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REPORTS

OF

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF NEW BRUNSWICK,

WITH A TABLE OF THE NAMES OF THE CASES.

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CONTAINING THE CASES OF HILARY TERM, IN THE TENTH YEAR OF **QUEEN VICTORIA, 1847.**

SAINT JOHN, N. B.

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1847

TABLE OF CASES CONTAINED IN THIS NUMBER.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF NEW BRUNSWICK,

IN

HILARY TERM,

IN THE TENTH YEAR OF THE REIGN OF VICTORIA.

FLETCHER and OTHERS, Assignees of J. and G. LOCKWOOD, *against* HIPPESLEY.

Wednesday, 3d February.

Where the cause had been at issue, and noticed for trial more than three years, and the only excuses offered for the delay were a hope that had been entertained of avoiding the expense of a commission by getting the cause referred to arbitration, but which was finally refused—an intention to apply for a commission, and a belief that the cause would be ready for trial at the next circuit: Held, insufficient to discharge a rule for judgment as in case of a nonsuit on a peremptory undertaking.

W. J. Ritchie, pursuant to notice, moved for judgment as in case of a nonsuit, on an affidavit which stated that issue was joined in the cause as of *Michaelmas* term 1843, and notice of trial given for the circuit Court for the city and county of *Saint John*, on the 9th *January*, 1844, but the plaintiffs did not proceed to trial according to notice, nor had they taken any further steps therein.

J. A. Street, Q. C., opposed the motion on an affidavit of one *Clews*, the agent of the assignees, setting forth that the action was brought to recover £27 12*s.* 3½*d.*, being a balance of account due the assignees, and that the cause of the delay had been in a great degree occasioned through the hope entertained by him (the agent) of getting the matter in dispute settled by arbitration or some other way, and thereby save the great expense of sending a commission to *England* to procure the necessary proof of the commission of bankruptcy, and the appointment of the plaintiffs as assignees; and with that view the agent had made several applications to the defendant to refer the matter to arbitration, but that the defendant finally refused to do so; that it was the agent's intention to apply for a commission to procure from *England* the required evidence, and that he had reason to believe the plaintiffs would be in a situation to proceed to trial at the

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next *August* circuit Court in *Saint John.* The counsel contended that the amount was small, that executing of a commission productive of an expense which would fall heavy on the failing party; to avoid which the plaintiffs' agent had made every exertion to effect an amicable arrangement, but without success: this sufficiently accounted for the previous delay; and now about to obtain a commission to procure the necessary proof, and the expectation of going to trial in *August* next, were sufficient grounds for discharging the rule on a peremptory undertaking.

Ritchie contra. It is submitted the Court will not discharge the rule. The agent's affidavit affords no ground for it; though more than three years have elapsed since the plaintiffs professed by their notice to be ready for trial, no reason is given for the delay. It is pretended to be rested on a hope of the agent that the defendant would refer the matter to arbitration, but always refused: it became a forlorn hope, and no ground for further indulgence. No reason is given why the commission was not applied for at an earlier period after the refusal to refer, nor can any reliance be placed on the mere belief of the agent that the plaintiffs will be ready for trial at the next *August* circuit.

Per Curiam. There is no sufficient grounds disclosed in the agent's affidavit for the Court to discharge the rule. It does not shew any cause, nor any sufficient reason for so long a delay in proceeding to trial. The rule must consequently be made absolute.

Rule absolute.

KINNEAR and ANOTHER *against* WATTS and ANOTHER.

A party is not in a condition to move for judgment as in case of a nonsuit for not proceeding to trial, pursuant to notice, where a demurrer is pending to one part of the cause of action. In such cases the motion may be for costs occasioned by not proceeding to trial pursuant to notice; but this cannot be done in a proceeding of which fourteen days notice has been given to move for judgment as in case of a nonsuit.

Berton, pursuant to notice, moved for judgment as in case of a nonsuit, on the ground that the plaintiffs had not proceeded to trial at the last *Charlotte* assizes, in pursuance of notice given by them for that purpose.

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G. Botsford, in shewing cause on an affidavit which stated that the defendant had demurred to the first count of the declaration, and that the plaintiffs had joined therein as of *Hilary* term, but which demurrer had not been argued, contended that this application should be dismissed on the authority of *Milton* v. *Griffiths* (*a*), where it was held that a defendant under such circumstances could only move for costs for not proceeding to trial.

The Court observed, that under the circumstances the motion should have been for the costs occasioned by the notice of trial.

Berton now proposed to vary the motion, and have the rule granted for the costs; but

Per Curiam. You cannot do that in this application, as you have given the opposite party notice that you would move for judgment as in case of a nonsuit only. Having given notice for one purpose, you cannot change it to another: the motion must therefore be dismissed with costs.

Motion dismissed with costs.

(*a*) 1 *Dow. P., N. S.*, 769.

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Saturday, 6th February.

TRESPASS, *quare clausum fregit*, lot No. 9, in the parish of *Saint James* in the county of *Charlotte*, tried before *Carter*, J., at the adjourned *August* circuit in *Saint Andrews*, 1845.

Where the plaintiff shewed title to lot No. 9 under a grant describing the land as commencing at a spruce stake on the south east angle of lot No. 8, and this grant referred to a plan annexed, which, besides designating thereon the spruce stake and the commencement of lot No. 9 as in the grant, also described lots No. 7 and 8, and gave a width to lot No 8 of twelve chains, commencing at the south east angle of lot No 7, a point admitted to be correct; and the defendant relying on a subsequent grant of lot No. 8, which described its commencement as in the plaintiff's grant plan, but gave a width of fifteen instead of twelve chains, thereby encroaching on the plaintiff three chains: Held, that the learned Judge who tried the cause was right in directing the jury, that the plaintiff's grant being prior could not be controled by the subsequent one to the defendant, and that lot No. 9 must commence agreeably to the first grant plan, twelve chains from the south east angle of lot No. 7.

A recorded deed, which was objected to because the memorandum thereon omitted to state the office of the person before whom the acknowledgment was taken, but the memorandum was subscribed "*Josephus Moore*, J. Peace," and the subscriber who was called as a witness, though objected to, was received to prove that when he took such acknowledgment he was a Justice of the Peace of the proper county: Held, that the ruling of the learned Judge at the trial was correct.

Where a release is given to the maker of a warranty deed, in order to qualify him as a witness for the party to whom the warranty was given, it is not necessary for such qualification that the release be recorded, nor is the contingency that the witness might be called on under his covenant by some future assignee a good ground of objection to the witness' competency.

The

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The plaintiff put in a grant of lot No. 9, dated 14th *September*, 1836, from the Crown to one *Thomas Robinson:* this grant had a plan annexed, which also designated lots No. 7 and 8, lying to the northward of the *locus in quo.* No. 9 was described in the grant as commencing on the west side of a reserved road at a spruce stake at the south east angle of lot No. 8; and by the plan, the width of twelve chains was given to lot No. 8, commencing from the south east angle of lot No. 7: the spruce stake as the commencement of No. 9 was marked on the plan: No. 8 was originally located to one *Benjamin DeWolfe.* A warranty deed of No. 9 from *Robinson,* the grantee, to the plaintiff, bearing date 7th *March,* 1843, was offered in evidence: the body of the acknowledgment did not state the character of the person before whom it was taken, but it was stated to have been done "before me the subscriber," and was signed "*Josephus* "*Moore,* J. Peace;" and *Moore,* the subscriber, was called, and swore that when the acknowledgment was taken by him he was a Justice of the Peace for the county of *Charlotte.* This deed was objected to on the ground that the acknowledgment was not a sufficient compliance with the registry act; but the objection was over-ruled, and the deed admitted in evidence. *Robinson,* the grantee, being called as a witness for the plaintiff, was objected to as interested by the warranty, whereupon a release from the plaintiff to him was tendered; but it was still objected that the release, not being recorded, passed no interest, and that as the warranty was a covenant running with the land, the release would be no bar to any subsequent assignee to whom the plaintiff might convey the premises: these objections were also over-ruled, and *Robinson* admitted as a witness. It appeared that when the grant to *Robinson* came out, and also when the deed from him to the plaintiff was given, the defendant was occupying No. 8; it seemed however that after *Robinson's* (the grantee) lines were run, the defendant asked permission of him to cross his land, and there was no distinct evidence of the defendant being in possession of the *locus* after the deed from *Robinson* to the plaintiff. The defendant claimed under a grant, with a plan annexed, bearing date 4th *August,* 1837,

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1837, from the Crown to him of lot No. 8, adjoining the plaintiff's lot: in this plan, as in *Robinson's* plan, lot No. 8 was marked and described as *commencing* at the south east angle of lot No. 7, but extending southerly fifteen chains instead of twelve, thereby encroaching on lot No. 9 three chains, as opposed to the *Robinson* grant plan. The learned Judge told the jury, that the grant under which the plaintiff claimed being first made could not be controled by any subsequent grant, and that according to the *Robinson* grant lot No. 9 was to commence twelve chains from the north east angle of lot No. 7, whereby the plaintiff was entitled to recover; and a verdict was accordingly given for the plaintiff.

G. J. Thomson, in *Michaelmas* term 1845, moved the Court for a new trial, and obtained a rule *nisi*, on the grounds of Improper admission of the deed in evidence, it not having been acknowledged agreeably to the Act of Assembly 26 *G.* 3, *c.* 3—*Regina* v. *Shipston* (*a*); and the improper admission of *Robinson's* evidence, the release not having been recorded, and not discharging him from liability to any subsequent assignee of the plaintiff; adverse possession in the defendant when the grant to *Robinson* and the deed to the plaintiff were made; and misdirection of the learned Judge to the jury, as to the twelve chains from the angle of lot No. 7.

J. W. Chandler, in *Trinity* term last, shewed cause. It has been contended that the words "J. Peace" do not indicate that the party taking the acknowledgment was a Justice of the Peace; but it is submitted that they do. The act requiring that the deed should be acknowledged before a Justice of the Peace, the Justice signing "J. Peace" or even "J. P." sufficiently denotes that character: this is the common abbreviation of the office of Justice of the Peace known to the Court: at all events sufficient to warrant the finding of a jury. The law requires the deed to be acknowledged before a person filling the character of Justice of the Peace, and the deed being acknowledged before a person who subscribes with initials indicating that character, especially where the character is corroborated by other evidence, it

(*a*) 8 *Jurist*, 192.

becomes

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becomes a question which the Court would not exclude, but submit, if doubtful, to the consideration of the jury. The case of *Regina* v. *Shipston* is not in favor of the defendant: there the question arose in a criminal case, and the examination, on which the objection was taken, contained no initials at all, nor was the particular office attempted to be supported by other evidence. But independent of this, the Act of Assembly 26 *Geo.* 3, *c.* 3, does not require that the Justice's character should appear on the deed: the sixth section of the act allows acknowledgments of this kind to be taken before Justices of the Peace, and requires the memorandum of the acknowledgment to be entered upon the deed, and "signed with their hands respectively;" and the eleventh section provides that all deeds &c. so executed, acknowledged and registered &c. shall be allowed in all Courts. The act therefore merely requires that the acknowledgment should be before a Justice, and it matters not whether he appends the addition "Justice of the Peace" or not, so that the character be manifest by other evidence, as was done in this case. Then as to the admissibility of *Thomas Robinson's* evidence, it was quite proper. This is an action of trespass, which did not involve the title at all, nor could any verdict in this case be used for or against *Robinson*, though a release was given, and therefore no release was necessary. There is no breach of warranty, for that implies an eviction. *Bowman* v. *Whittemore* (*a*), *Ros. E.* 111. In the case of *Steers* v. *Carwardine* (*b*), the title came directly in question, and no release was given to the person objected to as a witness; but the release given in this case effectually destroyed any remedy which the plaintiff might afterwards wish to have against *Robinson* on the warranty. It appears by *Com. Dig.*, tit. "Release" (E), 1, 3, 4, all covenants, personal and real, such as warranty &c., though the warranty be future—all actions, real, personal, or mixed, and a release of all covenants—is a good discharge of a covenant before it is broken as well as after. *Co. Lit.* 292 b. It is true that if this release had been made by a person after he had parted with the land, as in 1 *Greenleaf Ev. sec.* 428, or *Wallace* v.

(*a*) 1 *Mass. Rep.* 342. (*b*) 8 *C. & P.* 570.

Vernon

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Vernon (*a*), it would have been different; but here the plaintiff was owner and in possession of the land when he gave the release. As to the possibility of the plaintiff's disposing of the land to an assignee, who might sue *Robinson* on the covenant, that could not be in reference to this case; for it is abundantly clear without the citation of any authority, that the assignee of a covenant running with the land can maintain no action for an injury which happened before he became assignee nor after he has parted with his interest; nor is it at all clear that any future assignee could take any better title from the plaintiff as against *Robinson*, the grantee, than the plaintiff (who had released all right) had in assigning the property; but be this as it may, it is laid down in the books of evidence, 1 *Greenleaf Ev. sec.* 390, that the interest to be released must be a present, certain, and vested interest, and not an interest uncertain, remote, or contingent, and if the interest is of a doubtful nature the objection goes to the credit of the witness and not to his competency: if then there be any thing in the objection of the other side, it could be urged to the credibility not the competency of *Robinson*. The whole evidence repels the idea of adverse possession. If any such question could arise, it would be in respect to the deed from *Thomas Robinson* to the plaintiff; but that was not made a point of at the trial so as to be submitted to the jury. [PARKER, J. I do not see how any thing could be made of the disseisin after the grant from the Crown.] Disseisin is a question of fact particularly for the consideration of the jury. [PARKER, J. Mere adverse possession will not prevent a party from conveying, it must amount to a disseisin; and what amounts to a disseisin is a question upon the facts for the jury: the point was fully gone into in *Thomson* v. *Barnes* (*b*).] As to the direction of the learned Judge to the jury, it was strictly in accordance with the law. If the grant had been improperly passed from the Crown, the proper remedy would be by *scire facias* to repeal it, but while it stands the Court is bound to give effect to it. The south west angle of lot No. 7 was admitted by all parties to be established, and the starting boundary of lot No. 8 and 9;

(*a*) *Ante*, vol. 1, p. 5. (*b*) *Bertgn's Rep.* 426.

the

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the first grant gave the plaintiff his land twelve chains from that angle, but the subsequent grant, by giving fifteen chains, ran in upon the plaintiff three chains, which by law could not be done; and the plaintiff claiming these three chains was consequently a trespasser.

Thomson in support of the rule. The defective acknowledgment of the deed has not been answered. As to leaving patent defects of a deed to the jury it is out of the question; and the sixth section of the act declares that the due execution of all such deeds &c. to be entered and registered shall be made evident &c., or else the person so signing, sealing and delivering such deed shall before &c. one of His Majesty's Justices of the Peace acknowledge his or their signing, sealing and delivering &c., and the Justices aforesaid are empowered to take the said acknowledgments, and shall enter a memorandum of the acknowledgments respectively signed with their proper hands respectively upon the said deed; and no deed shall be registered or certificate thereof made by any register before such acknowledgment taken as aforesaid, and a memorandum thereof so entered on the same respectively, and all copies of such enrolments of such deeds so registered shall be allowed in all Courts &c. to be good and sufficient evidence of such deeds &c. Now to test the insufficiency of this acknowledgment, suppose in the case of loss a bare copy of the enrolment of this deed were offered in evidence, the act neither requiring or authorising evidence in addition to the copy itself, would it shew that the deed of which it was a copy had been acknowledged before a Justice of the Peace for the county of *Charlotte?* No; but there is no alternative between receiving the bare copy, unexplained, which dispenses with official character entirely, and the objecting to the sufficiency of the acknowledgment which has occasioned such a patent defect in the enrolment. It is clearly the intention of this section that the enrolment must be complete in itself without the aid of any other evidence; and if it be not so, the deed could not have been in a condition by the registry acts to be recorded. Again, by the eleventh section of the act it is provided that "*all deeds*" &c. so executed, acknowledged and registered in the said registry office,

"*which*

" *which shall appear to be so acknowledged*, and registered by " indorsement &c. thereon in form aforesaid, shall be allowed " in all Courts" &c. Hence not only do these sections require that the acknowledgments shall be made *before a Justice of the Peace of the proper county*, who shall enter a memorandum of the taking of such acknowledgments upon the said deeds, but also that by *the deeds* themselves *it shall appear to be so acknowledged before such Justice*. How could stronger words be employed for making evident every thing required in the acknowledgment than by what the Legislature has done in this instance; in fact minutely describing every thing to be done in the acknowledgment—before whom to be done—where to be indorsed, and then declaring that by the *deed* it shall *appear*—that is, all the foregoing requisites shall appear. Not that all shall appear in the acknowledgment except that the party who acknowledged was grantor, which could be shewn on a trial by extrinsic evidence, or that the real grantor appeared before the Justice, but the acknowledgment omitting so to state it, it might be supported by parol evidence, all the other requisites appearing except the officer. Not that being acknowledged before *John Doe*, he might by *viva voce* evidence be shewn to be a Justice of the Peace for the proper county, but by the *deed* all these things must *appear*. This view, so plainly expressed in the act, is fully supported in *Reg.* v. *Shipston-upon-Stour* (*a*), by what is there said by *Coleridge*, J.: Suppose (says the learned Judge) it was shewn here by affidavit, that the hand writing to the jurat of each examination was the same, would that be sufficient? So may it be said in the present case, can it be shewn by evidence *viva voce* that *Josephus Moore* was a Justice of the Peace for *Charlotte* county, when the act requires that by the deed this must appear? The act does not leave it to the register from any extrinsic circumstances to say who is a Justice of the Peace: it must appear on the face of the deed. Suppose the acknowledgment had been taken before a Judge of one of the superior Courts of *England*, would it be competent to prove by parol evidence that he was such Judge? The register can only look at the memorandum on

(*a*) 8 *Jur.* 492.

