon consid- "eration I have been unable to remove, is, that if a husband "drives his wife from home by his misconduct, and sends her "forth with an implied credit arising from their relative "relations, it is his duty by some positive act to determine "that liability." This is just as I would put the law. The husband's conduct and offer should be clear, distinct, unequivocal—perhaps unconditional—certainly without any improper or questionable conditions. But the actual decision in that case goes much further; it not only requires the liability to be put an end to by a positive act, but by a positive judicial act; for which, I humbly think, there is neither authority nor principle. I cannot find that this authority has been recognised or acted on in any subsequent case, nor do I see that it has been impeached. The only case that I have seen, where the point has been mentioned is, *Tempany* v. *Hakewill*, and the only report of that is, a newspaper one in The *Times*

1859.

BENNETT *against* JONES.

Times of the 9th *February* last. Mr. Baron *Channell* in summing up, is reported to have said—after stating what would justify a wife in leaving her home, and what would clothe her with her husband's credit—"If under these "circumstances she left her home, she was clothed with her "husband's credit, and he would be liable for all necessaries "which were supplied her. She would also be justified in "remaining away if, after the lapse of time, her husband "requested her to return, provided she had a well grounded "belief that the indignities or cruelties would be renewed "on her return." If this is an accurate report of what the learned Judge said, it is adverse to the case of *Emery* v. *Emery*. But the decision not having appeared in a recognised report, I have not allowed it to influence my mind.

The result then of my present judgment is, that the learned Judge should have submitted to the jury the question whether the defendant did or did not make his wife a *bona fide* request to return, receive support, and live with him; and if so, whether she refused on any well founded belief that indignities or cruelties would be renewed upon her return? And they should have been told that if she did, she was justified in remaining away. But if the offer was clear, distinct, positive, and *bona fide*, and she had no reasonable grounds for believing she would be subjected to further ill treatment, she was bound to return, and if she did not, the right to pledge her husband's credit ceased. I therefore think the rule should be made absolute for a new trial.

WILMOT, J. I am of the same opinion.

PARKER, J. After much consideration, and I may add, not without hesitation, I have come to the same conclusion as my learned brothers who have preceded me. My opinion at the trial was governed mainly by the judgment of the court in *Emery* v. *Emery (a)*, in which case, the ill treatment by the husband of his wife was not greater than that of the defendant in this case; the proof there, however, of the efforts of the husband to procure the return of the wife, was more vague than in the present instance. It will be more satisfactory that the case should go to another trial, and the

(a) 1 Y. & J. 501.

facts

1859.

BENNETT *against* JONES.

facts be left more openly to the jury. In *Emery* v. *Emery* the Lord Chief Baron expressed much doubt, and as there is no other case to be found which comes quite up to that, it may be doubtful whether it will stand the test of further examination. I concur in making the rule absolute.

N. PARKER, M. R. The question is, whether the learned Judge was wrong in the direction he gave to the jury, in regard to the effect of the offer of the defendant to receive his wife back, or to make other provision for her, in the manner stated. It is not denied that the defendant did turn her out of doors, and it is not attempted to be shewn that she had been guilty of adultery or other misconduct, which would justify his so doing. These points being clear, it is equally so, that having at the time of the expulsion made no provision for her support, he thereupon and thenceforth became liable for her necessary maintenance. Thus far there is no dispute between the parties, and the plaintiff having established that he had furnished necessaries to the wife while living apart from her husband in consequence of his act, is entitled to recover unless the defendant has given an answer to the case so established. The defendant contends he has given such answer, by the offer to take his wife back to his house, or to provide for her residence with his son; and that on the rejection of these offers his liability ceased, provided the jury were of opinion such offers were *bona fide* made. The plaintiff denies that this is an answer to the action. Now, the onus of shewing that these offers furnish a valid answer, lies on the defendant. He contends that the principle on which he is chargeable is, that of agency, arising out of the necessity of the wife to do that for herself which he was bound to do for her. If he shews, as he contends he has done, the necessity to have ceased, then the authority also ceases. There is certainly a shew of reason in this argument, and it may be that it may be held to furnish a valid answer; but the doctrine contended for, seems thus far wholly without authority. The cases and books certainly do recognise circumstances under which the husband's liability ceases, but they are of a different nature. Thus, if the separation is caused by the ill treatment of the husband,

and

1859.

BENNETT *against* JONES.

and he thereby becomes liable for necessaries, yet if the wife is afterwards guilty of adultery, his liability ceases, because the law holds that the act of the wife renders the separation thenceforth justifiable on the part of the husband. 2 *Roper Husb. & Wife*, 272 note *(g)*. Here, the ceasing of the liability is put on the ground of the misconduct of the wife; but the same author expressly lays it down that the obligation of the husband to maintain his wife and supply her with necessaries continues, except in cases of great misconduct on her part. Such, then, is the state of the authorities anterior to the case of *Emery* v. *Emery;* and neither in the treatises professedly written on the law of husband and wife, nor in the numerous other works where the subject is treated, nor in decided cases, do we find authority to support the defendant's position. At length the very point came into question in *Emery* v. *Emery*, and the proposition contended for was, by the judgment of the court, distinctly negatived. The decision is certainly not so strong as if the whole court had concurred in the judgment; but it is the only decision directly in point. Two of the learned judges delivered a clear opinion, that the liability of the husband did not terminate by an offer to receive his wife back. The Lord Chief Baron, however, who had entertained doubts on the subject during the trial, retained those doubts after the argument. Still it does not appear, nor is it intimated, that those doubts had ripened into any settled opinion, nor did the Lord Chief Baron desire time for further consideration, but acquiesced in the judgment of the court being pronounced in conformity with the opinions of Barons *Hullock* and *Garrow;* while Baron *Vaughan*, who had not heard the argument, and consequently might have abstained from the expression of any opinion, and who, moreover, was aware of the doubts entertained by the Lord Chief Baron, does not hesitate to express his strong impression in favor of the view taken by Barons *Hullock* and *Garrow*. This decision was never appealed from, and is cited without disapprobation or hesitation in works of authority, as establishing the position on which the present discussion turns. So far then, as to authority, I think the defendant, on whom it

1859.

