REPORTS

OF

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF NEW BRUNSWICK,

WITH A TABLE OF THE NAMES OF THE CASES.

BY DAVID SHANK KERR, ESQUIRE,

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CONTAINING THE CASES OF HILARY TERM, IN THE FOURTH YEAR OF **QUEEN VICTORIA, 1841.**

SAINT JOHN, N. B.

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1842.

TABLE OF CASES CONTAINED IN THIS PAMPHLET.

ERRATA.

Page 199, marginal note, for "HILL *against* COY," read "JOHNSTON *against* CORNWALL."
214, bottom note (*d*), for "*Moody P. Watkin's Rep.*" read "*Moody & Malkin's Rep.*"
237, line 13, for "deed" read "deal."

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF NEW BRUNSWICK,

IN

HILARY TERM,

IN THE FOURTH YEAR OF THE REIGN OF QUEEN VICTORIA.

WYER, Assignee of the Sheriff of Charlotte, *against* GOSS, CAMERON, and DIFFIN.

Wednesday, 3d February.

A confined debtor applying to be discharged under the act 6 Wm. 4, c. 41, s. 4, must account fairly and fully for any property of which he may have been possessed at the time of commencing the action; and relief will not be granted if his inability to discharge the debt arises from a voluntary disposition of his property made pending the action, the value of which is not properly accounted for.

Ritchie moved, pursuant to notice, for a rule absolute to discharge *William Goss*, one of the defendants in the cause, from confinement, under the act of assembly 6 *W.* 4, *c.* 41, *s.* 4. The affidavits in support of the motion stated that *Cameron*, one of the defendants, had been arrested on a *capias ad satisfaciendum*, issued upon a judgment recovered against him by the plaintiff, and that *Goss* and the other defendant had become bound as sureties with *Cameron* in a limit bond to the sheriff of *Charlotte;* that the bond became forfeited by *Cameron's* escape, and was assigned to the plaintiff, who brought an action on it in the beginning of *April* 1838, and recovered judgment, and issued a *capias ad satisfaciendum* in *September* 1839, on which the defendant *Goss* was arrested and confined to the gaol limits of *Saint Andrews*, where he had ever since continued; that *Cameron* was also arrested on the same execution and confined to the limits, but had made application under the act relating to insolvent confined debtors, and obtained an order for support, which not being complied with, he was discharged from custody; that the defendant *Goss* had also applied to the Justices for support under the insolvent debtors' act, which was refused in consequence of his having paid a sum of twelve pounds ten shillings to another of his creditors

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creditors since the commencement of the plaintiff's suit, though it was a just debt, and was paid under compulsion of a legal process, and without any intention of unduly preferring the other creditor to the plaintiff; that on the 30th *June*, 1838, he *(Goss)* sold a farm to his son for one hundred pounds, which was its full value, but that the sum mentioned as the consideration in the deed of conveyance was one hundred and fifty pounds, and so specified without *Goss'* knowledge, and at the request of his son, who considered that in addition to the one hundred pounds, he should be called upon to pay more money for his father, and in some degree support the family; that at the time of the conveyance the defendant *Goss* was indebted to a considerable amount, and much enfeebled by illness, and had no other means of paying his debts and supporting himself than by disposing of his farm; and that the sale was made without fraud, and for a good consideration. It was further deposed, that the defendant *Goss* had no real or personal property, except necessary wearing apparel, and was utterly unable to support himself on the limits, having been confined for four months by sickness, and that he was unable to pay even the costs in this action or to give any security for payment of the debt. It also appeared by his examination before the Justices, that out of the one hundred pounds received from his son, he had paid thirty pounds to the deputy sheriff of *Charlotte*, under an execution; twelve pounds ten shillings to another creditor, who had brought an action against him; and that the remainder was applied to the support of himself and his family.

Ritchie in support of the motion. This case is one of peculiar hardship, as it is not a debt of the applicant's own contracting, but incurred by him as bail for another person. The conveyance to the son was *bona fide*, and not for the purpose of defrauding the creditors: the party was disabled by sickness, and the money was necessary for his support; and when the conveyance was made to his son, the applicant could not know he would be liable for *Cameron's* debt.

The Solicitor General opposed the motion, upon an affidavit of the plaintiff, which stated "that he had offered to take the "note of *Goss*, the son, for the debt and costs, but that he "had

"had refused to give it, and that he, the plaintiff, had se-
"veral times offered to the defendant *Goss*, to relinquish the
"debt if he or his son would settle the costs, which he had
"promised to do, but had not yet done; and that the
"plaintiff was still willing to adhere to that proposition."
The *Solicitor General* also contended that the defendant's affidavits were a sufficient answer to this application. He was served with the writ in *April*, and in *June* following he conveys his property to his son for the very purpose of keeping it from his creditors; it was in consequence of his possession of the farm that he was taken as a security by the sheriff, and as soon as he becomes liable on the limit bond he disposes of his property; the money could not be levied on, and therefore if this rule is granted the creditor is without redress. But the circumstance of the son inserting the one hundred and fifty pounds in the deed, shows that he expected, at the time he purchased the property, to pay more than one hundred pounds for his father. If a man incurs debts, his property must be available to his creditors without reserving any part for the support of his family, and it is no answer to the claim of the creditor that the property has been swallowed up in maintaining the debtor and his family, otherwise it would avail a debtor in every case, how extravagant so ever he might be. The plaintiff's affidavit shows that the defendant has no wish to pay the debt, or even the costs, and the case cannot be viewed in a different light from one where the original debt was of the applicant's own contracting.

Ritchie in reply. The same reason which prevented the applicant from paying the debt also disabled him from paying the costs—it was not in his power to obtain money for the purpose. If there has been no fraud on the part of the applicant he is entitled to the benefit of the act; the plaintiff should not have gone on and incurred all these expenses after a knowledge of the applicant's circumstances; the son has already a sufficient burden on his shoulders, and it would be hard to tell him that he should pay; the fact of the farm being worth only one hundred pounds is uncontradicted, and the introduction of the larger sum in the deed is explained by the son, who has stated that he has supported the family

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for a year, and it would be extremely hard that the acts of the son should injure the father, or that the applicant should be harassed in prison to compel a third party to pay the debt.

CHIPMAN, C. J. Under all the circumstances I do not see that the party is entitled to relief; he makes a transfer to his son, probably for the purpose of avoiding payment of this debt, and when we consider the plaintiff's offer, I do not think we can relieve the applicant.

BOTSFORD, J. A party applying for relief under the act, must come fairly before the court; his conduct should be fair in every particular; and though this originally might not have been a debt of his contracting, he has made himself equally liable to the plaintiff. But the party here makes no advance to pay the plaintiff, and after being served with the writ conveys away his property; the son says he expected to make further advances for his father, and I think he must have had the payment of this debt in view. Another suspicious circumstance is the sum of one hundred and fifty pounds in the deed; and when a party comes with any suspicion, he cannot be relieved.

CARTER, J. I am of the same opinion.

PARKER, J. There was an existing debt due to the plaintiff which the defendant was bound to satisfy, and which he had ample means to satisfy when he made the conveyance to his son. It was his duty to have disposed of his property to the best advantage to discharge his debts; but his object seems to have been to make such a disposal as would best support his family. This would have been all very well had no higher duty interfered. Even now, if the son expected to pay £150 for the father when he got the land, he has the means of paying the debt, or at least the costs, which are all the plaintiff now requires.

Rule refused.

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JOHNSTON *against* CORNWALL.

Wednesday 3d February.

A judgment by defaultsigned by the plaintiff before common bail be filed or appearance entered for the defendant, is irregular; and such irregularity will not be considered waived by the mere delivery of a *notice of appearance* by an attorney for the defendant, if the plaintiff's attorney after receiving such notice has neglected to deliver a copy of declaration according to the practice of the Court.

G. Botsford moved, pursuant to notice, for a rule to set aside the interlocutory judgment signed in this cause for irregularity, on two grounds: first, that no common bail according to the statute had been filed; secondly, that the proceeding was contrary to good faith. It appeared by the defendant's affidavits, that notice of the declaration being filed was left at his house on the 3d *December* last, and on the 10th of the same month his attorney gave notice of appearance and of filing common bail to the plaintiff's attorney, who, on the 24th, agreed to give the defendant's attorney a copy of the declaration, on his paying the costs thereof, and of making out the papers for interlocutory judgment, which were at that time in the plaintiff's attorney's office; that the plaintiff's attorney had not served the defendant's attorney with the copy of the declaration or the bill of costs, but on the 2d *January* demanded a plea, and on the 5th signed interlocutory judgment, and that on the following day the defendant's attorney demanded a declaration, which was refused. The defendant had not in fact filed common bail, nor was such filed by the plaintiff according to the statute, at the time of signing interlocutory judgment; there was also an affidavit of merits by the defendant. It was contended by the counsel that the defendant's attorney having given notice of appearance was entitled to a copy of the declaration, and that the plaintiff was bound, before he could sign interlocutory judgment, to search for common bail, and if not filed by the defendant, to file it for him according to the statute. The rule of court (*a*) required the plaintiff to pursue that course, and until he did so the defendant was not in Court, and any judgment signed against him was irregular.

D. S. Kerr contra, relied on the notice of appearance which had been given by the defendant's attorney, and on affidavits stating that the defendant's attorney had agreed to call on the plaintiff's attorney on a certain day for a copy of the declaration, which had been prepared and ready for

(*a*) *Easter Term*, 26 *Geo.* 3.

delivery

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delivery, but which the defendant's attorney had omitted to do; and he contended that the defendant's attorney having given notice that common bail had been filed on a certain day, was estopped from showing that it had not been done; that the judgment was not signed against good faith, as it was the duty of the defendant's attorney to get the copy of the declaration from the office of the plaintiff's attorney, and not having done so according to agreement, the plaintiff's attorney might justly consider that the arrangement had been abandoned, and that he had obtained a copy from the clerk's office. [PARKER, J. The ordinary practice is for the plaintiff's attorney to serve the defendant's attorney with a copy of the declaration on his appearing; the notice of declaration was given on the 3d *December*, and notice of appearance on the 10th; the plaintiff's attorney has by the terms of the notice of declaration given twenty days to plead after the receipt of it; he has mixed up the practice of filing the declaration in chief and *de bene esse*.] The declaration having been made out, and the defendant's attorney having agreed to call at the office of the plaintiff's attorney superseded the necessity of the delivery of the copy.

Botsford in reply. The substance of the agreement between the attornies was, that a copy of the declaration should be given, not that the defendant's attorney should call at the plaintiff's attorney's office; it is admitted that that was mentioned, but not that it was to be a condition of the agreement. The plaintiff will not be injured by setting aside this judgment, as the venue is laid in *Westmorland*, and therefore he has not lost a trial. The other point has not been answered by the plaintiff, and it is quite clear that upon giving notice of appearance the defendant was entitled to a copy of the declaration.

CHIPMAN, C. J. delivered the judgment of the Court:

If we look at the steps actually taken in this cause, it is evident that the judgment is irregular, because no appearance has ever been duly entered for the defendant before signing interlocutory judgment, by filing common bail, as required by law and the practice of the Court. The answer given to that is, that the defendant is estopped from denying that an appearance has been entered, because his attorney on the

10th

10th *December* last gave notice to the plaintiff's attorney that he had filed common bail and appeared for the defendant; and we think it would have been a sufficient answer, had the plaintiff's attorney proceeded in the ordinary course to deliver a copy of declaration to the defendant's attorney. He however objected to doing this because a copy had been left at the clerk's office for him, of which notice had been given; but consents to do it on certain conditions, which he alleges have not been complied with; and here there is some difference in the affidavits as to the understanding between the attornies: the defendant's attorney states that the plaintiff's attorney agreed to deliver a copy of the declaration, and he agreed to pay the costs thereof and of making out papers for interlocutory judgment, on a bill of such costs being delivered to him, but that he was never served with either declaration or bill: the plaintiff's attorney on the other hand admits that he agreed to deliver a copy of declaration, but that the defendant's attorney was to call for it on the *Wednesday* following, which he did not do. It must be observed that the notice of declaration served on the defendant does not state that any copy was left for him at the clerk's office, and that it is neither usual to do this nor to serve a notice of a declaration filed conditionally, and it would seem but reasonable that if the plaintiff's attorney determined on proceeding to enter up judgment before the copy of declaration was delivered to the defendant's attorney, he should ascertain that the proper steps had been taken to enable him to do so regularly. As this has not been the case, and the defendant swears there is a good defence on the merits, and no trial has been lost, we are of opinion that the judgment should be set aside, and the defendant let in to defend; but as there was evident *laches* on the part of the defendant in not appearing before the 10th *December* to a writ returnable at the previous *Michaelmas* term, and he has had the benefit of further time by the proceeding of the plaintiff's attorney in serving him with notice of declaration, and there may have been a misunderstanding as to the service of the copy of the declaration, we think the defendant should pay the costs of such copy, and of the interlocutory judgment; and that the costs of this motion should abide the event of the suit.

Rule accordingly.

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Where a defendant has given a confession of judgment for £50, he is estopped from requiring that summary costs should be taxed, although the sum really due and for which execution is to issue be under £20.

Semb. In an action on a promissory note originally over £20, but reduced by payments below £20, the proceeding ought to be summary, as the payment may be averred.

D. S. Kerr moved, pursuant to notice, for a rule on the clerk to review his taxation of costs in this cause, and to tax summary costs only. The action had been brought on a promissory note, which was originally given for thirty pounds, but reduced by payments endorsed thereon to about eighteen pounds, which was the whole amount due at the time the suit was commenced. The plaintiff had proceeded according to the ordinary practice. The defendant's attorney had given a confession of judgment for £50, the damages laid in the declaration, with leave to issue execution for £18 8*s.* 7*d.*, the amount actually due. The clerk had taxed full costs in the cause, and the defendant had obtained a summons from Mr. Justice *Carter*, calling on the plaintiff to show cause why the taxation should not be reviewed. Upon the hearing His Honor gave no decision in the matter, but directed the parties to apply to the Court.

Kerr in support of the motion. The act of assembly *(a)* regulating the summary practice in the Supreme Court, enacts, that when the total amount in demand does not exceed £20, the plaintiff shall proceed in a summary way. The total amount must be considered to be the sum actually due at the time the suit was commenced, which in this case being under twenty pounds, the plaintiff by the very terms of the act should have proceeded according to the summary practice, for otherwise the intention of the legislature will be entirely defeated. The defendant is as much entitled to the benefit of the statute as if the original amount of the note had been under £20; for the plaintiff by an averment in his declaration might have acknowledged the receipt of such a sum as would reduce the debt under that amount. This position is fully borne out by the authority in *Com. Dig. County Court*, (C. 8,) and is the course that is usually adopted in practice. When the sum recovered is under £20, the clerk should only tax summary costs, unless there is an order

(a) 4 *Wm.* 4, *c.* 41.

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of the Court to the contrary, and as there has been no order in this case, the taxation is wrong, and should be reviewed.

G. J. Dibblee opposed the motion, on an affidavit, stating among other things that the defendant's attorney had given a confession in the action for £50, the damages laid in the declaration, with liberty to the plaintiff to enter up judgment for that sum, on a certain day mentioned therein, unless the sum of £18 8*s.* 7*d.*, the balance of the debt due, should be sooner paid; and resisted the application on three grounds: first, the defendant has precluded himself from taking advantage of the amount due, being under £20, by giving a confession for £50; secondly, the plaintiff could not have proceeded in a summary manner in this case—he must have proceeded according to the ordinary practice, as the amount of the note was £30; it is true there was an indorsement, reducing the amount below twenty pounds, but he was still obliged to declare upon it as a note for £30, or there would have been a variance between the pleadings and the proof. [PARKER, J. Suppose the note had been reduced to five shillings? the principle would have been the same. You might have framed a declaration, averring that after making the note a payment was made upon it: it is very important that the point should be settled.] Thirdly, the defendant is too late in making his application. [CARTER, J. The application was made to me at chambers, and I referred the parties to the Court; no term has intervened, and I do not see that any delay has taken place.]

Kerr, in reply, was directed by the Court to confine himself to the first point. The defendant cannot be placed in a worse situation by giving a confession for £50 than by giving one for the sum actually due; the amount of damage is a mere form, and the usual practice is to insert in the confession the sum laid in the declaration. The case is clearly within the meaning of the statute, the sum in demand being only about £18; and this being the whole amount due at the time the action was commenced, it was the duty of the plaintiff to proceed according to the summary practice.

CHIPMAN, C. J. The party has estopped himself by the confession. Why could he not have given a confession for

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the sum actually due? There can be no objection to that. On this ground alone we think the motion must be dismissed, but without costs.

Rule refused.

Saturday, 6th February.

MARTIN, Survivor of GAY, *against* GILBERT.

The mere removal of goods by the tenant from the demised premises, when rent is in arrear, is not conclusive evidence of a fraudulent intent to prevent the landlord from distraining, although the effect of such removal may be to prevent the landlord from thus recovering the rent; in order to justify the landlord in pursuing them, it must appear that they were removed with a view to elude the distress; and it is a question for the jury, whether the removal is fraudulent within the act of assembly 50 Geo. 3, c. 21.

REPLEVIN for deals. Cognizance by the defendant, as bailiff of one *Humphrey Gilbert*, for £60, rent for one year ending 20th *June*, 1837, stating in the terms of the lease, that the plaintiff, and one *Gay*, deceased, for one year before and ending on that day held and enjoyed a certain saw mill and premises, as tenants to *Humphrey Gilbert*, under a demise, "at the yearly rent of £60, payable on the 20th *June in mer-* "*chantable deals, at the market cash price, at the said mill, to* "*be there delivered on the said premises, and if not so delivered,* "*the said Humphrey Gilbert to have the right to distrain and* "*sell for the recovery of the rent,*" and averring that the deals had been fraudulently removed from the demised premises to avoid a distress. There was a second cognizance for rent payable generally on the 20th *June*, and averring the goods to have been fraudulently removed to avoid a distress. The plaintiff to the first cognizance pleaded—1st. A tender of the rent in deals on the day the rent fell due, &c.; 2d. A tender of the rent in deals on the day, &c., and no subsequent demand; 3d. A readiness and willingness to pay the rent in deals on the day, &c.; 4th. A readiness and willingness to pay, &c., on the day, &c., and no subsequent demand; 5th. A traverse of the fraudulent removal: and to the second cognizance the plaintiff pleaded—1st. A traverse of the fraudulent removal; 2d. *Non tenuit;* 3d. *Riens in arrere:* on which respective pleas issue was joined. At the trial before *Carter*, J., at the last assizes for the county of *Kent*, a lease was put in, by which it appeared that the plaintiffs had been tenants to one *Humphrey Gilbert*, the father of the defendant, on the terms stated in the first cognizance. It was proved that on the day the rent became due the plaintiffs had a large quantity, from forty to sixty thousand feet, of deals

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deals at the mill, and proposed to survey off a sufficient portion of them to satisfy the rent, but did not set apart any deals for that purpose, nor did it appear that more than half the deals were merchantable. The testimony as to the market price was rather conflicting: one witness stated that deals at the mills were not worth more than £5 per thousand, cash, but several of them stated the value there to be £6 per thousand. The plaintiffs offered to deliver the deals to *Gilbert*, at 10*s.* per thousand less than they could get for them at the nearest adjoining place of shipment, but he declined to take them at any other price than what they would produce at auction at the mill, and stated that to be the only fair way he knew for ascertaining the market price. It was the opinion of some of the witnesses that the deals would have sold for a very small price by auction at the mill, and all agreed that selling by auction was not the ordinary way of ascertaining the market price. The plaintiffs afterwards removed all the deals from the mill, and rafted them down the river, and piled them in a public place at *Long's*, to whom they were indebted, and who told them that if the lumber was off the premises the landlord could only sue them as for a common debt; they worked at the deals on *Sunday*, and said they removed them because they were afraid the landlord would sacrifice them, by selling them at public auction at the mill. The defendant distrained the deals for the rent, and advertised them for sale at auction; at the time of the distress *Martin* offered the deals to the defendant, but he refused them; there were no deals left at the mill, and nothing left on the premises to satisfy the rent. The learned Judge, on these facts, told the jury that the tender of the deals had not been made out, but considering the point substantially in dispute to be, whether the goods were or were not fraudulently carried off the premises to prevent the lessor from distraining the same for the rent in arrear, left it to the jury to determine on the intent with which the goods were removed, directing them to find either for the plaintiffs or defendant according to the conclusion they came to in regard to that intent. The other issue also (not a very material one) as to the readiness and willingness of *Gilbert* to receive the

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the rent, was left to the jury, the learned Judge considering that that must depend upon whether the only mode pointed out by *Gilbert* for ascertaining the market price (namely, an auction sale at the mill,) was correct or incorrect. The jury found a verdict generally for the plaintiffs, damages one shilling.

In *Michaelmas* term last, *D. S. Kerr* obtained a rule *nisi* for a new trial, on the grounds that the verdict was against law and evidence; and contended, first, that admitting the pleas of tender proved, they were no answer to the lease, which by its terms required an absolute delivery of the deals on the premises at the day; an act to be done by the plaintiffs alone; that the rate ought to have been ascertained by the plaintiffs giving *Gilbert*, the landlord, previous notice to attend with his appraisers for fixing the market price at the time of delivery. *Gilbert*, on so attending, would have had a voice in the price—or on neglecting to attend, the plaintiffs might have ascertained the price by their own appraisers, and have delivered the quantity; by which, on the one hand, they would have been relieved from all subsequent risk of the deals so set out, and discharged of the rent; and on the other, *Gilbert* would have had the property vested in him, and could have taken the deals at any time. But, secondly, there was no evidence to support the pleas of tender; that the replications of readiness and willingness were bad, being no discharge of the requisition of the lease; that the weight of evidence was in favor of the fraudulent removal; and that the finding on the *non tenuit* and *riens in arrere* was clearly opposite to the evidence: citing 4 *Dow. & Ry.* 33; *Chit. Stat.* 669, and note (K); 2 *Kent's Com.* 492, &c.; *Chipman on Contracts*, 28. 33. 46. 83. 88. 110. 113.