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the face of the deed; he cannot import into it other matters to supply the defect: after the death of the Justice, what would be the effect of admitting such evidence? [PARKER, J. The register has the means of ascertaining the genuineness of the signature of the Justice of the Peace, which he has not the means of doing when the acknowledgment is before a Judge in *England*.] Though more difficult perhaps in one case than the other, he has the same means in each; but there is nothing in his office which requires it in either. [STREET, J. It all comes to this, whether the party before whom the acknowledgment is taken, is a Justice of the Peace: there is nothing in the act to exclude parol evidence of the fact, or that any particular form of words is necessary to be used in the memorandum.] While there is nothing in the act to *authorise* parol evidence of the fact, there is ample to exclude it, by the enactment declaring that by the deed the requisites contended for shall appear. [PARKER, J. According to your argument, the register is bound to record a deed though the acknowledgment is before a person that he knows is not a Justice of the Peace: the register must have some discretion.] How can he officially know or be answerable for such an act, should an instance of a criminal nature occur by personating a Justice? The register's discretion and duty of resisting it is one thing, but his supplying defects in a deed or in the acknowledgment thereof is quite another. If he may have the discretion of supplying, by his own information, a part of what the act requires in the acknowledgment, why may he not, by the same discretion and information, record a deed he has discovered to have been acknowledged, though the memorandum indorsed on the deed omit all the principal facts which by the enactment should appear. There can be no doubt that the warranty in the deed from *Robinson* to the plaintiff was a covenant running with the land, and that *Robinson* was interested in the covenant, and not a competent witness without a legal discharge: the executing of a release to *Robinson* without the recording of it could not affect the covenant of the plaintiff, who held it under a recorded deed; more especially would it not impair the rights of any future assignee to whom

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whom the plaintiff might assign the land. This fully appears by *Busby* v. *Greenlade (a)*, and *Bowman* v. *Whittemore (b)*, in a note to that case, where it is said to have been twice ruled by the late Chief Justice *Parsons*, that a release unrecorded is not sufficient to remove the incompetency of a witness. The evidence was such that the learned Judge should have left it to the jury to determine whether there was not a disseisin of *Thomas Robinson* by the defendant, when the former made the deed to the plaintiff. There was a misdirection as to the line. The jury ought not to have been told that by measuring down twelve chains from the corner of No. 7, they would ascertain the angle of No. 8: it should have been left to them upon the evidence to find where was the south east angle of No. 8. *Har. Dig.* 1525. The description of lot No. 8 declares it to be fifteen chains wide, commencing at the south east angle of No. 7; but the plaintiff's grant makes no mention of No. 7: it is only described as commencing at the south east angle of No. 8. The grant does not in the body of it describe No. 8 as twelve chains wide; that only appears by the plan, which forms no part of the land included in the grant. If therefore the defendant could shew, as it is submitted he did, that he occupied fifteen chains from No. 7: that defined the commencing point of No. 9.

Cur. adv. vult.

CHIPMAN, C. J. now delivered the judgment of the Court. Several questions arose in this case. 1. It was ruled by the Judge at the trial, on the principle that a prior grant must have its effect, and that the Crown cannot by a subsequent grant derogate from its own act, that the plaintiff had proved his title to the *locus in quo*. This title was derived from a grant from the Crown to *Thomas Robinson*, dated 14th *September*, 1836, granting a certain lot No. 9. *Thomas Robinson* conveyed to the plaintiff. This lot No. 9 is described in the grant as commencing on the west side of a reserved road, at a spruce stake at the south east angle of lot No. 8: there is a plan annexed to the grant, and referred to in it. By that plan a width of twelve chains is given to lot No. 8, and the

(a) 1 *Strange* 445. (b) 1 *Mass. Rep.* 245.

spruce

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spruce stake at which No 9 commences is expressly marked and described in this plan as distant *twelve* chains from the south east angle of a lot therein laid down, as located to *Benjamin DeWolfe*, which *DeWolfe* lot is in the subsequent grant to the defendant, marked and described as No. 7. This south east angle of lot No. 7 cannot be mistaken, as it is placed at the point where two roads cross each other, and the Crown, which at the time of the grant to *Thomas Robinson* had the title to all the land contained in these several lots, clearly granted to *Thomas Robinson* his lot No. 9 as commencing at a distance of twelve chains from the south east angle of lot No. 7; and having done so, cannot by any subsequent grant alter this boundary. The defendant claims lot No. 8 under a grant from the Crown to himself, dated 4th *August*, 1837. In the plan annexed to this grant this lot No. 8 is marked and described as commencing at the same south east angle of lot No. 7, and extending southerly on the reserved road *fifteen* chains instead of twelve, thereby encroaching three chains on the prior grant of lot No. 9 to *Thomas Robinson;* which upon the principle above stated cannot be permitted. We therefore think that the ruling of the Judge at the trial on this point was quite correct.

2. It was objected that in the memorandum of acknowledgment indorsed on the deed from *Thomas Robinson* to *George Robinson*, the office of the person who took the acknowledgment is not set forth, but the parties are stated to have made the acknowledgment "before me the subscriber," and the memorandum is signed "*Josephus Moore*, J. Peace." This *Josephus Moore* was admitted as a witness, to prove that at the time of taking this acknowledgment he was a Justice of the Peace for the county of *Charlotte;* which was also objected to. But we think that this testimony was properly admitted. The provincial registry act 26 *Geo.* 3, *c.* 3, *s.* 6, authorises the Justices of the Peace and the other persons and Courts therein mentioned, to take the acknowledgment of deeds, and requires them to enter a memorandum of the same upon the deed, signed with their hands respectively, together with the time when the same were so taken. The act does not prescribe any form for this memorandum of acknowledgment.

acknowledgment. It is undoubtedly the general practice, and the most proper mode, to insert in the body of the memorandum the name and office of the person who takes the acknowledgment. When this is done it is received as *prima facie* proof, without further evidence, that the person so named bears the office under which he assumes to act; but when this is not done, we do not see any thing in the act of Assembly to exclude extrinsic evidence to shew the qualification of the person who may be proved to have taken the acknowledgment. 3. It was objected that *Thomas Robinson* was an incompetent witness, by reason of the deed which he had given to *George Robinson* (the plaintiff) containing a covenant warranting the title of the land conveyed. *George Robinson* had given a release to the witness, which undoubtedly discharged the covenant so far as it regarded him, the original covenantee. But it was contended that this release would not discharge the covenant with regard to any future purchaser of the land, and assignee of the covenant. This is not by any means a clear point; but be it as it may, it is utterly uncertain whether there will ever be a future assignee of the covenant, and an uncertain and contingent interest does not disqualify the witness. The rule in this respect is thus laid down by Mr. *Greenleaf*, agreeably to the authorities which he cites: "The true test of the interest of "a witness is that he will either gain or lose by the direct "legal operation and effect of the judgment, or that the "record will be legal evidence for or against him in some "other action. It must be a present, certain, and vested "interest, and not an interest uncertain, remote, or contin-"gent." 1 *Green. on Evid. s.* 390. It was argued on the part of the defendant, that the policy of the registry acts required a release in cases like the present, to be registered; but we do not see in these acts any foundation for such an argument. Other points were mooted upon an alleged adverse possession in the defendant at the time of the grant from the Crown to *Thomas Robinson*, and also at the time of the deed from *Thomas Robinson* to *George Robinson*; but the facts in evidence are not sufficient in either case to raise a question. On all the grounds we think the rule should be discharged.

Rule discharged.

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MECHANICS' WHALE FISHING COMPANY *against* WHITNEY and ANOTHER.

To an action on a surety bond, conditioned, *inter alia*, for the faithful performance of the principal, as secretary to the plaintiffs, and the making of satisfaction for any losses &c. within three months after due proof thereof and notice—the surety in his fourth plea averred performance up to a certain period, and as an excuse for the subsequent non-performance alleged a dealing by the plaintiffs in gold and silver coins, contrary to law, which increased the risk, whereby the surety was discharged; and in his fifth plea alleged that no due proof was made three months before the action; and the plaintiffs in their replication to the fourth plea traversed the dealing in gold and silver, and then assigned several breaches on divers days between periods which embraced not only that time in the plea covered by the performance, but also that during which the breach was admitted; and in the replication to the fifth plea took issue thereon in the words of the plea. On demurrer to each of these replications and joinder therein, with objections to the adverse pleading in reference to form: Held, that the replication to the fourth plea should not have assigned but suggested breaches, and confined them to the period for which the surety had pleaded performance, and should have concluded the traverse of the surety's excuse of non-performance with an issue to the country, and that consequently this replication was ill. Held also, that the replication to the fifth plea taking issue thereon in the words of the plea was sufficient. Held also, that where one party demurs to any pleading, the only objection which the other party can make to the former pleadings are those which go to the substance, not the form of such former pleadings.

To this action, which was debt on bond—several times before the Court, and twice reported on other points *(a)*—the defendant *Whitney* in his fourth plea, in substance, alleged a performance of the condition of the bond from the date thereof up to the 1st *January*, 1838, and averred as an excuse for the non-performance of the condition after the 1st *January* 1838, the fact of a dealing in gold and silver coins and bills of exchange by the plaintiffs, contrary to the provisions of the act of Assembly by which they were incorporated. In his fifth plea, the defendant *Whitney* admitting the default of *Kirby*, the principal, averred that no due proof thereof was made or obtained by the said plaintiffs, as required and specified by and in the condition of the said writing obligatory, three months before the commencement of this suit. The plaintiffs, in their replication to the fourth plea, traversed the fact of dealing in gold and silver coins and bills of exchange as averred in the plea, and then assigned several breaches of the condition of the bond on divers days between the 6th of *September*, 1836, the date of the bond, and the 30th *August*, 1843, and before the said plaintiffs dealt in gold and silver coins and bills of exchange. The replication to the fifth plea took issue thereon in the words of the plea. To each of these replications the defendants specially demurred, the grounds whereof will principally appear in the course of the argument. The plaintiffs in joining in demurrer, gave notice of several objections to the adverse pleading, which were

(a) *See* the bond and condition at large, *Ante*, vol. 2, p. 647, and vol. 3. p. 113.

argued,

argued, but no judgment having been pronounced thereon, they are consequently omitted.

Hazen, Q. C., in support of the demurrers. The fourth plea avers that *Kirby* faithfully performed his duty up to the 1st *January*, 1838, that the plaintiffs between that day and the 5th *September*, 1843, engaged in banking &c., whereby the responsibility of *Kirby* was greatly increased, and by reason whereof the defendant *Whitney* was discharged. *The Bank of New Brunswick* v. *Wiggins* (*a*). The plaintiffs reply, that they did not on 1st *January*, 1838, deal in buying and selling gold and silver; that *Kirby* did not well and faithfully serve, but did embezzle large sums of money &c. But the plaintiffs should either have denied the dealing in gold and silver, or admitted a performance between the date of the bond and 1st *January*, 1838, and alleged a breach afterwards. The replication admits that at some time, without saying when, the plaintiffs dealt in gold and silver coins &c.: it does not deny a dealing between 1st *January*, 1838, and 30th *August*, 1843. The day stated in the plea is a material date, and should have been answered; nor is it alleged that any breach took place before the 1st *January*, 1838. It is not expressly denied by the replication that the plaintiffs dealt in gold and silver between *January* 1838 and *August* 1843, and employed *Kirby* therein. The replication to the fifth plea should have distinctly shewn by what particular acts *Kirby* had committed a breach of the condition. The mode adopted in the replication is entirely too general: it should have set out what sort of notice was given in order that the Court might judge whether the proof was sufficient. It was for the plaintiffs to point out the doings or misdoings complained of, and the kind of notice given. This replication is so vague that no issue can be taken upon it.

Jack contra. The plaintiffs are not bound to reply to any part of the plea, except such as is material; the 1st *January*, 1838, is an imaginary day: the plaintiffs are not bound by it. If it can be shewn that a breach took place before any dealing in gold and silver the replication is good. The plaintiffs are not bound to fix any day when they com-

(*a*) *Ante*, vol. 2, p. 478.

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menced dealing in gold and silver; but to state, as they have done, "that before they dealt &c., and employed *Kirby* in "such dealing, he embezzled" &c.; and this is a complete answer to the fourth plea: it is an issue whether the dealing commenced on the 1st *January*, 1838, on which the defendants can go to trial. It is not usual to allege any particular day on which the breach took place. [CARTER, J. Should not you have stated some day on which you admit the dealing did commence?] It is not for the plaintiffs to point out when the dealing commenced, it is a part of the defendant's case; but according as the pleadings now stand the 30th *August*, 1843, may be the day on which the plaintiffs admit the dealing commenced. [CHIPMAN, C. J. The time is certainly material; and as it lies within your own knowledge more than in the defendants' as to when you commenced dealing, it may be a question whether you ought not to have stated on what day you did commence.] All that the plaintiffs have to shew is that the breach commenced before a certain fact took place, but it is not necessary for them to fix the time of that fact. There is no rule of pleading which requires that where a party denies that a fact took place on a particular day, he is bound to go on and state on what day it did take place. As to the replication to the fifth plea: as the latter admits all the breaches, it was not necessary to set out what these particular breaches were; it is sufficient to deny the plea in the very words of it. 1 *Chitty P.* 615. It is a matter not of pleading, but of evidence: otherwise the pleadings would run to great prolixity.

Hazen was heard in reply.

Cur. adv. vult.

CHIPMAN, C. J. now delivered the judgment of the Court. The first question in this case arises on a special demurrer to the replication to the fourth plea of the defendant *James Whitney*. The condition of the bond on which the action is brought having been set out on oyer, the fourth plea avers a performance of such condition from the date of the bond up to and upon the 1st *January*, 1838, and further avers as an excuse for the non-performance of the condition after the 1st *January*, 1838, the fact of a dealing in gold and silver coins and

and bills of exchange by the plaintiffs, contrary to the provisions of the Act of Assembly by which they were incorporated. The plaintiffs, in their replication to the fourth plea, traverse the fact of dealing in gold and silver coins and bills of exchange, as averred in the plea, and then assign several breaches of the condition of the bond on divers days between the 6th of *September*, 1836, the date of the bond, and the 30th *August*, 1843, and before the said plaintiffs dealt in gold and silver coins and bills of exchange. To this replication the defendant *James Whitney* has demurred specially, and set out several grounds of demurrer. There is a case of *Webb* v. *James (a)*, which is very analagous to the one before us. There the Court lay down the rule of pleading in such cases to be that "if the plaintiff omits to assign breaches "in his declaration, and waits until after plea—then as to "the part of the condition as to which performance is pleaded "the plaintiff may assign one or more breaches: but as to "the part of which performance is not pleaded but is ex- "cused there must be a suggestion; or if the matter of "excuse is traversed, then there must be no assignment but "a suggestion of breaches, the truth of which without any "issue must be tried, with a view to ascertain the amount "of damages if the issue in the traverse is found for the "plaintiff, otherwise not." In the present case, the defendant by pleading performance up to the 1st *January*, 1838, and pleading as an excuse for non-performance after that day the dealing in gold and silver coins &c. has made that date a material circumstance in the case, and it should have been dealt with as such in the replication. On the authority of *Webb* v. *James* the plaintiffs should have *assigned* breaches during the period for which the defendant has pleaded performance, that is to say from the date of the bond to the 1st *January*, 1838; and as the replication traverses the matter of excuse pleaded after that day, it should have concluded with an issue to the country on that matter of excuse, and should not have *assigned* but have *suggested* breaches after that day. We therefore think that this replication is clearly bad, but as the case of *Webb* v. *James* was not adverted to on

(a) 8 *M. & W.* 645.