BENNETT *against* JONES.

it rested to establish the cesser of liability on the ground on which he relies, has failed to do so; and for this reason I am of opinion the rule should be discharged. But considering the question on broader grounds, as affecting the conjugal relation, though there is doubtless strong reason for desiring to put an end to such a state of things as exists between the defendant and his wife, yet undoubtedly, right or wrong, the course of English jurisprudence has been to build up a system in which the separate rights of the wife are distinctly recognised and upheld; and whatever we may think of it, the same principles, except as modified by positive law, must govern courts here, as they do those in England. Hitherto, the courts of common law have proceeded no further than to ascertain whether the husband's misconduct has produced or justified a separation, and to hold him liable for his wife's support, unless her own flagrant misconduct has deprived her of a right to it. It may perhaps be thought desirable that these courts should possess further authority in conjugal matters; but if so, this, it would seem, should be effected by the action of the Legislature. These courts have never yet entertained the jurisdiction of deciding the very delicate and important question which is indirectly, but undeniably, involved in the present argument, namely, whether married persons, once separated, shall be bound to come together again: in other words, a suit for the restitution of conjugal rights. That has been hitherto purely a question for the Spiritual court, which has its own machinery and acts on principles and by forms of its own. It is singularly inconvenient to discuss a question of that nature, in an action to which the wife is not a party. The same objection prevailed very strongly before the late alteration of the law, to the action for *crim. con.*, where questions most nearly affecting the interests of the wife, were canvassed between third parties.

If the defendant is to be at liberty to rely on an offer to take his wife back, then it must necessarily follow, in order to do anything like justice, that the plaintiff be at liberty to open the whole subject, and to enter into all the evidence which the Spiritual court goes into, to show that the

1859.

BENNETT *against* JONES.

the wife is justified in refusing the proposal so made; and in fact, the court of common law must be thereby converted, though under great disadvantages, into a court matrimonial. At the same time, the jurisdiction of the proper tribunal over the case is not taken away, and, proceeding on principles of its own, it may arrive at a different result from that of the common law court. Looking to the origin of the conjugal relation, one element—indeed, the main element—it may be presumed in most marriages is, mutual affection and regard; but cases may arise, circumstanced in many respects like the present, where mutual estrangement has succeeded, and the wife has, not in a hasty fit of passion, but with cool deliberation, been ignominiously expelled from her husband's house; she has been thrown upon the world, deprived of the countenance of her natural protector, without, it may be, any provision whatever for her support; and she may, so far as he is concerned, be driven to the verge of starvation, or to a fate even worse. She, however, maintains herself, while she can, without aid from him, but is at length obliged, in order to obtain her necessary support, to incur debts on her husband's account, which he finds the law will compel him to discharge. Then comes an offer to take her back. Probably it may be much better that she should accept it. There is, however, this to be considered: the sentiments under which the union was entered into have vanished; she has been driven from her house, smarting under the sense of the indignities received; years of neglect may have quenched all original regard; and why is her husband moved to desire her return? To save his pocket. Now, the question is, not whether, as a christian wife, she ought not to forget and forgive, but whether she is legally bound, under these circumstances, either to return or starve. Her consent was necessary to their union: has not the act of her husband restored to her the right of exercising her own judgment as to a re-union? These are questions which would present themselves for consideration in a Spiritual court, which, having both husband and wife before it, as parties to the suit, and having fully investigated their mutual grounds of complaint, would then determine either

1859.

BENNETT *against* JONES.

either in favor of, or against a restitution of conjugal rights. Looking at the whole question, in the view of the authorities at common law on the one hand, and on the other, as being one peculiarly for the jurisdiction of another court, I cannot think, with great deference for the opinion of my learned brethren, that there is any ground for disturbing the verdict.

CARTER, C. J., not having heard the argument, gave no opinion.

Rule absolute for a new trial.

LAWTON *against* CHANCE.

It is discretionary with the Judge at *Nisi Prius*, under the power given by the Act 19 *Vict. c.* 41, § 16, whether he will allow a witness to be cross-examined as to the contents of a written statement made by him, without the writing being produced

The rule of evidence, that a communication respecting a suit between the agent of the client and his attorney, is privileged, is not altered by the Act 19 *Vict. c.* 41, § 1, allowing the parties to a suit to be examined as witnesses.

Quære, whether a plaintiff can elect to be nonsuited after the jury have given a verdict, but before it is recorded.

ON the trial of this cause before *Ritchie, J.*, at the last *St. John* circuit, the plaintiff's counsel, on the cross-examination of *S. A. Thompson*, the defendant's agent, proposed to ask him about a statement in a letter written by him to the defendant's attorney, relative to the suit, and also as to a verbal communication between the witness and the attorney about the suit, and the advice the attorney had given him. The counsel stated that it was not his intention to contradict the witness by the letter (which was in the possession of the defendant's attorney), but he claimed the right to cross-examine as to its contents, under the act of Assembly 19 *Vict. c.* 41, § 16. The learned Judge refused to allow the questions to be asked, unless the letter was in court; and he rejected the other evidence proposed to be given, on the ground that it was a confidential communication. The jury found a verdict for the defendant; whereupon the plaintiff's counsel, before the Clerk of the Court recorded the verdict, said, that he elected to be non-suited; but the learned Judge held that it was too late.

In *Hilary* term last, a rule *nisi* was obtained for a new trial, on the ground of the improper rejection of evidence, and the refusal to nonsuit.

Gray, Q. C., and *D. S. Kerr* shewed cause in *Easter* term last.

1859.

LAWTON *against* CHANCE.

last. A plaintiff cannot elect to be nonsuited after the jury have given their verdict, though it has not been recorded. *Locke* v. *Wood (a)*. The recording of the verdict, and the act of the Clerk in asking the jury to hearken to the verdict as recorded, is only to preserve the evidence of it. *Rex* v. *Carlile (b)*, *Keat* v. *Barker (c)*. As soon as the verdict is pronounced, it is final, whether recorded or not. [*S. R. Thomson* for the plaintiff—I abandon that point.] If the plaintiff's argument is correct, a party can get the contents of a writing without producing it, which would be a dangerous doctrine, and entirely at variance with the rule laid down in *The Queen's* case *(d)*. It must be in the discretion of the Judge, whether he will allow the evidence to be given; and in that case the court will not interfere. If the communication between *Thompson* and the defendant's attorney is not privileged, it will put an end to all professional confidence. *Rosc. Evid.* 139.

S. R. Thomson, contra. I had a right to examine the witness as to the contents of the letter, without producing it; otherwise the act is inoperative. The intention of it must have been, to enable counsel to test more effectually the memory and credibility of the witness. Since the act allowing the parties to a suit to be examined as witnesses, the rule about confidential communications between attorney and client is virtually done away; for it is absurd to say that though you can question the party as to the facts of the case,—and which he is obliged to answer, you cannot question him about a communication made to his attorney respecting those facts. I do not contend that the attorney is compelled to disclose professional communications made to him; but the rule is limited to that. *Greenl. Ev.* § 236.

Cur. adv. vult.

N. PARKER, M. R., now delivered the judgment of the Court. The rule in this case was obtained on two grounds; first, the rejection of evidence; and secondly, as to the right of the plaintiff to be nonsuited after the jury had intimated

(*a*) 16 *Mass. R.* 317.
(*b*) 2 *B. & Ad.* 364.
(*c*) 5 *Md.* 208.
(*d*) 2 *B. & B.* 286.

the

1859.