Chandler, Q. C. now showed cause. There was not a fraudulent removal in this case; the deals were taken off the premises to avoid the sale by auction, and not to avoid the distress for the rent. The ordinary proof of fraudulent removal is taking the goods off the premises, and concealing them, but here the deals were rafted down the river in the ordinary way to the place of shipping, without any intention on the part of the plaintiffs of concealing them. The question

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of fraudulent removal was left to the jury, and they having negatived the fact, it cannot again be agitated. The plaintiffs having offered the deals to *Gilbert* at the market price, and he having refused them, they were not liable to a distress; the sale by auction could not establish the market price; the mere removal is not of itself fraudulent. The case of *Parry* v. *Duncan* (*a*) decides, that in order to justify the landlord in following the goods off the premises he must shew that they were removed with a view to elude the distress. In *John* v. *Jenkins* (*b*) it was held, that whether a removal was fraudulent, within the statute 11 *Geo.* 2, *c.* 19, although admitted at the trial by the tenant that the removal was to avoid a distress, was a question for the jury. The case just cited afforded much stronger evidence of fraud than the one before the Court, in which the fraud was negatived by the testimony that the goods were removed to avoid the sale by auction, and not to elude the distress. [The Court here stopped *Chandler*, and called on]

Kerr, in support of the rule. If the finding of the jury has been against evidence, the Court will grant a new trial; the issues of tender were not proved. [CHIPMAN, C. J. Then there must be a verdict for the defendant entered on those issues, as on the other issues not supported by the evidence.] But the plaintiffs have had the benefit of the evidence of them on the trial, as they were the main grounds on which they relied before the jury. [CHIPMAN, C. J. It would have been impossible to exclude that evidence at any rate.] By the terms of the lease the plaintiffs were to deliver the deals at the mill, and they should have given *Gilbert*, the landlord, timely notice that the deals would be appraised, and at such time set them out; had they done their duty in this particular, the deals at the time they removed them would have been *Gilbert's* property, whereas by their own wrong the property continued in them, and the removal has had the effect of depriving *Gilbert* of the only source he had for getting his rent. The plaintiff adopted no proper measures for ascertaining the rent, and the proposal by *Gilbert* to have the price found by sale at auction, was merely in the ab-

(*a*) 7 *Bing.* 243. (*b*) 1 *Cromp. & M.* 237

sence

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sence of the plaintiffs adopting the proper mode. [PARKER, J. The parties by the contract have not provided any mode of ascertaining the price. CARTER, J. There appears to have been a distinct offer to let the deals go at £5 15*s.* per thousand.] The question to be decided is the intention of the party in removing the goods off the premises; and there is clear evidence that it was done to avoid the distress. The deals were removed on the *Sabbath*, and the plaintiffs acted under the advice of *Long*, who told them that if the deals were off the premises, *Gilbert* could not distrain. In ordinary cases the landlord has another remedy when the goods have been removed from the premises. [CARTER, J. I left it to the jury, whether the deals had been removed to avoid the distress or the auction. PARKER, J. There is no doubt of the fact of removal; the question arises on the intent. It is not a question of law. The subsequent offer to pay was given in evidence under another distinct issue.] At the time of making the contract it was the intention of the parties that *Gilbert* should look to the deals for payment of the rent, and not to the lessees individually; but it would be useless to proceed against *Martin*, who is entirely insolvent. [CHIPMAN, C. J. That cannot alter the law.] The weight of evidence is in favor of the fraudulent removal, and the justice of the case appears to call for a new trial; in allowing which the parties might have leave to amend their pleadings, and come more fairly before the Court.

CHIPMAN, C. J. We should require very clear evidence of fraud to induce us to set aside a verdict where the case is one so purely for the consideration of the jury; and there does not appear to me to have been any such intention on the part of the plaintiffs in removing the deals off the premises. I think the jury in deciding that the deals were removed to avoid the auction sale, have put the true construction upon the act of the plaintiffs, and that there is no ground for sending the cause down again.

BOTSFORD, J. I think the difficulty here has arisen from the loose terms of the lease. The parties must have understood at the time that there was a cash price, but if it was to be ascertained by auction it would have been a mere nothing, and

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and it would have been a very tyrannical act on the part of the landlord, as he made no offer to accept the deals at any price. I think the verdict must stand.

CARTER, J. The lessor has brought all the difficulty upon himself by his own obstinacy. The lessees showed a disposition to pay the rent, and made fair offers, which *Gilbert* did not agree to. If the deals had been removed to avoid the distress, there is no doubt but *Gilbert* would have had a right to distrain upon them off the premises. The goods must be removed for the purpose of preventing the landlord from distraining. The question was properly left to the jury, and I do not think the evidence so preponderates in favor of fraud as to justify us in setting aside the verdict.

PARKER, J. I am not sure, considering what the effect of the removal has been and the time and circumstances which attended it, that I should have come to the same conclusion as the jury have; but the question as to the fraudulent intention was one for their consideration entirely, and was properly left to them. This cause was tried before me at a former circuit, and I left it to the jury in the same manner as Mr. Justice *Carter* has since done, considering that there were two ways of viewing the plaintiff's conduct, and it was for the jury to say whether the deals were removed in order to elude a legal distress or merely to prevent their being disposed of at an illegal sale. The jury could not then agree, and possibly might not if the case were again sent down.

Rule discharged.

HENRY *against* MURPHY.

Monday, 8th February.

Until the general rule of the present term, the mode of proceeding against a sheriff when out of office for not bringing in the body of a defendant, was by *distringas*, and not by attachment; tho' the practice has been otherwise in England, since the rule of King's Bench, Trin. term, 31 G. 3.

IN *Michaelmas* term last, *Thompson* moved, pursuant to notice, for an attachment against *Colin Campbell*, Esquire, the late sheriff of *Charlotte*, for not bringing in the body of the defendant in obedience to a rule of this Court, which had been granted for that purpose, and duly served on the said late sheriff.

Campbell

1841.

HENRY *against* MURPHY.

Campbell contra, showed cause on affidavits, by which it appeared that the *capias ad respondendum* in the cause had been placed in the hands of one *John Campbell*, the deputy sheriff, by the plaintiff, who requested and procured the said deputy to depute one *Joseph Stewart*, who arrested the defendant in the presence of the plaintiff; that on such arrest two persons were offered as bail, of whom the plaintiff especially and fully approved, when they executed the bail bond in the usual way, and the defendant with the approbation of the plaintiff was discharged; that the bail to the sheriff having put in special bail, the plaintiff excepted to them, and they refused to justify; and it was accordingly contended, that as the deputation, the arrest, the bail to the sheriff, and the discharge of the defendant, had all been done at the request and with the full approbation of the plaintiff, he had not a right to have recourse on the sheriff.

Thompson in reply, contended that the grounds urged afforded no answer to the application. The sheriff having made a return of *cepi corpus* to the writ, was bound to produce the body or that the special bail should justify.

Cur. adv. vult.

Judgment was now delivered by

BOTSFORD, J. This is a motion for an attachment against *Colin Campbell*, Esquire, late sheriff of the county of *Charlotte*, for not obeying the rule to bring in the body of the defendant. This mode of proceeding against a sheriff who is out of office is irregular. The former practice of the Queen's Bench was to proceed against a sheriff when out of office by *distringas;* and it was not until the rule of *Trinity*, 31 *G.* 3, was made, that he could in such case be ruled to bring in the body. This rule does not extend to, nor has it been adopted by, this Court. To compel a sheriff when out of office to bring in the body, the practice of this Court is to proceed against him by *distringas*, and not by attachment.

Rule refused. *(a)*

(a) See *Rex* v. *Sheriff of Middlesex*, 6 East. 606; *King* v. *Adderley*, 2 Doug. 463; *Meekings* v. *Smith*, 1 H. Bl. 629. See also the General Rule of this Term.

1841.

THOMSON and WIFE, Administratrix of *John M'Master*, deceased, *against* ALLANSHAW.

An administrator will not be relieved from his liability to the payment of costs, under act 7 Wm. 4, c. 14, s. 23, where he moves, not on matters appearing at the trial, but upon affidavits which are sufficiently answered by the defendant.

Semb. The act extends only to cases in which executors or administrators were before that act exempted from the payment of costs.

THIS was a special action on the case, alleging that prior to the appointment of the plaintiff to the administration of the estate of *John M'Master*, the defendant had been irregularly appointed administrator, and such appointment afterwards revoked; but that before such revocation the defendant had wrongfully and fraudulently disposed of a certain part of the assets of the intestate to his own use; plea, the general issue. On the trial before *Parker*, J. at the *Charlotte* circuit, in *November* 1840, the plaintiffs having made out a *prima facie* case, the defendant clearly showed on his evidence that the intestate and he were partners in trade, and that the assets so disposed of were always treated as partnership property, and were required to pay the partnership debts: upon which the plaintiffs submitted to a nonsuit.

Thompson now moved, pursuant to notice, for a rule to exonerate the plaintiffs from payment of costs, under the act of assembly, 7 *Wm.* 4, *c.* 14, *s.* 23, upon affidavits, setting forth the necessity under which the plaintiffs felt of bringing the action in order to get possession of the assets of the deceased, and that they were designedly kept in ignorance of the circumstances of the intestate's estate by the defendant, and refused access to the proper means of information.

The *Solicitor General* opposed the motion, on affidavits, which in the opinion of the Court formed a clear answer to those of the plaintiffs; and the motion was dismissed, but without costs, as this was the first application under the act.

PARKER, J. expressed his opinion that the plaintiffs would have been liable to costs before the late act, the cause of action having altogether arisen since the death of the intestate; and he referred to *Spence* v. *Albert (a)*, in which it was decided that the discretionary power of the Court in regard to costs under *Stat.* 3 & 4 *Wm.* 4, *c.* 42, (from which our act is copied,) extends only to cases in which executors were before the enactment exempted from the payment of costs.

(a) 2 *Ad. & E.* 785.

1841.

BOYD *against* M'LAUCHLAN.

Monday, 8th February.

Declaration in assumpsit on the common counts. *Plea*, admitting the sum of 526*l.* 12*s.* 4*d.* to have been due to the plaintiff, avers that for that sum the defendant, at St. Andrews in this Province, drew his bill of exchange on one C. M., payable to the plaintiff, which was delivered to plaintiff, and by him received and accepted *for and on account* of the sum so due. *Replication*, that after the bill of exchange was so received and before it became due and payable, the plaintiff sent the same by a vessel, of which the said C. M. was master, addressed to the plaintiff's agent in the West Indies, for the purpose of being presented on the said vessel's arrival, but that the vessel foundered at sea on her passage out, whereby the said C. M., the drawee, perished, and the bill of exchange was destroyed and lost, and the plaintiff was unable te present the same, and the same remains wholly unpaid.

THIS was an action of assumpsit. The declaration contained the common counts, 1st. For work and labour, goods &c. sold and delivered, money paid, &c., had and received, and interest; 2dly. The count upon an account stated. Pleas: 1st. General issue; 2dly. *Actio non*, because as respects all the said several sums of money in the declaration mentioned, except the sum of £526 12*s.* 4*d.* parcel, &c., *non assumpsit* and conclusion to the country; and as to the said sum of £526 12*s.* 4*d.*, parcel, &c. the defendant said that after the making of the said several promises, &c., and before the commencement of the suit, an account was stated and settled between the parties respecting the said several sums of money, and upon that accounting the defendant was found to be indebted to the plaintiff in the sum of £526 12*s.* 4*d.*, for which sum the defendant, according to the usage and custom of merchants, made his certain bill of exchange, and directed the same to one *Colin M'Lauchlan*, by which he required him to pay the plaintiff, or order, the said sum of £526 12*s.* 4*d.*, ten days after sight thereof, for value received; that the defendant delivered the bill of exchange to the plaintiff, who then and there received and accepted it *for and on account* of the said sum of £526 12*s.* 4*d.* Verification. 3d plea, same as the second, except that the third plea

Special Demurrer, assigning for causes, that the plaintiff's remedy for the original debt was lost by his taking the bill of exchange, and was not restored by the destruction and consequent non-payment of the bill as set out in the replication; that the facts stated in the replication were immaterial; that after receipt of the bill the liability for the original debt was only a secondary liability, and the plaintiff's primary remedy was against the personal representative of the drawee; and that the remedy, if any, against the defendant, was in equity only.

Held, that the replication was not defective for any of the causes assigned, but afforded a sufficient answer to the plea:

Held also, that another plea, which averred that the bill of exchange (as above described) was accepted and received by the plaintiff in full satisfaction and discharge of the sum due; and that *afterwards* the drawee on sight *accepted* the said bill of exchange, and became liable to pay the same according to his acceptance, was bad, upon *special demurrer*, for duplicity, as alleging two separate and distinct grounds of defence admitting of different replies.

alleged

alleged that the plaintiff accepted and received the bill *in full satisfaction and discharge* of the said sum of £526 12*s.* 4*d.*, and that the drawee afterwards accepted the bill, and became liable to pay it, according to his acceptance. 4th plea, substantially the same as the second. To the second plea the plaintiff replied, that the bill of exchange before it became due and payable was sent by him on board a certain vessel, of which the said *Colin M'Lauchlan*, the drawee, was master, addressed to the plaintiff's agent in the *West Indies*, for the purpose of being presented upon the arrival of the vessel at her port of destination; but that she afterwards, and before reaching it, foundered at sea, and the said *Colin M'Lauchlan* perished in her, whereby the said bill of exchange was destroyed and utterly lost, and it was therefore out of the power of the plaintiff to present it to the drawee, and that it had not been paid to the plaintiff. Replication to the 4th plea the same as the second plea, with a verification. To the 3d plea a special demurrer, assigning for causes, that the defendant had in and by his third plea, stated two separate and material points of defence to the plaintiff's demand, viz. that the bill of exchange in the said plea mentioned was accepted and received by the plaintiff in full satisfaction and discharge of the said sum of £526 12*s.* 4*d.*, which of itself was an answer to the demand of the plaintiff; and also that the bill was afterwards accepted by the drawee, which is also a sufficient *prima facie* answer, and thus two points were involved in one plea, either of which would, if unanswered, be a good defence in law; but the plaintiff was precluded from replying to each separately, as he would have done had the same matters been presented in two distinct pleas, but was now obliged to confess one or the other, as he could not answer both in the same replication. The defendant joined in demurrer. The defendant demurred specially to the replications, to the second and fourth pleas, and set forth the following causes: 1st. That the plaintiff having admitted by his replications to the second and fourth pleas he received the bill of exchange for the balance due upon the account stated, his remedy, if any, was upon the bill itself, and the destruction or loss of it under the circumstances declared did not give

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the plaintiff a right to resort to the common counts, and recover for the consideration of the bill. He ought to have declared upon the bill. 2dly. That the replications to the second and fourth pleas tend to the production of immaterial issues, viz. whether the bill of exchange was destroyed or not, a question of fact in the present state of the pleadings wholly unimportant in whatever way found. 3dly. That the liability of the defendant upon the bill of exchange is a secondary liability only, growing out of the relation subsisting between the parties, that of the drawer on the one hand and payee on the other, and the destruction or loss of the bill in question did not make this secondary liability attach upon the defendant. It was the plaintiff's misfortune. 4thly. That if the plaintiff were permitted to recover against the defendant upon the common counts, upon the destruction of the bill, it would enable him at his own option, and without the concurrence of the defendant, to rescind the contract which the law created or implied between them upon the drawing and delivery of the bill of exchange. 5thly. That upon the destruction or loss of the bill and the death of the drawee, it was the duty of the plaintiff to have made application to the personal representative of the drawee for payment, and upon his refusal to have notified the defendant; but it is not stated that this was done. 6thly. That the plaintiff's remedy is in a court of equity and not in a court of common law, and also that the replications are in other respects informal, &c. The plaintiff joined in demurrer.

R. M. Andrews for the plaintiff. The third plea is defective, for the reasons set forth in the demurrer. Every plea should consist of one distinct traversable point or ground upon which a material issue can be taken, but the defendant by the present mode of pleading compels the plaintiff to admit the receipt of the bill of exchange in payment of the plaintiff's demand, or that the bill was accepted by the payee, either of which admissions would be a *prima facie* answer to the plaintiff's action, or force him to take issue upon both allegations, which would expose the plaintiff's replications to the objection of duplicity.

J. W. Chandler for the defendant, said the plaintiff's objection

objection at these was a mere matter of form, and if the Court thought there was any thing in the objection, he would move to amend, particularly as the grounds of defence were covered by the second and fourth pleas. [*Per Curiam.* The better course will be to amend the plea, or perhaps strike it out altogether, as the two grounds of defence which are joined together in this plea, are separately pleaded in other pleas. You had better now proceed to your demurrers to the replications.] The first question here is, can the plaintiff recover upon the common counts which include the consideration of the bill, or should he not declare upon the bill itself. It is conceived that no case can be found which decides that the payee of a bill of exchange may upon the destruction of it proceed against the drawer and recover upon the common counts. In fact the law cannot be so, and for this very obvious reason, the liability of the drawer of a bill is a secondary and not a primary liability like that of the acceptor or the maker of a promissory note. Now it is alleged in the replications to the second and fourth pleas that the bill was destroyed, and upon this ground simply the plaintiff contends that he is entitled to recover upon the common counts; but the course of a payee of a lost or destroyed bill is well understood. He ought to call upon the personal representative of the drawer, if he should have any, if not, then at his house or last known residence, and give notice to the drawer. *Chitty on Bills (a)*, *Thackray* v. *Blackett (b)*. [PARKER, J. Is not this analogous to the case of a party losing a check?] Probably it is so. If the plaintiff, therefore, upon the mere destruction of the bill could resort to the common counts, and recover for the consideration, the obligation created by the drawing and delivery of the bill would be avoided; indeed the plaintiff might by his own act get rid of the responsibility of calling upon the drawer or of giving him notice by procuring the bill to be destroyed. In the case of *Rolt*, assignee of *Welsford*, a *bankrupt*, v. *Watson (c)*, which will no doubt be cited on the other side, the defendant had *accepted* a bill, payable at three months, for the amount of goods he

(*a*) 389, *8th Edit.* (*b*) 3 *Camp.* 164 (*c*) 4 *Bing.* 273.

had

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had purchased; the seller lost the bill, and not having endorsed it, and became bankrupt, no demand was ever made on the defendant in respect to the bill; the Court held the acceptance of this bill was no defence to an action for the value of the goods; but it is to be observed that this was an action against the *acceptor* of the bill, the party *primarily* liable; there were but two parties to this bill, the drawer and acceptor. *Powell* v. *Roach et al (a)*, was an action by the indorsee against the indorser, the plaintiff declared upon *the bill itself;* it was held to be a good defence to the action on the bill that it was not produced, or shown to be lost or destroyed, though the party promised to pay it. *Dangerfield* v. *Wilby (b)*, is a case in which Lord *Ellenborough* held that the plaintiff could not resort to the common counts without showing a destruction of the note; this however was an action by the payee against the maker of a promissory note, the person primarily liable. It certainly is not necessary to declare upon a promissory note as between payee and maker, it is admissible as evidence of money paid, even before the statute 3 & 4 *Anne*, *c.* 9, which enabled the plaintiff to declare upon the note; and that statute did not alter the rule, but supplied only an additional concurrent remedy. In the case of *Pierson* v. *Hutchinson (c)*, which was an action by the payee against the acceptor, Lord *Ellenborough* says, "If the bill were proved to be destroyed, I should feel no "difficulty of receiving evidence of its contents, and direct- "ing the jury to find for the plaintiff." Here, however, the action was upon the bill itself. The plaintiff's remedy then in this case is in a court of equity, which has the power to order an indemnity to such an extent as it may think proper, and make such decree as will afford an adequate remedy to the plaintiff, and full security to the defendant.

R. M. Andrews for the plaintiff. The bill of exchange having been destroyed, it never can rise in judgment again against the defendant; and that is the ground upon which *Best*, C. J., puts the decision of the cause *Rolt*, assignee of *Welford*, v. *Watson (d)*. In all cases in which a defendant

(*a*) 6 *Esp. R.* 76. (*b*) 4 *Esp. R.* 159. (*c*) 2 *Camp. Rep.* 211.
(*d*) 4 *Bing.* 273. See also *Chitty on Bills*, 197; *Moody & Watkin's Rep.* 517.

has

has been holden to be discharged in respect of a supposed liability on a bill, the bill has been in such a state as to be likely used against him. That is not the case here, for the bill is destroyed. And this is also an answer to the argument on the other side as to the presentment. How could a presentment be made of an instrument which had no existence. [PARKER, J. Why did you send this bill to sea? There is no ground alleged in your replications to justify such a proceeding. Why did you not present it to the drawee before he sailed on his voyage?] It was expressly agreed by both parties that it should be sent to the *West Indies* to the plaintiff's agent, in order that he might receive the proceeds there. [PARKER, J. The replications do not set out any such agreement.] No objection is made on that head, the only question here is whether the bill be destroyed or not; if so, this case falls clearly within the principle of *Rolt* v. *Watson*, already cited.

Cur. adv. vult.

In this term, the Judges delivered their opinions as follow:

BOTSFORD, J. This was an action of assumpsit for work and labour, goods sold and delivered, money lent and advanced, money paid, money had and secured, account stated. Pleas: 1st. General issue; 2d. That an account was stated aad settled by and between the plaintiff and defendant, of and concerning the several sums of money in the declaration mentioned; and upon such accounting the said defendant was found in arrear, and indebted to the plaintiff, in the sum of £526 12*s.* 4*d.*; for which said sum the defendant on the 7th day of *January*, 1839, at *Saint Andrews*, "made his cer-"tain bill of exchange in writing, and directed the same to "one *Colin M'Lauchlan*, and thereby and then required the "said *Colin M'Lauchlan* to pay to the said *James Boyd*, or "his order, ten days after sight, the said sum of £526 12*s.* "4*d.* for value received; and the said *John M'Lauchlan* then "and there delivered the said bill of exchange to him, the "said *James Boyd*, who thereupon and then and there re-"ceived and accepted the same for and on account of the "said sum of £526 12*s.* 4*d.* so due from him, the said

"*John*

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Boyd *against* M'Lauchlan.