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either side, and as the view which in consequence of that case we now take of the matter was not presented to us on the part of the defendants, we think the plaintiffs should have leave to amend this replication without payment of costs. There is also a special demurrer to the replication to the fifth plea of *James Whitney*. That plea admitting the default of *John Kirby*, avers that "no due proof thereof "was made or obtained by the said plaintiffs as required "and specified by and in the condition of the said writing "obligatory three months before the commencement of this "suit." The replication takes issue on this averment in the plea. It is objected, that the precise nature of the proof and the particular cases of default should have been set forth in the replication. We think there is nothing in this objection. The condition of the bond requires that *due proof* should be made, without specifying in any way the nature or mode of proof: the plea denies that such due proof was made, and the replication takes issue on this fact in the words of the plea and of the condition of the bond. The nature and sufficiency of the proof and the particular cases of default proved are matters of evidence rather than of pleading. No rule of pleading is violated by the issue as it now stands; but to have set out the particular mode of proof, and the several instances of default of which proof was given, would have infringed a rule too often disregarded, viz. the avoidance of unnecessary prolixity. Some objections were taken to the fourth and fifth pleas, but as they are all such as could only be taken advantage of on special demurrer, even if they would have been available in that shape, they certainly cannot be maintained in the present state of the pleading. When one party demur to any pleading, the only objections which the other party can make to the former pleadings are those which go to the substance not the form of such former pleadings. The result is, that on the demurrer to the replication to the fifth plea of *James Whitney* there should be judgment for the plaintiffs; on the demurrer to the replication to the fourth plea of *James Whitney* there should be judgment for the defendants, unless the plaintiffs should see fit to amend that replication, which they should have

have leave to do in the manner we have pointed out, without payment of costs.

Rule accordingly.

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AMOS and ANOTHER *against* FIELDS.

The summary jurisdiction of the Inferior Courts of Common Pleas extends to actions of trespass to personal property, where the damages claimed do not exceed £20.

THIS was an action of trespass for taking personal property, to which the defendant pleaded a judgment in trespass for the conversion of personal property, obtained by him on the summary side of the *Westmorland* Common Pleas, and issued a *fi. fa.* thereon, by virtue whereof he took the goods and chattels for which this action was brought. An objection being raised that the Courts of Common Pleas of this Province had no jurisdiction to try and give judgment in trespass to personal property under £20 on the summary side, the point was submitted in a special case for the opinion of this Court. If this Court should adjudge that the Courts of Common Pleas had such jurisdiction, then a *nolle prosequi* to be entered in this action; if otherwise, judgment to be entered for the plaintiffs, with nominal damages. The case was argued in *Michaelmas* term last.

G. Botsford for the plaintiffs. The Act of Assembly 35 *G.* 3, *c.* 2, which gives jurisdiction to the Inferior Courts for summary trials, by the fifth section enacts, that the said (Inferior) Courts are empowered in all actions of debt, assumpsit, and actions of trover and conversion, the sum total whereof shall not exceed ten pounds, to proceed in a summary way, by the examination of witnesses in open Court &c., to try the merits of such cases &c., and to determine therein according to law and equity &c. It is therefore clear by this section that actions of trespass to personal property, not being named in the act, are not cognisable on the summary side of the Court of Common Pleas. But the 42 *G.* 3, *c.* 7, which was made in amendment of the law in summary cases, does not give the required jurisdiction to the Inferior Courts. By the second section it enacts, that in all actions thereafter to be brought in the said Courts wherein the sum &c. should not

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not exceed £20, the declaration shall be inserted in the writ, and the Courts shall proceed therein as allowed by the former act, and on which no dilatory plea shall be allowed and no judgment reversed &c. for error &c., where substantial justice shall appear to have been done. The third section declares that in the above cases no defendant shall remove the action into the Supreme Court by *habeas corpus* &c. It is observable that while the first act omits any jurisdiction in actions of trespass, the second act does nothing more than enlarge the jurisdiction as to the sum, making it £20 instead of £10, but enumerates no other actions in addition to those mentioned in the first act. Now, to shew by analogy the intention of the Legislature, the act 4 *Wm.* 4, *c.* 41, establishing the summary jurisdiction in the Supreme Court, is important to be referred to: the first section c merates the actions, viz.: " in all actions of debt, covenant, " assumpsit, trover, and conversiou, and *trespass to personal* " *property*" &c. The inference therefore clearly is that the other act which stops at trover and conversion, gives not the jurisdiction to the Court of Common Pleas to determine in a case like the one under which the justification is attempted in this action. In 7 *Bac. Abr.* 456, it is laid down that wherever a jurisdiction is created by statute which takes away a common law right, it must have a strict construction. The act which establishes the summary power in Inferior Courts creates a new jurisdiction, and takes away the common law right of having a writ of *habeas corpus* to bring the case before this Court.

D. S. Kerr and *A. L. Palmer* for the defendant. The Court of Common Pleas had power by law to proceed and give judgment in the summary action of trespass under which the justification is set up in this case. By the original county charter *(a)*, after giving power for the erection and establishment of Courts of Common Pleas, and assigning certain persons to be Justices therein, it gives them power to hold pleas and have cognizance of all manner of plaints, actions, and pleas whatsoever, accruing within the county, and which should be for more than 40*s.* and not to exceed £50, and in

(a) Appendix to the First Volume Province Laws, p. 26.

which

which the title to lands should not come in question &c. Thus the law stood when the act 35 *Geo.* 3 was passed: the title of that act, *inter alia*, is to enlarge the jurisdiction of the Inferior Courts of Common Pleas and for the summary trials of certain actions; and the first section, after reciting that doubts had arisen whether the jurisdiction of the Court extended to any other cases than those which happened within the limits of the county, and that it was deemed advisable to extend the jurisdiction of the Inferior Court to sums exceeding £50, enacts that the jurisdiction of the said Court shall extend to all transitory and other actions arising in any other place or county (except where the title to land came in question), and should have concurrent jurisdiction with the Supreme Court of this Province &c. The fifth section, after reciting that it had been found by experience that the practice of prosecuting suits in the Inferior Courts, where the sum did not exceed £10, had been attended with an expense which bore no reasonable proportion to the sum in contest, enacted that the Court should be empowered in all actions of debt, assumpsit and trover, for sums not exceeding £10, to proceed in a summary way &c. Hence the jurisdiction of the Inferior Court in all transitory actions was enlarged, and made concurrent with the Supreme Court. Then the 42 *G.* 3, *c.* 7, entitled "An act *inter alia* to enlarge the jurisdiction "of the Court of Common Pleas, and for the summary "trials of actions," by the second section enacts that in all actions hereafter to be brought in the said Courts, wherein the sum in demand does not exceed £20, the declaration shall be inserted in the writ &c., and the Court shall proceed therein in a summary way in the same manner as is directed in and by the act in matters not exceeding £10. Reading the two acts together, what can be clearer than that the Inferior Court having jurisdiction in all transitory actions, whereof the action under which the defendant justifies is one, had power to proceed in that action in a summary way for a demand under £20; but lest there should be a doubt the act goes on to say the proceedings shall be *summary in the same manner as in the former act*, which mentions debt, assumpsit, and trover. Any analogy which can be drawn from the

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the Supreme Court summary law can only apply to the 35 *G.* 3, in reference to summary actions; but the jurisdiction contended for in this case is made out by the 42 *G.* 3, between which and 4 *Wm.* 4, *c.* 41, there is no similitude.

Botsford in reply. The fallacy of the opposite argument is in confounding the erection and the limitation of the jurisdictions together. The terms "all actions to be brought in "the said Court," used in 42 *G.* 3, must be considered with reference to those actions mentioned in the fifth section of 35 *Geo.* 3, which are debt, assumpsit, and trover. The manner must be construed to mean the kind of action, not the summary form of it.

Cur. adv. vult.

CHIPMAN, C. J. now delivered the judgment of the Court. This is a special case, in which the question presented for the decision of the Court is whether the summary mode of proceeding in the Inferior Court of Common Pleas for the county of *Westmorland* extends to an action of trespass for personal property, when the damages claimed did not exceed £20. The plaintiffs' counsel contended that the summary mode of proceeding in the Inferior Courts of Common Pleas is confined to the particular actions mentioned in the Act of Assembly 35 *Geo.* 3, *c.* 2, *s.* 5, by which such mode of proceeding was originally created, viz. actions of debt, assumpsit, and trover, notwithstanding the expression used in the subsequent act of 42 *Geo.* 3, *c.* 7, which enacts that the proceedings shall be summary "in all actions hereafter to "be brought in the said Courts wherein the sum or matter "in demand shall not exceed twenty pounds." The words of this last act taken by themselves would certainly imply no limitation to the particular actions of debt, assumpsit, and trover; and it is singular that if it were the intention of the Legislature to continue that limitation, the same expression used in the 35 *Geo.* 3, *c.* 2, *s.* 5, was not imported into the subsequent act. The express object of the 42 *Geo.* 3, *c.* 7, was to extend the summary mode of proceeding in the Inferior Court of Common Pleas: the obvious meaning of the words of that act taken by itself would be that such mode of proceeding is extended as to the forms of actions as well as to

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to the amount in demand. Indeed the jurisdiction of the Courts is not extended, but a particular mode of proceeding is given in cases over which the Courts previously had jurisdiction. The object of the summary proceedings was to save expense to the suitors, and the policy of such object is applicable to other actions as well as those enumerated in the first act. The expression in 42 *Geo.* 3, *c.* 7, *s.* 2, "*in* "*the same manner*" evidently refers to the mode of proceeding, and not to the forms of actions as was contended by the plaintiffs' counsel. Our judgment will be that a *nolle prosequi* be entered for the defendant.

Rule accordingly.

DOE on the demise of ROOM and ANOTHER *against* BROWN.

In ejectment, the lessor of the plaintiff relied on the following letter as an admission of title by the defendant: "If you intend to sell the place, I want you to give me the first offer as soon as possible; write me an answer by the first opportunity; dont sell it to nobody till you let me know, and as to the money it shall be ready as soon as you give a good deed:" Held, not a sufficient acknowledgment of title in the lessor to be submitted to the consideration of the jury.

EJECTMENT for land in the county of *Kings*, tried before *Carter*, J., at the *Kingston* circuit in 1845. The lessors, among other evidence, put in a deed of the premises from one *James Jones* and wife to *William Room*, bearing date 2d *January*, 1832: likewise two other deeds not important to the decision; and shewed that one *Mary Masculine*, a lunatic, the aunt of the lessors, had lived on the place, and that the defendant had moved on it in 1820, and taken care of *Mary Masculine*, who had been dead, about ten years; that the mother of *Mary Masculine*, who was also dead, had lived on the place over thirty five years before the trial. A letter from the defendant to *William Room*, one of the lessors of the plaintiff, dated 6th *July*, 1835, was put in evidence, and is as follows: "If you intend to sell the place, I want you to "give me the first offer as soon as possible; write me an "answer by the first opportunity: dont sell it to nobody till "you let me know, and as to the money it shall be ready as "soon as you give a good deed." The learned Judge ruled, that in the absence of further evidence the letter did not amount to a sufficient acknowledgment of title, and directed a verdict for the defendant; which was accordingly given.

The *Solicitor General* in *Michaelmas* term 1845, obtained

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a rule *nisi* for a new trial, on the ground of misdirection of the learned Judge in telling the jury that the admission by the letter was insufficient to make out the title of the lessors of the plaintiff. It should have been left to the jury under all the circumstances to determine whether the defendant had occupied the premises by the permission of the lessors of the plaintiff or not. *Doe dem. Thompson* v. *Clark (a)*, *Doe* v. *Brown (b)*, *Tillingh. Adams' on Eject.* 275, 2 *Johnson's Cases* 353, *Doe* v. *Turner* (*c*), *Doe dem. Turner* v. *Bennett* (*d*), *Tillingh. Adams' Eject.* 56. 275, 12 *Johns.* 430, *Jackson d. Russell* v. *Croix*, *Jackson d. Kelly* v. *Cuerdon* (*e*).

Hazen, Q. C., in *Michaelmas* term last shewed cause. The defendant shewed a clear title by possession of more than twenty years. The lessors of the plaintiff never appear to have been in possession; they did not claim as heirs to Mrs. *Masculine*, nor did it appear they were in any way connected with her; nor was there any connexion shewn between *Jones* and the *Masculines*. The plaintiffs' whole case rested on the letter as an admission of title: the defendant not only shewed a legal title by possession, but an equitable one by reason of maintaining *Mary Masculine*, a lunatic. The lessors of the plaintiff must be considered mere strangers to this land, except so far as any thing contained in the letter; but the letter could convey no title. There is no admission of title here, as shewn in *Jackson* v. *Cuerdon*: in that case there was a distinct admission that the land belonged to the lessors, and that there was a tenancy. In 2 *Bing. N. C.* 776, where a letter was written by a wife in her husband's name, at his request, offering to pay a debt by instalments, and sent by the husband to the plaintiff, it was held not sufficient to take the case out of the statute. Reasoning by analogy to that case, it may be said here that the party was not in possession of the land when the letter was written. The words of the act of limitations 6 *Wm.* 4, *c.* 41, are the same as 9 *Geo.* 4. If the letter was not offered as a bar to the statute of limitations it amounts to nothing, for the defendant having shewn title in himself this letter cannot

(*a*) 8 *B. & C.* 717. (*b*) 7 *A. & E.* 447.
(*c*) 7 *M. & W.* 226. (*d*) 9 *M. & W.* 643. (*e*) 2 *Johns.* 553.

divest

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divest it. If the letter is offered to make out a tenancy at will, that must be shewn to have been put an end to by notice. This letter however contains no admission of title, but a proposal to purchase, and that the defendant would pay if the lessor *William Room* would give a good deed; but the lessors did not shew that they were in a condition to give a good and sufficient deed of the premises, nor did it appear that they had any title or shadow of right whatever.

The *Solicitor General* in support of the rule. The defendant never set up any adverse possession at the trial, but merely relied on the case as made out by the lessors of the plaintiff. The defendant did however attempt to shew some equitable circumstances in his favor, but his letter amounted to an admission of title: the words "good deed." [STREET, J. Was not that letter written upon the supposition that *William Room* could give a good title? CARTER, J. It is a conditional offer to purchase I think.] It cannot be distinguished from the *American* cases. This letter, in connexion with the other circumstances, seems to admit that *Room* is the heir to *Mary Masculine*. If the defendant had any right, would he have written this letter, or would he not at least have asked to purchase at a diminished price? The *prima facie* view to be taken of this letter is that the person to whom the defendant wrote had a right to turn him out of possession, and until he could shew a title to the place he was not bound to go out. The letter is not urged as an estoppel, but merely as evidence against the defendant, which unexplained is sufficient to turn him out of possession. The *American* authorities are strictly agreeable to reason and justice; and according to them it should have been left to the jury to say whether the letter was or was not an admission by the defendant that he held under the lessors of the plaintiff.

Cur. adv. vult.

CHIPMAN, C. J. now delivered the judgment of the Court. This was an application for a new trial, on the ground of misdirection of the Judge. The misdirection complained of was in directing the jury that a letter from the defendant to the lessors of the plaintiff, which was the only evidence relied on in support of the plaintiff's title, was not a sufficient

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acknowledgment of title for that purpose. The letter was as follows: "If you intend to sell the place, I want you to give "me the first offer as soon as possible; write me an answer "by the first opportunity: dont sell it to nobody till you let "me know, and as to the money it shall be ready as soon as "you give a good deed." Two *American* cases were cited by the counsel for the plaintiff on arguing this motion; but the present case does not come up to these cases, inasmuch as the evidence in each of these cases was held to amount to an acknowledgment that the defendant was in possession, and held under the plaintiff. They did not rest, as the present case does, on a single offer to purchase unattended by any intimation of holding under the lessors of the plaintiff, as establishing a privity of title between the parties, clogged moreover with a condition that the lessors of the plaintiff should give a good deed. The fair import of which expression is that his title must turn out to be good. We are therefore of opinion that the Judge was right in the view he took of this letter, and that the verdict should not be disturbed.

Rule discharged.

BROWN and OTHERS *against* PARTELOW.

If no original execution issued within a year and day after judgment, is found on file; a second *ca. sa.* is not warranted without a *scire facias* to revive the judgment.

An application to amend a *ca. sa.*, issued sixteen years ago, by inserting a testatum clause, will not be granted unless the writ is found on file, or some record of it is produced.

Quere. Whether such an amendment would be made after such a lapse of time, and after the defendant had been arrested upon a second execution, which was also irregular.