LAWTON *against* CHANCE.

the nature of their verdict, and before it was recorded. The second ground was afterwards abandoned. The evidence rejected was, of the contents of a letter written by *S. A. Thompson*, the agent of the defendant, to Messrs. *Gray & Kaye*, the defendant's attornies, and of a conversation between *Thompson* and *Gray & Kaye*. The right to examine into the contents of the letter, depends upon the act 19 *Vict. c.* 41, § 16. By that section, a witness may be examined as to the contents of a paper written by him, without shewing the writing to him; but if it is intended to contradict him by the writing, his attention must be called to those parts of it which are to be used for the purpose of contradicting him; provided that the Judge may, at any time during the trial, require the production of the writing for his inspection. This section is copied from one in a recent Act of Parliament, 17 & 18 *Vict. c.* 125, § 24, *The Common Law Procedure Act*, 1854, with the exception that the English act is expressly confined to cross-examinations. In the present case, however, as the question arose on cross-examination and not on the examination in chief, it is a case which would fall under the provisions of the English act. In the absence of any decided case as to the construction of the act, we must of course speak with much diffidence. We think, however, that by force of the latter part of the section, it must rest in the discretion of the Judge, whether he will require to see the paper; and if he decides to do so, before the examination of the contents is permitted to be gone into, and the paper is not forthcoming, that the rejection of the oral examination as to its contents must necessarily follow.

With respect to the conversation between *Thompson*, the defendant's agent, and Messrs. *Gray & Kaye*, his attornies, on the subject of the suit, there can be no doubt this is a privileged communication, which the defendant had a right to object to have divulged. We think therefore the rule must be discharged.

Rule discharged.

1859.

October 22nd.

STILES *against* BREWSTER and DOBSON.

Application having been made to the defendant, a Justice of the Peace, for a warrant to summon a jury to determine on the necessity of a private road through the plaintiff's land, he issued a warrant under which a jury was summoned, but were unable to agree upon the amount of damages to the plaintiff. Another application was made, and another warrant issued by the defendant, under which a second jury was summoned to determine upon the road, but having been resisted by the plaintiff in entering on his land, and threatened with injury if they did so, one of them made oath before the defendant that the plaintiff "had molested the jury" in the discharge of their duty; whereupon the defendant issued a warrant against the plaintiff, on which he was arrested and detained several hours. **Held—that though the entry on the plaintiff's land under the warrant might not have been justifiable, in consequence of irregularity in the proceedings, there was no want of *bona fides* in the defendant, and that he had shewn reasonable and probable cause for what he did.**

It is discretionary with a Judge at *Nisi Prius* to receive evidence at any time during the trial.

The issuing of the writ, and not the filing of the declaration, is the commencement of an action.

TRESPASS. The first count of the declaration stated that the defendants assaulted the plaintiff on the 13th *June* 1857, and unlawfully and maliciously imprisoned him, and kept him in prison for twelve hours, without any reasonable or probable cause. The second count varied from the first, only in omitting to state that the trespass was malicious. The third count was for trespass on the plaintiff's land; alleging it to be malicious, and without any reasonable or probable cause. Plea—not guilty; with the following notices of defence:—

1. That the defendant *Dobson*, together with four other disinterested persons, duly qualified and required to act as a jury under the act of Assembly relating to Highways, 18 *Vict. c.* 18, being duly summoned and sworn to examine and determine as to the necessity of a road to be laid out from *John Wood's* land to *Michael Kiever's* saw-mill in *Hopewell*, a warrant having been issued for that purpose, and that while they were in the performance of their duty as such jurors, the plaintiff wrongfully and unlawfully molested them, and made a great noise and disturbance, and by threats and violence put *Dobson* and the other jurors in fear of bodily harm; and in order to quell such noise and disturbance and to prevent the plaintiff from doing bodily harm to the jurors, *Dobson* made a complaint before the defendant *Brewster*, then being a Justice of the Peace for the County, and caused the plaintiff to be taken before the said Justice to answer such complaint; and the plaintiff thereupon promised the said Justice to cease from his misconduct and to behave himself peaceably, and he was thereupon discharged.

2. That the jurors entered on the plaintiff's land to examine the proposed road, doing no damage thereto, and that in

1859.

STILES *against* BREWSTER.

all things done by the defendants, they acted according to law, and in the discharge of their duties.

3. That the plaintiff broke the peace and put *Dobson* and the other jurors in fear of bodily harm, and that *Dobson*, in order to protect himself from the plaintiff's violence, went before the defendant *Brewster*, being a Justice of the Peace, and made complaint on oath of the plaintiff's violence; that *Brewster* thereupon issued a warrant upon which the plaintiff was arrested and brought before him to answer the complaint, and that *Brewster*, at the plaintiff's request, and on his promise to conduct himself peaceably and to cease from the offence complained of, discharged him from custody.

At the trial before *Parker*, J., at the *Albert* circuit in 1858, it appeared that in *June* 1857, *Michael Kiever* and four other freeholders made an application to the defendant *Brewster*, who was a Justice of the Peace, for a warrant to summon a jury to decide as to the necessity of a road from *Hopewell* Corner to *Kiever's* mill, through the plaintiff's land, and to assess the damages; that a warrant was thereupon issued by *Brewster*, and a jury summoned, who proceeded with a Commissioner of Highways to examine the proposed road; and that when they came to the plaintiff's land he forbid them from entering upon it, and, being armed with an axe and a gun, threatened to injure them if they did so. After some delay, finding the plaintiff determined to resist the entry on his land, the defendant *Dobson*, being one of the jury, made a complaint on oath before *Brewster*, (who was present with the jury) that the plaintiff with unlawful weapons, namely, a gun and an axe, had molested the jury and the Commissioner of roads in the exercise of their duty, and had threatened to do bodily harm to any person entering on his land to examine the proposed road. *Brewster* thereupon issued a warrant to arrest the plaintiff "to answer the information of *Thomas Dobson* for "a breach of the peace, in molesting the jury and Commis- "sioner of highways in *Hopewell*, in the exercise of their "duty as such Commissioner and jury." The plaintiff was arrested under the warrant and taken before *Brewster*, a short distance from the place, and during his absence the jury

1859.

STILES *against* BREWSTER.

jury went over his land and examined the proposed road. He was detained about three hours, and then discharged by *Brewster*. It did not appear that *Dobson* had given any directions about the arrest or detention of the plaintiff, though he was present while he was in custody, and said, in answer to a question put to him by the Justice, that he was willing the plaintiff should be discharged. It appeared that another jury had been summoned under a warrant issued by *Brewster* a short time before, and had determined that a road through the plaintiff's land was necessary, but were not able to agree upon the amount of damages, and went away at the instance of *Kiever*, without being discharged by the Justice. The defendants' counsel, however, did not rely on that laying out in the present case, but contended that the defendants were justified in entering on the plaintiff's land to lay out a private road under the tenth section of the Highway act. The defendants' counsel having objected, in closing to the jury, that the plaintiff had not proved that the action was brought within six months after the right accrued, as required by the 1 *Rev. Stat.* 338; the learned Judge allowed the plaintiff to prove that fact.