"*John M'Lauchlan*, to the said *James Boyd*, upon the state-"ment and settlement of the said accounts," with a verification. 3d plea stated, that the bill of exchange was received by the plaintiff in full satisfaction and discharge of the said sum of £526 12*s.* 4*d.*, and then went on to state further, "that the said *Colin M'Lauchlan* afterwards, to wit, "on the same day and year aforesaid, at *Saint Andrews* "aforesaid, upon sight thereof, accepted the said bill of ex-"change, and by means whereof, then and there became "liable to pay to the said *James Boyd* the said sum of "money in the said bill of exchange specified, according to "the tenor and effect thereof, and of his said acceptance," with a verification. 4th plea the same as the second, with the exception that it is limited and confined to the sum of money in the first count of the declaration for goods sold and delivered. The plaintiff in his replication to the second plea, stated, that after he had received the said bill of exchange, "he sent the same by a certain brig or vessel, called the "*Frederick*, of which the said *Colin M'Lauchlan*, the "drawee, was master, addressed to his, the said plaintiff's, "agent in the *West Indies*, for the purpose of being presented "so soon as the said vessel arrived at her port of destina-"tion, but that the said vessel afterwards, and before reach-"ing such destination, foundered at sea, and the said *Colin* "*M'Lauchlan* perished in the said vessel, whereby the said "bill of exchange was destroyed, and became and was utterly "lost to the said plaintiff, and it became and was entirely "out of the power of the said plaintiff or his agent, to pre-"sent the same to the said *Colin M'Lauchlan*, and the same "never was, nor has been, paid to the said plaintiff," with a verification. The like replication to the fourth plea. The plaintiff demurred specially to the third plea; joinder in demurrer. The defendant demurred specially to the second and fourth replications; joinder in demurrer.

On the argument, the counsel for the defendant may be said to have abandoned the third plea, it being clearly ill for duplicity. In support of the demurrer to the second and fourth replications it was contended, on the part of the defendant, that the plaintiff having admitted that he had received

received the bill of exchange for the balance due upon the account stated, his remedy was upon the bill of exchange; that the destruction and loss of it under the circumstances as stated, did not give the plaintiff a right to have recourse to the common counts, and none on the original demand for which the bill of exchange had been given. The case as presented to us by the demurrer to the replications is not without difficulty, as there is no one to be found in the books similar in its facts. It having, however, been admitted by the pleadings that the bill of exchange had been sent by the plaintiff to his agent in the *West Indies*, in a vessel of which *Colin M'Lauchlan*, the drawee, was master, for the purpose of being presented to him on the arrival of the vessel at her port of destination; that the said *Colin M'Lauchlan* perished, and the said bill of exchange was destroyed and utterly lost in the vessel, which foundered at sea on the voyage. It seems to me that the circumstances are such as to bring this case within the authority of *Rolt* v. *Watson* (*a*). In that case the purchaser accepted a bill for the amount of the goods he had purchased, which the seller lost, not having indorsed it. In an action to recover the value of the goods, the verdict was for the plaintiff; on motion to set it aside, on the ground that the defendant having accepted a bill for the amount of goods, which had not been dishonored, he was not liable to an action for the goods, *Best*, C. J., said, "The "question for us therefore is, whether the bill which the de- "fendant in this case has accepted be an instrument which "can ever rise in judgment against him. In all cases in "which a defendant has been holden to be discharged in "respect of a supposed liability on a bill, the bill has been "in such a state as to be likely used against him." Now in the present case the bill was lost on its transmission from the plaintiff to his agent; it had not been accepted by the drawee, nor had it been indorsed by the plaintiff; it therefore never can rise in judgment against the defendant; it never can be used against him. I am therefore of opinion, that the bill was not an extinguishment of the original demand of the plaintiff; that judgment be for the plaintiff.

(*a*) 4 *Bing.* 273.

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CARTER, J. This case presents two demurrers; one by the plaintiff to the defendant's third plea, and one by the defendant to the replications to the second and fourth pleas. The third plea states that on an accounting between the plaintiff and defendant, the defendant was found to be indebted to plaintiff in the sum of £526 12*s.* 4*d.*, for which sum he gave the plaintiff a bill of exchange, drawn on one *Colin M'Lauchlan*, payable to the plaintiff or his order ten days after sight, which bill the *plaintiff received in full satisfaction and discharge of the said sum of* £526 12*s.* 4*d.* The plea then goes on to state that afterwards *Colin M'Lauchlan*, the drawee, accepted this bill. This plea is demurred to on the ground of duplicity—that it gives two distinct answers to the plaintiff's demand: 1st. That the bill was received by the plaintiff in full satisfaction and discharge of his demand; and 2dly. That it was accepted by the drawee; and on this demurrer I think there must be judgment for the plaintiff, unless the defendant applies to amend this plea. Two facts are stated in this plea, one of which, viz. the taking the bill by the payee in full satisfaction and discharge of the debt, is an absolute defence; and the other, viz. the acceptance of the bill by the drawee, is a qualified defence, which would require as an answer that the bill was not paid, reasonable care and diligence having been used by the plaintiff to procure payment thereof. With respect to the demurrer to the replications to the second and fourth pleas, the facts set out in these pleadings having been already stated, I will not repeat them. The second and fourth pleas differ from the third in merely stating that the bill was taken *for and on account of the debt*, and not *in full satisfaction and discharge thereof.* It presents therefore the common case of a debtor giving his creditor a bill of exchange for the amount of his debt. Such taking of a bill of exchange is only a *prima facie* satisfaction of the debt, and prevents his recovering for his original debt, unless he shows that the bill has been dishonored, that it was a void instrument, as for being on a wrong stamp, or *that it has been destroyed.* See *Chitty on Bills*, 97 *a.* In the case of *Chamberlyn* v. *Delarive (a)*, the

(a) 2 *Wilson*, 353.

Court

Court says, "The plaintiff by accepting a note or draft undertakes to be duly diligent in trying to get the money of the drawee, and to apprise the drawer if the drawee failed in payment." And undoubtedly that duty of reasonable diligence is always imposed upon the holder of a bill or note. On the pleadings to which these demurrers apply nothing like *laches* on the part of the plaintiff appears, and had that been so, it should have been rejoined by the defendant. It does appear, however, that the amount can never be recovered from the drawee or any person, on the bill itself, that both the drawee and the bill have perished at sea, that the plaintiff can never recover his debt by virtue of the bill, nor can the bill, to use the words of Chief Justice *Best*, in *Rolt* v. *Watson (a)*, "ever rise in judgment against the defendant." No liability of any sort can arise on the bill itself; and I therefore think it is quite in accordance with the law of decided cases, and with the principles of justice, that the plaintiff should be able to revert to his original demand. I am of opinion on these demurrers also there should be judgment for the plaintiff.

PARKER, J. I shall make no observations on the demurrer to the third plea, as I considered that the defendant's counsel acquiesced in the suggestion of the Court that the plea should be either abandoned or amended, but shall proceed at once to the demurrer to the replications. The plaintiff declares on the common counts, including the account stated. The defendant by his second plea admits that he accounted with the plaintiff, and was found indebted to him in the sum of £526 12*s.* 4*d.*; but alleges that for this sum he drew a bill of exchange in favor of the plaintiff on one *Colin M'Lauchlan*, payable ten days after sight, which he delivered to the plaintiff, and the plaintiff accepted and received *for and on account of the debt;* the plea is silent as to the residence of the drawee and as to the place of presentment or payment. The plaintiff replies in substance as follows: *True it is I did accept and receive the bill on account of the debt you owe me, but* Colin M'Lauchlan, *the drawee, was master of the brig* Frederick; *and I sent the bill to my agent*

(a) 4 *Bing.* 273.

in

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in the West Indies *by the said brig, in order that the bill might be presented to the drawee as soon as the vessel reached her port of destination, but the brig perished at sea on the said voyage, and never reached her port of destination, and both the bill and the drawee were lost and destroyed, so that I could not get payment of the bill.* The defendant does not rejoin any new facts, but demurs specially. The replication is certainly not drawn with much care, for it does not state, except by inference, the place where the vessel was bound for, nor any agreement as to the transmission of the bill, or notice of its loss; but neither of these mattes are assigned as grounds of demurrer, so I must suppose the defendant did not consider them valid objections. Before examining the grounds which have been assigned, I will remark that the plea does not allege that the bill of exchange was given, or accepted and received *in satisfaction of the debt*, but merely *for and on account of the debt;* and there is nothing on the record to show any liability of a third person for the payment of the sum, nor any loss to the defendant or liability to loss on account of the non-presentment of the bill. Under these circumstances the rule to be drawn from the various cases on the subject, some where the pleadings are special and some on the general issue only, seems clearly this, that the taking of the bill not operating as a payment or satisfaction of the debt when it was received, could only become so from subsequent circumstances; either—first, that the bill has been paid; second, that it has *not* been paid by reason of the *laches* of the holder; or third, that after its dishonour for want of due notice to the defendant or some other act or default in the holder, the defendant has been deprived of some advantage or remedy to which the law entitled him, and that therefore it must be concluded that the plaintiff elected to hold the bill in satisfaction of the debt. *Dangerfield* v. *Wilby (a)*, *Champion* v. *Terry (b)*, *Tapley* v. *Martens (c)*, *Drake* v. *Mitchell (d)*, *Everett* v. *Collins (e)*, *Marsh* v. *Pedder (f)*, *Smith* v. *Ferrand (g)*, *Robinson* v. *Read, (h)*, *Rolt* v. *Watson (i)*.

(*a*) 4 *Esp.* 159. (*b*) 3 *B. & B.* 295.
(*c*) 8 *T. R.* 451. (*d*) 3 *East.* 252.
(*e*) 2 *Camp.* 515. (*f*) 4 *Camp.* 257.
(*g*) 7 *B. & C.* 19. (*h*) 9 *B. & C.* 449. (*i*) 4 *Bing.* 273.

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It is upon the second of the above grounds that the defendant must rest, if any, and I will here repeat that the receipt of the bill as pleaded, does not show *an extinguishment of the debt*, but works only a *suspension of the remedy* to recover that debt until the bill is accounted for. Now the bill has not changed hands, neither has it involved the responsibility of any other person; it has not merely been lost, but absolutely destroyed in the hands of the original party. The grounds of demurrer assigned are in effect as follow: 1st. The plaintiff by taking the bill of exchange on account of his debt, lost his remedy for the original debt, and could only resort to the bill of exchange.—This is certainly not true, as an abstract proposition, nor supported by any of the cases. 2d. The loss and destruction of the bill are immaterial, and cannot restore the right of action lost by taking the bill. 3d. Liability of the defendant was changed from a primary to a secondary liability by the plaintiff's receiving the bill, and the loss of the bill was his misfortune, and cannot affect the question.—The second and third grounds evidently depend on the correctness of the proposition contained in the first. If the taking of the bill was not an extinguishment of the first debt, the primary liability remains, though there may be a *suspension of the remedy* until the bill is accounted for; and then the question arises whether the fact of the bill having been neither paid nor negotiated, and incapable of being so, and this, without any charge of *laches* against the holder, does not remove the suspension. 4th. The replication shows a suspension of the contract, without defendant's consent, which the law created or implied on the delivery of the bill of exchange.—How so? The receipt of the bill did not extinguish the debt, but merely required the plaintiff first to seek payment through the bill, which he has done. It is an averment of *laches*, or nothing, but *laches* are not necessarily made out. The defendant does not specify that the transmission of the bill to the *West Indies* was *laches*, or that payment could be received without that having been done. 5th. Application ought to have been made for payment of the bill to the personal representative of the drawee, and on his refusal notice given to the defendant; and these facts

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facts averred.—The answer to this is, that there is no bill to produce to the representative, no liability in him, and in fact nothing on the record to show there is any personal representative. The last ground, that the remedy of the plaintiff is in equity, is already sufficiently answered : it amounts to nothing more than an assertion that the plaintiff has a remedy in equity, and not at law. These are the only grounds assigned on the special demurrer, and if the defendant intended to rely on any others, he was bound by the rule of Court (*a*) to have stated them.

This case stands clear of all the decided cases in *England* in which a bill of exchange has been held to be a satisfaction, for the following reasons, viz. : There has been no negotiation nor acceptance of the bill ; there is no existing liability nor chance of any future liability, on account of the bill, either of defendant or any other person ; it does not appear that the defendant has been in any manner damnified by reason of the bill, nor that he will be ; he has lost no remedy for any effects he might have in the drawee's hands ; the drawing of the bill might show an intention to appropriate such effects, if any, to the specific purpose of meeting this bill ; but not having been presented for acceptance, and the plaintiff having no right of action whatever against the drawee's representatives, the effects can only be recovered by defendant.

If by any *laches* of the plaintiff, defendant has lost these effects, or been otherwise damnified, such not being apparent on the record as it stands, should have been shown by rejoinder. We cannot presume *laches*, and a loss consequent on such *laches*. If the defendant has suffered at all for any thing appearing on the record, it must have been by sending the bill away on board the vessel whereby it was lost, by not presenting for acceptance at *Saint Andrews*, or by not giving timely notice of the loss ; but no objection is made on these grounds, as I have before mentioned. I cannot think that the replication is bad on any of the grounds assigned. The demurrer to the replication to the fourth plea stands on precisely the same grounds ; and on these two demurrers there must be judgment for the plaintiff. I also quite agree in

(*a*) *T. T.* 3 *Vic.*

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thinking there must be judgment for the plaintiff on the demurrer to the second plea, if we are called on to give an opinion.

Judgment for the plaintiff on all the demurrers.

LINTON *against* WILSON.

Monday, 8th February.

THIS was an action on the case for an injury to a saw mill and a grist mill. The first count stated that the plaintiff was possessed in his demesne as of fee of one-ninth undivided part of certain lands and premises, and of, in, and to a certain saw mill and grist mill in the parish of *Saint George* in the county of *Charlotte;* that the defendant was also seised, &c., of five-ninths of the said premises; that the defendant on the 21st *June*, 1837, wrongfully, &c., cut away, broke down, &c., a great part of the dam, and took out of the saw mill the saws with the wood and iron work, and broke down and destroyed the grist mill, and the flooring covering the iron work and timber to it, and carried away, &c. 2d count was for injury done on 16th *September* following to the saw mill and dam (omitting grist mill). 3d count same as the first, with the exception that it stated that one *John M'Keen* was tenant, and that the injury was done to the reversionary interest, &c. 4th count same as the second, with the like exception, that *John M'Keen* was tenant, &c. Plea, not guilty. On the trial before *Botsford*, J., at the *October* assizes for *Charlotte* county, 1839, the principal facts appeared to be these: One *Aaron Linton*, who was seised in fee of the premises in question, died intestate in *August*, 1827, leaving the plaintiff, his widow, and eight children; the plaintiff subsequently purchased all the right

In an action on the case in the nature of waste between two tenants in common, the damages must be confined to the actual injury done to the premises, and to such a proportion thereof as the plaintiff's undivided share of the premises bears to the whole estate. The saws, water wheel, and mill gear, fixed in a saw mill, and the cog wheel of a grist mill, the property of two or more tenants in common, are a part of the inheritance, the damaging, or taking away of which, except with the intent to repair or replace them, is in the nature of *waste;* for which one tenant will be answerable to his co-tenant.

In making out a title under a sheriff's deed of real property seized in execution, the original *fi. fa.* when not returned to the Court is admissible, and the same effect will be given to it under the act 4 Wm. 4, c. 22, as to an exemplification of such writ.

The *fi. fa.* was for £47 2*s.* 9*d.*, and the judgment upon which it was founded for £46 11*s.* 9*d.* only: Held, that this variance would not defeat the sale made under such execution, on the ground that the execution was not warranted by the judgment; no question being made at the trial as to the execution having in fact issued upon the judgment.

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and title of one of her sons, *Joseph Linton*, being one ninth part of the lot and mill, under a sheriff's sale, supported by an exemplification of the judgment for £46 11*s.* 9*d.*, and the original execution which was for £47 2*s.* 9*d.*, as also a deed from the sheriff bearing date 15th *November*, 1834, for the consideration of £57, without any assignment of dower being first made, and continued in the possession of the whole of the premises from the death of her husband to the time of the alleged injuries. In 1835 and 1836 the plaintiff leased the grist mill to one *John M'Keen*, for the yearly rent of £150, and in 1837 leased the same to *M'Keen* from the 1st *June* to the end of the sawing season for £80. It appeared that the defendant became seised in fee of five shares of the said lot and mills by purchase from some of the children, and of *Aaron Linton;* to get possession of which he, the defendant, was obliged to bring an action of ejectment against the plaintiff, and obtained judgment in *Hilary* term, 1836. On this judgment a writ was sued out, and under which the defendant was put in possession of the mill and premises by the sheriff of *Charlotte* in *July*, 1837. On taking possession of the mills the defendant broke the cogs of one of the spiral mill wheels, took out and carried away the saws, and cut away a part of the waste way of the dam. Soon after this one *Thomas Linton*, a son of *Aaron Linton*, repaired the dam, replaced one saw, and continued to work the mill until the *September* following, when the sheriff again put the defendant in possession of the mill and premises under and by virtue of the same writ of possession. At this time the defendant, on taking possession, took out the saws, unshipped the water wheel, took out the crank, removed the iron straps that held it, and carried the saw, crank, and straps, and the iron work, away; the water wheel drifted away with the stream, and was lost. It appeared that the grist mill never had been in operation after the cogs had been broken, and the saw mill was never worked after taking away the saws and crank. No attempt was ever made by the defendant to repair the mills until *September*, 1838, about two months before the trial, when he put the mill in a better condition than it was before. It was likewise proved that the plaintiff had said

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said that the defendant should never have any part of the property. It was proved on the part of the plaintiff, that the expenses for repairing the waste way of the dam, and of replacing the saws, crank, and water wheel, would have amounted to from £30 to £45. The grist mill was worth about £20 for the year. It was objected by the *Solicitor General* at the trial, that this was not an injury in point of law for which one tenant in common could maintain an action against another, as the damage was to the mill gear—personal and not real property—and that there was no exemplification of the execution sufficient to establish the plaintiff's claim under the judgment, and no evidence of an execution, the one put in not corresponding with the judgment in point of amount. The learned Judge overruled the objection, and told the jury that they were to consider whether the injury complained of was done for any *bona fide* purpose; that if they believed the witnesses they should find for the plaintiff; and on considering the damages they might estimate them according to the rent paid, and might also consider the intention of the defendant as to breaking the cogs, &c. The jury found for the plaintiff, damages £33 5*s.* 9*d.*

In *Hilary* term last, the *Solicitor General* obtained a rule *nisi* for a new trial on the following grounds: 1st. For the misdirection of the learned Judge in point of law, as the injury complained of was not such as to enable one tenant in common to maintain an action against another, and that the jury had no right to consider the intention of the defendant, citing 8 *Term Rep.* 145, 2 *B. & C.* 257, 267, 2 *B. & Ald.* 165. 2d. Because there was no exemplification of the execution, which was required, before the proof of the levy and advertisements for sale by the sheriff could be dispensed with, and because the execution put in evidence did not correspond with the judgment as to the amount *(a)*, and because the original execution ought not to have been admitted in evidence. 3d. Excessive damages.

Wilmot, Q. C., last term showed cause. It is contended on the other side, 1st. That the injury complained of was not of such a nature as to entitle one tenant in common to

(a) 4 *Wm.* 4, *c.* 22.

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maintain this action against his co-tenant; that as the crank and wheels could be taken out of the mill, they were accordingly moveables or chattels personal. To test this position, let it be inquired whether the property injured and taken away, in case of death, would go to the executor, or could be distrained for rent. The water wheel and crank in a saw mill are similar to the sails of a wind mill, stated in 1 *Sid.* 207, to descend to the heir, not the executor. In *Farrant* v. *Thompson (a)* it was held, that the machinery of a mill was a part of the inheritance. The only right which the defendant here sets up is to five-ninths of the *real* estate, not any claim to the personal property; but his position is that the property damaged was personal; if so, it makes much stronger for the plaintiff, for then the defendant damaged property to which he had no claim whatever. It has been contended that one co-tenant has a right to remove property for the purpose of repair, but the learned Judge left it to the jury to say whether the defendant removed this property for any *bona fide* purpose, and they negatived the question by their verdict. In the case of *Lawton* v. *Lawton (b)*, it was held that certain salt pans, which had been placed on the premises for manufacturing salt, should go to the heir, not to the executor, because the inheritance could not be enjoyed without them, they being accessaries necessary to the enjoyment and use of the principal; and it is the same here—the saws and crank taken away, the inheritance could not be enjoyed without them. In *Lyde* v. *Russell (c)* it was held, that house bells could uot be removed, being part of the freehold, and 1 *Williams Ex.* 469, is to the same effect; all parts of the mills injured forming a part of the realty entitled the plaintiff as tenant in common to recover against the defendant. Secondly, no exemplification of the execution to satisfy the act of assembly, and the original execution could not be given in evidence. The act 26 *Geo.* 3, with respect to sales under execution, found very inconvenient—on account of its being necessary to prove the judgment, execution, and that the property had been regularly advertised, and sold between the hours of twelve and five o'clock—it was by the act of 4

(*a*) 5 *B. & Ald.* 826. (*b*) 1 *Hen. Black.* 259, *note a*. (*c*) 1 *B. & Ad.* 394.