Hazen, Q. C., moved in *Michaelmas* term last to set aside the writ of *capias ad satisfaciendum* issued in this case, and that the limit bond taken thereunder should be delivered up to be cancelled. The motion was made on the grounds—1st. Irregularity in the writ, which should have been a *testatum ca. sa.*, and which was issued more than a year and day after signing judgment. 2d. That the defendant had been previously arrested and discharged. 3d. That since the arrest the defendant had been elected and returned a member of the House of Assembly. *Phillips* v. *Wellesley (a)*. The

(a) 1 *Dowl.* 9.

affidavits

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affidavits stated that the judgment was signed 21st *October*, 1829, the venue was laid in the county of *York*, and that a *ca. sa.* was issued to the sheriff of *Saint John* sometime in *October* 1830, but the exact day did not appear, which writ could not be found on the files in the clerk's office, and that he was again arrested by the sheriff of *Saint John* on the 12th *October*, 1846, on an alias *ca. sa.*, which was the writ now sought to be set aside. The other facts of the case are not now material.

Gray and *Bayard* shewed cause, and produced affidavits stating that it appeared by the register kept in the office of the plaintiffs' attorney, that a *ca. sa.* was issued on the 20th *October*, 1830, directed to the sheriff of *Saint John*, and filed in the clerk's office in *May* 1845; but the affidavit was not made by the person who made the entry in the attorney's book. They contended that it was not necessary to have an execution returned and filed within a year and day from the signing of the judgment, in order to authorise the issuing of a second writ without *scire facias;* that was a dictum not founded on any authority, and the case of *Simpson* v. *Heath* (*a*) was directly opposed to it: there it was held that a defendant might be taken in execution upon a *ca. sa.* sued out within a year after judgment, though not executed until after the year, and that such writ might be returned and filed at any time. There was no doubt the present execution should have been a *testatum;* but the mistake was not fatal—the execution might be amended at any time, even on shewing cause, by inserting a *testatum* clause. *Chit. Arch.* (6th ed.) 1164, *Cowperthwaite* v. *Owen* (*b*), *Brand* v. *Mears* (*c*), *M'Cormick* v. *Melton*. In *Cowperthwaite* v. *Owen*, the amendment was made after a levy under a *fi. fa.:* and upon the authority of that case, they applied to amend this execution by inserting the *testatum* clause.

Hazen, Q. C., in reply. There is no direct proof that the first execution issued within a year and day after the judgment was signed: the *onus* of shewing that lies upon the plaintiffs; who should at least have produced the affidavit of

(*a*) 7 *Dowl.* 832.
(*b*) 3 *T. R.* 657.
(*c*) 3 *T. R.* 388.
(*d*) 1 *A. & E.* 331.

the

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the person who made the entry in the book of the issuing of the execution: not having done so, the proof is insufficient. The authorities cited only shew that in certain cases the Court will permit the amendment to be made. But was such a thing ever heard of as amending an execution issued fifteen years ago, and which cannot be found? It would be too late to amend it now if it could be found, particularly after the defendant has been arrested on it. There should have been a distinct motion to amend, of which notice should have been given.

Cur. adv. vult.

CHIPMAN, C. J. now delivered the judgment of the Court. This was an application to set aside a writ of *capias ad satisfaciendum* and a limit bond taken thereunder, on various grounds; but as it appears to us that one of the grounds, namely, that of irregularity, is decisive of the case, we shall confine ourselves to that ground alone. It appears that judgment was signed so long ago as *October* 1829. The venue was laid in the county of *York*. In the month of *October* 1830, somewhere near the lapse of a year and a day from the time of signing the judgment, the precise day is not satisfactorily shewn, a writ of *ca. sa.* was issued to the sheriff of *Saint John*. This *ca. sa.* was confessedly irregular, not being a *testatum* writ. It was attempted to obviate this difficulty at the time of arguing this motion, by then applying to the Court to be permitted to amend the writ by inserting a *testatum* clause. But this writ, although in one of the affidavits it is stated in a loose manner to have been filed in *May* 1845, is not to be found on the files of the Court, and is not forthcoming. Now without the production of the writ, or some record of it, the requisite amendment cannot be made even if under the other circumstances of the case it would be allowable after the lapse of so long a period of time, which is at least doubtful. Under these circumstances, the writ under which the defendant was last arrested is clearly irregular. It should have been an *alias* or a *pluries testatum ca. sa.*, and there being no original execution issued within a year and a day on file, this second *ca. sa.* is not warranted without a *scire facias* to revive the payment. For these reasons

reasons we think that the defendant must succeed in the present application, and the rule be made absolute with costs.

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Rule absolute.

READ *against* ASHE.

ASSUMPSIT. The declaration contained several special and the common counts. The first special count, from which the others did not materially differ, in substance stated that on the 28th *November*, 1843, in consideration that the plaintiff, at the request of the defendant, would obtain a license for a timber birth on crown lands on *Little River*, to authorise the cutting of four hundred logs, and permit the defendant to work thereon, and sell and deliver to him certain supplies, which he might from time to time require to enable him to get the logs, the defendant promised to pay the plaintiff the monies he might advance for the attainment of the license and value of the supplies in merchantable logs at the current price in the ensuing spring, out of the quantity to be cut and felled by the defendant on the license aforesaid, and would allow and permit the plaintiff to saw, and would deliver at the plaintiff's mills in the spring, to be sawed on the halves, such quantity of logs to be cut under the said license as might remain to the defendant after paying the plaintiff for the license money and supplies aforesaid; and averred that the plaintiff did obtain such license for a timber birth, and permitted the defendant, who entered upon the license, and worked in pursuance of the agreement, and sold and delivered to the defendant such supplies as he from time to time required, and demanded of him (the plaintiff) while defendant was working on same, to a large amount &c., and though the defendant did cut and haul four hundred logs off the said license ground, and the defendant was always ready to receive them according to agreement, and kept his

Where part of the contract stated in the declaration was in consideration that the plaintiff would sell and deliver to the defendant, certain supplies which he might from time to time require to enable him to get logs, and this was succeeded by an averment that the plaintiff sold and delivered to the defendant such supplies as he from time to time required and demanded of the plaintiff, and it appeared in evidence that the agreement was for supplying only particular articles, which were specified, and that on application by the defendant to the plaintiff for some of the articles he was unable to furnish them; on motion for a nonsuit on the grounds of variance and the points reserved: Held, that there was a clear variance between the agreement alleged and the one proved. Held also, that under the agreement it was a condition precedent that the plaintiff should supply to the defendant the articles agreed for, and the plaintiff having made default in so doing was not entitled to recover.

mill

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mill unemployed for the purpose for a long time, of which the defendant had notice, yet the defendant did not pay for the license money and supplies out of the logs, nor deliver the residue at the plaintiff's mill to be sawed on the halves, by which the plaintiff was not only unsatisfied for his supplies but lost the gains and profits of his mill. Plea, general issue, besides other pleas which were demurred to. At the trial before *Parker*, J., at the *Gloucester* circuit in *August* 1845, the agreement proved between the parties was that the plaintiff would not consent to furnish supplies generally, but only a particular description of supplies, viz. oats, fish, molasses, hay, and any other article he had and could spare; could not supply the defendant with pork and flour; nor was the hay to be furnished under the agreement; and it likewise appeared the defendant had called once or twice for fish, but the plaintiff had none to give him, and at one time for molasses, but could not get it; and it was proved that the license money and supplies, furnished by the plaintiff to the defendant under the agreement, had been satisfied in another action. At the close of the plaintiff's case, a motion was made for a nonsuit, on the ground of variance between the contract stated and the one proved, and also because the plaintiff had not performed the condition precedent of furnishing the supplies, which under the agreement proved he was bound to do. The points were reserved, with leave to move to enter a nonsuit if the Court above should think the objections valid. The cause proceeded, and the plaintiff got a verdict for £23. In *Michaelmas* term 1845, *DesBrisay* moved the Court, and obtained a rule *nisi* on the grounds reserved at the trial. 1 *Chitty's P.* (6th ed.) 298. 301. 319, 6 *East.* 568, 8 *E.* 7, *Cro. Eliz.* 79, 12 *East.* 1, 13 *East.* 102.

D. S. Kerr, in *Michaelmas* term last, shewed cause; and cited 1 *Chitty's P.* (5th ed.) 326, 10 *Jurist* 376, 1 *Saund.* 320.

J. A. Street, Q. C., supported the rule, relying on the above authorities.

Cur. adv. vult.

CHIPMAN, C. J. now delivered the judgment of the Court. In this case a rule was obtained for entering a nonsuit, pursuant to leave granted at the trial, on two grounds: 1. Variance

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ance between the agreement set forth in the declaration and that proved at the trial; 2. Non-performance on the part of the plaintiff of a condition precedent on his part to be performed. 1. In all the counts upon which the plaintiff could have recovered in this action, the agreement is set forth as an agreement generally to furnish supplies to enable the defendant to get out the logs agreed to be procured by him, whereas the agreement proved in evidence was for supplying certain articles, which were specified. There is therefore a clear variance between the agreement alleged and that proved. 2. We are also of opinion, that under the agreement proved it was a condition precedent to the defendant's being bound to procure the logs for the plaintiff, that he should supply to the defendant the articles agreed for, and the plaintiff having made default in so doing is not entitled to recover in this action. On both grounds therefore the rule for entering a nonsuit must be made absolute.

Rule absolute.

SANDS *against* KEATOR and THORNE.

ASSUMPSIT on two promissory notes, besides the common counts: pleas, general issue, and the statute of limitations. The case was tried before *Parker*, J., at the *Saint John August* circuit 1845. The note set out in the first count, bearing date 25th *February*, 1836, for £2475 1*s.* 8½*d.*, with interest, and the note stated in the second count, for £32 10*s.*, with interest, payable three months after date, were put in evidence; and it was proved by one *Armstrong* that in 1836 the defendants were in partnership, and that the witness had acted as agent for the plaintiff: this witness *inter alia* further stated that he had received payments on these notes within six years, and produced the books of the plaintiff, in which

The plaintiff sued on two promissory notes, made by the defendants while partners in trade, more than six years before the commencement of the action; certain payments having been made within six years by one partner after the dissolution of the firm, as also an account in writing, stated and signed by him, acknowledging a balance which included what was still due on the notes: Held, sufficient to entitle the plaintiff to a verdict against such defendant, and if the respective payments were actually made on the notes they would be sufficient to take the case out of the statute of limitations against both defendants, the Act of Assembly 6 *Wm.* 4, *c.* 51, having expressly left the effect of payments on the same footing that they were before the passing of the act.

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the witness had made various entries of sums received by him for the plaintiff, namely, on the 22d *February*, 1840, he received £17 5*s.* 6*d.*, paid by the defendant *Thorne* on the two notes; that the sum of £7 5*s.* 6*d.* and £10, with discount, had been paid into the commercial bank in reduction of the notes, for which a receipt was at the time given; that the notes were the only transactions then between the parties; and besides various sums spoken of in 1838, the witness swore that on 6th *March*, 1840, he received from the defendant *Thorne* on account of these notes £59 1*s.* 10*d.*; that on 20th *March*, 1839, another payment was made on account of the notes of £49 4*s.* 6*d.*; and on the 25th *December*, 1838, he received goods from the defendant *Thorne's* store, on account of these notes, £6 1*s.* 6½*d.* It appeared that there were entries in the plaintiff's book by another person, stated to have been clerk for the defendants and subsequently for the defendant *Thorne*. It was likewise stated by this witness that soon after 1837 the defendant *Keator* quitted the firm, and the plaintiff had frequently asked him for money due, and applied to him for payment of the notes; that *Keator* had replied that he was indemnified, did not wish to prejudice his sureties, could do nothing until he was compelled, and that what Mr. *Thorne* did was the same as if he had done it himself; that the plaintiff had rendered *Thorne* an account, about which there was some dispute, and which *Thorne* had refused to give up; and that the balance of the account due the plaintiff from the defendants was ultimately settled by *Thorne:* this appeared by an account put in evidence, dated 25th *January*, 1844, in the hand writing of the defendant *Thorne*, shewing on one side an amount to the debit of the plaintiff made up of various sums, including interest on the same every three months from 25th *February*, 1840, of £4033 0*s.* 9*d.*, and on the other to the credit of the plaintiff the following "By the amount of your "account, made up in the same manner as above, £4195 "5*s.* 10*d.* Due *R. S.* £162 5*s.* 1*d.* Signed *E. L. Thorne.*" It was also sworn by the same witness, that an account of the plaintiff's was rendered to the defendant *Thorne*, but being called for under notice was not produced. This witness

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witness in his cross examination, stated that the £17 5*s.* 6*d.* spoken of by him in his direct examination, was paid him by Mr. *Thorne* or his clerk at *Thorne's* store; that there was a transaction of a bill of exchange and rent between the parties, but was kept separate; that he thought the £59 1*s.* 10*d.* was received from *Thorne* in produce, and that at the time he received this he could not say the notes of the plaintiff were mentioned; that the £49 4*s.* 6*d.*, spoken of as gotten on the 20th *March*, 1839, was not received in money, but in a note, and that he could not say that the notes were then mentioned, nor when the £6 1*s.* 6½*d.* was received. On the close of the plaintiff's case a motion was made for a nonsuit, and replied to on grounds substantially the same as afterwards urged before the Court in banc. *Channell* v. *Ditchburn* (*a*), *Holme* v. *Green* (*b*), and *Wood* v. *Braddick* (*c*), were cited. The nonsuit was refused. The defendants called no witnesses; and after the closing of the counsel to the jury, the learned Judge directed them to consider whether they were satisfied on the evidence that the payments spoken of were made on the notes, for if so they amounted to an admission that the notes were still due; but if not proved to the jury's satisfaction, without reasonable doubt, that the payments were made on these notes, their verdict must be for the defendants; that the evidence of payment ought to be direct to the fact, or such as not only led to a conclusion that the payments were on the notes, but such as was not reasonably consistent with any other view of the case; and that if they were satisfied that the payments spoken of had been made on the notes, they must determine what was the amount fairly due: that as to any delegation of authority from *Keator* to *Thorne*, to act for the former, His Honor said he did not think it sufficient to take the case out of the statute of limitations, but it might be sufficient to authorise *Sands* to settle such payments as ought to be credited if the notes were not outlawed. The jury returned a general verdict for the defendants. *Jack*, in *Michaelmas* term 1845, obtained a rule *nisi* for a new trial, on the ground that the verdict was against law and evidence. *Wood* v. *Braddick* (*d*).

(*a*) 5 *M.* & *W.* 494.
(*b*) 1 *Stark.* 488.
(*c*) 1 *Taunt.* 104.
(*d*) 1 *Taunt.* 104.

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W. J. Ritchie, in *Michaelmas* term last, shewed cause. The learned Judge left it to the jury to say whether the payments were made on the notes; if not, the notes would be bound by the statute of limitations; and they found that the cause was so barred: this finding was after weighing the evidence of *Armstrong*. In *Holme* v. *Green* (*a*), it is laid down by Lord *Ellenborough* to be clear law, that to take a demand out of the statute of limitations by payments, they must affirmatively and clearly appear to have been made on the claim which would otherwise be barred. It is true that in the direct examination of *Armstrong* he stated that certain payments he referred to were made on the notes, and stated also there was no other transaction between the parties, but in his cross examination, on being questioned on each of the items, he could not and would not swear that the notes were ever mentioned or referred to in any way; and it also appeared by him that there were other transactions between the parties, such as a bill of exchange and a demand for rent. As to the application of these payments therefore there was nothing whatever to support it, the dedication of payment being the mere opinion and feeling of the witness, warranted by no facts shewn in evidence. That the monies paid were not connected with the bill of exchange, the rent, or other transactions foreign to the notes, the witness could have no distinct knowledge. The evidence being thus left doubtful, the jury, upon a full consideration of the whole of the testimony, have rightfully exercised their province, with which it is presumed the Court will not interfere. Suppose it should go to another jury on the same evidence, would not the charge of the Court, which has not been complained of, be similar, and is it not more than probable that the result would be the same? It seems extraordinary, if these payments were directly made on the notes—these notes all the time in the possession of the plaintiff—yet no indorsement of payments upon them or any act of dedication of payment in writing or otherwise, by which it would appear reasonably certain that the payments had been so applied; the notes never appear to have been brought forth at any

(*a*) 1 *Stark. Rep.* 488.

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time—never mentioned—never referred to in any way when these payments were sworn to have been made; the goods gotten by the plaintiff was an ordinary transaction—nothing connected with it to establish a payment. In a very recent case, *Waugh* v. *Cope (a)*, it was held that to take a claim out of the statute by payment, there must appear a distinct appropriation of the thing so paid to that which is sought to be taken out of the operation of the statute. Then as to the manner of the admission: one joint debtor cannot delegate another to make an acknowledgment to take a contract made by them both out of the statute of limitations: such authority must be in writing, and signed by the party charged. *Hyde* v. *Johnson* (*b*). But it was not made a point at the trial that *Thorne* would be liable on the settlement even if *Keator* was not, and therefore this is no ground to be urged in the present application. As to the mode of making up the amount, by which the balance of £162 5*s.* 1*d.* is produced, charging interest every three months, it most clearly appears that the calculation at the foot of the account is wrong; and if it can be shewn that there was a mistake in the calculation of interest, and that upon correcting the mistake the plaintiff appeared to have been paid, the verdict is right on the general issue; and upon calculation this does appear—there would even be a balance in favour of the defendants. *Whitcomb* v. *Whiting* (*c*), *Tippits* v. *Hearne* (*d*), *Mills* v. *Foukes* (*e*).