The jury were directed as follows:—

1. That the application being for a private road, should have been made by *Kiever*, or the Commissioners of Highways; and though the four other freeholders joining in the application would not make it void, if otherwise sufficient, it was bad in not stating that it was for a private road applied for by *Kiever*, and for not specifying the width.

2. That the warrant issued thereon by the Justice was defective.

3. That there was no sufficient termination of the proceedings of the first jury, to warrant the summoning of the second jury; that they should have been discharged by the Justice.

4. That the entry on the plaintiff's land, and his arrest and imprisonment were unlawful, and he was entitled to recover, unless the defendants were protected by the provisions of the 1 *Rev. Stat.* 337.

5.

5. That it was doubtful whether *Brewster* had jurisdiction in the matter; but, as the declaration had been framed, they should consider that he had jurisdiction, though he had acted irregularly; and therefore it was necessary, in order to find him guilty, to prove that he had acted maliciously, and without reasonable or probable cause.

6. That there was no reasonable or probable cause; though it might have been otherwise if *Brewster* had not been concerned in the previous proceedings. Whether he had acted maliciously, was a question for the jury; and if they considered he had not acted maliciously, to acquit him, though his acts were unlawful and done without reasonable or probable cause.

7. If he acted maliciously, that is, if he knowingly and intentionally caused the entry on the plaintiff's land, and his arrest; such entry and arrest, being unlawful, would be evidence of malice; and they might, though they were not bound to, infer malice from the want of reasonable and probable cause.

8. That *Dobson* was not entitled to the same protection as the Justice; therefore as regarded him, the question was, whether he was justified, or not, in what he had done.

9. That if the application and warrant were illegal, *Dobson* was not compelled to enter on the plaintiff's land, or to procure his arrest for opposing the entry; and therefore he was not justified, though he was not there voluntarily, but as a juror under the Justice's warrant.

The jury acquitted *Dobson*, and gave a verdict against *Brewster*, for £25 damages.

In *Hilary* term last, *Steadman* moved for a new trial on the following grounds:—1. Improper admission of evidence of the time of bringing the action. 2. Misdirection as to proof of malice. He contended that the evidence was improperly received after the close of the plaintiff's case, and that the filing of the declaration, and not the issuing of the writ, was the commencement of the action. But the Court held, that it was discretionary with the Judge to receive evidence at any stage of the cause, *(a)* and that the issuing of the writ was the commencement of the action.

(a) See *Scribner* v. *M'Laughlin*, 1 *Allen*, 379, and *Doe* v. *Connoly*, 3 *Allen*, 337.

1859.

STILES *against* BREWSTER.

A rule *nisi* having been granted on the ground of misdirection,

A. L. Palmer shewed cause in *Easter* term last. It was not necessary for the plaintiff to prove malice or want of probable cause, because the case was outside of a Justice's jurisdiction; and the allegation in the declaration that the imprisonment was without reasonable or probable cause, is surplusage. Without a proper information, a Justice has no authority to issue a warrant; there is a total want of jurisdiction, and trespass lies against him. *Morgan* v. *Hughes (a)*. The information here, charged no offence which would authorise the issuing of a warrant. A charge of molesting a jury has no legal meaning; therefore the warrant under which the plaintiff was arrested was illegal. *Bessell* v. *Wilson (b)*. The most that the Justice could have done upon the information was, to require the plaintiff to find sureties to keep the peace: he had only threatened the jury, but committed no violence. Whether there was probable cause for the arrest, was a question of law, and the jury might infer malice from the want of probable cause. *Blachford* v. *Dod (c)*, *Mitchell* v. *Jenkins (d)*, *Heslop* v. *Chapman (e)*. The entry on the plaintiff's land was unlawful, because the application for the road was not made in the manner directed by the 10th section of the act. If it was for a private road, the application should have been made by *Kiever*, the person who wanted the road, and not by five freeholders; it should have been made to the Commissioners of Highways, and not to the Justice; and it should have appeared on the face of it that it was for a private road, the width of it, and the place where it was to be laid out. The warrant should also have shewn that the plaintiff had objected to its being laid out through his land. It must appear on the face of the warrant that the Justice acted within his jurisdiction. *Regina* v. *The Inhabitants of St. George, Bloomsbury (f)*. When once a jury has been summoned to determine the necessity of a road, the power of the act is exhausted, and another jury cannot be called; therefore

(a) 2 *T. R.* 225. (b) 18 *Eng. R.* 294. (c) 2 *B. & Ad.* 179.
(d) 5 *B. & Ad.* 588. (e) 22 *Eng. R.* 296. (f) 4 *E. & B.* 520.

1859.

STILES *against* BREWSTER.

therefore the proceedings were *coram non judice*, and trespass is the proper remedy.

Steadman, contra. The plaintiff has admitted the Justice's jurisdiction by the declaration, and by giving notice of action. 1 *Rev. Stat.* 337, § 1, 8. It was not necessary to state in the application that it was for a private road, because it is only on an application for a road of that kind that a jury is required to determine its necessity. Public roads are laid out by the Commissioners without the intervention of a jury. The fact of other persons joining in the application for the road, does not invalidate it; nor does the disagreement of the first jury, deprive the applicant of his right to have another jury summoned *(a)*. But whether the laying out of the road was good or not, if the Justice had a reasonable ground to believe that he was acting under the law, and had authority to issue the warrant, he is not liable in trespass; and that question should have been left to the jury. *Wedge* v. *Berkeley (b)*, *Cann* v. *Clipperton (c)*. The plaintiff was bound to prove that the defendant acted maliciously, and without reasonable or probable cause; and that was a mixed question of law and fact, to be left to the jury under the act, 1 *Rev. Stat.* 337. [*Parker*, J., referred to *M'Donald* v. *Rooke* (*d*).] All proof of malice was negatived. There was nothing in the defendant's conduct from which malice could be inferred, even if there was want of probable cause, which I do not admit. The defendant had jurisdiction over the subject matter, although he may have made mistakes in the proceedings; therefore he is not liable, however insufficient the evidence may have been to establish the plaintiff's liability to be arrested. *Cave* v. *Mountain (e)*. [PARKER, J. This warrant is bad on its face. "Molesting the jury" is no offence: the names of the jurors should have been stated.] If the warrant was legal, the defendant would not require the protection of the act; therefore it must apply to a case where the warrant is illegal.

Cur. adv. vult.