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Wm. 4, *c.* 22, among other things enacted, that the deed of the sheriff duly executed, and the exemplification of the judgment and execution upon which the same is founded, shall in all cases be *prima facie* evidence of all the matters and things therein set forth, so far as the obtaining the judgment, issuing the execution, levying upon the property sold for the want of goods and chattels of the defendant from whom the property is taken, the advertising the same by the sheriff as the law required, and the sale thereof under the execution recited in the said deed, and exemplified as aforesaid, &c. Here a question arises as to when an execution is considered to be returned; it is submitted, that until it comes to the office of the clerk of the pleas it is not returned. The execution given in evidence in this cause was in the hands of the attorney, and the act 4 *Wm.* 4 does not take away the right to produce the original writ; the exemplification was never considered better evidence than the original itself, but after coming to a certain stage a document can only be given in evidence by exemplification. In 1 *Star. Ev.* 285, (1st edit.) it is said where a writ is returned it becomes a record, but it has never been so considered while the writ is in the hands of the attorney. In *Star. Ev.* 151, it appears that it is not until a document is returned to the proper office that it becomes a record, and must be given in evidence by exemplification. It is not insisted here that this is not the execution founded on the judgment, or that this is not the execution under which the sale was made, but these facts seem fully admitted. Now the legislature never intended to compel the purchaser to file the execution under which he purchased. [PARKER, J. Would the omission to file the execution defeat the sale? It would not operate as a defeasance of the sale.] Certainly not; but by the argument of the other side the sale would be worth nothing. The plaintiff at the time of the purchase was living on the property claiming a right of dower; the defendant recognized her title, and offered to purchase of her; evidence was given of the disposal of all the shares; that the plaintiff was in possession of one-ninth under a deed from the sheriff, who had put her in the shoes of the person owning the property taken

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taken under the execution. Again, it has been contended that there is a variance between the execution and the judgment; but it appears that the attorney, the term, the parties, and the nature of the action are the same, and there is no evidence of any other suit between the same parties. The only variance is a difference of eleven shillings, which does not render the writ a nullity; it is good on the face of it, possessing all the elements of a perfect writ, and which the sheriff would not be justified in disobeying. The time for making the objection is now past. There does not appear any authority directly in point, but on general principles an objection cannot be taken to the writ in this way, for it cannot invalidate the sale under the act of assembly. The recital in the deed of the amount on the back of the execution is mere surplusage; the deed having been recorded, and the plaintiff having taken possession under it, and held down to the period of the trial, the defendant is too late in making the objection. The last objection is for excessive damages. The learned Judge left it to the jury *quo animo;* the machinery was taken out of the mill; the actual loss was a question for the jury. [PARKER, J. Is there any authority for giving beyond actual damages in a case of this nature?] It is laid down by *Chitty*, that in actions on the case the party may recover more than the damages actually sustained, but there does not appear any direct authority in actions on the case in nature of waste. [CARTER, J. There is a case in 2 *Saund.* 252 *c*, which has some bearing on the point.] The waste was clearly wilful on the part of the defendant, and it appears most just and proper that the plaintiff should be allowed to recover adequate damages for it.

The *Solicitor General* in support of the rule. In order to sustain an action of waste for an injury to a freehold, the injury must be of a permanent nature to the inheritance. The cases cited on the other side only relate to the right of property between executor and heir, and landlord and tenant, but do not apply to the present. If a sole owner chooses to separate fixtures from the realty he may, when they become no longer part of the realty. If a sole owner has such right, so also has a tenant in common. One co-

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tenant cannot bring an action against his co-tenant for taking personalty; he may if he destroys it, but not in this form of action. [PARKER J. The cogs in the grist mill were not personalty. BOTSFORD, J. He destroyed the water way also, which was part of the realty.] As to the saws taken by the defendant, they were old, not in use, and belonged to defendant himself, and only taken from the mill a little distance. The new saws put in by the tenant *M'Keen* were taken out, but not taken away. The saws were mere moveables, taken out and put in as required by the person occupying the mill. It was proved that the plaintiff said that the defendant never should have any part of the property, and the second time the defendant went up, it was for the purpose of stopping the mill, not for destroying it. Some of the witnesses said the damage to the water ways could have been repaired for five shillings; there was no evidence of the value of the cog wheel; there was no permanent injury proved to the reversion of the property; all the damage could have been repaired in a few days, and it was in fact proved that the defendant made the mill of more value by the repairs he put upon it. [PARKER J. He did not do this till after this action was brought.] If one co-tenant takes away mill gear, and afterwards puts in better, there can be no permanent injury; the defendant had a right to take away this machinery; but if he should sell or destroy it he is liable to an action. A question might arise whether the cutting away the water ways would not be an injury to the inheritance; but as to the other property removed from the mill it was mere personalty, and the defendant had a right to remove it. [BOTSFORD, J. You contend that a co-tenant may do an injury to real property, and remove part of it, and that it becomes personalty.] There is no case cited on the other side to shew that an action of this nature can be sustained against one tenant in common by his co-tenant for removing fixtures from the freehold therein, and it is submitted that on this ground the action is not maintainable. To the second point, as to the construction of the act of assembly 4 *Wm.* 4, *c.* 22; the old act was certainly inconvenient, but if parties come in and avail themselves of the benefit

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benefit of the new act, they must be strictly governed by the letter of it in every respect; they must show that the deed was on record, and must exhibit the exemplification of the judgment and execution; as the exemplification shows that the proceedings are all regularly recorded, they are literally bound to give such evidence as the act points out; the act says that the exemplification of the judgment and execution shall be given in evidence, and if the plaintiff rests upon this act she is bound to conform to its requisitions. A question arises whether after the sheriff has returned the writ to the attorney, it can be given in evidence except by exemplification; it has often been brought up at Nisi Prius, but never finally settled [PARKER, J. Might it not be presumed that after the party had been in possession, the regular proceedings had been taken?] The plaintiff is bound by the allegations in the declaration to make out an indefeasable estate in fee simple. It is not necessary for the defendant to show that the execution was void, in order to defeat the plaintiff's title; it is sufficient to show that it does not follow the judgment; it may have been founded on some other judgment. The deed recites an execution under which the judgment was sold, and the execution put in evidence does not support that recital. [PARKER, J, It recites as much as was necessary, and a little more; the recital seems mere surplusage, and you cannot make much of the objection.] That objection may be waived; but the variance between the judgment and execution must be fatal, for it does not appear that there was no other suit between the parties, *non constat* that there was not another action of the same nature between the parties. As to the third point, the question of damages. One of the witnesses said the whole amount of damage could be repaired for about £30. As to the water way, it was a mere question of shillings, and of little importance; if £35 was the whole amount of damage the plaintiff's share would be less than £4. But the jury were not, in giving damages, confined to the actual value of the mills; they must have taken into consideration the intention of the party, left open to them by His Honor. The Court therefore has no rule to go by in reducing the

the amount of damages. The verdict should be set aside on account of the misdirection of the learned Judge.

Cur. adv. vult.

The Court now delivered judgment.

CARTER, J. This was an action on the case in the nature of waste, brought by the plaintiff to recover damages for an injury done by the defendant to a saw and grist mill, of which the plaintiff and defendant were tenants in common, the plaintiff being the owner of one-ninth and the defendant of five-ninths. It appeared at the trial that in the year 1837, the plaintiff had let the saw mill to one *John M'Keen* for the season, for the sum of £80, and that during his occupation of it the defendant, on two occasions, came to the mill, took away the saws, partially cut away the dam, removed the iron cranks, and partly took down the wheel. On another occasion the defendant broke the cogs of the grist mill, which never went afterwards. The amount of the damage actually done to the property appeared to be from £30 to £45. The jury found a verdict for the plaintiff, damages £33 5*s.* 9*d.* In the motion for to set aside this verdict, and have the cause sent for a new trial, three main grounds were taken: 1st. It was contended, that this action can only be maintained for an injury done to real property; that the property which was injured in this case being what is called the mill gear, was not real property, but were all chattels, which any tenant in common had a right to remove as he pleased, and that the acts complained of caused no permanent injury to the inheritance; therefore this action could not be supported. I have however never entertained any doubt that the greater part of the damage done to this property is damage done to freehold property, which must be considered an injury to the inheritance. With respect to the dam, there can be no doubt I think that that forms as much a part of the freehold as the walls of the mill; so also the wheel and crank (without which the property could never be used as a mill) I cannot but consider as affixed to the freehold, and forming a part of that property, which as a whole is denominated *the mill.* I am therefore clearly of opinion that there was ample evidence in this case of damage done to the real property causing

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causing injury to the inheritance, to enable the plaintiff to maintain this action against her co-tenant. The second point raised on behalf of the defendant, refers to what are contended to be defects in the plaintiff's title. Her title to the one-ninth of this property rested on a deed from the sheriff of *Charlotte* county, under a judgment and execution against one *Joseph Linton*, who was admitted to have had the title to this one-ninth. In proof of this title, the exemplification of the judgment was produced and the original execution. It was contended for the defendant, that under the provisions of the 4 *W.* 4, *c.* 22, the *exemplification* of the execution is the only evidence which can be received, and that the original was inadmissible. I cannot so construe the words of that act; for when a statute says that a copy shall be evidence, I cannot think it excludes the original unless it expressly says the copy shall be the only evidence. Till the writ of execution is returned to the Court whence it issued, I am clearly of opinion it is properly proved by the production of the original, and that the learned Judge was right in admitting the writ in this case to be given in evidence. It was further contended that the plaintiff failed in proof of her title, because there was a variance between the judgment and the execution in the amount of damages, the judgment being for £46 11*s.* 9*d.*, and the execution reciting a judgment for £47 2*s.* 9*d.* This difference of 11*s.* is the only variance relied on. In every other particular there was a perfect correspondence between the judgment and the execution. Nor is it contended that in point of fact this execution did not issue on the judgment, but that the judgment does not warrant it. Could the execution have been set aside on this ground? The case of *M'Cormack* v. *Melton (a)* clearly shows that it could not; and if that be so, I cannot think that a *bona fide* sale made by the sheriff under that execution can be considered void. The last ground urged for a new trial was that the damages were excessive. The jury were not confined by the learned Judge in their award of damages to the actual amount of damage done, and as the plaintiff could only be entitled to recover one-ninth part of the

(*a*) 1 *A.* & *E.* 331.

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damage, it seems clear that the jury in their award must have gone far beyond the damage done to the property. In the absence of any case directly in point, I would refer to the case of *Weeton* v. *Woodcock (a)*, where the declaration contained two counts, one of which was in trover, and there was a demurrer for misjoinder; the other being for the removal of a steam boiler off certain premises after the termination of a term, stated by defendant's counsel to be in trespass, and not case, Lord *Abinger* says, "I am of opinion that the first "count is substantially a count in trespass. Supposing it to "have been the only count in the declaration, and that the "cause had gone to trial, the plaintiff might recover under it "damages exceeding the value of the boiler." It would seem that in injuries to property the distinction exists between the action of trespass and case; that in the former the intent and manner of doing the act may be taken into account in estimating the damages, while in *case* the only measure of damages is the actual amount of the injury done. In the case before us the highest amount of injury done being £45, the plaintiff would not be entitled to more than one-ninth of that; and on this last point I think there should be a new trial unless the plaintiff consents to have the damages reduced to £5.

PARKER, J. A rule *nisi* was obtained for setting aside the verdict, and granting a new trial, on the following grounds: 1st. The damage done was not of that nature which would give an action of waste to a tenant in common of the realty against his co-tenant. 2dly. The plaintiff failed to prove the title and seisin she had alleged, the evidence admitted neither being proper itself nor making out the allegation; in the following particulars: 1st. The original *fi. fa.* was received in evidence, whereas a return having been made thereon by the sheriff, it ought to have been filed and exemplified. 2d. As there was no proof of the legal notice of sale by the sheriff except the affidavit endorsed on the deed, no other proof of the *fi. fa.* was admissible, under the act of assembly 4 *Wm.* 4, *c.* 22, than an *exemplification of the fi. fa.* 3d. There was a variance in the amount between the judg-

(a) 5 *M.* & *W.* 593.

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ment and execution, and it did not appear that the *fi. fa.* was issued upon the judgment 4th. A variance in the recital of the *fi. fa.* in the sheriff's deed between that and the *fi. fa.* given in evidence. Lastly, the Judge misdirected the jury as to the *quantum* of damages, in stating to them that they might allow one-ninth of the rent of the premises injured to the time of action brought, and also might take into consideration the *quo animo* to enhance the damages. It appearing clearly that the sheriff's sale and conveyance were in fact made under the *fi. fa.* given in evidence, the counsel for the defendant did not at the argument persist in the objection raised on a trifling variance in the recital, which in truth amounted only to surplusage, and I shall therefore pass over that point, and consider the remaining ones upon which the rule is sought to be sustained. 1st. As to the nature of the damage.—It could scarcely be denied that the cutting away the waste ways and dam, and breaking the teeth of the cog wheel, were *waste* to the *inheritance;* but the objection was principally taken to the charge of removing and carrying away the mill gear and saws. There can be no doubt I think on the authorities, that the question of waste may assume different aspects, and be entitled to different considerations, according to the description of persons between whom it may arise; for instance, as between landlord and tenant, heir and executor, guardian and ward. It is not necessary for us now to determine whether if the mill buildings had been let without mill gear, or with the gear but without saws, the tenant could or could not remove the gear or saws; or whether if the defendant had alone placed them there, he could remove or destroy them; for this is the case of a mill with its machinery and saws in the joint occupation of plaintiff and defendant as tenants in common, in no part of which the plaintiff had any exclusive interest, and where the whole interest he had was derived from the conveyance of the realty. The case of *Colegrave* v. *Dias Santos (a)*, *Lee* v. *Risdon (b)*, and *Marshall* v. *Lloyd (c)*, and others which might be cited, show clearly that articles annexed to the freehold, and which are capable of removal, yet if not removed, will

(a) 2 B. & C. 76. (b) 7 Taunt. 188. (c) 2 M. & W. 450.

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pass by a conveyance of the premises to the vendee; or will vest in the landlord if not taken away by the tenant during the term. In the last cited case *Alderson*, B. says, "Fixtures "cannot become goods and chattels until the tenant has "exercised his right of making them so, which he can only "exercise during his possession." In the case of *Steward* v. *Lombe (a)* it was held, that a wooden wind mill which stood upon a brick foundation, and was separate therefrom, passed by a mortgage of the premises from *A.* to *B.*, and could not be seized in execution against *A.*, although the jury considered it not a fixture. In *Farrant* v. *Thomson (b)*, which was an action of trover by a landlord against the vendee of a sheriff for mill machinery in the mill demised, which was separated from the mill by the tenant, and seized by the sheriff on an execution against the tenant, *Abbott*, C. J. said, "here the goods consisted of machinery annexed "to the mill, and *formed part of the inheritance*, and when "*wrongfully severed* became the property of the reversioner." *Bayley* and *Holroyd*, Justices, also consider the machinery as parcel of the inheritance, and belonging to the reversioner when severed. In *Martyr* v. *Bradley (c)*, mill stones put in a grist mill by tenant were considered as *fixtures, fastenings, or improvements*; "they were," says *Park*, J., "an essential "part of the mill." In *Place* v. *Fagg (d)*, cited 2 *Stark. Ev.* 909 *a*, it was held, that under the mortgage of a mill the stones, although moveable, passed without delivery, and as against the owner of the freehold could not be taken in execution as tenants' fixtures. In the *United States* it has been decided that the main wheel and *gearing* of a factory, attached to the factory, and necessary for its operation, are fixtures and real estate, to which the right of dower may attach. *Powell & Wife* v. *M. & B. Manufacturing Company (e)*; and also that pumps, cisterns, iron gratings, and distillery and horse mills, fixed to the freehold, passed by the sheriff's deed of the land and house built for a distillery. *Kirwan* v. *Latour (f)*, cited in 3 *Powell on Mort.* 1041, n. (1). In *The*

(*a*) 1 *B. & B.* 506.
(*b*) 5 *B. & A.* 826.
(*c*) 9 *Bing.* 27.
(*d*) 4 *M. & R.* 277.
(*e*) 3 *Mason*, 159.
(*f*) 1 *Har. & McHen.* 269.

Attorney

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Attorney General v. *Gibbs* (*a*) it was clearly held, that the *pumps and engines, water wheels, fly wheels and pit wheels,* affixed to a paper mill, could not be seized under an extent from the Crown, as utensils for the making of paper, although it did not seem to be denied that they might have been removed by a tenant during his term if assigned by him to demised premises. *Alexander*, C. B. says, "I am not able to "discover how the right of the tenant to remove during the "term that part of the freehold which he himself has made "part of it, can alter its nature and description, and convert "into utensils what in their own characters are not utensils, "and cannot properly be described as such. I find it still "more difficult to apply this reasoning to machinery, not "the property of the tenant, and which he never could have "any right to remove, but which is the property of the "landlord, and part of his freehold estate." Are not the mill gear, machinery and saws, fixed therein, essential parts of a saw mill? Would they not pass by a conveyance of the saw mill *eo nomine?* If placed by the tenant, and left at the end of his term, would they not become the property of the landlord as part of the inheritance? And if the case were that of two co-landlords or two co-purchasers, would they not be part of the common property, for the very reason that they were part of the inheritance; and if so, will not the destruction of them or the severing of them from the mill and carrying them away by one tenant in common be *waste* committed on the realty? I am at a loss to see on what principle they should not. *Davis* v. *Jones* (*b*) was a case, between landlord and tenant, of trover for certain jibs erected by the tenant, which could be removed without injury to the other parts of the machinery, and which were left on the premises expressly without prejudice to the tenant's right to remove; that can be no rule for the decision of this case. In 7 *Com. Dig.* 652, in enumerating what shall be waste, it is said, "If "glass windows be broke, or *carried away* (*c*), or the wains-"cot, benches, doors, furnaces, &c. fixed to the house." Lord *Coke*, in his commentary on the statute of *Westm. 2d*, which gave the action of waste as between tenants in com-

(*a*) 3 *T. & J.* 333. (*b*) 2 *B. & A.* 165. (*c*) *Co. Lit.* 53.

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mon, says, "What is waste against tenant for life, &c. shall "be waste within the provisions of this act," and at that time we know it was considered waste in the tenant to take away any thing he had once annexed to the freehold; though the rule has been much relaxed since his days in the case of landlord and tenant. In *Twort* v. *Twort* (*a*) Lord *Eldon* said, "It was not usual to grant injunctions to stay *waste* "one tenant in common against another, but where a case of "positive and actual destruction appeared, I granted an in- "junction, *as that was not the legitimate exercise of the enjoy-* "*ment arising out of the nature of the party's title to that which* "*belonged to him and the other party.*" The case of *Cubitt* v. *Porter* (*b*), a good deed relied on by the defendant's counsel, was not a case for waste, but trespass for destruction of a wall either the common property of the two or the sole property of one; and there *Littledale*, J. says, distinctly, "Where there has not been a total destruction of "the subject matter of the tenancy in common, but only a "partial injury to it, waste, or an action on the case, will lie "by one tenant in common against another." It was said in argument that the defendant might have removed the saws and gear for the purpose of replacing them, and that he had in fact since repaired the mills; but the intention with which he did the acts was a question for the jury, and properly left to them in this point of view; and as to the repairs, they were not made until after the action brought. In 2 *Inst.* 306, it is said "If tenant commit waste and repair it before "action brought, the action does not lie, but the tenant "must plead the repair specially." "If the repair be made "after action brought the tenant cannot plead it." Under these authorities, and for the reason I have stated, I think the acts committed by the defendant were *waste*, for which he was answerable to the plaintiff proportionably to her interest.

It will be more convenient here to take up the last point, and consider the extent to which the plaintiff would be answerable; and I must confess I cannot see any ground in this case for carrying the damages beyond the actual value of the waste committed. I do not mean to say that there

(*a*) 16 *Ves. J.* 128. (*b*) 8 *B. & C.* 257.

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may not be special grounds for extending the damages; but in this case the whole extent of damage done by the defendant to the premises at the highest estimate would not exceed £45, whereas they have been assessed at the rate of £300; and the only principle on which the jury could have acted is, either that the rent of the premises or the malicious intent of the defendant were proper to be taken into consideration; probably the former. I cannot find any case of *waste* where either of these matters has been considered in damages, nor any text writer who refers to them as properly such. In *Kinlyside* v. *Thornton* (*a*), which was case for waste, plaintiff proved that defendant had pulled down and demolished the fixtures mentioned in the declaration, to the value of £10; and the verdict was for £10. In *Martyn* v. *Knowlys* (*b*), action by one of two tenants in common against his co-tenant for cutting trees, the Judge directed a verdict for *the value of half the trees.* There are several circumstances attending the old action of waste that would lead to the supposition that the value of the waste was the *criterion* of damages: 1st. The plaintiff was bound to specify the waste; 2d. The sheriff and jury were to view the place wasted; 3d. If the amount of waste did not exceed 40*d.* or 3*s.* 4*d.*, the plaintiff did not recover; 4th. If the waste was repaired before action brought, that might be pleaded in bar to the action. The words of the statute of *Gloucester* (*c*), which gave treble damages in cases of waste done by tenants, are "he which shall be attainted of waste shall lose "the thing that he hath wasted, *and moreover shall recom-* "*pense thrice as much as the waste shall be taxed at.*" In 22 *Vin. Abr.* 487, tit. *Waste*, "If waste be brought for "such trees, whereof the cutting of every particular tree "would be waste, then the count shall be that he cut so many "trees, *so that damages may be more certainly taxed.*" (*d*) I do not very well see how the plaintiff as tenant in common of *one ninth* could have advantageously let the property without the consent of the co-tenant, or how if unlet she could bring in logs to saw, or corn to grind, so as to make it pro-

(*a*) 2 *W. Bl.* 1111.
(*b*) 8 *T. R.* 145.
(*c*) 6 *Ed. I. c.* 5.
(*d*) 46 *Ed.* 3, *c.* 17.