Hazen, Q. C., and *Jack* in support of the rule. The evidence of a settlement and £162 5*s.* 1*d.* due the plaintiff, was binding until the contrary could be shewn. *Armstrong* proved that there was no other transaction between the parties to which the payments could apply, except the notes. Here were payments made by the defendants to the plaintiff's agent: the witness expressly stated that the payments were made, and upon these notes, and the defendants did not contradict this testimony. The counsel asked the witness in his cross examination, if any thing was said at the time of the payment about the notes, to which the witness replied that

(*a*) 6 *M. & W.* 824.
(*b*) 2 *Bing. N. C.* 776.
(*c*) 1 *Smith L. C.* (American notes) 431.
(*d*) 4 *Tyr.* 775.
(*e*) 5 *Bing. N. C.* 455.

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there was not; but the counsel should have gone further, and asked the witness how he knew the payments were made on the notes? The witness could have given positive reasons, and in the absence of the explanation, which the defendants' counsel might have drawn out, the express declaration of the witness that the payments were made on account of the notes must be considered conclusive. The witness might know the facts in various ways besides hearing the notes mentioned at the time of payment. There were other transactions between the parties at other times; and by reason of these transactions it was attempted by the defendants' counsel to make it appear to the jury that the payments might apply to matters unconnected with the notes. It is not necessary in this case to contend that a verbal delegation from one person to another is sufficient to take the case out of the statute of limitations. According to *Wood* v. *Braddick*, it required no express authority from *Keator* to *Thorne* to bind the former: one partner may bind another, as to partnership transactions, even after dissolution, without any writing or express delegation of authority. The £162 5*s*. 1*d*. is a balance due on the notes, as appears by the statement of the account in possession of the defendants, and as proved by *Armstrong*. It has been contended, that however the accounts are made up there must be a balance in favor of the defendants; but if they had thought so they would have claimed the balance under a plea of set-off. The jury did not go into the transaction: it was impossible to shew any error in the account, and therefore there should have been a verdict for the plaintiff for the balance claimed by him. The point respecting a verdict against *Thorne*, was indeed not much urged at the trial: that was looked upon as a matter of course; but the great object was to fix *Keator*, the solvent partner.

Cur. adv. vult.

CHIPMAN, C. J. now delivered the judgment of the Court. In this case we think there should be a new trial. The account stated and settled by the defendant *Thorne* on the 25th *January*, 1844, shewing a balance due to the plaintiff of £162 5*s*. 1*d*., is clearly sufficient to entitle the plaintiff to a verdict against this defendant; and if the items of debit in this

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this account were payments on the notes of hand which constituted the plaintiff's demand they would be sufficient, under the authority of the cases, *Channell* v. *Ditchburn (a)* and *Manderston* v. *Robertson (b)*, to take the case out of the statute of limitations against the other defendant *Keator*, as the Act of Assembly 6 *Wm.* 4, *c.* 51, expressly leaves the effect of payments of principal and interest under the statute of limitations on the same footing that they were before the passing of that act. In the present case it did not satisfactorily appear whether or no the items charged in the account stated, as above mentioned, by the defendant *Thorne*, were to be deemed specific payments on the notes. This point requires to be further investigated, and to be distinctly brought up for the consideration of the jury. The rule will be made absolute for a new trial upon payment of costs.

Rule absolute.

(a) 5 *M.* & *W.* 494. (b) 4 *Man.* & *Ryl.* 444.

DOE on the demise of LONCHESTER *against* MURRAY.

A verdict against the weight of evidence, on a question of boundary, was set aside by the Court and a new trial granted on payment of costs, though the cause had been tried by a special jury of view.

Where the shewer of one of the parties read to the jury while viewing the premises the description of the starting point taken from the grant, which was proved in evidence at the trial: Held, not sufficient to invalidate the verdict, nor could arguments and discussions before the jury of view be complained of, it appearing that the shewer of the complainant was in *pari delicti* with the shewer of the successful party.

The declaration of a party, accompanying the act of shewing the point of beginning on the boundary of a grant are admissible in evidence as part of the *res gestæ*, but the truth and correctness of such declarations are open to be controverted by other evidence.

EJECTMENT for land in the parish of *Botsford* in the county of *Westmorland*, tried at *Dorchester*, in *September* 1845, tried before *Carter*, J. and a special jury of view. The lessor of the plaintiff claimed under a grant, dated *March* 8, 1813, from the Crown to one *Alexander Kinnear;* and the whole question in dispute was the eastern boundary or starting point of this grant. The grant, as also the subsequent conveyances to the lessor, described the *locus* as lying on the shore of the gulph of *Saint Lawrence*, between *Cape Torment* and *Shemogue*, being the first lot or tract, beginning at a spruce stake placed on the edge of *Sandy Beach* on the said gulph shore, forty eight rods easterly from the extremity of

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the point, which forms the easterly entrance of the brook commonly called *Trout Brook*, and about half a mile westerly from *Bear Cape;* thence from the said stake, running by the magnetic needle south thirty six degrees and thirty minutes east, one hundred and thirty eight chains of four poles each; thence north fifty three degrees and thirty minutes west, thirty chains; thence north thirty six degrees and thirty minutes east, until it meets the sea shore; thence along the said shore easterly, and crossing the said *Trout Brook*, until it meets the first described bounds, containing in the whole three hundred and fifty acres more or less, as by the plan annexed to the grant would more fully appear. A great deal of evidence, in addition to that which the jury possessed from a view of the premises, was given on either side, especially in reference to the position of *Trout Brook* and the shifting entrance thereof, and the character of the beach on which the stake mentioned in the grant was said to have been placed; but the testimony which principally weighed with the Court in granting a new trial was that of *Alexander Kinnear*, the original grantee, and one *M'Cardy*, a surveyor called on behalf of the lessor, and one *William Spence*, a witness for the defendant. *Kinnear*, whose memory appeared imperfect as to particulars, stated that previous to the grant he applied to one *Watson*, a surveyor (since deceased), to run out the land for him; that they began at *Spence's* or *Smith's* boundary, being the land claimed at the trial by the defendants, and that one of the chief objects of the witness in applying for the land was to take within his bounds a piece of marsh lying near the shore; that the stake was placed on the shore described in the grant, and the line run in such a way by *Watson* as to include the marsh; that beyond the beach was a piece of bog marsh, and that *Watson's* first line, run for witness, *went across the bog marsh. M'Cardy* testified that in *August*, about nineteen years before the trial, he went on the land with the lessor of the plaintiff to run his lines, and met *Watson* (the surveyor) there, who pointed out to witness the eastern boundary of the *Kinnear* grant; that the witness started his line from the place pointed out by *Watson* on *Trout Brook*, went according to his

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his directions, and measured easterly forty eight rods from the point on *Trout Brook*, which carried him a little further east than the line pointed out by *Watson*, and to which the lessor claimed; that there was about five chains difference between the *Watson* line and the one on which the defendant relied; that the line as shewn by *Watson* would give the lessor about five chains or seventy acres more than the thirty chains mentioned in the grant; and that the line as pointed out by *Watson*, and run by witness, and then claimed by the lessor, ran entirely to the eastward of the bog marsh, but that the line claimed by the defendant ran across it. *Spence* swore that he assisted at *Watson's* survey, and that *Kinnear's* east line ran through the bog marsh; and other witnesses for the defendant stated that *Spence* had shewn them the boundary, and that the stakes had been pointed out to them as boundaries in the bog marsh. The learned Judge left it to the jury, upon the whole evidence, to determine whether the boundary claimed by the lessor was the line run by *Watson*. Verdict for the plaintiff.

Hazen, Q. C., in *Michaelmas* term last, moved for and obtained a rule *nisi* for a new trial, on the grounds that the verdict was against the weight of evidence; improper conduct, as stated in affidavits, of the plaintiff's shewer before the jury of view, in exhibiting an extract from the grant, and arguing for the line as claimed by the lessor, *Tidd's P.* 894; improper admission of evidence, in receiving the declarations of *Watson* to *M'Cardy*, in relation to the bounds; and the discovery of new evidence since the trial.

D. S. Kerr, in *Michaelmas* term last, shewed cause; and contended that the verdict was not against the weight of evidence: but if so, there having been a view of the premises, the Court would not, unless some special reasons for so doing apart from the weight of evidence, grant a new trial, because it was to be presumed that the jury were as much or perhaps more influenced by what they obtained upon the view than by the evidence given in Court. 7 *Bac. Abr.* 766, "Trial" (L). As to improper conduct of the shewer: supposing there had been such, it was a good cause of challenge at the trial, and could not be taken advantage of after

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after the defendant had elected to take his chance by going to trial. 4 *Bac. Abr.* 580, "Juries" (H). But there appeared no improper conduct in the shewer, as the affidavits in answer fully repelled the charge. That the declarations of *Watson*, a deceased surveyor, of a line run by him, and as a mere act of shewing that line to *M'Cardy*, were properly received in evidence: they were connected with the principal fact in dispute—a part of the transaction essential to be known, in order to explain and for a right understanding of the thing referred to; a part of the surrounding circumstances—the *res gestæ* of the boundary in question. The act of pointing out could not be objected to: the declaration accompanied the act, and it was the same whether the knowledge of the surveyor was conveyed by gesture or by speech. 1 *Greenleaf Ev. s.* 108.

Hazen, Q. C., contra, urged that the verdict was against the weight of evidence; that *M'Cardy* began the survey in the wrong place; that the testimony of *Kinnear*, *M'Cardy*, *Spence*, and other witnesses, shewed that *Watson's* line went across the bog marsh, to which line the defendant claimed and no other; that having a jury of view made no difference when it appeared that the verdict was clearly against the lessor's own evidence. The declarations of *Watson* were clearly inadmissible: they were not made by him while he was running the line; he was not acting under oath when he made them, nor in the discharge of any official duty; there was nothing in the circumstances to impose the obligations of truth, or to distinguish his declarations to *M'Cardy* from the ordinary hearsay evidence which is invariably rejected by the Courts of law; yet the verdict rested alone on this, and had nothing else to support it. The charge of improper conduct in the plaintiff's shewer had not been sufficiently answered: it had been attempted to be met by a set off of improper conduct in the defendant's shewer; but this if true would be no excuse for the impropriety of the plaintiff's shewer; if both wrong they have misled the jury, and occasioned the verdict complained of.

Cur. adv. vult.

CHIPMAN, C. J. now delivered the judgment of the Court. In this case we think that the verdict is against the weight of

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of evidence, inasmuch as it was clearly proved that the original line run by *Watson* crossed apiece of bog marsh, which the line claimed on the part of the plaintiff does not. There were other grounds on which the rule for a new trial was moved for, which might affect the question of costs. 1. On the ground of the misconduct of the plaintiff's shewer before the jury of view in reading to them a piece of written evidence. This piece of evidence was the description of the starting point taken from the grant which was produced in evidence at the trial. Although it may not have been strictly correct in the shewer to have done this, yet we do not think the reading of this extract from the grant afterwards given in evidence sufficient to invalidate the verdict. In the arguments and discussions which took place before the jury of view, it appeared by the plaintiff's affidavits that the defendant's shewer was *in pari delicto* with the shewer of the plaintiff. 2. It was objected that *Watson's* declaration to *M'Cardy* with regard to the point of beginning in the boundary of the grant, should not have been received in evidence. But this declaration accompanied the act of shewing the boundary, and we think that as the act was given in evidence, the declaration of *Watson* accompanying the act and merely shewing its character, was admissible as part of the *res gestæ*: the truth and correctness of the declaration were open to be controverted by other evidence. 3. One other ground for a new trial was the discovery of new evidence. But it is not necessary to enter upon this ground, as if acceded to it would not vary the question of costs. We are of opinion that there should be a new trial on the ground of the verdict being against evidence on payment of costs.

Rule absolute.

THORNE *against* BEDELL.

Wednesday, 10th February.

Where a party voluntarily becomes nonsuit, he cannot afterwards move to set it aside, and obtain a new trial on payment of costs.

AT the *Saint John January* circuit, 1846, before *Street*, J., where the cause was entered for trial, on the opening thereof, it appeared that the Nisi Prius record was an old

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one in the same case, filed by mistake, and not the record of amended pleadings, upon which it was the plaintiff's intention to proceed. On the discovery of this error the plaintiff consented to a nonsuit. In *Hilary* term last,

Kaye moved to set aside the nonsuit, and have a new trial on payment of costs, on affidavits explanatory of the circumstances under which the mistake occurred, and shewing the plaintiff's inability to proceed with success on the Nisi Prius record before the Court; and cited *Smith* v. *Kuff (a)*, *Brown* v. *Otley (b)*. A rule *nisi* was granted.

W. J. Ritchie in the course of this term shewed cause. The plaintiff was nonsuited at his own request: he might have applied at the time to bring in the correct record, under the circumstances, when he discovered that he had filed the wrong record. *Swayne* v. *Ingleby* (*c*) shews that a party cannot move to set aside a nonsuit occasioned by the want of formal proof. After electing to become nonsuit, the plaintiff cannot move to set it aside: he is estopped from so doing. *Barnes* v. *Whitman (d)*. The plaintiff might have applied at the trial to amend the record or to discharge the jury. The defendant gets no benefit by the plaintiff's paying costs of a new trial: the attorney gets the benefit of that. *Doe dem. Andrews* v. *Seelye (e)* is entirely different from the present: there the learned Judge ordered a nonsuit; not so here. Also in that case there was no issue to try; but in this there was a perfect issue, on which the plaintiff might have proceeded. The case of *Swayne* v. *Ingleby*, where the Court refused to set aside on payment of costs a nonsuit for want of formal proof, is entirely applicable to the present.

Hazen, Q. C., contra. *Doe dem. Andrews* v. *Seelye* is in point. The record filed did not contain the declaration in the cause as there exhibited: it was the same as if there was no issue. [CHIPMAN, C. J. There was a record and an issue which could have been tried.] It was not the issue in the cause.

CHIPMAN, C. J. I should be very glad to help the plaintiff if I could; but the difficulty is, he voluntarily became nonsuit, and I know of no case where a party voluntarily

(*a*) 2 *Chitty's Rep.* 271. (*b*) 1 *B. & Ald.* 253.
(*c*) 5 *M. & R.* 125. (*d*) 9 *Dow. P. C.* 181. (*e*) *Ante*, p. 134.

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becomes nonsuit that he can afterwards move to set it aside. *Doe* v. *Seelye* is very different: there the learned Judge ordered a nonsuit; there also there was no issue to try; but in this case there was a good issue, on which the plaintiff might have proceeded to trial.

CARTER, J. I am of the same opinion. It is laid down as far back as *Barrow's Reports*, that if a party voluntarily becomes nonsuit he cannot move to set it aside. *Doe* v. *Seelye* is entirely different: there the Judge directed a nonsuit when he had no power to do so. I think we should be infringing a wholesome rule of law if we were to set aside this nonsuit.

STREET, J. I entirely agree with the rest of the Court. I should be glad to help the plaintiff if I could; but I think he must be bound by the election which he made.

Rule discharged.

BLAIR *against* ARMOUR and ANOTHER.

Saturday, 13th February.

A deed acknowledged before a deputy mayor of a borough in *Great Britain*, with the common seal of the borough affixed, is a sufficient acknowledgment within the meaning of the Act of Assembly 52 *Geo.* 3, *c.* 20.

IN trover for wood &c. before *Carter*, J., at the sittings after *Michaelmas* term 1845. The plaintiff offered in evidence a deed of the premises from one *Alexander Blair* to himself, acknowledged before the deputy mayor of *Walsall* in *Great Britain*, 11th *May*, 1815, with the seal of the office of mayoralty affixed, and registered in *York* county 1820. The deed was objected to on the ground that the acknowledgment before a deputy mayor was not a sufficient compliance with the Act of Assembly 52 *Geo.* 3, *c.* 20, *s.* 1, which requires that such acknowledgment shall be taken before any mayor or other chief magistrate of the city, borough, or town corporate, in any part of the United Kingdom, where or near to which the said grantors or bargainors shall reside, and certified under the common seal of such city, borough, or town corporate, or the seal of the office of the officer or other chief magistrate &c. The objection was over-ruled, the deed admitted, and the plaintiff had a verdict for £5. In *Hilary* term last, *Wilmot*, Q. C., obtained a rule *nisi* for a new trial on the foregoing objection.

G.