(*a*) See *Ex parte Hebert*, 3 *Allen*, 108. (*b*) 6 *A. & E.* 663.
(*c*) 10 *A. & E.* 582. (*d*) 2 *Bing. N. C.* 217. (*e*) 1 *M. & G.* 257.

N.

1859.

STILES *against* BREWSTER.

N. PARKER, M. R., now delivered the judgment of the Court. The declaration in this case contains counts for trespass and false imprisonment, and also for trespass *quare clausum fregit.* The alleged causes of action both arose under proceedings taken at the instance of *Michael Kiever* and others, under the act 18 *Vict. c.* 18, for the purpose of laying out a private road across the plaintiff's land in the parish of *Hopewell,* to *Kiever's* mill; the defendant *Brewster* being the Justice to whom the application was made, and *Dobson* one of the jury summoned under his warrant. The jury, so summoned, having been prevented from entering on the plaintiff's land, by the determined opposition and threats of the plaintiff, who stood at his fence armed with an axe and a gun, a complaint, on oath, by the defendant *Dobson* was made before *Brewster,* and he thereupon issued his warrant, and the plaintiff was arrested and kept some time in confinement, and afterwards discharged on the evening of the same day. At the trial, the defendants sought to justify the entering on the land under the act of Assembly; and the imprisonment, as warranted by the complaint on oath, upon which the warrant for the arrest was issued. Sundry objections were raised by the plaintiff's counsel, to the regularity of the proceedings for obtaining the road, both as regarded the written application and the warrant issued thereon, and also in consequence of a former jury having been summoned for the same purpose, who had separated without being able to come to any agreement as to the amount of damages to be awarded to the plaintiff for the injury to him, occasioned by the road. The learned Judge, after hearing the evidence and the arguments of counsel, directed the jury (though expressing considerable doubts on the point) that the defendants had failed in making out their justification; and also, in regard to *Brewster,* that he had not shewn reasonable or probable cause, to bring him within the benefit of the act for the protection of Justices acting in the execution of the duties imposed on them by law. The jury thereupon found a verdict in favor of the plaintiff against *Brewster*—acquitting *Dobson.* The case was ably argued on the motion for a new trial, and the various points

1859.

STILES *against* BREWSTER.

points fully discussed. We have taken ample time for the consideration of our judgment, and, without expressing any opinion as to the somewhat nice questions involved, have all come to the conclusion that, whether the proceedings of the Justice with respect to the entering on the plaintiff's land by the jury, under the authority of his warrant, were in all respects regular or otherwise, yet looking to all the circumstances of the case, we are unable to discover any want of *bona fides* on the part of the Justice, who appears to have acted according to the best of his judgment, in a case by no means free of difficulties. There was, at all events, reasonable and probable cause shewn for what he did, and on that ground he is entitled to have the rule for a new trial made absolute.

Rule absolute.

STILES *against* GILBERT.

THIS was an action on the case against the Sheriff of the County of *Albert*, for a false return to a writ of election, under the Act 11 *Vict. c.* 65 — "An act relating to the election of Representatives to serve in the General Assembly."

By the Act 11 *Vict. c.* 65, § 30, all false returns which shall be wilfully made of any Member to serve in the Assembly of this Province, are prohibited and declared to be illegal; and in case any person shall return any Member to serve in the Assembly contrary to the right of elections established by the Act, such return shall be adjudged to be false, and the party aggrieved, to wit, every person that shall be elected to serve in such Assembly, by such false return, may sue the Sheriff or returning officer, and persons wilfully making and procuring such false return, and recover the damages he shall sustain by reason thereof. Held—that an action would not lie against a Sheriff, under this Act, for a false return to a writ of election, without proof of actual malice.

Per N. Parker, M. R., *Quære*, whether a person returned by the Sheriff as a member, but who, upon a scrutiny before the House of Assembly, fails to maintain his right to the seat, is a person "elected," and therefore entitled to maintain an action under the Act as "the party aggrieved."

Per Parker, J., That a person having the majority of votes, and who ought to have been returned by the Sheriff, did not lose his right of action for the false return, by a decision of the House of Assembly against his petition; though the *quantum* of damages might be doubtful.

"Polling" under § 21 of the Act, is complete when the elector declares the name of the candidate for whom he votes, and the officer enters such vote in the poll-book; after which, it is too late to require the elector to take the oath of qualification.

Per Ritchie, J., (*Parker*, J., *dubitante*), That in an action against the Sheriff of *A.* for a false return to a writ of election, where the charge was, the unlawfully striking out the names of voters who had refused to take the oath of qualification after having polled, evidence of such a practice at elections in the county of *W.*, of which *A.* was formerly a part, was admissible on the question of malice.

Per Parker, J., that where two candidates have an equal number of votes, the Sheriff should make a double return.

1859.

STILES *against* GILBERT.

At the trial before *Parker*, J., at the last *Albert* circuit, it was proved that the plaintiff, *Edward Stevens*, *John Lewis*, *Abner R. McClelan*, and three other persons were candidates for the representation of the County of *Albert* in the House of Assembly of the Province, at the general election in 1854; that the defendant had given the returning officers at the several polling places, written instructions as to the mode of taking votes, and administering to voters the oaths prescribed by the Election law, 11 *Vict. c.* 65, § 21; in which instructions, after directing that the name, place of residence and freehold of the elector should be entered in the poll-book, and that he should be asked for whom he voted, and his vote be placed in the book under the name of the candidate—it was stated "and if the voter be requested to swear, put the "first oath to him in the 21st section of the act, and also the "second oath, if it be requested by the candidate or his "agent. The candidate or his agent can, as he please, swear "the voter either before or after he votes; and if the voter "refuse to take the oath, the poll-clerk will strike out the "vote so given, and mark, *objected.*" In pursuance of these instructions, the names of a number of persons in each parish, whose votes had been entered in the poll-books for the several candidates, were afterwards struck out, and not counted at the close of the poll, because they had been required to take the qualification oath after their votes had been recorded, and refused to do so. At the close of the poll, it appeared that *Stevens* had the majority of votes; that *Lewis* and *McClelan* had an equal number, and that the plaintiff stood next below them on the poll; but if none of the votes given, had been struck out under the defendant's instructions, the plaintiff would have stood second on the poll, and been elected. The defendant declared *Stevens* and *McClelan* duly elected, and the plaintiff protested against the return for bribery and corruption, and afterwards petitioned the House of Assembly against the election and return of *McClelan*, but the petition was dismissed *(a)*. The defendant was *McClelan's* brother-in-law, and it was proved that after he received the writ of election, he had spoken

(a) See House of Assembly Journals 1855, page 219.

favorably

1859.