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fitable, without his consent, even if it had not been injured; much less do I perceive her right, if she have undertaken to let the whole property without the consent of her co-tenant. No action will lie by one tenant in common against another for not allowing the common property to be beneficially used; the party's only remedy is a partition, unless the acts amount to an *actual ouster*, where the party after recovery in ejectment may recover the *mesne* profits.

With respect to the *quo animo;* to a certain extent it was proper the jury should consider it, namely, for the purpose of seeing whether *any and which of the acts were properly waste.* In *Cubitt* v. *Porter* (*a*), *Bayley*, J. says, "There is "no authority to show that one tenant in common can main- "tain an action against the other for a temporary removal "of the subject matter of the tenancy in common, the party "removing it having at the same time an intention of ma- "king a perfect restitution." So here the jury had a right to consider whether the intent of the defendant in damaging or taking away was to injure and spoil, or to repair and replace, so as to determine the *quantum* of *actual* damage, but not I conceive to *enhance* the damage beyond the real value. It is true, there are cases which show that the plaintiff may recover where there has been no pecuniary loss, as for conversion of one sort of building into another, as in the case reported in 1 *Leo.* 309, 2 *Saund.* 259, and 1 *Mod.* 95, where damages were recovered though the property was improved, by taking down old buildings and erecting new, from £120 to £200; or in the case stated by *Heath*, J. in 2 *B.* & *P.* 86, "If a tenant convert a furze brake, in which game has been "bred, into arable or pasture, by which its real value would "be improved, but its value to the landlord depreciated." The principle of these cases seems to be that the tenant should not do such acts, as alter the state of the property, without the landlord's consent; and if he do, he shall not be exempted from paying for the waste he has done, because he may in his own way have made improvements equal or beyond the injury.

Since preparing the above, it has been a great satisfaction

(*a*) 8 *B.* & *C.* 257.

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to me to find distinctly stated by Mr. Chancellor *Kent*, what I have in vain looked for in any of the *English* books, that in the action on the case for waste, (which has superseded the common law remedy, and relieves the tenant from the penal consequences of waste under the statute of *Gloucester*,) "the plaintiff recovers no more than the actual damages which the premises have sustained." (*a*)

I will now proceed to the formal objections to the evidence of plaintiff's seisin: 1st. That the original *fi. fa.* was admitted in evidence, whereas a return having been made thereon by the sheriff it ought to have been filed and exemplified. The learned counsel also expressed a wish that the Court should say whether in any case the original execution could be given in evidence. I cannot conceive how there can be any question on this point, as the books of practice, supported by decided cases, all agree that the sheriff even in justifying under a writ of *fi. fa.* need not shew its return; and in the case of *Rowland* v. *Veale* (*b*), and *Cheasly* v. *Barnes* (*c*), a distinction is made between *mesne* process and execution. In *Doe d. Bland* v. *Smith* (*d*), and *Doe d. Batten* v. *Murless* (*e*), which were cases of ejectment by purchasers of term of years, seized and sold by sheriffs under writs of *fi. fa.*, the original executions appear to have been received without objection. There is an exception in the case of an *elegit*, the reason of which confirms the general rule, namely, that in execution by *elegit* the inquisition founded thereon is the plaintiff's title on record, and is examinable into by the Court, the sheriff making no conveyance of the property. (*f*) Besides, the possession is delivered to the plaintiff, and is to be held only until the issues and profits of the estate have paid the debt. Neither can I very well see the ground of the distinction, which the defendant's counsel has here attempted to draw, in consequence of the sheriff having indorsed a return on the writ. The writ, if in existence, is either on the files of the Court, where if proof be required of it, it may and must be proved by an exemplification or examined copy, or it is not on the files, and may be produced,

(*a*) 4 *Kent's Com.* 79.
(*b*) *Comp.* 18.
(*c*) 10 *East.* 73.
(*d*) *Holt's N. P. C.* 589, *and* 2 *Stark.* 199.
(*e*) 6 *M. & S.* 110.
(*f*) 4 *Rep.* 67.

and

and will prove itself. In this case it had not reached the files, and could not be exemplified. I am not aware of any *intermediate state* in which evidence of it could not be given at all. It would be very proper and prudent no doubt to have it filed, but the plaintiff here is not a party to it, and her title in no way depends on the return the sheriff may have made, but on the writ itself, and the sheriff's sale and conveyance thereunder. I think the execution was properly received.

It is next objected, that if the original is produced, and not an exemplification, the plaintiff will be bound to show, independently of the act 4 *Wm.* 4, *c.* 22, that the time and place of sale were duly advertised—that act confining the effect of the affidavit endorsed on the deed to the proof by exemplification. The clause of the act is as follows: "Be it enacted," &c. "that the deed of the sheriff or other officer authorised to "execute the same, duly executed, acknowledged and re- "corded as the law directs, and the *exemplification of the "judgment and execution* upon which the same is founded, "shall in all cases be *prima facie* evidence of all the matters "and things therein set forth, so far as the obtaining the "judgment, issuing execution, levying upon the property "sold, &c., the advertising the same by the sheriff as by law "required, and the sale thereof under the execution recited "in the said deed and exemplified as aforesaid;" (the *onus* of proving defect to be in the party disputing) "provided "always, that the sheriff," &c. "shall at the time of the ex- "ecution of the deed make affidavit before the Justice," &c. "who is required to take and endorse the same on the deed "that the said property by such deed conveyed was regularly "seized, advertised, and sold, in every respect as by law "directed." I agree that by the literal meaning of the act the exemplification of the execution is what is comprised in the clause; but this being clearly a remedial act we are bound to give it an enlarged construction to fulfil the intention of the legislature, according to what may appear the true reason of the act. What we want is evidence of the execution; now independently of this act we know that after a writ is on the files of the Court, the exemplification, or in other words, an attested copy under the seal of the Court, is

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a proper mode of giving evidence of it; there are two cases in which such evidence could not be given: one where it is in existence but not on the files of the Court; the other, where it may have been lost or destroyed. Does the reason of the act exclude these two last cases? The rules on this head have been collected by Mr. *Dwarris:* p. 717, he says, "It "has been before remarked that it is a question of construc- "tion on every act interfering with the provisions of a former "law, whether it operates as a total, or partial, or temporary "repeal. It only remains to be added in this place, that it "is always to be presumed that the legislature when it en- "tertains an intention will express it, and that too in clear "and explicit terms. *Thus it is generally to be taken that the "legislature only meant to modify or repeal the provision of any "former statute in those cases when such its object is expressly "declared.*" *(a)* p. 718, "A remedial act shall be so con- "strued as most effectually to meet the beneficial end in "view, and to prevent the failure of the remedy. As a ge- "neral rule a remedial statute ought to be construed libe- "rally. Receiving an equitable, or rather a benignant, in- "terpretation, the letter of the act will be sometimes en- "larged, sometimes restrained," &c. p. 726, "Beneficial "statutes therefore have always been taken and expounded "by equity *ultra* the strict letter, but not, it is well and wisely "said, *contra* the letter." Lord *Coke* lays down a rule which "has been often quoted, "*Quando verba statuti sunt specialia, "ratio autem generalis, generaliter statutum est intelligen- "dum.*" *(b)* In 13 *Price*, 565, *Hullock*, B. says, "The "construction of a statute must not be confined to mere "words, but regard should in all cases be had to the spirit "and the general tenor of the statute, and *the object of the "legislature in making the enactment.*" In a late case in the Court of Common Pleas, that of *Evans*, *Griffith*, and *Jones (c)*, these rules of construction have been considered and confirmed, and there it was decided that the Court, under the *St.* 1 *W.* 4, *c.* 70, *s.* 27, which gave power *to amend the records of fines and recoveries passed in the Courts of Great Sessions of Wales thereby abolished*, was authorised to order and

(*a*) 10 *Rep.* 138 (a). (*b*) 10 *Co.* 101. 6. (*c*) 9 *Bing.* 311.

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allow a record to be made up and enrolled where none existed before. Now if we look at the act before us, we can find no intent to *narrow* the rules of evidence; the necessity of proving certain acts which the law had made requisite to a sheriff's sale was the mischief to be remedied; and what did this arise from? the difficulty of procuring *viva voce* testimony of the person who did the acts: the remedy was not to be supplied by a return and file of the execution, (and the act requires no return by the sheriff,) but by the affidavit to be made and endorsed on the sheriff's deed; that affidavit has reference to the seizure, advertisement, and sale of the land, but not to the contents or return of the execution. The title of the purchaser, a stranger to the execution, becomes perfected before and independent of any return of the execution. The words are mere affirmative words, and had it been intended to make the affidavit proof of the facts therein stated, only on condition of the execution being exemplified, the simple and obvious mode of doing so would have been by a proviso, "that such affidavit shall not be deemed proof of "the seizure, &c. unless the execution be returned and filed." I cannot therefore think that we shall in any way be carrying out the intent of the legislature by confining the proof under the act to exemplifications only.

There is one other point to be considered, namely, the variance between the execution and the judgment. There is a variance no doubt in the amount, the judgment being for £46 11*s.* 9*d.* and the *fi. fa.* for £47 2*s.* 9*d.*; the judgment therefore, strictly speaking, does not warrant the execution. We have lately had occasion to look into this point, in the case of *Spence* v. *Stuart (a)*, and it is clear from the authorities there cited that such an irregularity will not nullify the writ, nor make void the proceedings under it. In *M'Cormack* v. *Melton (b)*, the judgment was for £33 10*s.*, the *ca. sa.* for £34 10*s.*, under which the defendant was in custody, the Court refused to discharge him, and allowed the writ to be amended. This was between the parties; but supposing it to be defective, the act of assembly, 26 *Geo.* 3, *c.* 12, *s.* 8, expressly provides that a reversal of a judgment or process,

(*a*) *Berton's Rep.* 219. (*b*) 1 *Ad. & E.* 331.

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under which a sale may be made by the sheriff, shall not operate against any *bona fide* purchaser to affect his title, but only against the plaintiff to make restitution. Here the reversal of the process for error must, I conceive, intend the setting it aside in the Court from which it issues, or at least to comprehend that. The enactment is quite in accordance with the old cases in the *English* books (*a*), and the same rule was adopted in *Doe d. Emmett* v. *Thorn* (*b*), where a *fi. fa.* was set aside for irregularity, but a sale made under it held valid. But it is said that it did not appear the *fi. fa.* was issued *on* the judgment, and that this, in consequence of the variance, shall not be presumed. That point does not appear to have been distinctly taken at the trial, where the omission could probably have easily been supplied by the evidence of the attorney. The objection was not that the *fi. fa.* did not in fact issue *on* the judgment, but that it was not *warranted* by the judgment. In every other respect but the difference of eleven shillings it has been clearly shown by the plaintiff's counsel that the judgment and execution do correspond; there is nothing to show that in fact any other judgment existed under which the *fi. fa.* could have issued, or that that judgment has been in any other way satisfied, neither does any objection appear to have been made by the defendant in the suit. Under these circumstances, and as it would have been perfectly easy for the defendant to have produced an affidavit to that effect if there were any reason for that objection, I do not think we should be justified in setting aside the verdict on that ground.

It appears to me, therefore, that the defendant has failed in sustaining any of his objections excepting that which relates to the *quantum* of damages; but on that head we have enough evidence to guide us to what is right, and to reduce the verdict accordingly; and with the assent of the plaintiff we may, I think, allow the verdict to stand for £5: if she object, there must be a new trial.

BOTSFORD, J. I concur in the opinion expressed by their Honors, that the actual injury committed should be the stan-

(*a*) *Dyer*, 363. 5 *Rep.* 90. *Cro. Jac.* 216. *Cro. Eliz.* 273.
(*b*) 1 *M. & S.* 125.

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dard for estimating the damages. As to the question, whether the jury in fixing the damages had a right to consider the motive of the defendant, on consideration I think my charge to the jury rather too extensive in that particular; but it is a source of satisfaction to me that my brethren agree in the other parts of my direction.

CHIPMAN, C. J. I was not present at the argument, therefore I do not say any thing on the general merits of the case, as to which I concur with the rest of the Court; but I will say a few words on the construction of the act of assembly relating to the proof of judgments and executions. In all cases an *original* document is the best evidence of its own contents, but in the case of public records (which by the way an execution does not become until it is *returned* and *filed)* the originals are not permitted, on grounds of public policy, to be removed from the places of their custody, and other modes of proof are of necessity resorted to; one of which is by *exemplification*—another by *examined copy;* and it never could have been the intention of the statute, either on the one hand to give a preference to, or on the other hand to exclude, any particular mode of proof. It is true, that the expression is particular, but the reason is general; and therefore according to Lord *Coke's* rule, cited by Mr. Justice *Parker*, the expression shall be deemed general; or as it is said by L. C. J. *Tindal*, in one of the cases cited, the expression shall be taken as an *instance* of the *class* of things referred to in the statute. In the present case the reason applies to all kinds of proof, and exemplification is only a particular instance. For the particular term "exem- "plification," therefore, read the statute as if it had the general term "proof," of the judgment and execution, and all difficulty vanishes; and this I conceive to have been the intent of the framers of the act, and to be its true construction.

Rule *nisi* discharged, the verdict being reduced to £5 with the assent of the plaintiff's counsel.

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The term *Rebel* is not actionable, unless it be used in a treasonable sense; which sense must appear on the record, otherwise the judgment will be arrested.

THIS was an action of slander, tried before *Botsford*, J. at the sittings after *Hilary* term, 1839, and on not guilty pleaded, the jury found for the plaintiff £250 damages. In *Trinity* term, 1839, a rule *nisi* was obtained to arrest the judgment for the badness of the declaration, because the words in themselves did not necessarily import a crime, and the declaration contained no *inuendo* to make them so, nor any averments of special damage. The declaration contained five counts. The first count stated, that "the de- "fendant contriving, and wickedly and maliciously intending, "to injure the plaintiff in his good name, fame and credit, and "to bring him into public scandal, infamy and disgrace, with "and amongst all his neighbours, and other good and worthy "subjects of our Lady the Queen in this Province; and to "cause it to be suspected and believed by these neighbours "and subjects that he, the said plaintiff, had been guilty of re- "bellion, and was a rebel; and to subject him to the pains "and penalties by the laws of *Great Britain* and this Pro- "vince, made and provided against and inflicted upon persons "guilty thereof; and to vex, harass, oppress, impoverish, "and wholly ruin him, the said plaintiff, heretofore, to-wit, "on the twenty-fifth day of *September*, in the year of our "Lord one thousand eight hundred and thirty seven, at the "parish of *Fredericton*, to-wit, in the county of *York* afore- "said, in a certain discourse which he, the said defendant, "then and there had with one *John Patchell*, of and con- "cerning him, the said plaintiff; and of and concerning the "election of representatives for the county of *Carleton* to "serve in the house of assembly in this province, that was "then pending in the said county, at which the said plaintiff "was a candidate; then and there spoke and published to "him, the said *John Patchell*, of and concerning the said "plaintiff, and of and concerning the said election, and of "and concerning the said plaintiff as such candidate as afore- "said, these false, scandalous, malicious, and defamatory "words

"words following, that is to say: 'Has old *Papineau* "(meaning the said plaintiff) got ahead of *Coombes* (meaning "*Leonard R. Coombes*, another candidate at said election,); "he (again meaning the said plaintiff) wont be long so; no "body but blackguards will support him (again meaning the "said plaintiff); he (again meaning the said plaintiff) was "driven out of this province (meaning this province of *New* "*Brunswick*), was since kicked out of *Canada* on account of "being a damned old rebel, and it was a disgrace to put such "a man (again meaning the said plaintiff) into the house of "assembly, and that no decent man would support him,' "(meaning the said plaintiff)." In the second count, the words were stated as follows: "What, has old *Papineau* "(meaning the said plaintiff) got ahead of *Coombes* (meaning "the aforesaid *Leonard R. Coombes)?* Who is supporting "him (again meaning the said plaintiff)? None but black-"guards would do it. He (again meaning the said plaintiff) "was driven out of this place (meaning the province afore-"said), and has since been kicked out of *Canada*, on account "of his (again meaning the said plaintiff) being a damned "old rebel, and it would be a disgrace to put such a man "(meaning the said plaintiff) into the house of assembly." In the third count the words were: "He (meaning the said "plaintiff) is a damned old rebel; he (again meaning the "said plaintiff) was kicked out of *Canada* on account of his "being a damned old rebel." In the fourth count, as follows: "He (meaning the said plaintiff) is a damned old "rebel, and was kicked out of *Canada* on account of his "being a damned old rebel." In the last count, as follows: "He (meaning the said plaintiff) is a damned old rebel." The case was twice argued; first, in *Michaelmas*, 1839, by *Chandler*, Q. C., for the plaintiff; and by the *Solicitor General* and *Wilmot*, Q. C., for the defendant; and again by the same counsel in *Trinity* term, 1840. The arguments for the plaintiff were chiefly as follows:

It has been contended by the other side, that the words laid in the declaration do not necessarily impute a crime *per se*: and as there is no *inuendo* to give them a criminal import, and no special damage alleged, the declaration is therefore bad.

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The general principle is, that any words which directly charge a person with a crime punishable by law, as treason, murder, &c., are actionable. *Sel. N. P.* 1248, *Stark. on Libel*, 32. In *Roberts* v. *Camden (a)*, Lord *Ellenborough* says, "The "rule which at one time prevailed, that words are to be un- "derstood in *mitiori sensu* has been long ago superseded, "and words are now construed by courts, as they ought al- "ways to have been, in the plain and popular sense in which "the rest of the world naturally understood them." The same learned Judge, in the case cited, further observes that, "it was laid down by Mr. Justice *Gould*, that what was the "defendant's meaning was a fact for the jury to decide upon; "and that Lord *Mansfield* afterwards, when that case was "brought into the court of *King's* bench, said, if the words "had been shown to be innocently spoken, the jury might "have found a verdict for the defendant; but they have put "a contrary construction on the words as laid, and certainly "if the sense of the defendant in speaking the words had "varied from that ascribed to them by the plaintiff, he might "by specially pleading have shown them not actionable, had "he not chosen to have rested his defence merely on the ge- "neral issue." Now the question is, what is the meaning of the word or term *rebel*, in its plain and popular sense? The defendant's meaning was a fact for the jury; it was for the defendant, either by specially pleading or by evidence under the general issue, to show that the words were innocently spoken, or that they varied from the sense ascribed to them by the plaintiff; but this the defendant failed to do. If any thing be understood other than the crime of rebellion, what is it? for the defendant has not attempted to show any other meaning. It cannot be contended, that the charge of rebel, in its popular sense, meant a person against whom a commission of rebellion out of chancery had issued, or that the defendant had intended to use it in that sense; because they could not possibly be so understood consistently with the context; looking at the discourse in which the words were used, their reference to chancery are wholly negatived; in no other sense then but in that of treasonable rebellion can the

(a) 9 *East*. 96.

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be employed. In *Tomlin's Law Dict.*, title "Rebellion," it is said, "rebellion with us is generally used for the taking arms "traitorously against the king. *David*, prince of *Wales*, who "levied war against *Edward I.*, had sentence pronounced "against him as a traitor and rebel." So private persons may arm themselves to suppress rebels. *Hawk. P. C. c.* 63, *s.* 10; 2 *Chit. Crim. Law*, 62; 1 *East. P. C.* 70. 72. In *Webster's Dict.*, "A rebel is one who revolts from the government to "which he owes allegiance, either by openly renouncing the "authority of that government, or by taking arms, and openly "opposing it." A rebel differs from an enemy, as the latter is one who does not owe allegiance to the government which he attacks: indeed, the word rebel is less equivocal than the word traitor; and the authorities in the old books support the plaintiff; for though it is said in *Wells* v. *Hemmerson*, that to say "thou art a rebel and no true subject," is not actionable—because he might be a rebel under proclamation of rebellion. 1 *Roll's Abr.* 49. 63. Yet subsequently, and while the old doctrine *mitiori sensu* still obtained, it was held in *Redstone* v. *Elliot (a)*, that the words, "thou art a rebel, "and all that keep thee company are rebels, and thou art not "the *Queen's* friend," were actionable. So here, alleging that the plaintiff was driven out of this province, and kicked out of *Canada*, in connexion with calling him a damned old rebel, give a meaning to the latter words which they otherwise might not bear, and shew the ill intent of the defendant in speaking them. The case of *Fountain* v. *Rogers (b)*, where it was held, that the bare words, "thou art a rebel," were not actionable, cannot be received as an authority against the plaintiff, as it passed without argument; and from the shortness of the report it cannot be told what was the colloquium—what the accompanying expressions—or what were the averments in the case. In *Brooks* v. *Wise (c)*, an action for these words, "thou art a pocky knave, get thee "home to thy pocky wife—her nose is eaten with the pox," it was moved after verdict that these words were not actionable; for it shall not be intended by them that he is infected with the *French* pox, and otherwise the action lies not. But

(a) *Cro. Eliz.* 638. (b) *Cro. Eliz.* 878. (c) *Cro. Eliz.* 878.