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G. Botsford in the course of this term shewed cause. The question is, whether *Blair's* deed is sufficiently acknowledged, having been done before the deputy mayor of *Walsall.* The concluding words of the acknowledgment are "I have "caused the seal of the office of mayoralty to be hereto "affixed." The deed having the seal of the corporation thereto, affords sufficient evidence that the deputy mayor is in the place of the mayor: he holds the corporate seal, and is in fact the mayor. The act says that the acknowledgment shall be taken before the mayor or other chief magistrate, certified under the common seal of such city &c. The seal is the great thing required: here is the seal in the hands of the chief officer, for the time being; having the corporate seal, he is *prima facie* presumed to be deputy mayor, clothed with all the forms of the principal. He could not act in the mayor's presence, as the deputy has no power in the presence of the principal; but in the absence of the mayor he is chief magistrate, holding the seal by which the corporation speaks: the presumption is that the mayor is absent, because the deputy holds the seal, which is always in the possession of the chief officer. The rule *omnia rite esse acta* applies in this case: the seal of the city is the evidence that the certificate is correct. [CARTER, J. Are we bound to take notice that the words "deputy mayor" implies that there is a mayor?] Certainly not; it may be that the deputy mayor is head of the corporation.

Wilmot in support of the rule. Who is chief magistrate of a city? the mayor. The words "or chief magistrate," mean that the person is the head officer of the city. The words "deputy mayor" imply that there is a principal—a superior officer. There may be boroughs in which the head officer is not called mayor: if there was a mayor in *Walsall*, he alone could take the acknowledgment. [CHIPMAN, C. J. It is fair to infer that the mayor was absent. CARTER, J. How are we to know that he is chief magistrate?] By what he calls himself. [CARTER, J. There are some towns in *England* where the chief officer is called borough reeve. Now if the certificate stated that it was before the borough reeve, could we take judicial notice that he was chief officer?]

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In that case it would not appear that there was a superior officer; here it does. The certificate proves on the face of it that it was taken before a subordinate officer, and therefore the acknowledgment not warranted by the act.

Cur. adv. vult.

CHIPMAN, C. J. now delivered the judgment of the Court. The question in this case is, whether a deed given in evidence was sufficiently authenticated under the Act of Assembly 52 *Geo.* 3, *c.* 20. The deed was proved before "the deputy "mayor" of the borough of *Walsall* in *Great Britain*, who declares in his certificate that he has caused the common seal of the borough to be thereto affixed. The Act of Assembly authorises the proof to be made before "any mayor "or other chief magistrate of the city, borough or town cor- "porate," near to which the grantor may reside; and we consider the deputy mayor who, it is a fair intendment, is acting in the absence of the mayor, to be for the time being the chief magistrate of the borough, especially as it appears by the certificate that he has the control of the common seal of the borough: indeed it appears from the case of *The Queen* v. *Kerr (a)*, that the use of the term "deputy" is by no means incompatible with the person to whom it is applied being a substantive independent officer. This Act of Assembly should be construed in a way to accomplish the beneficial purpose for which it was intended. We therefore think the rule must be discharged.

Rule discharged.

(a) Ante, vol. 2, p. 137.

WILSON *against* ATKINSON.

A writ of *procedendo* having been issued after a *habeas corpus* to remove the cause being on file, as also common bail, but it likewise appeared that there had been a previous irregularity in the writ of *habeas corpus* by which the cause had been removed, and the writ afterwards amended by the defendant's attorney, who availed himself of the writ so improperly amended to defeat the plaintiff's right of action by refusing to receive a declaration; both parties having been guilty of irregularity, the Court set aside the writ of *procedendo*, on the condition that the defendant should receive a declaration in the course of the term of which it had been offered to the defendant's attorney.

THIS was an application, pursuant to notice, to set aside the writ of *procedendo* for irregularity, with costs, founded on an affidavit which stated that the cause was removed

from

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from the *Westmorland* Common Pleas by a writ of *habeas corpus*, issued 29th *May*, 1846, and notice of appearance the same day given to the plaintiff's attorney, with notice that common bail would be filed, which was accordingly done on the 9th *June* last. On the 19th *September* last the plaintiff's attorney served the defendant's attorney with a rule for a *procedendo* unless common bail was filed within twenty days; that on the 18th *October* last the attorney of the defendant served the plaintiff's attorney with notice that common bail had been filed in the *habeas corpus* as of *Hilary* term previous, and if a writ of *procedendo* should be issued it would be irregular; and the defendant's attorney about 12th *October*, 1846, on search at the clerk's office was informed that no entry of the cause had been there made; and on the 12th *November* last was served with a copy of bill of costs in the cause in the Common Pleas with notice of taxing for next day, on which he searched in the office of the Common Pleas, and found a writ of *procedendo* under the seal of this Court, directed to the Justices of the Common Pleas, without naming the County, tested the 9th instead of the 10th *Victoria*, indorsed issued 13th *October* last, and filed the same day; that subsequently the plaintiff's attorney signed judgment by default, of which the defendant's attorney had no notice, nor did he know that the writ of *procedendo* had been issued, or that any proceedings had been taken in the Inferior Court after the filing of the writ of *habeas corpus*, until 21st *November* last.

A. L. Palmer, in support of the motion, contended that there was not sufficient certainty in the direction of the writ which was to "our Justices of the Inferior Court of Common "Pleas greeting," without saying to the Justices of what county: that the writ was irregular in being tested the 9th instead of the 10th *Victoria;* and was irregular also for having been issued on a rule obtained 19th *September* last, when common bail was on file 9th *June* previous.

Chandler, Q. C., shewed cause, on an affidavit of the plaintiff's attorney, by which it among other things appeared that upon search for the writ of *habeas corpus* in the clerk's office of the Inferior Court of Common Pleas the plaintiff's attorney discovered it to be without any teste therein,

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therein, of which he informed the defendant's attorney, telling him if he wished to remove the cause he must do it correctly. A declaration in the cause as in this Court having afterwards been tendered by the attorney of the plaintiff to the defendant's attorney, and not accepted in consequence of a dispute about the entitling of it, the defendant's attorney contending it should have been entitled as of *Hilary* instead of *Trinity* term, the former took steps, and procured a writ of *procedendo;* that subsequent to the conversation about the teste of the *habeas corpus*, the attorney for the defendant went to a son of the clerk of the Common Pleas, who had the charge of the office, and represented to him that the plaintiff's attorney had consented that the writ of *habeas corpus* should be altered by inserting the teste: upon the faith of which the alteration was permitted; whereas the plaintiff's attorney never at any time gave any such authority or consent; and that the demand was nearly barred by the statute of limitations. The counsel contended that there was nothing in the objections to the *procedendo*, but if so the Court could amend; the writ of *habeas corpus* being without a teste was void: the cause therefore not removed by it, and the proceedings in the Court below regular, the subsequent alteration of the *habeas corpus*, obtained on misrepresentation, did not cure it nor invalidate the proceedings taken on the *procedendo*. The plaintiff's attorney willing to waive the irregularity tendered a declaration in sufficient time, which the attorney of the defendant refused to receive: he had therefore no cause to complain. The plaintiff could not entitle his declaration the term before the writ was returnable, nor until common bail filed. 2 *Arch.* (2d ed.) 190, 1 *Arch.* 345.

Palmer was heard in reply.

Cur. adv. vult.

CHIPMAN, C. J. now delivered the judgment of the Court. This was an application to set aside a writ of *procedendo* for irregularity, on the ground that common bail had been filed before such writ issued. This writ was undoubtedly improperly issued, but it appears from the affidavit of the plaintiff's attorney that there was a previous irregularity in the writ of *habeas corpus* by which the cause was removed from the Inferior

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Inferior Court, which irregularity was improperly amended by the defendant's attorney, who afterwards availed himself of the writ so improperly amended, to defeat the plaintiff's right of action, by refusing to receive a declaration. Both parties having been guilty of irregularity, and the defendant's attorney being *at least in pari delicto*, we think it would be unjust to grant this application except on such terms as will put the parties in the same position in which they would have been, had the proceedings been all regular. This application for setting aside the writ of *procedendo* will be granted; but on this condition that the defendant shall now receive a declaration as of *Trinity* term last; the defendant having the full time to plead, after service of the declaration.

Rule accordingly.

DOE on the demise of BURNHAM and OTHERS *against* WATTS and ANOTHER.

In ejectment to recover certain premises which had been mortgaged to *J. K.* and *H. G. K.* securing a bond debt, a deed of assignment was put in evidence from *J. K.* and *H. G. K.* to the lessors of the plaintiff, creditors of *J. K.* and *H. G. K.* and trustees for all the creditors, reciting among other things "that the assignors proposed to assign all their joint and separate estate and effects, real and personal, except as thereinafter excepted," and after designating certain real and personal estate, assigned all and singular (certain property named in the deed, and) "debt and debts, sum and sums of money, bonds, bills, notes, securities, vouchers for or affecting the payment of money," and all the estate and effects of what nature or kind soever, &c., wearing apparel excepted; upon motion to enter a nonsuit on the ground that the deed of assignment having described other real estates, but omitted to describe or allude to the mortgaged premises, the same was not assigned by the deed: Held, that as the deed expressly mentioned debts, bonds, and securities for money, the bond debt which the mortgage was given to secure, passed to the lessors and carried with it, as accessary thereto, the land contained in the mortgage.

IN ejectment for land, before *Carter*, J., at the last *November* circuit for *Charlotte* county. The lessors of the plaintiff put in a mortgage of the premises in question, bearing date 27th *April*, 1835, from the defendants to *John Kinnear* and *H. G. Kinnear*: the mortgage recited a bond debt, which appeared to be the object of the security. A trust deed, dated 5th *October*, 1841, was then given in evidence, from *John Kinnear* and *H. G. Kinnear* to the lessors of the plaintiff, creditors of *John Kinnear* and *H. G. Kinnear*, and trustees for all the creditors: this deed *inter alia* recited the reason and object of the assignment, and that the assignors "professed to convey and assign as well all their "joint property as also their separate estate and effects,

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" real and personal, except as thereinafter excepted." It particularly alluded to and described certain real and personal estate in which the *Kinnears* had a joint, as also certain other property, in which each had a separate interest. It then expressed that the assignees and each of them had bargained, sold, assigned, transferred, and set over unto the said trustees, all and singular (certain property in the deed expressed, and also) " debt and debts, sum and sums of " money, bonds, bills, notes, securities, and vouchers for or " affecting the payment of money &c., and all other the estate " and effects of what nature or kind soever, and wheresoever " situate and being, and in whatsoever hands, custody or " power, the same or any part thereof might then or there- " after be, at any time might come or be with them, and " every of their appurtenances, and all the estate, right and " interest, property, claim and demand whatsoever therein or " thereto, of them the said *J. K.* and *H. G. K.*, as well jointly " as partners in trade, as separately and distinctly in their " own separate and distinct capacity, the wearing apparel of " themselves and their families excepted." It was among other things objected at the trial that the trust deed did not convey the property in question, and that consequently the lessors were not entitled to recover. The point was reserved, with liberty to move to enter a nonsuit; and subject thereto a verdict was taken for the lessors of the plaintiff.

G. D. Street in this term moved the Court on the foregoing objection, for a rule *nisi* to enter a nonsuit. It is true the deed states an intention by the assignors to convey all their property for the benefit of their creditors, but it goes on to particularize the properties intended to be conveyed; describes several real estates as also personal property, without making any mention of the one in question. Now if it had been the design of the assignors to convey the mortgaged premises, why were they omitted while property no more valuable was minutely described. The words in the trust deed " all other the estate and effects of the assignors" will not have the effect. [CHIPMAN, C. J. The word " lands" is used in the assignment, and this mortgage shews a bond existing with it.] But after a particular description

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of the property conveyed, no explanation or extension can be given by general words. In *Anon.* case (*a*), it was held that a sweeping clause at the end of a particular specification, would not pass any property of a different nature from that particularly set forth; and in *Doe* v. *Meyrick* (*b*), it is laid down that general words in a deed following words specifically describing and enumerating a certain house and closes, are controlled and limited thereby: so it is submitted here, that the general words in the trust deed "all other the "estate" &c., following the specific description of certain estates, are controlled and limited by such specific description. The same doctrine was held in *Doe dem. Holderness* v. *Donnelly* (*c*), and the same is laid down in *Broom's Legal Maxims* 278, viz. that though property will pass by general deeds of assignment, the express contract controls the general words, on the principle *expressum facit cessare tacitum.*

Cur. adv. vult.

CHIPMAN, C. J. now delivered the judgment of the Court. The question in this case turns upon the point, whether the assignment from *J. & H. Kinnear* to the lessors of the plaintiff included the mortgaged premises for which this action is brought. The mortgage was given to *J. & H. Kinnear* by the defendants, to secure the payment of a bond recited in the mortgage. The deed of assignment from *J. & H. Kinnear* purports to be for the benefit of all their creditors, and to convey all their property real and personal, expressly mentioning debts, bonds, and securities for money. There can be no doubt that under such an assignment, the bond debt, which the mortgage was given to secure, passed to the assignees; and as the debt was well transferred thereby, it carried with it as accessary thereto, the land contained in the mortgage, which the lessors of the plaintiff are entitled to recover in this action. The case differs widely from that of *Doe d. Holderness* v. *Donnelly*, referred to at the bar. The rule must be refused.

Rule refused.

(*a*) *Lofft's Rep* 398. (*b*) 2 *Tyr.* 178; 2 *C. & J.* 223.
(*c*) *Ante*, p. 238.

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PARTELOW, Trustee &c. *against* SMITH and ANOTHER.

The plaintiff having demurred to the defendants' plea, delivered a copy thereof to the defendants' attorney—received from him a joinder in demurrer with objections, and gave him notice of setting down the case for argument; whereupon the demurrer book of the defendants was made up and delivered, but the plaintiff discovering that the defendants' papers in the cause were not on file, signed interlocutory judgment; subsequent to which the attorney of the defendants who had been in default for non-payment of Court fees, purged his contempt by paying up the fees, and procured an order at Chambers to the clerk to receive his papers; on motion to set aside the interlocutory judgment for irregularity, so signed after the several steps taken: Held, that the signing of the interlocutory judgment was regular, the contempt of the attorney being no excuse for the wrong: Held also, per *Street*, J., that the subsequent steps did not amount to a waiver of the irregularity, the plaintiff having been in the dark as to the circumstances afterwards discovered.

THIS was an application, by *D. L. Robinson*, to set aside an interlocutory judgment signed in this cause, for irregularity. It appeared by the affidavits of the defendants' attorney, that on the 5th *January* last he received from the agent of the plaintiff's attorney a demurrer to a plea put in by the defendants' attorney, and on the 25th of the same month received a notice from the plaintiff's attorney that the demurrer would be set down for argument in this term; whereupon the attorney for the defendants delivered a joinder in demurrer, with a note of objections to the declaration, which was received; and accordingly the defendants' attorney prepared his demurrer book, and delivered a copy thereof according to the rules of the Court, but on the 17th *February* instant he was informed by the agent of the plaintiff's attorney that he had signed interlocutory judgment in the cause; that previous to the 17th he (the defendants' attorney) had been in contempt for default in payment of Court fees, and had not had his papers in the case marked as filed in the clerk's office, but had on the morning of the 17th purged his contempt, and had procured the order of Mr. Justice *Carter* directing the clerk to receive and file the attorney's papers, which he accordingly put on file, and of which the defendants' attorney informed the agent of the plaintiff's attorney and counsel. It was submitted that the interlocutory judgment was irregularly signed, and ought to be set aside, and the defendants entitled to judgment on the demurrer, the plaintiff not having delivered his demurrer books.

Wilmot, Q. C., shewed cause. By the affidavit of the agent of the plaintiff's attorney it appears that common bail and interlocutory judgment were filed 2d *February* instant, previous to doing which the agent made search and discovered that no papers whatever in this cause had been filed by the defendants' attorney. This sort of practice, of

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carrying on suits without filing the proper papers in Court, is unfair towards the correct practitioner, the Judges, the public revenues of the country, and is a contempt of the Court: the whole proceedings so conducted are a complete nullity. If such a course could be tolerated, why may not it be extended to the whole bar: whereby no fees will be paid, the Judges deprived of their fees, the revenues defrauded, and the Court left without any papers in suits pending before them? But it is submitted the Court will at once put down such a practice by shewing a party no favour who indulges in it. The order did not authorize the filing of the papers *nunc pro tunc:* it did not heal what was before defective. No papers were on file when the plaintiff on the 2d *February* filed common bail and interlocutory judgment. There is no affidavit of merits, and unless this mode of carrying on suits be considered by the Court as correct, there is no ground whatever for the application.

Robinson in reply. It was too late for the plaintiff to sign judgment for irregularity after going so far in the proceedings. Being entitled to charge for a search, it was his duty to have made one on receiving the appearance, and if he chose to take the objection to have made it in the first instance, but if he chooses to waive it he may; and it is submitted, that after receiving the plea and demurring to it—receiving the joinder and giving notice that he would set down the cause for argument, upon which the defendants' attorney prepared demurrer books—the plaintiff's attorney cannot be permitted to go back and treat the proceedings as he originally might; but has waived the objection, and the signing of interlocutory judgment under such circumstances was irregular. [CHIPMAN, C. J. Do you contend that this interlocutory judgment was not regularly filed?] Certainly.