STILES *against* GILBERT.

favorably of *McClelan* as a candidate, and applied to one person in the county to canvass for him, saying that he would be well paid for doing so. The defendant proved that the practice of striking out of the poll-book the names of voters who refused to take the qualification oath, had been adopted without objection at a former election in the county in 1850, when the plaintiff was a candidate; and some evidence was given, to shew that no objection had been made to it by the plaintiff or his agents at this election, but the plaintiff swore that he had objected to it as being illegal. Evidence was also offered to shew that a similar practice was adopted by the Sheriff of *Westmorland* before its division; but it was not admitted.

In leaving the case to the jury, the learned Judge told them that the defendant was answerable for the acts of his deputies at the different polls, acting under his written instructions, although they were given without any evil intent. That the true construction of the 21st section of the act was, that a voter should be challenged before his vote was recorded in the poll-book, after which, the Sheriff had no right to strike it out; that if the names had not been struck out, the plaintiff would have had a majority of votes, and would have been entitled to be returned as a member instead of *McClelan*, and consequently he had sustained a wrong and would be entitled to recover, although the defendant acted under a mistake of the law, and believed he was justified in giving the instructions, unless the plaintiff had acquiesced in that mode of striking out votes; and whether he did so or not, was a question for them. That as to damages: it was not necessary for the plaintiff to shew pecuniary damages, for it was a damage if he had not been returned as a member, when he was entitled to be returned; and the amount of damages would depend upon the view the jury took of the defendant's conduct. His Honor then left the following questions to the jury:—

1. Did the plaintiff acquiesce in the mode of proceeding adopted by the defendant at the election, in striking out the votes of persons whose votes had been recorded in the poll-books, and did he knowingly allow the defendant so to act, without making any objection?

2.

1859.

STILES *against* GILBERT.

2. Did the defendant act with an evil design in adopting that mode of proceeding, and instructing his deputies so to act, and intentionally return *McClelan* as the member for the county, when he ought to have returned the plaintiff; knowing or believing that the plaintiff was entitled to be returned?

The jury answered the first question in the negative, and the second in the affirmative, and gave a verdict for the plaintiff with £125 damages.

In *Michaelmas* term last, *A. R. Wetmore* obtained a rule *nisi* for a new trial on the grounds of misdirection; the improper rejection of evidence; and that the verdict was contrary to law.

J. A. Street, Q. C., and *A. L. Palmer* shewed cause in *Hilary* term last. If the defendant made the return with a knowledge of all the facts, he is liable to an action whether he thought he was right or not, because he was bound to know the law. Assuming that the striking out the votes was an illegal act, and that it was done by the defendant intentionally, with a knowledge of the facts, then it was a wilful wrong; and as the effect of it was to deprive the plaintiff of the majority of votes and of his right to be returned, an action lies; for the Sheriff in holding an election is only acting as a ministerial officer. *Ashby* v. *White (a)*. The case of *Turner* v. *Sterling (b)*, decides that where an officer does anything against the duty of his office, and a damage thereby accrues to a party, an action lies. It is true, it was said there by *Wylde*, J., that no action would lie at common law by a Parliament-man against a Sheriff for not returning him, being elected; and the reason given was, that a seat in Parliament was a place of burthen. But a seat in the House of Assembly in this country cannot be considered a burthen, because there is pay attached to it. [PARKER, J. There was no right to pay at the time of this election: the act had expired.] When the new act passed giving pay to members, the right to damage arose. [RITCHIE, J. But when the cause of action, if any, arose, there was no right to pay.] The common law of *England* relating

(a) *Ld. Raym.* 938.

(b) 2 *Vent.* 25.

1859.

STILES *against* GILBERT.

relating to members of Parliament is not in force here: it has been altered by our statute law. In the case of *Turner* v. *Sterling, Archer*, J. says—"that upon a writ *de coronatore* "*eligendo*, if the Sheriff will not return him Coroner, who "was chosen by the major part, an action on the case lies." [RITCHIE, R. What is the meaning of the word "wilfully" in the thirtieth section of the act 11 *Vict. c.* 65, which says "All false returns which shall be wilfully made of any mem- "ber," &c. ?] It means, improperly returning a man to an office contrary to the public duty of an officer. The act of the defendant here was a wilful denial of the duty of his office; and that is actionable. The declaration alleges that the defendant wilfully made a false return; the jury have found that he did so, and the evidence warrants it. The striking out the votes after they were recorded was illegal, and the plaintiff is "the party aggrieved" under the 30th section. The term "polling" in the 21st section of the act, means the naming of the candidates for whom the elector votes: after that, it is too late to require him to take the oath. [CARTER, C. J. You need not argue further on that point.] There was no evidence of the plaintiff's acquiescence in the striking out the votes. The practice of the Sheriff of *Westmorland* in conducting elections and striking out votes, was properly rejected. The principle established in *Ashby* v. *White*, and confirmed in *King* v. *The Rochdale Canal Company (a)*, is, that every injury to a right imports a damage, and that an action is maintainable though no pecuniary damage is shewn. The defendant's breach of duty affords presumption of some damage to the plaintiff; *Wylie* v. *Birch (b)*; and though where no actual damage is proved, the verdict might be reduced to nominal damages—*Jarvis* v. *Miller (c)*—the Court would not grant a new trial on account of the damages being excessive. *Gilbert* v. *Burtenshaw (d)*.

A. J. Smith and *A. R. Wetmore, contra.* The first question is, whether the striking out the votes was illegal. That depends upon the construction to be given to the word

(*a*) 15 *Jur.* 896.
(*b*) 4 *Q. B.* 566.
(*c*) *Bert. R.* 191.
(*d*) *Cowp.* 230.

"polling"

1859.

STILES *against* GILBERT.

"polling" in the 21st section of the act. The oath which the elector may be required to take, is one of the ingredients of polling, and the poll is not complete without it. The oath may be taken at any time before the close of the poll; and the meaning of the words of the oath "that I have not before "polled at this election" is, that the elector has already done everything that was necessary, except taking the oath. The defendant's instructions to his deputies were in accordance with the law; or, at all events, the meaning of the act is so doubtful, that he is not liable to an action merely for misinterpreting it, particularly as he had given similar instructions at former elections. It was impossible for the defendant to know how these instructions given before the election would affect the plaintiff—they affected one candidate as much as another—and even admitting that his conduct was injudicious, it does not prove, that in giving the instructions, he acted wilfully or maliciously. On this point, the practice of the Sheriff of *Westmorland* was material evidence to rebut any presumption of malice in the defendant, and to shew that he was only doing what had been the practice in the adjoining county, and which he might reasonably suppose to be correct. However much he may have mistaken the law, he is not liable to an action, without proof of malice. *Drew* v. *Conlton (a)*, *Tozer* v. *Child (b)*. [PARKER, J., referred to *Bernardiston* v. *Some (c)*, to shew that proof of malice was necessary to maintain the action.] If the plaintiff was aggrieved by the return, his remedy was by petition to the House of Assembly—the Sheriff's return not being final; and the House having decided against him, he was not elected, and therefore is not "the party aggrieved," to whom the right of action is given by the 30th section of the act. The case of *Turner* v. *Sterling (d)*, shews that no action lies at common law against a Sheriff for not returning a person as a member of Parliament, when elected; because it is a place of burthen and not of profit. If any action can be maintained here, it must depend on the act of Assembly. The defendant is liable to a

(*a*) 1 *East*, 563.
(*b*) 40 *Eng. R.* 89.
(*c*) 2 *Lev.* 114.
(*d*) 2 *Ventr.* 25.

prosecution

1859.