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"were taken in the sense that he would undo him; and the "plaintiff is not charged with doing an act, but only that he "would do it; and yet the words were judged actionable, be- "cause of his ill intent." Again, the learned Judge says, "it "must be supposed that the defendant designed to be believed "when he spoke those words, because he used this argument "to hinder others from voting for the plaintiff, for he who hears "him must believe that he has detected this either from some "speech or some act done by him, the plaintiff; for no man is "supposed to know the design of another but by his words or "acts; and therefore when we say positively that it is for such "a thing, he must take upon himself that he has detected some "act or word of him, that gives him reason to make this infe- "rence." &c. This case is also reported in *Salk.* and *Lord Raymond*: and it is said by the latter reporter, that after removal and many days debate the judgment was affirmed in the house of *Lords*. And in *Bac. Abr.* title *Slander* (B 1), it is said, that the doctrine of this report in the last cited case was recognized in a subsequent case, 18 *Geo.* 1. Now this doctrine is very important, not only from its lateness and authoritativeness, but also by its facts and reasoning so fully embracing the present case. In *Peak* v. *Oldham (a)*, in answer to a motion for arresting the judgment, Lord *Mansfield* says, "What, after a verdict, shall the Court be "guessing or inventing a mode in which it might be barely "possible for these words to have been spoken by the defen- "dant without meaning, to charge the plaintiff of being "guilty of treason? Certainly not; where it is clear that "words are defectively laid, a verdict will not cure them; "but where from the general import they appear to have "been spoken with a view to defame a party, the Court "ought not to be industrious in putting a construction upon "them different from what they bear in the common accep- "tation and meaning of them." Again, the learned Judge in referring to *Ward* v. *Reynolds*, where judgment was affirmed, "Lord Chief Justice *Parker* said, 'it was very odd, "that after a verdict a court of justice should be trying "whether there may not be a possible case in which words

(a) *Cowp.* 275.

"spoken

"spoken by way of scandal might not be innocently said; "whereas if that were in truth the case the defendant might "have justified, or the verdict would have been otherwise.' "So here," continues Lord *Mansfield*, "if shown to be inno- "cently spoken, the jury might have found a verdict for the "defendant, but they have put a contrary construction on "the words as laid," &c. The case of *Holt* v. *Schofield* (*a*) differs from the present, inasmuch as there the declaration contained no matter with which to connect the charge of being forsworn; but here it is in connexion with the allegations of being kicked out of one Province and turned out of another. The case of *Tomlinson* v. *Brittlebank* (*b*) strongly supports the present case; for it was there held that the words, "he robbed *S. W.*," are actionable, as imputing an offence punishable by law; and if they were used in any other sense, the defendant was bound to show it.

The *Solicitor General* and *Wilmot* contra. The term "re- "bellion" has a known legal import of two kinds: one, a levying of war; the other, as a proceeding in a Court of Chancery: these are its legal parlance; but it also has a known moral import, in common parlance, applying to the disposition and temper of the mind, and denotes nothing more than unreasonable opposition and stubbornness. In *Walker's Dictionary* the term "Rebel" is defined, "one who opposes lawful au- "thority;" so its common import is instanced by passages in Holy Writ—*Deut.* xxi. 18. 20—"If a man have a stubborn "and rebellious son, who will not obey the voice of his father "or the voice of his mother, and that, when they have chas- "tised him, will not hearken unto them; then shall his father "and his mother lay hold on him, and bring him out unto "the elders of his city, and say this our son is stubborn and "rebellious, he will not obey our voice;" so Bishop *Hall*, "Who could ever yet show me a man rebelliously undutiful "to his parents that hath prospered in himself and his seed." Many other instances may be given from various authors to show the common parlance in which the word rebel is used. Standing abstractedly therefore by itself, without any words directly connecting it with a treason that has taken place, or

(*a*) 6 T. R. 691. (*b*) 1 B. & Ad. 63.

that

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that is alleged to have taken place, it is a mere term of abuse, and does not necessarily imply an indictable offence, and is not in itself actionable. This term has a most extensive application in the moral, political and social conditions of life, as in those of master and servant of every description, husband and wife, parent and child, and various other relations in which a person may stand as a member of society; and though a person's conduct in these several relations might, as opposed to good morals, be highly censurable, yet not criminally actionable. As opposed to the particular authority, the person acting would be a rebel, but unless connected with a treason not legally so. Hence a factious evil-disposed person toward the government of a country, who takes up political opinions, and expresses sentiments which tend to stir up a general feeling in the hearts of the community, inimical to the ruling persons of the country, shows a spirit of rebellion against those persons, and therefore in that sense is a rebel in spirit, but yet so long as he keeps himself within the pale of the law, or does no overt act which amounts to treason or sedition, he is not guilty of an indictable offence; and it is not a very uncommon case to so apply the term rebel, in respect to the political principles of such a man. So again, upon the same principle, in a process of outlawry against an individual who does not appear to the process of the Court, a commission of rebellion issues against such a man, and in such sense he is a rebel against the legal authority of the Court, but it is not an indictable offence; and in this sense several of the reported cases show the term may be used, and therefore upon that ground it has been expressly decided that the word in itself is not actionable; as in *Wells* v. *Hemmerson* (*a*), 1 *Roll. Abr.* 69, 1 *Sid.* 132. 172. These authorities all show that the term in itself is not actionable, it being a word of different meanings, and may be differently applied, accordingly as the speaker intends it. It is true, it may be applied, and intended to apply, to a direct act of treason, and when so applied it is actionable; but to make it so it must be coupled with words, to show that it has a reference to an act of treason that has actually taken place, or is alleged to

(*a*) *Cro. Eliz.* 621. 638.

have

have taken place, and that the speaker intended to charge the party with being concerned in that act of treason when he used the term rebel; and in bringing an action for such words, in order to sustain the action, it should be alleged in the declaration, introductory to the charge, that an act of treason had been committed, and that the defendant alleged such act had been committed, and that the defendant in speaking of and concerning the said act of treason, and of and concerning the parties guilty thereof, and of and concerning the plaintiff as connected therewith, spoke the words, or called him a rebel, with an *inuendo*, showing thereby that he meant to charge the plaintiff with being a party concerned in such treason. But the declaration in this case contained no such introduction to bear out such an *inuendo*, nor any *inuendo* showing that the words had a reference to any act of treason that had been committed, and no statement on the face of the record to show that the words were applied by the speaker to any indictable offence, and therefore the declaration is bad. If there had been such an introduction in the declaration, and such an *inuendo* to the words as is just mentioned, the plaintiff must have failed to have sustained his action; and as all the evidence shows that there was no act of treason referred to by the words, nor had any rebellion in *Canada* or this Province, taken place before the time of speaking the words, they would not have been applied or intended to be applied to any such act. The terms thief, stealing, and murder, have each one legal definite meaning, and necessarily contain a charge of felony, unless accompanied by other words to show that the speaker did not mean to impute a criminal offence, but only applied the term in using it to designate something not in itself criminal; and this is the true distinction of terms, which may be used in different senses, from those which have but one legal definite meaning. The former to make them actionable must be coupled with words that show they are used with a direct reference to some indictable offence, that has been or is alleged to have been committed; the latter are actionable in themselves, and to make them not actionable they should be used with words showing that they had had reference to an act which was not

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an indictable offence. The decisions in the cases for verbal slander, where parties have been charged as committing perjury, clearly support this doctrine, and are directly analogous to this case; for any man who takes a false oath is in fact guilty of perjury, but is not liable to be indicted for the offence unless the oath was taken in the course of some judicial proceeding; to bring him within the statute, therefore, in declaring for such slander the facts and circumstances under which the oath was taken must be set out, and an averment made that the words were used with reference to the oath so taken. The same principle must apply to the word rebel, because a man may be a rebel, and yet not guilty of treason or of any indictable offence; and all the authorities cited on the other side most clearly establish this position.

Cur. adv. vult.

The Court now delivered judgment.

CHIPMAN, C. J. This is an action of slander, and a motion has been made to arrest the judgment, on the ground that the words, as laid in the declaration, are not actionable. The declaration states, that "The defendant contriving, "and wickedly and maliciously intending, to injure the "plaintiff in his good name, fame, and credit, and to "bring him into public scandal, infamy and disgrace, with "and amongst all his neighbours, and other good and worthy "subjects of our Lady the *Queen* in this Province; and to "cause it to be suspected and believed by these neighbours "and subjects that he, the said plaintiff, had been guilty of re-"bellion, and was a rebel; and to subject him to the pains "and penalties by the laws of *Great Britain* and this Pro-"vince, made and provided against and inflicted upon persons "guilty thereof; and to vex, harass, oppress, impoverish, "and wholly ruin him, the said plaintiff, heretofore, to-wit, "on the twenty-fifth day of *September*, in the year of our "Lord one thousand eight hundred and thirty seven, at the "parish of *Fredericton*, to-wit, in the county of *York* afore-"said, in a certain discourse which he, the said defendant, "then and there had with one *John Patchell*, of and con-"cerning him, the said plaintiff; and of and concerning the "election of representatives for the county of *Carleton* to

"serve

" serve in the house of assembly in this province, that was " then pending in the said county, at which the said plaintiff " was a candidate; then and there spoke and published to " him, the said *John Patchell*, of and concerning the said " plaintiff, and of and concerning the said election, and of " and concerning the said plaintiff as such candidate as afore- " said, these false, scandalous, malicious, and defamatory " words following, that is to say: 'Has old *Papineau* " (meaning the said plaintiff) got ahead of *Coombes* (meaning " *Leonard R. Coombes*, another candidate at said election,); " he (again meaning the said plaintiff) wont be long so; no " body but blackguards will support him (again meaning the " said plaintiff); he (again meaning the said plaintiff) was " driven out of this province (meaning this province of *New* " *Brunswick*), was since kicked out of *Canada* on account of " being a damned old rebel, and it was a disgrace to put such " a man (again meaning the said plaintiff) into the house of " assembly, and that no decent man would support him,' " (meaning the said plaintiff)." In the second count, the words are stated as follows: " What, has old *Papineau* " (meaning the said plaintiff) got ahead of *Coombes* (meaning " the aforesaid *Leonard R. Coombes)?* Who is supporting " him (again meaning the said plaintiff)? None but black- " guards would do it. He (again meaning the said plaintiff) " was driven out of this place (meaning the province afore- " said), and has since been kicked out of *Canada*, on account " of his (again meaning the said plaintiff) being a damned " old rebel, and it would be a disgrace to put such a man " (meaning the said plaintiff) into the house of assembly." In the third count as follows: " He (meaning the said " plaintiff) is a damned old rebel; he (again meaning the " said plaintiff) was kicked out of *Canada* on account of his " being a damned old rebel." In the fourth count, as follows: " He (meaning the said plaintiff) is a damned old " rebel, and was kicked out of *Canada* on account of his " being a damned old rebel." In the fifth and last count, as follows: " He (meaning the said plaintiff) is a damned old rebel."

In the cases of words which impute crime the rule as laid

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down by Lord *De Grey*, in *Onslow* v. *Horne* (*a*), repeated by *Lawrence*, J. in *Holt* v. *Scholefield* (*b*), and universally referred to as the correct rule, is that the words must contain an express imputation of some crime liable to punishment, some capital offence, or other infamous crime or misdemeanor. The present case turns upon the meaning of the word "Rebel." In the law books this word is used in two senses altogether distinct from each other. First, I think it must be admitted that in law books and proceedings, and even in statutes, this term of itself bears the meaning of that particular species of treason which consists in the levying of war by subjects against the *Sovereign* within the realm. The instances referred to in the course of the discussion of this motion fully establish the *norma loquendi* in this respect. Secondly, in the law books this term has the signification, equally known and definite with its treasonable sense, of a rebel upon a commission of rebellion, a process issued by Courts of equity to enforce appearance, in which the persons named in it are described as "rebels and contemners of the "law." In a very recent case, that of *Miller* v. *Knox* (*c*), there is an instance of such a commission, and an extended discussion upon it. But, thirdly, the term rebel, in the ordinary usage of society, has not only the sense first above mentioned of a traitor by open insurrection against the government, but is also frequently made use of in a loose and colloquial sense, to denote a person of disloyal principles and disaffected to the government, without imputing the actual commission of treason. It is obvious, that in order to make this word of itself actionable, it must appear on the record to have been used in the sense first above mentioned, namely, as imputing the actual commission of treason; for if used in either of the two other senses, which I have mentioned, it is clearly not actionable. There is no *innuendo* to that effect, and the only averment in the declaration, bearing upon the point, is that the defendant intended "to cause it to be suspected and "believed" that the plaintiff "had been guilty of *rebellion*, "and was a *rebel*, and to subject him to the pains and

(*a*) 3 *Wils.* 186. (*b*) 6 *T. R.* 691. (*c*) 4 *Bing. N. C.* 581.

"penalties

"penalties by the laws provided against and inflicted upon "persons guilty *thereof*." Now I do not think that this is sufficient to fix the meaning of a term of so varied an import as the word rebel. In reality it affords no explanation of the sense in which it is used, being merely the repetition of the word itself; there may be "pains" and "penalties" inflicted upon rebels and contemners of the law under a commission of rebellion. It is altogether too vague and uncertain to confine the term to its *treasonable sense; which sense it seems* to me should appear so plain upon the record, as to require the Judge upon the trial to instruct the jury that, unless they thought the defendant by the words he used intended to impute to the plaintiff the actual commission of *treason*, they could not find for the plaintiff. Then it is said that in the four first counts of the declaration words are charged, accompanying the word rebel, which show their intention. It may be admitted, that the accompanying words in these counts go to negative the sense of a rebel under a commission of rebellion, but they are not such as bring the meaning up to a charge of the crime of treason. The being "kicked out of *Canada*" is not a sufficiently grave result for this capital offence of the highest degree. These accompanying words savour altogether of the loose and colloquial sense I have before adverted to, of being a person of disaffected and disloyal principles, and upon this record it is quite open to infer, nay I think it most natural to conclude, that this was the sense in which the charge was understood by those who heard it, and by the jury who tried the cause. On this point, it is material to advert to the historical fact, that the words were spoken before the breaking out of the late insurrection in *Canada*, and therefore could not reasonably be deemed to allude to any actual traitorous rebellion in that country. In the peculiar position of this case, I do not think that the verdict of the jury helps the record. This verdict may be held generally to affirm the truth of the plaintiff's complaint, but unless the Court is able to make out distinctly from the plaintiff's allegations that he has a legal ground of action, we cannot give him judgment. Mr. *Starkie*, in his work on *Libel*, commenting on a case where

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where the words imputed a charge of felony, expresses himself as follows: "It would be sufficient to aver, that the defendant, intending to charge the plaintiff with felony, spoke "the words, and in setting them out to add an *innuendo* to "the same effect, *in which case* a verdict for the plaintiff "would be conclusive as to the defendant's meaning and "intention." *(a)* So, in the present case, if there had been a similar averment and *innuendo*, I should have held the verdict to have been conclusive, as to the meaning of the words; without them, I do not think the record shows that the words were used in a treasonable, and therefore an actionable, sense. There are no modern instances of actions for slander, founded on the word rebel. There are several cases in the older reports, viz. *Wells* v. *Hemmerson* (*b*), *Fountain* v. *Rogers* (*c*), *Redston* v. *Elliot* (*d*), *Glanvil* v. *Gully* (*e*). These cases appear all to have turned on the distinction between the use of the word in its treasonable sense, as imputing a capital crime, and its sense derived from a commission of rebellion, without adverting to the use of it, in the familiar and colloquial sense, attributed to it in the present case, not amounting to a charge of the actual commission of the crime. The result of *these cases* would seem to be, that the word used alone, without accompanying words to show the intent, is not actionable. If this case were to be decided upon the naked authority of these precedents, we must at all events determine that the last count in the declaration is bad, and therefore arrest the judgment. In the case of *Redston* v. *Elliot* (*f*), where there were accompanying words, which were considered by the Court to show the intent, and render the charge actionable, it does not appear from the report that *an averment* of the intent would be unnecessary. But in truth I am not disposed to place reliance upon any precedents of actions of slander in that age, when it was the fashion to introduce into the consideration of them such subtleties as the good sense of modern times has repudiated.

(*a*) 1 *Star. on Libel*, 395.
(*b*) *Cro. Eliz.* 621.
(*c*) *Cro. Eliz.* 875.
(*d*) *Cro. Eliz.* 635.
(*e*) *Sid.* 132.
(*f*) *Cro. Eliz.* 635.

It is said by the Court, in the case of *Harrison* v. *Thornborough* (*a*), that "precedents in actions for words are not of "equal authority as in other actions, because *norma loquendi* "is the rule for the interpretation of words, and this rule "is different in one age from what it is in another." The present case, as has been seen, is attended with this peculiarity, that the word "rebel" has, in legal parlance, two distinct significations, and in common parlance, a third signification, differing from both the others. After much consideration, I have come to the conclusion, that the view I have now taken of the case is the proper one, and in this view of it, I am of opinion that no one count in the declaration can be supported, and, therefore, that the rule for arresting the judgment must be made absolute.

CARTER, J. This is a motion in arrest of judgment, on the ground that the words set out in the declaration are not actionable in themselves, and are not made so by introductory averment, *colloquium*, and *innuendo*. The words charged in the declaration are varied in the different counts, but the amount of them is to accuse the plaintiff of being a rebel, and in the last count the only words used are "He is a damned old rebel." The declaration contains no averment that there had been any rebellion against the *Queen's* government, nor any *colloquium* in reference to any such rebellion, nor does the last count contain even an *innuendo* that the defendant meant to charge the plaintiff with the crime of rebellion. We are to decide, therefore, whether these words as they appear in this declaration are sufficient to support an action for verbal slander. It is laid down in *Selw. N. P.* 1248, *7th edit.*, that "an action on the case lies "against any person for publicly and maliciously speaking "and publishing of another words which *directly* charge him "with any crime, for the commission of which the offender "is punishable by the common law or by statute." It is also necessary that the charge upon the person spoken of must be *precise*. *Onslow* v. *Horne* (*b*). Some difficulty may arise in looking through the numerous cases to be found in the books, as to what degree of precision is necessary, or

(*a*) 10 *Mod.* 196. (*b*) 3 *Wils.* 186.

indeed

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indeed whether the sense in which the words are used be not altogether a question for the jury. In the case of *Roberts* v. *Camden* (*a*), where the words were, "He is under a "charge of a prosecution for *perjury*," Lord *Ellenborough* says, "Words are now construed by Courts, as they always "ought to have been, in the plain and popular sense in which "the rest of the world seem to understand them." But it is to be observed with respect to that case, that the only offence, if any, charged there, was clearly perjury, and the only doubt was whether saying a man was under a charge of a *prosecution* for perjury, amounted to a charge of his having been guilty of perjury. The words there had no ambiguity as to the nature of the offence charged, and as to the nature of the offence admitted of but one construction. So again in the case of *Tomlinson* v. *Brittlebank* (*b*), Mr. Justice *Parke* says, "I think the *prima facie* import of the words is that "the plaintiff has done that which, in ordinary parlance, is "called robbing, *and is described in this count as a punishable* "*offence*;" confirming the doctrine laid down by Lord *Ellenborough* in the case I have before cited. In the same case, however, Chief Justice *Denman* founds his decision on a principle which is, I think, applicable to the case now before us. He says, "The word to rob gives a sufficient description of "an offence punishable in the very terms of the statute, "7 & 8 *Geo.* 4, *c.* 29: it has but one legal sense." "Forsworn "(alluding to the case of *Holt* v. *Scholefield*) is applicable not "only to perjuries punishable by law, but also to offences of "the same description which incur no temporal punishment." Hence I deduce this principle that where a word has two legal senses—one of which imports an offence punishable by law, which the other does not—in order to support an action for using such word in speaking of a person, it must appear on the record that it is used in the sense which imports an offence punishable by law. It may be that there are very few terms of reproach which will bear more than one legal meaning. At all events, I have been able to discover no case in which such a term has been the ground of an action, except the word forsworn, which occurs in the two cases, cited

(*a*) 9 *East*. 93. (*b*) 4 *B. & Ad.* 630.

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at the bar, of *Holt* v. *Scholefield* and *Hawkes* v. *Hawkey*. In both these cases, the judgment was arrested on the ground that an action would not lie for calling a man forsworn, unless it was alleged to have been said in reference to his having forsworn himself in some judicial proceeding for which he might be indicted for perjury. So in the case before us the word rebel has two legal meanings: one importing a person under a commission of rebellion, for which he is not indictable; the other meaning one who has been guilty of levying war against the government, which is indictable. It appears to me that in order to support an action for calling a man a rebel, it must appear in the declaration by introductory averment, by *colloquium* and *innuendo*, that the term was used in that sense which imports an indictable offence. This not being the case on the record now before us, I think the judgment should be arrested.

PARKER, J. I entirely concur in the judgment pronounced by His Honor the Chief Justice and Mr. Justice *Carter*. The meaning of the term *rebel* is equivocal, just such as is actionable or not actionable, according to the sense in which it may have been used, and the plaintiff ought in a proper manner, in his declaration, to have affixed a criminal meaning to it, so that the jury must in finding their verdict for the plaintiff, have been satisfied that such was the signification; and we must be satisfied that there is such a malicious sense imputed as will form the legal basis of an action. Not only is there no *colloquium* alluding to any traitorous rebellion against the *Queen*, to which the words referred; but it is not even alleged that the defendant in using them meant to impute such a crime. The language was exceedingly reprehensible; but it has not been shown to be actionable either on principle or authority.

BOTSFORD, J. I am of the same opinion, but I found it on the last count of the declaration, as this count contains no words to charge a treasonable offence; but according to authorities to be found in *Com. Dig.* and other books, I think a treasonable inference arises from the words and matter laid in the other counts. To be called a damned old rebel, in connexion with being kicked out of one province and turned out

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out of another, is sufficient, I think, from which to collect a treasonable charge; therefore, with great deference to the rest of the Court, I conceive that the four first counts of the declaration are sufficient.

Rule absolute for arresting the judgment.

RITCHIE and OTHERS, Trustees of *Easton*, an Absconding Debtor, *against* BOYD and OTHERS.

The trustees of an absconding debtor, duly appointed under the Act 26 Geo. 3, c. 13, may maintain trover, to recover the value of certain goods of the debtor, wrongfully converted, by the defendant, before any proceedings taken under the Act; such right of action being transferred by the operation of the Act from the debtor to the trustees.