CHIPMAN, C. J. The interlocutory judgment was regularly signed. The attorney cannot be allowed to allege his own contempt as an excuse: it comes clearly within the maxim *nemo suum turpitudinem allegans audiendus.* The rule must be refused.

CARTER, J. The only excuse given here is the wilful contempt

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contempt of the defendants' attorney: it would be dangerous to allow success to such an application.

STREET, J. I am quite of the same opinion. I do not think the subsequent steps here amounted to a waiver of the irregularity, because the plaintiff was kept in the dark as to the circumstances, which he afterwards discovered, of the defendants' situation before the trial.

Application dismissed.

POLLOK and OTHERS *against* RITCHIE.

A trial being put off by a Judge's order upon the defendant's paying to the plaintiffs "all costs incurred in preparing for the trial," "and for the expenses of one *D. M.* from *Canada*," who was sent for, should he attend as a witness: Held, that the *prima facie* construction of the order was the taxable expenses of the witness, and if any thing more was agreed to be paid, the *onus* was on the claimant to shew it.

THIS was a question on review of the Master's taxation. The cause stood for trial at the sittings after *Michaelmas* term last, and on application to His Honor Mr. Justice *Street* at Chambers to put off the trial, the following order, of 22d *October* last, was made: "Upon the application of the de- "fendant, and upon hearing the affidavits and allegations "adduced on both sides, and the arguments of counsel, I do "order that the trial of the issue in fact and the assessment "of damages in this cause, be postponed until the sittings "after next *Hilary* term, upon the defendant paying to the "plaintiffs or their attorney all costs that have been incurred "in preparing for the trial of the said issue, and assessment "of damages, for the sittings after this present *Michaelmas* "term; and for the expenses of one *Donald Morrison* of "*Canada*, who has been sent for by the plaintiffs, should he "attend on such application, as a witness in the said cause "for the said last mentioned sittings." It appeared, before the Master on taxation, that *Donald Morrison* attended as a witness, having travelled from *Gault* in *Canada West*, a distance of eleven hundred and thirty miles: his actual expenses of coming from *Gault* to *Fredericton* were £25 10*s.* 3*d.*, and he believed the expenses of his return would be a similar amount; the plaintiffs had actually paid him £51 for his expenses of coming and returning, and the further sum of £30 for his loss of time in attending on the subpœna. The

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The above sums were accordingly claimed before the Master, on taxation, as entitled to be taxed under the foregoing order. It was objected, for the defendant, that no more than the regular mileage under the ordinance could be allowed; that the charge for time was wholly inadmissible; and that the expenses named in the order meant the legal expenses of a witness as allowed by law. The Master disallowed the charge of £30 for loss of time, but allowed the £51 for expenses instead of the mileage, which was £28 5*s.*

D. S. Kerr, on the first day in this term, moved on the foregoing objection to reduce the amount, citing the ordinance of fees, and *Judkins* v. *Parker (a)*. A rule *nisi* was granted.

J. A. Strect, Q. C., now shewed cause. The word "expenses" in the order means those expenses which the witness actually incurred as necessarily incident to his travel from *Canada* and back: it would be very unfair to confine him to the mere mileage allowed by law. It is well known that the fees allowed by the ordinance are insufficient to pay the expenses of a witness at any time; more especially when he is brought from a distance: this is the obvious reason for introducing the word "expenses" into the order, that the party plaintiff might be made whole in his necessary outlays, when for the convenience of a defendant a cause is put off, and wherein the former has taken the proper steps, incurred the expense, and is ready for trial. The plaintiff has to suffer by being kept out of his rights, in the delay of the defendant, and it seems unjust that he should sustain the additional loss of paying the expenses of his witness: to provide against this hardship is the obvious wording and construction of the order, putting off the cause upon "the defendant paying to the "plaintiffs all *costs* which have been incurred in preparing "for the trial &c., and for the *expenses* of one *Donald Mor*-"*rison* of *Canada*, who has been sent for by the plaintiff, "should he attend on such application, as a witness in the "said cause." The word "expenses" is a departure from the ordinary language, and the words used before were imported into the order, as distinguished from the legal costs, and

(a) *Chipman's MSS.* 58.

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intended to signify something more, namely, those necessary expenses which were shewn within the letter and meaning of it on the taxation; wherefore the amount ought not to be reduced.

Kerr in support of the rule. A Judge at Chambers has no power to order the payment of any thing more than the legal mileage of a witness, nor does this order aim beyond it. The ordinance, in establishing the table which includes the witnesses fees, declares that "no person or persons whatsoever, for any services &c., for any fee, perquisite, or other benefit or reward, shall exact, demand or ask any greater or other fees, sum or sums of money, for the discharge of his or their respective duties, other than what is allowed" therein; and then provides "Witnesses fees in all Courts." "Travelling, if from a foreign country, per mile 3*d.*" In *Judkins* v. *Parker* it was held, that a witness travelling from the state of *Maine*, in the *United States* of *America*, to *Miramichi*, was entitled to his mileage under the ordinance: the same has been ruled of a witness travelling to this Province from *Halifax*, *N. S.*, and from *Boston*, *U. S.*, but nothing ultra, there being no law to authorise it. How dangerous would it be if witnesses might be brought from abroad, spend what they please by the way, and then come in, under affidavit, with an exorbitant amount for taxation? Every witness would then be at liberty to measure the sum to be taxed by his necessary expenses, and his necessary expenses by his extravagance. The Court could put no limit nor exercise any control except by an adherence to the positive law on the subject. The argument pressed in favor of a witness coming from abroad applies to every suitor at home; and as he is confined to the legal standard, why the former receive greater favor? The present case affords a striking instance of the evil such a practice would introduce. Why have the plaintiffs volunteered to pay the large sum of £30 for time and £51 for expenses, without inquiry or contest? It was optional with the witness, beyond the jurisdiction of this Court, to attend or not on the subpœna: electing to act upon it, he could claim no more than was incident thereto. Had a suit been brought by him against the plaintiffs,

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plaintiffs, and the subpœna adduced, what the result? Nothing for time, and merely the mileage now contended for. No express agreement is shewn between the plaintiffs and the witness for any thing above the ordinary scale, nor is any such to be collected from the order. But here the plaintiffs in paying the witness over £50 more than required by law, is attempting to recover it of the defendant: he need not have incurred the expense—might have executed a commission, as provided by law; and as prior to the act he would have had to bear the costs himself, by the law regulating commissions would be subject to the order of the Court: preferring the course of subpœning the witness, he must put up with the legal result. But this order does not profess to give any thing more than the legal fees, should *Donald Morrison* attend *on his subpœna as witness:* this referring to him in a capacity which is governed, in point of expenses, by express law; and like the various cases in arbitrations, where an arbitration has awarded expenses, the Courts have referred it to the proper standard, and held that only the legal expenses allowed by law were meant. The special provision in the order, in reference to *Morrison's* coming from *Canada*, was to avoid a question which might arise for allowing the mileage for such a distance, when the testimony might have been had under a commission at a less rate. Were a witness brought from a distant part of the world, where mileage might be enormous as contradistinguished from the expense of a commission, no doubt the Court would not allow it.

CHIPMAN, C. J. I think from the tenor of the order the *prima facie* construction of it is that the witness is to be allowed merely his taxable expenses. If there was any thing more agreed upon, the *onus* lies on the other side to shew it. The witness will accordingly be entitled to 1130 miles travel, at 6*d.* (£28 5*s.*), which will reduce the demand £22 15*s.* from the sum allowed by the Master on taxation.

The rest of the Court concurred.

Rule absolute to reduce the amount £22 15*s.*

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M'EACHERN *against* FERGUSON and OTHERS.

A new trial having been granted on payment of costs, an *allocatur* allowed for shewing cause was taxed against the party who obtained the new trial: Held, that such taxation was wrong, and the costs accordingly entitled to be deducted.

THE Court having granted the defendants in this case a new trial on payment of costs, and allowed an *allocatur* of three guineas to the plaintiff's attorney for the argument on shewing cause, the Master in taxing the costs of the plaintiff to be paid by the defendant, allowed the three guineas, though objected to on the taxation. *J. A. Street*, Q. C., on a former day in this term having obtained a rule *nisi* for the Master to review his taxation, and deduct the three guineas as improperly allowed,

D. S. Kerr now shewed cause. The new trial was granted on payment of costs, and the meaning of the rule is, all costs that have occurred up to the time of granting the new trial, and which cannot be claimed in the general costs of the cause or be taken into account in the event of another trial. The rule is not restricted to the mere costs of the trial. The plaintiff is entitled to the necessary costs of shewing cause against the rule: this is just, and in the power of the Court to enforce, as they may grant a new trial on such terms as may seem right.

Street contra. The *allocatur* cannot be allowed. The plaintiff seeks to get the costs of the very motion which is decided against him.

Per Curiam. The clerk was wrong in his allowance of the three guineas: it was not intended to be charged against the defendants; the *allocatur* therefore must be struck out.

Rule absolute to deduct three guineas from the costs.

STEADMAN *against* HOLSTEAD.

A variance between a promissory note set out in the copy of a summary process, served on the defendant, cannot be taken advantage of on the trial, if the note correspond with the original, which is the record: and under the account stated a promissory note may be given in evidence, though there be no particulars thereof attached to the process.

ASSUMPSIT on the summary side, setting out a promissory note for five pounds, and containing a common count on the account stated, tried before *Street*, J., at the last *Saint John* circuit. The five pound note was proved, and also another

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note between the parties for three pounds ten shillings. It was objected at the trial, that the plaintiff could not recover on the five pound note by reason of a variance between the note and the copy of the process served on the defendant; nor on the three pound ten note, as there were no particulars, and it could not be given in evidence under the account stated. The learned Judge ruled, that he could not look at the copy served on the defendant, but only to the record before him, and which supported the five pound note; and received the other note in evidence under the account stated. The plaintiff recovered a verdict for both notes, £8 17*s.* 6*d.*

G. J. Thomson, in this term, moved for a new trial on the above objections; but the Court supported the ruling of the learned Judge, and refused the rule.

Rule refused.

THE QUEEN *against* STEVENS.

Where the information in a conviction charged the defendant with measuring or surveying lumber intended for exportation, in violation of the Act of Assembly 8 *Vict*, *c.* 81, and the evidence referred to three distinct acts, but it did not appear for which of them the defendant had been convicted: Held, that the conviction was bad for uncertainty. Held also, that the Court had no power to allow costs on the quashing of a conviction.

A rule having been obtained in *Michaelmas* term 1845, for a *certiorari* to remove a conviction of the defendant by *Benjamin L. Peters*, Esquire, a Justice of the Peace, for a violation of the Act 8 *Victoria*, *c.* 81, relating to the survey of lumber; it appeared by the conviction, that the defendant on the 3d *July*, 1845, on the information of *James Stockford*, high constable of the city of *Saint John*, had been summoned to answer before *B. L. Peters*, Esquire, a Justice of the Peace for the city and county of *Saint John*, for that the defendant between the 1st day of *May* and 2d day of *July* in the year aforesaid, in violation of an Act of the General Assembly, had measured or surveyed lumber intended for exportation, before filing a bond or taking the oath required by the said act; and it was proved by a witness, one *F. A. Wiggins*, that he had had survey bills from the defendant for timber bought: this witness described what was the usual custom of the *Saint John* market—that sometimes a survey above the falls is considered a final one, but in general a re-survey took place below the falls; and several other witnesses proved that

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that between the 1st of *May* and the 2d of *July* aforesaid, they had seen the defendant measuring and marking some sticks of timber and logs lying afloat in joints above the falls near *Indian Town:* one witness spoke of seeing the defendant so employed on three several occasions; but they could not speak to the exact date, nor the purpose for which the measuring or marking was done, nor who was the owner of the timber and logs, excepting a lot of logs for *Spurr's* mills at *Indian Town.* The Justice decided that the defendant was guilty of the offence charged upon him in the information, and convicted him in £5 and £1 19*s.* costs.

J. A. Street, Q. C., now moved to quash the conviction. It does not appear by the conviction that the defendant was guilty of violating any of the provisions of the act 8 *Vict. c.* 41. The first section provides, that no lumber of the description thereinafter mentioned should be shipped for exportation from this province, until the same should have been surveyed and measured as thereinafter directed, under the penalty &c. of not less than £5, to be paid by the person who knowingly shall have shipped or cause to be shipped &c. for exportation, without having been so surveyed or measured. The second section requires the surveyors under the act to give bonds and to be sworn. The eleventh section prescribes a penalty of £5 upon any person who shall measure or survey any lumber intended for exportation, before filing a bond or taking the oath required by the second section of the act; and the fifteenth section provides that nothing in the act shall extend to any existing contracts relative to the scale of measurement &c. It does not appear by any part of the evidence that the sticks of timber or logs measured and marked by the defendant were intended for exportation, or ever were exported, nor whose logs and timber they were, or that the measuring or marking related to any thing else than the scale of measurement under existing contracts between buyer and seller, which is excepted in the act. If this conviction were to stand, a man would be liable to the penalty for measuring his own lumber in any part of the *Saint John* river.

The Court stopped *Street,* and called on

The

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The *Solicitor General*, in support of the conviction. The survey below the falls is for shipment: timber surveyed above the falls is as much for exportation as that below the falls. If the construction contended for by the other side were to prevail, the act would be altogether evaded on the pretence that the survey above the falls was not the final one, and consequently not for shipment; but the second survey, which usually takes place below the falls, is only a correction of the first. The evidence shews that the defendant was measuring timber in the usual way, and marking it, and it was for him to shew that this was his own timber and logs, or not for exportation, in order to bring himself within the proviso of the act: the charge is general, but the evidence points to particular offences. In *The Queen* v. *Boltin (a)*, it was held that the Court would only consider whether the Justice had power to enter on the subject matter of the inquiry, but not as to the correctness of his conclusions of the degree and sufficiency of the evidence to support a conviction: the Magistrates alone are the judges. *Paley on Conv.* 178. From the evidence given by *Wiggins*, the Justice was warranted in drawing the conclusion he did: the intention for exportation can only be gathered from the circumstances, and the Justice having decided upon the intention, his judgment is conclusive. The time is laid between the 1st *May* and 3d *July;* and it is laid down in *Paley on Conv.* 85, that the precise day need not be named either in the information or the evidence, but that it is sufficiently certain if the fact be alleged to have happened between such a day and such a day, provided the last of the days specified be within the limited time: the same latitude is admitted in the evidence. *Rex* v. *Simpson (b)*, *Paley on Conv.* 168. *Regina* v. *French (c)* is a very short case, and does not appear to be supported by the doctrine in *Paley*, and *Rex* v. *Chandler* (*d*). The duty of the magistrate is very onerous, and ought not to be too severely criticised.

Street, Q. C., in reply. In *Paley on Conv.* 67, it is laid down that the offence must clearly be brought within the meaning of the act, and the charge must be positive and

(*a*) 1 Q. B. 66.
(*b*) 10 *Mod.* 248
(*c*) *Ante*, vol. 2, p. 121.
(*d*) 1 *Salk.* 378.

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certain. It cannot be in the alternative of "measuring or "surveying," as here appears by the complaint and the evidence. Convictions being an infringement of the common law should be construed strictly, and nothing is to be gathered from inference or intendment to support them. The timber marked may have been of a totally different description from that for shipment, as it is only timber of a particular description that is fit for shipment.

Per Curiam. The conviction cannot stand for want of sufficient certainty. There is evidence of three distinct acts, and it is impossible from the evidence to say for which of these offences the party was convicted. Upon that distinct ground the conviction must be quashed.

Rule absolute.

Street applied for costs.

CHIPMAN, C. J. We have no authority to give costs on the quashing of convictions: that has been decided over and over again. The rest of the Court were of the same opinion.

Motion dismissed.

Doe on the demise of B. BELDING *against* HALLETT.

Saturday, 6th February.