STILES *against* GILBERT.

prosecution for a penalty under the 51st section of the act, if he has wilfully violated its provisions, and the proceedings should have been under that section. If this action can be maintained under any circumstances, the verdict cannot stand without proof of actual damage.

Cur. adv. vult.

The Court now delivered judgment as follows:—

N. PARKER, M. R. This action, it is stated by the counsel for the plaintiff, is founded upon the thirtieth section of the act 11 *Vict. c.* 65 *(a)*, "An act relating to the election of "Representatives to serve in the General Assembly." That act prescribes the course to be pursued, and the duties of the Sheriff in conducting the election, and by the thirtieth section provides as follows—"All false returns which shall "be wilfully made of any Member to serve in the Assembly "of this Province, are against law, and hereby prohibited; "and in case any person or persons shall return any Member "to serve in the Assembly of this Province for any county, "city, or place, contrary to the rights of elections established "in and by the provisions of this act, or of any of the acts "now in force in this Province relating to elections, such "return, so made, shall and is hereby adjudged to be a false "return, and the party aggrieved, to-wit, every person that "shall be elected to serve in such Assembly for any county, "city, or place, by such false return, may sue the Sheriff or "returning officer, and persons wilfully making and procuring "such false return, and every or any of them, at his election, "in the Supreme Court of this Province, and shall recover "the damages he shall sustain by reason thereof, together "with his full costs of suit." *(b)*. The plaintiff claimed to be entitled to recover under this section, and it became of consequence incumbent upon him to bring his case within its terms, by shewing,—first, that the Sheriff had made a false return, and therein so acted as to become liable to damages

(*a*) 2 *Rev. Stat.* 124.

(*b*) By the Act 18 *Vict. c.* 37, § 47, which repeals the Act 11 *Vict. c.* 65, "Any "Sheriff who shall make a false return, or return more than are required by the writ "to be chosen, shall forfeit for every offence £100; and the party aggrieved may also "recover the damages he shall sustain thereby, with costs, in an action on the case "against him, or any person who shall knowingly procure the same."

therefor

1859.

STILES *against* GILBERT.

therefor; and secondly, that he, the plaintiff, was a party aggrieved thereby, namely, "a person elected" at such election. The evidence established the fact of holding the election, and described the course pursued by the Sheriff in conducting it. There were several candidates; and at the close of the poll it appeared that *Stevens* had the largest number of votes, and that *McClelan* and *Lewis* had an equal number. The Sheriff, however, did not make a double return, but declared *Stevens* and *McClelan* duly elected. At the close of the poll, the plaintiff protested against the whole election and demanded a scrutiny. The scrutiny, however, was not proceeded with before the Sheriff, but it appeared that proceedings were had in the House of Assembly, the result of which was, that the plaintiff failed in establishing his right to a seat, and consequently did not become one of the representatives of the county. He contends that the proceedings of the Sheriff were not according to law, but, that in consequence of his improper rejection of a number of votes which had been polled for him, after they were so polled, the numbers in his (the plaintiff's) favor were made to appear less than those polled for *McClelan;* while, had those votes so struck off, remained on the poll-book, as they ought, he would have had the greater number of votes, and would, in consequence, have been entitled to be returned by the Sheriff; and there is no doubt, if the Sheriff was wrong in striking off the votes referred to, such would have been the case, and the plaintiff would have stood second on the poll-book, and entitled to be returned. This question depends on the 21st section, which enacts that "Every elec- "tor, at the time of polling, shall distinctly name the candi- "date or candidates for whom he votes, and before he be "admitted to poll at the same election, shall, if required by "the candidates, or any of them, first take the oaths herein- "after mentioned, or any or either of them," (which oaths are set forth) or, in case of being a Quaker, solemnly affirm to the same effect; and on neglect or refusal, it is directed that the vote of such person shall not be taken, and the same is thereby declared to be null and void, and as such shall be rejected and disallowed; and a penalty is imposed on

1859.

STILES *against* GILBERT.

on the officer refusing to administer the oath, or otherwise offending in the premises contrary to the act, to be recovered by any candidate, or by any elector at such election. It appeared that at this election written instructions had been given by the Sheriff to the Poll-clerks, under which, when an elector came forward to vote, his name and residence were first put down in the poll-book, and the name of the candidate for whom he voted; and if he was required to take the oaths, or either of them, and refused, the Sheriff or deputy then struck out the vote. It is contended on the part of the plaintiff that this was wrong, and that the oath must be tendered before the vote was recorded, after which, the Sheriff had no power to strike out the vote, but that it must stand and count as a vote for the candidate for whom it was given. The learned Judge who tried the cause, was of opinion that this was the true construction of the act, and I agree with him that such is the case. The section referred to, states what the elector is to do at the time of polling, and what may be done before he is admitted to poll. "Polling," then, so far as the elector is concerned, must mean, giving his "poll or vote" for the candidate or candidates he names; and, so far as the officer is concerned, the receiving and entering such "poll or vote" in the poll-book, in the manner prescribed. When the vote is so entered and recorded, the "polling" is complete, after which, the act does not authorise the administration of any oath, or any alteration of the entry so made in the poll-book. The practice therefore adopted by the Sheriff, in regard to the votes struck out after entry, upon a refusal by the elector to take the oaths, was not warranted by the act. Evidence was gone into, to show the acquiescence of the plaintiff in this mode of proceeding, which was properly left to the jury, but such acquiescence was negatived by them.

The plaintiff then, I think, clearly established his right to be returned by the Sheriff. But it still remains to be considered, how far the Sheriff's conduct renders him liable to an action for damages at the suit of the plaintiff, under the act. The whole tenor of the thirtieth section, on which the liability depends, evidently contemplates not merely the making a

1859.