THIS was an action of trover for goods and chattels, tried before Mr. Justice *Carter*, at the *Charlotte* circuit Court, in *April* last. At the trial it appeared that the property in question belonged to one *A. S. Easton*, who left this Province in 1837; that immediately afterwards the defendants entered his store in *Saint Andrews*, took the goods, and had them sold at auction, without any authority from *Easton*; the proceeds, amounting to £116, were apportioned by the defendants towards the payment of the respective debts due to themselves and to some other creditors of *Easton*. Proceedings were had against him, as an absconding debtor, under the provisions of the Act of Assembly 26 *G.* 3, *c.* 13. On the 4th *December*, 1838, a warrant was issued to the sheriff of *Charlotte* county, for the attachment of all the estate, real and personal, of the said *Easton*, within the county. The plaintiffs were duly appointed trustees for all the creditors, and this action was brought by them to recover the value of the goods which had been so taken and sold by the defendants. It was objected at the trial, that as the goods were converted before any proceedings under the absconding debtor act, no property ever vested in the plaintiffs, as trustees, to enable them to maintain trover, and that their only remedy was an action for money had and received; but a verdict was taken by consent for the plaintiffs for £116, with leave to the defendants to move to set the verdict aside, and enter a nonsuit. In *Trinity* term last a rule for this purpose having been obtained,

R. M. Andrews and *Ritchie* showed cause. The objection taken

taken at the trial was, that as a party to maintain trover must show a right of property, the conversion in this case being before the plaintiffs had that right, this action could not be maintained. But it is submitted that under the act for relief against absconding debtors, 26 *Geo.* 3, *c.* 13, *s.* 10, whereby it is among other things enacted, that the trustees are fully authorized and empowered to take into their hands all the estate, &c., of such absconding or concealed person, &c., and all other his, her, or their estate and effects, &c.; and such trustees immediately from their appointment shall be and hereby are declared to be vested with all the estate, real and personal, of such absconding or concealed person or persons, &c., and is and hereby are made capable to sue for, recover and receive all such estate and effects, as well real and personal, debts, dues, effects, or other thing or things whatsoever, which they shall find due, payable, or belonging to such absconding or concealed person or persons, &c. The plaintiffs appointment under this section of the act gave them all the right and dues of *Andrew S. Easton*, and the right to maintain this action against the defendant. [CARTER, J. You contend that whatever action the debtor might have brought, the trustees may bring ?] It is not necessary to go that far, but the words of the bankrupt act, 6 *G.* 4, *c.* 16, *s.* 12 & 63, giving authority to the commissioners and assignees over the debts of the bankrupt, are not so strong as the words of our absconding act, which uses the words debts, dues, effects, or other thing or things whatsoever; there is no specified power given by the bankrupt act to maintain actions of trover, yet it is clear trover will lie. See *Saunders on Pl. & Ev.* 870. 877, 3 *East.* 407, 2 *Cowp.* 570. There are also cases to show that assignees, as here, cannot claim before their appointment. Executors and administrators can maintain trover for a conversion in the time of the testator and intestate, and churchwardens have a power to a similar extent. *Hadman* v. *Ringwood (a)*. In *Price* v. *Helyar (b)* it was held, that a sheriff who takes in execution the goods of a bankrupt is liable in trover to his assignees, although he had no notice of the bankruptcy, and a commission

(*a*) 5 *Str.* 852, *and Cro. Eliz.* 145. 179. (*b*) 4 *Bing.* 597.

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had not been issued out at the time of execution; and *Clark* v. *Calvert (a)* is to the same effect. In these cases the parties were held liable by relation to the act of bankruptcy; and it is conceived that the property in this case would relate to the time of the absconding of *Easton*. If the trustees have not a right to bring this action, the defendants, wrong doers, would pick up all the property, to the exclusion of the creditors for whose benefit the proceedings under the absconding act were adopted. It is important to look to the intention of the legislature, and give the act, for the benefit of creditors, a liberal construction: it seems to have been the intention of the act to vest the trustees with all the rights of the debtor; and this is evidenced by the act of assembly taking away all rights and demands of the insolvent, as appears by the fifth and sixth sections of the act: by the fifth it is enacted, that if any person, after public notice given, pay any debt or demand, the person paying any such debt or demand shall be deemed to have paid the same fraudulently, and is liable to the trustees; and if any person be sued by such debtor, after such public notice, for any such debt, duty or demand, effect or thing, be shown, they so sued may plead the general issue, and give the matter in evidence: and by the sixth section, all sales by such absconding debtor, and all powers of attorney by him, after such public notice, given for selling any estate or effects, or collecting any debts or demands, &c., shall be null and void. Now this act did not intend to abrogate any right or demand of the absconding debtor to the exclusion of the creditors, but to give all such right to the benefit of such creditors; and to the same extent as it has cut the debtor off from recovering those debts for his own benefit it has empowered the trustees to sue and recover these rights and demands for the benefit of the creditors. Now here was an existing demand, which *Easton*, but for the absconding act, would have a right to sue defendants for, but the act takes from him that power, and by consequence has given it to the plaintiffs on the record. In *Smith* v. *Coffin (b)* it is said, that the right to bring a real action passes to the assignees by the usual words of the

(a) 8 *Taunt.* 751. (b) 2 *Hen. Blac.* 444.

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deed of assignment, so here the right to bring this action is the transfer which the law makes of all rights to the trustees. It has been contended, that an action for money had and received was the proper remedy, but that would be confining the trustees to the limited proceeds of the sale, perhaps half the value of the goods, instead of recovering from the wrong doers the full value, which could only be done in an action of trover. The act never intended that the wrong doer should be placed in a better situation by the appointment of trustees, or have the benefit of his wrong, to the exclusion of the creditors, which would be the case unless this action be holden maintainable.

The *Solicitor General* in support of the rule. The case of executors and administrators cannot apply to the present, as the power they have of bringing trover for a conversion in the time of the testator and intestate is expressly given by statute 4 *Ed.* 3*d;* but on the contrary, these instances press strongly against the plaintiffs, inasmuch as they show that in the absence of the statute the principles of the common law, as applied to such a conversion, are directly opposed to this action; the case too of churchwardens stands on its own peculiar grounds; nor do the cases from the bankrupt law help this action. The bankrupt laws apply to a particular trade and set of persons in trade. Before the Court could find any analogy between the bankrupt law and the present case, it would be necessary to go through all these acts and examine the general policy of them. There is a wide difference between the bankrupt laws and our own act: we must look to the letter. It is clear that under the bankrupt law no specific term is limited in the act for vesting the property in the assignees, and that produces the right of bringing an action, by relation to a time past; but under the absconding act it is specifically pointed out when the property shall be effected in its right, and when to vest it in trustees. Now before the appointment of trustees it is clear no property was in them, but continued in the debtor; so before the public notice, the absconding debtor's right to the property was not affected in any way; any thing done by him or to him before the time of such public notice could not be affected by the

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the subsequent proceedings under the act. If monies had been paid, or persons had acted under a power of attorney or otherwise, it is clear that the act, limited to a certain extent, could not be allowed to reach back by relation, as in the bankrupt act, which relation has been the very ground of supporting the action referred to on the other side; the property here was converted a long time before public notice; there was no evidence of the existence of the goods either at the time of appointing the trustees or of the public notice; there was therefore no property which ever could vest in the trustees to enable them, according to common law principles, to maintain this action. If in the absence of any express provisions reaching backwards, and in the face of a limited time for their right, as in the act, they can support this case, why could not as well an executor or administrator by the common law support trover for a conversion in the testator or intestate's time; and where was the need of the statute of *Edward* 3*d*? It has been contended, that unless this action can be maintained there would not be a complete remedy under the present state of the law. With equal reason it might have been so contended before the statute of *Edward* 3*d*, that the Court in those times did not undertake to alter, but it was changed by the interposition of the legislature; so it is submitted it must be the case here, though not affected until after notice; and to allow trover to be maintained in this case, where there was no property in existence to be converted at the time the right accrued, is directly against the statute of *Edward* 3*d*, and repugnant to the fundamental principle of the action.

Cur. adv. vult.

The Court now delivered judgment.

BOTSFORD, J. (After stating the facts.) The question of law that arises in this case, and which was reserved for the consideration of the Court, must depend upon the meaning and intent of the act 26 *Geo.* 3, *c.* 13. By the tenth section it is enacted as follows: "That such trustees, "and each and every of them, when so nominated and ap- "pointed under the hand and seal, or hands and seals of the "said Judges, or any one of them, hereby is and are fully "authorized

" authorized and empowered to take into their hands all the " estate or estates of such absconding or concealed person " or persons, for the management of whose estate or effe " they were appointed, and every part or parcel thereof tha " shall have been seized as aforesaid, and all other his, her, " or their estate and effects which they, the said trustees, " may afterwards discover in any part of this Province, and " all evidence, books of account, vouchers and papers, relating " thereto; and such trustees immediately from their ap- " pointment shall be, and are hereby declared to be, vested " with all the estate, real and personal, of such absconding " or concealed person or persons for the management of " whose estate they were appointed, and they and the sur- " vivors and survivor of them, is and hereby enabled and " made capable to sue for, recover and receive all such " estate, as well real as personal, debts, dues, effects, " or other thing or things whatsoever, which they shall " find due, payable, or belonging to such absconding or " concealed person or persons." It will appear by this section that the trustees are immediately on their appointment vested with all the real and personal estate of an absconding debtor, and are enabled to sue for, recover, and receive, all such estate, real as well as personal, debts, dues, effects, or things, which they shall find due, payable or belonging to the absconding debtor. Now, it appears to me by the use of the words, " personal estate," " dues," " effects," all of which have a broad and comprehensive meaning, more especially the words, " personal estate," which may be said to include a chose in action, that it was the intention of the legislature to vest the trustees also with all rights of action belonging to the absconding debtor at the time of their appointment, and with every thing that could be turned to the benefit of the creditors. That such was the intention and meaning of the act I think is to be inferred from the sixth section, by which it is enacted that all powers of attorney for collecting any debts or " demands," whether made after or before the public notice required by the act, shall be null and void. I am therefore of opinion, that the right of action, or cause of suit, which *Easton* had against the defendants for the

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the wrongful taking of his goods, was vested in and belonged to the plaintiffs on their appointment as trustees. This construction I think is agreeable both to the meaning and policy of the act, which is to be construed beneficially for the creditors. The act for the relief against absconding debtors may be said in some respects to be analogous to the bankrupt laws; this Court will therefore look to the decisions which have been given as to the rights and powers of the assignees under the assignment from the commissioners. By these decisions it will appear, that actions by the assignees have been sustained for torts to the personal property of the bankrupt, which had been committed before the bankruptcy. In *Wright* v. *Fairfield (a)*, *Littledale*, J. said, "It had been the "constant practice for assignees to declare in trover upon a "conversion before bankruptcy." The verdict I think was right, and the rule must be discharged.

CARTER, J. This was an action of trover, brought by the plaintiffs as trustees of the creditors of *Andrew S. Easton*, an absconding debtor. It appeared that *Easton* absconded sometime in *May*, 1837, and that shortly afterwards the defendants took possession of his stock in trade and furniture, sold it by auction, and appropriated the proceeds, towards satisfying certain debts of *Easton*, to themselves and some others of his creditors. All this was done previous to any proceedings being taken under the absconding debtors' act. On the 4th *December*, 1838, the plaintiffs were duly appointed under the provisions of that act trustees for the creditors of *Easton*, and the question which arises upon these facts is, whether by that appointment they became vested with any rights by which they can support an action of trover for that which certainly was a wrongful conversion of the property of the absconding debtor, *Easton*. On the part of the defendants it has been contended, that the property of the plaintiffs in the estate of the absconding debtor can only date from the time of their appointment as trustees, and that the conversion being prior to that time they can have no right to support this action of trover. To this it is answered by the plaintiffs, 1st. That by the analogy of the *English* bankrupt

(a) 2 *B. & Ad.* 733.

laws

laws the property in the trustees reverts back to the time of the act of absconding, or 2dly. That the right of action existing in the absconding debtor at the time of the appointment of trustees is by that appointment vested in them. On the first of these points, viz., the relation back of the trustees of property to the time of absconding, it is obvious that there is no express provision for this in the absconding debtors' act, but on the contrary from the provisions of the fifth and sixth sections of that act—by which all payments and deliveries to absconding debtors after the first public notice of the issuing the warrant, and all sales by the absconding debtor after such notice are made void—it would seem that such transactions, by and with the debts before such public notice, would be valid; and thence it would follow that the title of the trustees could not relate back to the time of the absconding. With respect to the *English* bankrupt law, it is to be observed that by the 6 *G.* 4, *c.* 16, *s.* 12, the commissioners appointed by the *Lord Chancellor* have full power to take, order, and direction with the lands, tenements, and hereditaments of the bankrupt, which he shall have had in his own right *before he became bankrupt*, and with all his money, goods, chattels, debts, &c. The words of this section are nearly the same as are contained in 13 *Eliz. c.* 7, *s.* 2, in a note to which, Sir *William Evans*, in his collection of statutes, says, "By force "of this provision the commission attaches upon all the pro- "perty of the bankrupt from the time of the act of bank- "ruptcy, and all transactions however given which had af- "terwards taken place are wholly void except so far as the "general provision has been modified by the exceptions con- "tained in subsequent statutes." If we then look to the assignment by the commissioners to the assignees, it appears that transferred to them, "All the goods, &c., and personal "estate which the bankrupt was possessed of, &c. *at the time* "*he became bankrupt*, or at any time since." On this point therefore there is no analogy between our absconding debtor act and the *English* bankrupt law. It is different, however, with respect to the second point, viz., the vesting in the trustees of the right of action existing in the debtor at the time of their appointment. The case of *Wright* v. *Fairfield*

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Fairfield (a) seems to me to settle this point. The marginal note to that case is thus:—"A person under 6 *G.* 4, *c.* 16, "may maintain an action for unliquidated damages which "had accrued before the bankruptcy by non-performance of "a contract." The Court held that this passed to the assignees under the words, "all the present and future personal "estate of the bankrupt." *Littledale*, J. says, "I am of "opinion the legislature intended to give the assignees power "to sue upon contracts made with the bankrupt, *and for in-*"*juries affecting his property*, though not for mere personal "wrongs, and such causes of action as would abate by his "death;" and afterwards, "It has been the constant prac-"tice for assignees to declare in trover upon a conversion "before the bankruptcy." *Parke*, J. says, "The statute is "to be construed beneficially for creditors, and the subject "matter of this action if not strictly a part of the estate is "something which when recovered will be for the benefit of "the estate." On looking at the words of the absconding debtor act, 26 *G.* 3, *c.* 13, *s.* 10, they will be found to be at least as large and comprehensive as are contained in the *English* bankrupt act. By that section the trustees, when duly appointed, are immediately from their appointment declared to be vested with all the estate, real and personal, of such absconding or concealed person for the management of whose estate they were appointed, and are enabled to sue for, recover, and receive all such estate, real and personal, debts, dues, effects, or other thing or things whatsoever, which they shall find due, payable, or belonging to such absconding or concealed person. Under the words of this section, and under the policy of the act, which is certainly to make the estate of the debtor as much as possible available for the satisfaction of his creditors, I am of opinion that the right which existed in *Easton* to sue for the wrongful conversion of this property, before the appointment of the plaintiffs as trustees, passed to them by their appointment; that this action has been properly brought; and the rule for entering a nonsuit must be discharged.

(a) 2 *B.* & *Ad.* 727.

PARKER, J.

PARKER, J. I cannot agree in the argument of the plaintiff's counsel, that by analogy between the bankrupt laws in *England* and the absconding debtor act in this Province the *relation*, which has been there held, to carry back the right and title of the assignees to the first act of bankruptcy, shall extend here, in the case of trustees, to the time of the debtor's absconding; neither do I think it necessary that such should be made out to support the present action. The bankrupt acts distinctly specify what shall be acts of bankruptcy, and do not mark any other period for the relation, whereas our absconding debtor act, 26 *G.* 3, *c.* 13, has not left the time of relation to inference, but has in various clauses, namely, the fifth, sixth, tenth, fifteenth, and twenty third (which I need not recite), made it contemporaneous with the first publication of the notice accompanying the warrant to the sheriff, except as to seizures made by the sheriff under the warrant prior to the notice. It is well known that in the execution of the bankrupt laws many individual cases of hardship arose, especially to sheriffs; acts of bankruptcy being frequently secret; and new enactments have from time to time been made, by which the general rule has been relaxed, to obviate difficulties which the care of our legislature has provided against in the first instance. The relation is fixed at the time of an open notorious act, which no one can mistake. Up to this time (except where an actual seizure is made) any control exercised *bona fide* by the debtor over his property will be valid; if he make any fraudulent assignment, or acquittance, in order to defeat his creditors, such would on general principles be void. It is not necessary to discuss this point here, as the defendants have no authority from the debtor to sanction their acts. Independently of the *time of relation* I have spoken of, the policy and object of the two sets of laws seem to me, so far as regards the legal rights of the assignees and the trustees, the same. The object and policy in both cases is to divest the debtor of his property and rights, and to vest them in trust for the general benefit of all the creditors, in equal rateable proportion, according to the amount of their legal claims. "Trustees" and "Assignees" are, in fact, here convertible

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terms; the trustees of an absconding debtor are assignees by virtue of the act, which operates as a legal assignment; and it has been decided in *England* that the assignees of a bankrupt are to be considered in the light of trustees in regard to their mutual rights and liablities, and the nature of their office; and I should even, if necessary, be disposed to give the same liberal and beneficial construction to our provincial act as the bankrupt acts have received; but the words of our act are even more extensive than those of the bankrupt acts, and would, I think, without resorting to the enlarged sense given to those acts, vest in the plaintiffs, as trustees of *Easton*, the interest and right they now seek to enforce. The words of the bankrupt act, 1 *Jac.* 1, *c.* 15, *s.* 13, which have been also adopted in the new consolidated act, 6 *Geo.* 4, *c.* 16, *s.* 63, are, "That the commissioners shall assign "to the assignees, for the benefit of the creditors of the "bankrupt, all the present and future personal estate "of such bankrupt," &c., and "all debts due, or to be "due, to the bankrupt, wheresoever the same may be "made or known, and such assignment shall vest the pro-"perty, right and interest in such debts in such assignees," &c. There is no specified mention of *actions* or *rights of action*, yet a right to maintain trover for a conversion made of the effects, before any act of bankruptcy committed, has been repeatedly exercised and allowed. In *Kearsey* v. *Carstain* (*a*), *Parke*, J. asks, "If goods of the bankrupt are "taken and converted before the bankruptcy, is it not the "every day practice that assignees bring trover?" This is most fully confirmed in *Wright* v. *Fairfield* (*b*), which has been already cited. Now if we look to the fifth section of our act we find a word used of more extended meaning than any contained in the bankrupt acts, viz. the word "demand." *Litt. s.* 508: "Also if a man release to another all manner "of demands, this is the best release to him to whom the "release is made that he can have, and shall accrue most to "his advantage; for by such release of all manner of de-"mands, all manner of actions, reals, personals, and actions "of appeal, are taken away and extinct." Lord *Coke*, in

(*a*) 2 *B. & A.* 723. (*b*) 2 *B. & A.* 727.

his

his commentary, adds, "Demand, *demandum*, is a word of "art, and in the understanding of the common law is of so "large an extent as no other one word in the law is, unless "it be *clameum*, whereof *Littleton* maketh mention, *s.* 445." So in *Edward Altham's* case *(a)*, after referring to the above section in *Littleton*, it is said, "As a release of suits is "larger and more beneficial than a release of quarrels or of "actions, so a release of *demands* is more large and bene- "ficial than any of them, for thereby is released all that is "by the others released, and more." * * * * So it is resolved in *Chauncey's* case (*b*), that "He who releases all "*demands*, excludes himself from all actions, entries, and "seizures." * * * * "By release of *demands*, all the "means and remedies, and the causes of them, which any "one has to lands, tenements, goods, chattels, &c. are "extinct." There can be no doubt as to the spirit and intent, nor indeed as to the letter of the act, unless we take the strictest legal interpretation of the term "indebted" to control the operation of the other words in the section; but it is evident by reference to the ninth, fourteenth, and fifteenth sections, that no such limited meaning is given to the terms "debt" and "indebted;" and I may observe one of the definitions of the term indebted in *Johnston's Dict.* is "*liability to make restitution.*" The words of the tenth section also are very extensive, whereby the trustees are made capable to sue for, recover and receive all the estate, real and personal, debts, *dues*, effects, or other thing or things, due, payable, or belonging to the absconding debtor. Having settled then the meaning of the act, let us look to the circumstances of the present case. Here we find that certain goods and chattels which belonged to *Easton*, the absconding debtor, before the warrant issued and notice given under the act, (whether before or after the debtor absconded appears to me immaterial,) were taken possession of and sold by the defendants without any apparent right or authority whatever from *Easton*. There was then a subsisting legal demand and right of action in *Easton* at that time, and such remained without any subsequent assent

(a) 8 *Rep.* 305. *(b)* 34 *H.* 8.

given

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given by, or satisfaction made to, *Easton* at the time of the public notice under the act. This demand therefore, in my opinion, at the time of the plaintiffs appointment as trustees vested in them, (the title relating back to the time of such public notice,) and may be enforced by them in an action of trover for the conversion as set out in the second count, to which the verdict must be confined. The defendants are doubtless bound to make compensation to some one; and had they after the public notice given *paid the demand* to *Easton*, they would not have been discharged; and had they been sued by him, or should hereafter be sued, the act would afford them a good defence. If they are creditors they must be content with their fair proportion, and shall not, by taking the law into their own hands, oust the other creditors altogether.

CHIPMAN, C. J. Not having heard the argument I pronounce no opinion at large, but will merely say that I entirely concur in the opinions expressed by my brethren on the bench.

Rule discharged.

(Verdict to be confined to the second count.)

Monday, February 8th.

O'CONNOR *against* THE NEW BRUNSWICK and NOVA SCOTIA LAND COMPANY.

Since the Act 6 W. 4, c. 33, s. 6, substituting a writ of summons for the original writ, a corporation may be proceeded against in the summary manner; and in cases where the proceedings ought to be summary the plaintiff, if he succeed, will only be entitled to summary costs.