EJECTMENT for a parcel of land, lying in the parish of *Studholm*, *King's* county, tried before *Street*, J., at the *Kingston* adjourned circuit in *December* last. The question was, whether the *locus in quo* was included in the bounds of lot No. 43, granted by the Crown 11th *December*, 1809, to *John*

In ejectment, the lessor of the plaintiff, for upwards of twenty years before the defendant's occupation, was in possession of the *locus in quo* as part of lot 43, granted in 1809, up to the rear boundary of the grant, ran by a Crown surveyor in 1828; and it appeared in defence that the line so run in 1828 was at the instance of the lessor, who took part in the survey and establishing the rear boundary, and this rear boundary was made the base line of a second tier of lots surveyed and returned to the land office, upon which a grant of such lots afterwards came out and was predicated, and the defendant became the purchaser of lot 43 at sheriff's sale, and went into possession of the *locus in quo* as part of it about eighteen months before the trial; the lessor in reply shewed that after such possession he, without the assent of the defendant, got another surveyor to run a rear line, who made it eight rods further in than the Crown surveyor had done, and endeavored to shew by several witnesses a mistake in the first rear line, and that the lessor by reason of his long possession was entitled to the surplus as against the defendant's deed of lot 43. The learned Judge however ruled at the trial, that whether a mistake or not it could not be rectified after so long a period, but the first line having been agreed to at the time and acted on by all parties interested, neither the Crown itself nor any person coming in under it could then dispute such line. On motion for a new trial, on the ground of misdirection: Held, that the ruling of the learned Judge at the trial was right. *Semble*, That sixteen years is not a reasonable time within which to rectify such an error.

and

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and *Benjamin Belding*. It appeared in evidence that *Benjamin Belding*, the above lessor, went upon the lot 43 soon after the grant came out, and held the *locus in quo* as part of lot 43 up to the bounds run and marked by a Crown surveyor in 1828, for twenty two or twenty four years prior to the defendant's going into possession thereof, eighteen months before this action; and that while the lessor so held possession it was always considered as part of lot 43; and upon this evidence the lessors rested their case. On the part of the defence it was not denied that *Benjamin Belding*, one of the above lessors, had had the *locus in quo* in possession upwards of twenty years before the defendant went into possession; in fact, the defendant claimed title to lot 43 under *Benjamin Belding*, and contended that the *locus in quo* was part of it—put in the grant of lot 43, called the mill stream grant, which contained lots 41, 42, 43, 44, 45 and 46, to *Benjamin Belding* and others, and proved by one *Alexander Burnett*, a deputy surveyor, that by direction of the Government in 1828 he ran the rear lines of the mill stream grant, in which was lot 43; that this was done on the application of *Benjamin Belding*, the above lessor, who was with the witness when he ran such rear line; that it was run according to the courses and distances of the mill stream grant, making due allowance to the grantees; and that boundaries were accordingly marked, and put up at the different angles, especially for the rear or western boundary of the lot 43; that *Benjamin Belding*, at the time, seemed to think he (the surveyor) had not gone out quite far enough, as such rear line passed rather close upon *Belding's* improvements on the lot 43; that the land in the rear was then vacant, belonging to the Crown, and that this rear line was made the base line of a second tier of lots surveyed by this witness, and returned to the Crown land office; upon which a grant of these lots, 4th *November*, 1828, to *Benjamin Belding* and others came out and was based: this grant was also put in evidence, and the base line thereof corresponded with the evidence given by *Burnett*. An exemplification of a judgment on the summary side of the Supreme Court, obtained in *August* 1843, by one *Campbell* against *Benjamin*

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Benjamin Belding for £16 10*s.* 6*d.*, debt and costs, and an execution directed to take the goods and chattels, lands and tenements of *Benjamin Belding* were offered in evidence; to which several objections were made, but over-ruled by the Court, and the evidence admitted; and it appeared by them, that lot 43 had been sold in due course of law by the sheriff, and the defendant had become the purchaser thereof, and received a deed 19th *March*, 1844; upon which he brought ejectment against *Benjamin Belding*, and recovered judgment by default against the casual ejector, and was thereby put in possession of the *locus in quo;* after which *Benjamin Belding*, the lessor, without the assent of the defendant, got one *Fairweather*, a deputy surveyor, to run a rear line of the mill stream grant, making such rear line eight chains further in than that run by *Burnett;* and offered to shew by *Fairweather* and several other witnesses, that *Burnett* had made a mistake by carrying the rear line of all the lots in the mill stream grant eight rods too far to the rear; that consequently the eight rods in rear of 43 was overplus, which he (the lessor) was entitled to by reason of his possession as against the conveyance of the sheriff to the defendant of the lot 43; and it appeared that upon the faith of this the lessor had brought the action. But the learned Judge ruled, and so directed the jury, that whether *Fairweather's* line was correct or not, could not alter the boundaries made so long since, the Crown having recognized, agreed to, and acted upon the boundaries ran in 1828 by its own servant *Burnett*, acting under the directions of the Government for the time being, and as the boundaries were at the time agreed to and acted on by all parties interested in the lands on both sides thereof, neither the Crown itself nor any person coming in under the Crown could then dispute them. Verdict for the defendant.

Jack now moved for a new trial, on the ground of misdirection, and contended that if parties agree to make a line they were not precluded from shewing error in it. At the time *Burnett's* line was run both parties supposed it correct, and the lessor of the plaintiff admitted it was so; but it since appeared that such line was very erroneous, and the lessor

was

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was not estopped from taking advantage of it: he was no party to the Crown grant subsequently made. Have the Crown and the lessor a right to fix boundaries where the Crown grant does not warrant them? Suppose that immediately after the line was run, the lessor had discovered it was erroneous, would it not be open to him to remedy the error in reasonable time?

Per Curiam. The lessor permits the Crown to make a subsequent grant predicated upon *Burnett's* survey, which he himself had assented to, and makes no objection to this line for upwards of sixteen years. The Crown must unquestionably be deemed in possession of the *locus in quo* until the grant came out in 1828, under *Burnett's* survey, and then the grantees under the first grant were in possession of it *(a)*. *Lawrence* v. *M'Dowall (b)*, and *Doe dem. Carr* v. *M'Cullough* (*c*), are against the lessor of the plaintiff. Sixteen years is not a reasonable time within which to rectify such error.

Rule refused.

(a) See Doe dem. Ponsford v. Vernon, *Ante*, vol. 2, p. 351
(b) Berton's Rep. 253. *(c) Ante*, vol. 1, p. 460.

MACKINTOSH *against* ALLAN and HAYNE.

Where an action had been commenced on a limit bond, the Court relieved the surety on his rendering the principal, and paying the costs of the action on the limit bond, together with the costs of the application, within a period fixed by the Court for that purpose.

THIS was an application in *Michaelmas* term last, under the act 6 *Wm.* 4, *c.* 41, *s.* 13, to relieve bail in a limit bond. The principal facts were, that in *March* or *April* 1845, *Allan* being in gaol on *mesne* process for £16 and upwards, requested *Hayne* to become bail for the limits, which was complied with. *Allan* afterwards applied for relief under the insolvent debtors' act, and an order was duly made directing a weekly sum to be paid within a certain period for his maintenance; which not being done agreeably to the order, *Allan* without the additional authority required by the act left the limits. The plaintiff took an assignment of the limit bond, and commenced this action upon it. *Allan* had no property, but had not been rendered when this application was made, and

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and *Hayne*, who was not privy to *Allan's* leaving the limits, was not indemnified.

J. A. Street, Q. C., was heard in support of the application.

G. J. Thomson contra.

The Court took time to consider, and on this day,

CHIPMAN, C. J. delivered the judgment of the Court. In this case we think relief should be granted, and proceedings stayed in the action on the limit bond, on rendering the defendant *Allan* into the custody of the sheriff of *York*, and on payment of the costs incurred in that action and the costs of this application. These conditions to be performed on or before the 10th day of *March* next.

Rule accordingly.

SEWELL *against* BURPE.

Saturday, 13th February.

The want of an original *ca. sa.* to the county where the venue is laid, if not amended, is a valid objection to an arrest under a *testatum ca. sa.* Where the defendant after judgment indorsed a note of a third party to the plaintiff, to be collected by him, and the proceeds applied in payment of the judgment, accompanied also by a request that the plaintiff would carry on the suit against such third party in his own name, and on the plaintiff's suing such third party, the suit was settled between them by the plaintiff receiving a sum of money on account and taking a new note in his own name for the balance, of which he informed the defendant: Held, that this was a satisfaction of the original judgment.

THIS was an application on the first day of the term for a rule *nisi*, to rescind the order of Mr. Justice *Street*, His Honor having originally granted a summons, calling on the plaintiff to shew cause why judgment and all subsequent proceedings in this cause should not be set aside for irregularity and fraud, and the defendant be discharged from custody. The principal facts as they appeared by the affidavits of the parties at Chambers on the 1st *December* last were, that in *January* 1840, the plaintiff having obtained judgment for £19 14*s.* 7*d.* against the defendant in a summary case, the venue whereof was in *York* county, issued a *testatum ca. sa.* to *Sunbury* county, returnable in *Hilary* term 1840, upon which the defendant was not taken, but subsequently came to the plaintiff, and requested him to take a note of one *Richard Burpe*, as it appeared, for security and collection, the proceeds to be applied in payment of the judgment. The same was accordingly indorsed to the plaintiff, who sued the *Richard Burpe* note; after which *Richard Burpe* came to

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the plaintiff, paid nine pounds on the debt and costs, and gave the plaintiff, who had been requested by the defendant to transact the business in his own name, a new note, of which he afterwards informed the defendant in this action. The plaintiff unable to get payment of the new note, sued *Richard Burpe* on the same and obtained judgment, but before he was in a condition to sue out execution, *Richard Burpe* left the country, and the plaintiff realized nothing in either of the actions except the nine pounds; six pounds whereof went to pay the attorney's costs in the action on the first note against *Richard Burpe*, and the other three pounds were less than was due to the plaintiff on another transaction independent of the judgment in this cause. On the 7th *August* last, an *alias testatum ca. sa.* was issued to *Sunbury*, tested of *Trinity* term, and returnable in *Michaelmas* term last; upon which the defendant was arrested: and it was sworn, in one of the affidavits which accompanied the summons, that search had been made at the clerk's office, and that except the *testatum ca. sa.* first issued to *Sunbury* in *January* 1840, there was no other execution on file in the said cause for *Hilary* term 1840, *Trinity* following, *Michaelmas* following, or *Hilary* following. The principal objections urged at Chambers were, that the *alias testatum ca. sa.* was irregular, it not appearing that any execution had been first issued to the county where the venue was laid, as a foundation for the *testatum*, and that it appeared that the note had been paid. It was answered, that from any thing on the face of the affidavits it did not appear but that a *ca. sa.* had been issued to the proper county, and was on file of *Trinity* term 1846, as the proper time for issuing it was the return previous to the one in which the *testatum ca. sa.*, sought to be set aside, was issued; that the taking of the new note was no satisfaction of the demand, especially as it appeared that the new note had been taken in the name of the plaintiff at the request of the defendant, who desired that all the proceedings might appear in the plaintiff's name: at all events it did not make out fraud, which was the only thing the summons required the defendant to answer. The learned Judge ordered, that it appearing to him that the judgment upon which the execution,

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execution, whereby the defendant had been arrested and was in custody, had been satisfied in law by a note given by the defendant to the plaintiff; and it also appearing that no *ca. sa.* had been issued to the county of *York*, where the venue was laid, to support the *alias testatum* on which the defendant had been arrested; that accordingly such *alias testatum* should be set aside, and the defendant discharged from custody, upon the condition of his bringing no action against the plaintiff's attorney on the ground of no *ca. sa.* having been issued.

D. S. Kerr, in support of the motion, contended that it did not appear in the affidavits that an execution to the county of *York* was not on file, nor had such an objection been pointed at either in the application before His Honor for the summons or in the summons itself, and there was nothing to lead the opposite party to conclude that such an objection was to be made, otherwise it was a point so easily answered by shewing it to be on file or obtaining leave to amend, by issuing, returning, and filing it, that the execution would not be set aside on that ground. In all continued writs the *alias* or *testatum* must be tested the day the former writ is returnable. *Tidd's P.* (10th ed.) 1023. Here the *testatum* set aside by the order was tested in *Trinity* last, in that term therefore the writ to *York* would be properly returnable, and on file; and there was nothing in the affidavits to shew it not so, or to support the objections taken at Chambers. Suppose the new note to be a satisfaction of the judgment against the defendant, the application was confined to irregularity and fraud, and there is nothing in the circumstances to shew fraud: all the facts proving the reverse. Nor could it be any ground of irregularity, but only for staying the execution. *Tidd's P.* 530. But it clearly appeared by the affidavits that the new note was taken in accordance with the express directions of the defendant to have the whole matter transacted in the plaintiff's name; that he was told of the circumstance after it was done, and made no claim of satisfaction.

Cur. adv. vult.

CHIPMAN, C. J. now delivered the judgment of the Court. In this case we think no sufficient reason has been given for rescinding

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rescinding the order made by Mr. Justice *Street*. The irregularity complained of by the defendant, that there is no *ca. sa.* issued to the sheriff of *York*, in which county the venue is laid, on which to form the *testatum ca. sa.* on which the defendant was taken, is a valid objection to the arrest, and if amendable should have been amended, which has not been done, or had not at the time the order of the Judge was made. On the other ground, that the judgment on which the execution was founded had been satisfied, we think the order was rightly made. Even on the plaintiff's own statement of the transaction, and granting that the note of *Richard Burpe* was taken as a collateral security, the plaintiff having sued *Richard Burpe* on that note, compromised that action, and taken from *Richard Burpe* another note payable to himself, without the previous consent or authority of the defendant, cannot in good faith have recourse to his judgment for satisfaction of his debt. The plaintiff has availed himself of the collateral security, supposing the note of *Richard Burpe* to be of that nature, and cannot restore to the defendant that security, and the plaintiff now holds in his own right a substituted security to which the defendant is no party.

Motion refused.

Ex parte MORSE, Gent., one &c. in the matter of LEE *against* STILES and ANOTHER.

The parties to a suit have a right to settle it without the consent of the attorney; and he is not justified after notice of the settlement, in proceeding with the suit to recover his costs, unless the settlement was collusive for the purpose of defrauding him.

A. L. Palmer, in *Hilary* term last, obtained a rule *nisi* for the plaintiff's attorney to shew cause why he should not pay certain costs incurred in this suit subsequent to a release executed by the plaintiff to the defendant, and which was pleaded *puis darrein continuance*, on the ground that he had carried on the suit contrary to the plaintiff's directions, and after notice from him that the suit was settled, and that he

If an affidavit is properly entitled in the Court, it is sufficient in the jurat to describe the person before whom it is sworn, "A commissioner &c Sup. Court."

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(the plaintiff) was ready and willing to pay the attorney his costs. *Ex parte Hart* (*a*) and *Jordan* v. *Hunt* (*b*) were cited.

Allen now shewed cause on affidavits, by which he sought to make it appear that the settlement between the parties was collusive, and made for the purpose of defrauding the plaintiff's attorney of his costs. If such was the case, he had a right to proceed with the suit. He also objected to one of the affidavits on which the rule was obtained, and which appeared by the jurat to have been sworn before "*Elisha Peck*, A commissioner &c. Sup. Court." He contended that it ought to appear on the face of the affidavit that the party before whom it was sworn was a commissioner for taking affidavits in the Court—he might be only a commissioner for taking bail. [STREET, J. You might shew that, if it is the case. CHIPMAN, C. J. We will intend that he is a commissioner for taking affidavits. CARTER, J. The affidavit is entitled in the "Supreme Court:" that makes the jurat sufficient at all events. There are authorities to that effect (*c*).]

Chandler, Q. C., in support of the rule. The case of *Jordan* v. *Hunt* is conclusive that the parties may settle the suit without the consent of the attorney, because they are the principals—it is their suit, and not the attorney's; and unless the settlement is collusive for the purpose of defrauding the attorney of his costs, he is bound by it. The attorney does not pretend that there was any collusion, but he is possessed of the extraordinary idea that the suit could not be settled without his consent.

Per Curiam. There is no doubt in this matter. The rule must be made absolute. (*d*)

(*a*) 1 *Dowl.* 334. *S. C.* 1 *B. & Ad.* 660. (*b*) 3 *Dowl.* 666.

(*c*) If an affidavit is duly entitled in the Court, it is sufficient in the jurat to describe the person before whom it is sworn "A Commissioner &c."—*Burdekin* v. *Potter*, 1 Dowl. N. S. 134.

(*d*) *See* Chapman v. Haw, 1 *Taunt.* 341; Nelson v. Wilson, 6 *Bing.* 563.

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ABBOT *against* FRINK.

A motion to enlarge a rule *nisi* for an attachment against a witness for not obeying a subpæna, on the ground that he could not be served with the rule, must be made at the term in which the rule *nisi* is returnable.

IN *Trinity* term 1845, a rule *nisi* was obtained for an attachment against a person for not obeying a subpæna in this cause.

Allen now moved to enlarge the rule until next *Trinity* term, on an affidavit stating that the witness had been absent from the Province the principal part of the time since the rule was obtained, and could not be served therewith. He contended that the contempt was no way purged by the lapse of time.

CHIPMAN, C. J. You are too late. The application should have been made in *Michaelmas* term 1845, when the rule *nisi* was returnable.

The rest of the Court concurring,

Rule refused.

END OF HILARY TERM.