STILES *against* GILBERT.

return, not warranted by the law, but also that the return has been *wilfully* wrong; and it is for the wilful making such false return that the Sheriff or other officer is made liable. This is quite in accordance with common sense and justice, and with the principles which are firmly established in similar cases in *England*. In the case of *Drewe* v. *Coulton (a)*, *Wilson*, J. says—"In very few instances is an officer "answerable for what he does to the best of his judgment, "in cases where he is compellable to act." Here, the defendant had no option; and independent of the language of the act, was, upon general principles of law, protected from the consequences of an honest mistake. A good deal of evidence was produced, however, with a view to shew that the Sheriff was not by any means indifferent as between the respective candidates. This was a point exclusively for the jury: but I am not quite satisfied that the way in which the question came before them, may not have prejudiced the defendant. The learned Judge had stated that, in his opinion, express malice was not necessary to be proved; and though, at the instance of the plaintiff's counsel, the jury were directed to find this fact one way or the other, yet it may be doubted whether the verdict is such as it would have been, had the whole case been left to them as entirely depending on the return being wilfully and maliciously false.

There is another point which, I think, requires more mature consideration. The act gives the right of action to every person "that shall be elected to serve in the Assem-"bly," as being the party aggrieved. It was one of the grounds made for a nonsuit, that the Sheriff's return was not final. The fact being, that the plaintiff, on petition to the House of Assembly against the return, failed to make good his right to the seat, though he might have been entitled in the first instance to take his place; yet, as we must consider the election to be determined, not by the return, but by the result of the scrutiny following the return, it is, I think, a question deserving careful consideration, whether a party who takes his seat subject to the result of a scrutiny, after that scrutiny is determined against him, is entitled to recover

(a) 1 *East*, 564.

damages

damages at all, as a "person elected." On this point, to which the attention of counsel has not been much directed, I pronounce no opinion at present. But, supposing he is entitled to maintain an action for the privation of his temporary right as sitting Member, I think that circumstance becomes a very material element in the consideration of damages, and one to which the attention of the jury should be specially directed. Under all these circumstances, I am of opinion the case imperatively requires reconsideration, and therefore that the rule for a new trial should be made absolute.

PARKER, J. I am quite prepared to concur with the rest of the Court that there should be a new trial in this case, and was so at the *Easter* term, as I am satisfied I was wrong in directing the jury that the plaintiff was entitled to recover, on shewing that the greater number of votes were polled for him; and that the rejection of persons' names from the poll-book, after they had voted and their votes been recorded, was the reason of his not being returned, and that this proceeded from illegal conduct of the Sheriff, and his deputies, acting under written instructions from him. At the trial, I was inclined to think that an unlawful act, done purposely, whereby the plaintiff had been injured, would be a ground of action under the Act of Assembly, although there was no wilful malice against the plaintiff; but I now think actual malice a necessary ingredient, the *animus* being the main thing whereon to ground the action. And although the jury have found this cause of action, and in express terms by their verdict, said, the false return was made designedly to injure the plaintiff, it would be well this should undergo a further consideration. I am not satisfied that after the Judge had determined to leave the question of *animus* to the jury, it would be a sufficient reason for the defendant's counsel not producing the defendant as a witness, because the Judge had also ruled, that, independently of the *animus*, the plaintiff was entitled to recover. It might be a discreet and prudent course for the defendant's counsel to adopt; but if the defendant could have exculpated himself, it would have been most important, and a great privilege

1859.

STILES *against* GILBERT.

privilege for him to be able to do so on oath. Had the case rested solely on the *animus*, I am not sure that I should have rejected the evidence of the practice at elections in the county of *Westmorland;* nor am I quite satisfied I ought to have received it. It does not appear that the practice prevailed in any other part of the Province, and as it was, to my mind, quite illegal, I can hardly believe it was not considered questionable. The evidence of acquiescence, though strong, the jury have negatived; but it would not be undesirable to submit that question to another jury. And seeing how difficult it was to empannel a jury in the county of *Albert*, where there is so much family connexion, I should think it better if it could be tried in an adjacent county, *Westmorland* or *King's*.

In regard to the conduct of the defendant, I cannot refrain from observing that although he is legally entitled to vote, and so may select his particular candidates, and may, with all propriety, have his preference as to the selection of suitable Members, still he went beyond what a proper sense of the duties of his position required, as shewn by the evidence. And although, in giving the illegal instructions, he may not have known whether they would operate favorably, or unfavorably, towards *McClelan*, the candidate he favored, it did give him the power, at any time before the return was actually made, to depart from the result of those instructions if he found they had had an unfavorable effect on *McClelan*. In other words, he could stand to them if it suited his views, or abandon them if it did not. Nor can it be said, that there is no foundation for supposing the defendant would so act, when we find that at that very election, when the number of votes given for *McClelan* and *Lewis* were equal, which clearly required of him to make a double return, he returned *McClelan* as having the majority of votes; in consequence of which, *McClelan* did take his seat on an illegal return, without being duly elected, or at least without its having been legally ascertained that he was duly elected. I consider this a most dangerous proceeding; for if done by one Sheriff, it may be done by another, and as even a single vote is sometimes

1859.

STILES *against* GILBERT.

sometimes a most important one, laws—the most important—may thus pass the Legislature without the consent of the legal representatives of the Province. It, moreover, enables a candidate, so returned, to keep his seat if he can make a private arrangement with the other candidate; for although other voters of the county might petition the House of Assembly, it is not to be expected they would do so, when the candidate does not. The Act of Assembly does certainly contemplate, and that unavoidably, that the person returned by the largest number of votes polled, may not have the largest number of votes of duly qualified electors; but it recognises the right of the party returned, to sit and vote until the House of Assembly otherwise orders.

As we must now consider it settled that the plaintiff had not the greatest number of legal votes, and therefore has sustained no great damage by not being returned, my own impression is, that this did not take away his right of action, although there may be considerable doubt as to the *quantum* of damages, and by what criterion it is to be ascertained. The plaintiff gave no proof of actual pecuniary damage, and all the law would show, was, the loss of the allowance to Members for travel and attendance. For these reasons, I am of opinion there should be a new trial.

CARTER, C. J. I have not been able to give this case much consideration, but as far as I have considered it, I quite agree that there should be a new trial. Malice is the very essence of the action; and as the case was not submitted to the jury in that way, I think it ought to be sent to another jury. I also agree in the construction of the act, as stated by the Master of the Rolls.

RITCHIE, J. I quite concur that there should be a new trial, on the ground that malice was an essential ingredient to be proved by the plaintiff, to enable him to maintain the action, and that the jury should have been so directed. I also think, that evidence of the mode of conducting elections in the county of *Westmorland*, when *Albert* formed part of it, should have been received, as materially affecting the question of malice. On both grounds, therefore, I think there should be a new trial.

Wilmot, J., took no part in the case.

Rule absolute for a new trial.

GENERAL RULE.

(Judgment as in case of nonsuit.)

IT IS ORDERED, That in future the affidavit on which a motion is made for judgment as in case of a nonsuit, for not proceeding to trial according to the practice of the Court, (where notice of trial has not been given) do state the Term in, or before which, issue has been joined, or do state some particular day in vacation, on or before which issue has been joined.

END OF MICHAELMAS TERM.