ASSUMPSIT to recover the balance of an account. The defendants, under a rule, paid into Court the sum of £6 7*s.* 7½*d.*, which the plaintiff accepted in full discharge of his debt, and the Master taxed ordinary costs for the plaintiff.

The *Solicitor General* moved in *Michaelmas* term last for a rule, calling upon the Master to review the taxation of costs in the cause, and to reduce them to the costs allowed under the Act of Assembly, 4 *W.* 4, *c.* 41, by the first, second, and eighth sections of which it is enacted, that in tions like the present where the sum total does not exceed twenty pounds the Supreme Court may proceed in a summary

summary way by causing the declaration to be inserted in the writ; and that in such case if the plaintiff proceed according to the ordinary practice of the Court he should only be entitled to summary costs, unless by an order of the Court, or a Judge for the larger costs; and contended that under the provisions of the Act of Assembly, 6 *W.* 4, *c.* 33, abolishing the proceeding by original against corporations, and substituting and prescribing the form thereof, it was evidently the intention of the legislature to afford a summary mode of proceeding in cases where the amount came within the summary jurisdiction; that there was nothing in the act to preclude a party from proceeding against a corporation according to the summary practice; the declaration might as properly be inserted in a summons as in a writ; and the words in the form of summons given by the act, "*as the case may be*," showed evidently that such was the intention of the legislature. That it might with equal propriety be argued, that because the act was silent on the subject, money could not be paid into Court by a corporation, as that they could not be proceeded against in a summary form of action.

D. L. Robinson showed cause. The practice cannot be as stated by the defendants counsel, for a corporation sued by summons has twenty days to appear in, and the Act of Assembly, 1 *Vic. c.* 13, *s.* 2, extends the time for appearing in summary actions to thirty days after the return of the writ. [PARKER, J. That would only alter it *pro tanto*.] The Court has power to establish rules relating to the summary practice, but they have not yet made any; the form of summons given by the act is express, and cannot be altered.

Cur. adv. vult.

CARTER, J. now delivered the judgment of the Court. This was an application for the Master to review the taxation of costs, and to reduce them to the costs allowed under the Act of Assembly giving a summary jurisdiction to this Court in certain actions where the sum total does not exceed twenty pounds. This was an action of assumpsit, to which the general issue was pleaded, and six pounds paid into Court, which sum the plaintiff took out of Court in full satisfaction

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satisfaction of the action. The question which arises here is, whether the defendants, being a corporation, could have been sued under the summary act? By the 6 *W.* 4, *c.* 33, *s.* 6, the old mode of proceeding against corporations by original was abolished, and the writ of summons substituted in its stead. The summary act, 4 *W.* 4, *c.* 41, *s.* 9, mentions the writ of summons as one mode of proceeding under the act, and we can see no reason why the provisions of that act should not be held to extend to corporations as well as individuals. An objection was urged on the argument by the plaintiff's counsel, that by the act of 7 *W.* 4, *c.* 14, *s.* 2, twenty days, after the return of the writ, are given to corporations for entering an appearance; and by the 1 *Vic. c.* 13, *s.* 2, thirty days are given in summary actions for putting in bail or entering an appearance. This does not appear to us to offer any difficulty, because if the summary act applied to corporations before the passing of the 1 *Vic. c.* 13, after the passing of that act the summary law would still be applicable, only modified by the provisions of that act. For these reasons we think the rule must be made absolute.

Rule absolute accordingly.

MOORE and WIFE *against* OGDEN.

A rule *nisi* for a new trial refused in an action for assault and battery, where a verdict had been found for the defendant contrary to the evidence; the defendant assenting to a *stet processus*.

Trespass for assault on the wife; plea, not guilty. On the trial before *Carter*, J. at the last *Westmorland* circuit, it appeared by the plaintiff's witnesses that in the course of a conflict about some property the defendant struck the plaintiff rather a violent blow on the head, which caused some pain and a bleeding at the nose. There was some evidence as to the bad character of the woman. The learned Judge directed the jury that an assault had been proved, which was not justified, and their verdict should be for the plaintiff, but the *quantum* of damages was wholly in their discretion. The verdict however was for the defendant.

D. S. Kerr, in *Michaelmas* term last, moved for a rule *nisi* for a new trial, on the ground that the verdict was against evidence

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evidence and the Judge's charge. The Court asked, whether there were any cases in which *new trials* had been granted in actions of this nature, where no serious injury had been committed, and the damages might be trifling; and suggested the entering a *stet processus;* to which *Chandler*, for the defendant, assented; but *Kerr* having no instructions to withdraw his motion, the Court took time to consider; and in this term, per

BOTSFORD, J. An application was made to us at the last term for a rule *nisi* in this cause, which we then omitted to decide. We do not think there was any thing in the nature of this cause to make it proper for us to send it down to a new trial, and as the counsel for the defendant consents to forego the entering up of his judgment, and to a *stet processus* being entered, we recommend that course to be adopted.

FAULKNER *against* CENTRAL FIRE INSURANCE COMPANY OF NEW BRUNSWICK.

Where by the conditions subjoined, and referred to, in a policy of insurance upon goods against fire, it is declared, "that if there should at any time be more than twenty five pounds weight of gunpowder on the premises insured, or where any goods are insured, such insurance should be void, and no benefit derived therefrom," the deposit of gunpowder over the above mentioned weight, though for a temporary purpose, will vacate the policy.

To a plea alleging such a breach of the conditions of the policy, a replication averring that the powder had been put on the premises without the plaintiff's privity, because a vessel in which it was intended to ship it to *Windsor* had sailed without it; and the plaintiff had used every exertion to find another conveyance without success; in consequence of which it remained on the premises until a fire broke out which eventually consumed the plaintiff's premises; but that long before it reached those premises the gunpowder was removed, and thrown into the harbour, and no loss or damage occasioned thereby to the goods insured; was held bad *on demurrer.*

THIS was an action of debt, on a policy of insurance on goods against fire. The first count of the declaration stated, that by a certain deed poll or policy of assurance made by the *Central Fire Insurance Company of New Brunswick*, and sealed with their common seal, on the 30th *May*, 1839, reciting that the plaintiff had paid to the said company the sum of £8 16*s.* for the assurance from loss or damage by fire for a term commencing on the 30th day of *May*, 1839, at twelve o'clock at noon, and ending on the 30th day of *August*, 1839, at twelve o'clock at noon, of the following premises, viz. *goods, hazardous and not hazardous*, contained in store number two, and a room in number one, occupied

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by assured as an office, on *Donaldson's* wharf, in the city of *Saint John*, part of the said goods being owned by the assured and part held by him on commission, £550, from the 30th day of *May* to the 30th day of *August*, 1839. It was by the said deed or policy of assurance witnessed, "that "the capital or joint stock estate and securities of the said "*Central Fire Insurance Company of New Brunswick*, should "be subject and liable to pay, make good, and satisfy, unto "the said assured all such loss and damage as should happen "by fire to the said property therein above mentioned, "within ninety days after proof thereof, provided the same "should amount to the sum of five pounds, which the said "insured should suffer by fire in the premises above men- "tioned during the term aforesaid, not exceeding however "the sum of five hundred and fifty pounds, the amount in- "sured by the said policy." And by certain provisions in the said deed poll or policy of assurance contained, it was provided and declared to be the true intent and meaning of the said policy that the capital or joint stock estate and securities of the said company should not be liable or subject to pay or make good to the insured any loss or damage which should happen by any invasion, foreign enemy, civil commotion, mob, riot, or any military or usurped power whatever, or by any earthquake or hurricane, nor for loss occasioned by the explosion of gunpowder. Other provisos were then set out, and the declaration proceeded as follows, viz.: And it was also by the said deed poll or policy of assurance further declared and agreed "to be the true intent and "meaning of the parties thereto, that in case the therein "above mentioned premises should at any time after the "making and during the continuance of that said insurance, "be appropriated, applied, or used to or for the purpose of "carrying on or exercising therein any trade, business or "vocation, denominated hazardous or extra hazardous in "the conditions annexed to the said policy, or for the pur- "pose of storing therein any of the articles, goods, or mer- "chandize, in the same conditions denominated hazardous "or extra hazardous, unless in the said policy otherwise spe- "cially provided for, or thereafter agreed to by the said "company

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" company in writing, to be added to or endorsed upon the " said policy, then and from thenceforth, so long as the same " should be so appropriated, applied, or used, the said policy " should cease and be of no force or effect." And it was thereby moreover declared that the said policy or the insurance thereby intended to be made, did not comprehend or cover " any books of account, written securities, deeds, or " other evidence of title to lands, bonds, bills, or other evi- " dences of debt, money or bullion." And it was also by the said deed poll or policy of assurance further declared to be " understood and agreed, as well by the corporation of the " said *Central Fire Insurance Company* as by the insured " named in the said policy, and all others who might become " interested therein, that the said insurance was made and " accepted in reference to the conditions which accompanied " the said policy; and in every case the said conditions were " to be used to explain the rights and obligations of the " parties, except so far forth as the said policy itself " specially declared those rights and obligations." The conditions of insurance referred to in the body of the said deed or policy of insurance were then set out at length; among others the following, " It is declared and conditioned " that goods not hazardous were such as are usually kept " in dry good stores, including also household furniture, and " linens, cottons in bales, coffee, flour, indigo, potash, rice, " sugar, and other articles not combustible. Second, that " goods, wares, and merchandize therein, denominated ha- " zardous, were china, glass, and earthenware in packages, " booksellers stock, chip and straw hats, flax, hemp, groce- " ries, including spirituous liquors, oil, pitch, saltpetre, tar, " turpentine. Third, that the goods, wares and merchan- " dize therein, denominated extra hazardous, were aqua " fortis, ether, spirits of turpentine, hay, straw, fodder, " grain unthrashed, and cotton wool not in bales." It was also by the said condition declared, " *that if there should be* " *at any time more than twenty-five pounds weight of gun-* " *powder in the premises insured, or wherever any goods were* " *insured, or if the said gunpowder should not be inclosed* " *and kept in tin canisters, or if it should be sold by artificial*

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" *light, in any or either of the said cases such insurance should* " *be void, and no benefit derived therefrom, and in no other* " *way or manner should gunpowder be insurable*, and that no " unslacked lime should be kept on the premises wherever " any goods were insured, unless it was properly secured " from rain or water." It was then averred, that the said *Central Fire Insurance Company* became insurers to the said plaintiff for the said sum of £550, in the said deed poll or policy of assurance for the time and on the terms and conditions therein mentioned; and that at the time of making the said policy of assurance, and also at the time of the loss thereinafter mentioned he, the said plaintiff, had divers large quantities of goods, wares and merchandize, of the denomination mentioned in and insured by the said policy, stored and housed in the said store and room in the said policy mentioned to a large amount in value in the whole, to wit, to the amount of all the money by the said company so insured or caused to be insured thereon by the said policy. It was then averred, that the plaintiff was interested in the goods insured, and that afterwards and whilst the said goods were so remaining in the said store and room mentioned in the said policy, in the city of *Saint John* aforesaid, and whilst the same store and room was in the occupation of the said plaintiff, and whilst the said plaintiff continued to be so interested in the said goods, and before the expiration of the said term for which the same were so insured as aforesaid, to-wit, on the 17th day of *August*, in the year aforesaid, the said store and room mentioned in the said policy of assurance, together with divers other buildings near or adjoining thereto, were accidentally consumed by fire, without any fraud, collusion, or contrivance of him, the said plaintiff, whatsoever, and that divers large quantities of the said goods, so insured by the said policy, were wholly consumed and lost to the said plaintiff by the said fire to a large amount in the whole, to-wit, to the amount of £429 19*s.* 2*d.* of the amount insured by the said policy. It was then averred, that notice was given to the company of the loss, and that a particular account was made out and rendered, verified by the oath of the plaintiff; and that the plaintiff also made

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oath that no other insurance was effected; that he procured a certificate from a notary public contiguous to the place, and no way concerned in the loss, as to the character of the plaintiff, and the absence of fraud or evil practice, &c., as required by the conditions of the policy; and that the premises mentioned in the said policy of assurance were not at the time the said fire happened, nor at any time after the making of the said policy, appropriated, applied, or used to or for the purpose of carrying on or exercising therein any trade, business or vocation, denominated hazardous or extra hazardous in the said conditions annexed to the said policy, *or for the purpose of storing therein any articles, goods or merchandize, in the same conditions denominated extra hazardous, or for storing therein any articles not specially provided for in the said policy.* It was then averred, that the stipulated time for paying the loss after due proof thereof had elapsed, and that the plaintiff had been ready and willing, and had offered to submit all matters in difference to arbitration, &c.; that the defendants had refused payment, whereby *actio accrevit*, &c. There were two other counts on the same policy, which it is not material to set out; also the common counts.

The defendants pleaded among other pleas, the following to the three special counts, viz.: And for a further plea in this behalf as to the said supposed causes of action in the said first, second, and third counts of the said declaration mentioned, the said defendants by like leave, &c. *actio non*, &c., because they say that there was after the execution by the said defendants of the said deeds poll or policies of assurance as aforesaid, in the said store and room in the said deeds poll or policies of assurance in the said first, second and third counts of the said declaration mentioned, to wit, at the city of *Saint John*, in the city and county of *Saint John* aforesaid, at the time and while the said goods, wares, and merchandize of the said plaintiff were so remaining in the said store and room as aforesaid, and before the said expiration of the said term for which the said goods were so insured as aforesaid, by the said last mentioned deeds poll or policies of assurance, and at the same time the fire mentioned, &c., so accidentally broke out in the city of *Saint John*

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John as aforesaid, to wit, on the 17th day of *August*, in the year aforesaid, *a large quantity of gunpowder, to wit, five hundred pounds weight of gunpowder, contrary to the terms and conditions of the said deeds poll or policies of assurance in the said last mentioned counts of the said declaration described*, to wit, at &c., by reason whereof the said last mentioned deeds poll or policies of assurance were and are void, and of no force, to wit, at the city aforesaid, in the city and county aforesaid, and this they, the said defendants, are ready to verify, wherefore they pray judgment if the said plaintiff ought to have or maintain his aforesaid action thereof against them, &c. The fifth plea was similar to the fourth, only stating that there was a quantity of gunpowder on the premises, viz. twenty five pounds weight, not kept inclosed and in tin cannisters, contrary to the conditions of the said policy. To these pleas was the following replication: "And the "said plaintiff as to the said pleas of the said defendants by "them fourthly and fifthly above pleaded to the said first, "second and third counts of the said declaration saith" [*precludi non, &c.*] "because he saith that although true it "is that there was after the execution by the said defend- "ants of the said deeds poll or policies of assurance as afore- "said, in the said store in the said deeds poll or policies of "assurance mentioned, to wit, at" &c., "at the time and "while the said goods, wares and merchandize of the said "plaintiff in the said first, second and third counts of the "said declaration mentioned, were so remaining in the said "store and room, and before the expiration of the said time "for which the said goods were so insured as aforesaid by "the said deeds poll or policies of assurance, and at the "time the fire mentioned in the said first, second and third "counts of the said declaration, so accidentally broke out in "the said city of *Saint John* as aforesaid, to wit, on the "17th day of *August*, in the year aforesaid, a quantity, to "wit, eight kegs of gunpowder, of the weight of twenty five "pounds and upwards, to wit, of the weight of two hundred "pounds, not inclosed in tin nor any part thereof, which was "the same gunpowder as is mentioned in the said fourth and "fifth pleas of the said defendants above pleaded to the said first,

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" first, second and third counts of the said declaration; yet " for replication thereto the said plaintiff saith, that the said " eight kegs of gunpowder, being the same gunpowder as is " mentioned in the said fourth and fifth pleas of the said de- " fendants, was not put into the said store or room in the " said deeds poll or policies of assurance mentioned, but was " kept and deposited at the powder house or magazine at " *Carleton*, in the neighbourhood, in the said city of *Saint* " *John*, until a short time before the said fire in the said first, " second and third counts of the said declaration mentioned, " and that afterwards, to wit, on the 15th day of *August*, in " the year aforesaid, to wit, at" &c., " the same eight kegs " of gunpowder were brought over across the harbour of " *Saint John*, in the city and county aforesaid, from the said " powder house in *Carleton* aforesaid, to be shipped on board " a vessel bound to *Windsor*, in the province of *Nova Scotia*, " then lying in the said harbour of the said city of *Saint John*, " but that before the said gunpowder could be shipped on " board of the said vessel, so lying in the harbour aforesaid, " and bound for *Windsor*, in the province of *Nova Scotia* " as aforesaid, the said vessel departed and sailed away from " the said harbour of *Saint John* aforesaid, whereby the said " eight kegs of gunpowder or any part thereof could not be " put on board the said vessel, and there being no other " vessel ready to sail from the city aforesaid, or other con- " veyance by which the said gunpowder could be sent or " conveyed to *Windsor*, in the said province of *Nova Scotia* " as aforesaid, the same eight kegs of gunpowder were af- " terwards, to wit, on the said 15th day of *August* in the " year aforesaid, without the knowledge or privity of the " said plaintiff placed in the said store in the said deeds poll " or policies of assurance mentioned, by the person who had " the same in charge, there to remain only until a conveyance " could be found to transport the same to *Windsor*, in the " province of *Nova Scotia* aforesaid, it being then expected " that such conveyance would be found in the next day or " two, but no conveyance being found to take the said gun- " powder away, the same necessarily and unexpectedly (al- " though every exertion was used by the said plaintiff and

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" his servants to obtain a conveyance by which the said gun-
" powder could be sent away from the said store) remained
" in the said store, to wit, at" &c., " until the said time of
" the said fire in the said first, second and third counts of the
" said declaration mentioned, to wit, until the 17th day of
" *August*, in the year aforesaid, and that after the said fire
" in the said first, second and third counts of the said decla-
" ration mentioned, had so broken out in the city of *Saint*
" *John* aforesaid, but long before the said fire had reached
" or been communicated to the said store or room in the said
" deeds poll or policies of assurance mentioned, or any of
" the buildings next adjoining thereto, or any of the buildings
" upon the wharf upon which the said store and room were
" situated in the city aforesaid, all and every part of the said
" eight kegs of gunpowder, which had been so placed in the
" said store as aforesaid, being the same gunpowder as is
" mentioned in the said fourth and fifth pleas of the said
" defendants, was removed from the said store and room
" and thrown into the water and mud in the slip there of the
" said harbour of *Saint John* aforesaid, and entirely excluded
" from any danger of explosion from the said fire, and with-
" out any alarm or apprehension thereof of the persons there
" present, and the same gunpowder was not nor was any part
" thereof burnt or exploded by the said fire, to-wit, at" &c.
" And the said plaintiff further saith, that except the said
" eight kegs of gunpowder so placed in the said store in
" manner aforesaid, and for the time aforesaid, and so as
" aforesaid removed from the said store in the said deeds
" poll or policies of assurance mentioned, there was not after
" the execution by the said defendants of the said deeds poll
" or policies of assurance as aforesaid, any other gunpowder
" in the said store or room mentioned in the said deeds
" poll or policies of assurance in which the said goods of
" the said plaintiff so insured as aforesaid were placed,
" at any time before, or at the time of the said fire in the
" said first, second and third counts of the said declara-
" tion mentioned, and that the said deeds poll or policies
" of assurance did not thereby become void and of no force,
" in manner as in the said pleas of the said defendants

" fourthly

"fourthly and fifthly above pleaded is alleged; and this the "said plaintiff is ready to verify, wherefore," &c. To this replication there was a special demurrer, assigning for causes, 1st. That the plaintiff professes in the first instance to admit the allegations contained in the defendants said pleas, and then alleges matter which amounts to denial of the same, and concludes with a verification. 2dly. That the said replication is double. 3dly. That the said replication alleges matter in excuse which is in direct violation of the term and conditions of the deed poll or policy of insurance set out in the three first counts of the plaintiff's declaration, and is in contradiction of some of the plaintiff's material averments in those counts. 4thly. That the said replication is evasive, uncertain, and argumentative, and also for that the said replication is in other respects uncertain, informal, and insufficient, &c. Joinder in demurrer.

Street, Q. C., in support of the demurrer. The special counts set out the policy, and the conditions of it aver that none of the conditions have been broken; and in fact this is a necessary averment in declaring on a policy of assurance; the fourth plea in answer to the special counts alleges, that a large quantity of powder, to wit, five hundred pounds, was on the premises in question; and in the fifth plea it is alleged that more than twenty five pounds was in the place, contrary to the terms of the policy, by which it became void, and of none effect. The replication admits that eight kegs, or two hundred pounds, of powder were brought from *Carleton*, and put into the premises in question, thus showing a direct breach of the condition relative to powder, but it assigns causes for doing this which afford no legal excuse for such breach, and consequently the policy by the express provisions of it has become void. [The Court stopped *Street*, and called on]

The *Solicitor General* in support of the replication. This policy is made for goods hazardous and not hazardous, and it contained this express stipulation, "that in case the "above mentioned premises shall at any time after the "making and during the continuance of this insurance be "appropriated, applied or used," &c., "for the purpose of "storing

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"storing therein any of the articles, goods, or merchandize, "in the same conditions denominated hazardous or extra "hazardous, unless herein otherwise specially provided, or "hereafter agreed to by the company in writing, to be added "or indorsed upon the policy, then and from thenceforth *so* "*long* as the same shall be *so appropriated, applied or used*, "these presents shall cease, and be of no force or effect." Wherefore by this wording it is clear that so soon as the premises cease to be so appropriated, applied or used for storing articles, hazardous or extra hazardous, the policy is in full force. Now granting, as admitted by the replication, that so long as the powder was in the store the policy was of no effect, yet as it appeared that the powder was removed long before the fire approached the store, such removal revived the liability, and placed the parties in the same condition as if the powder had never been placed there. By the conditions of the policy the goods are denominated not hazardous, hazardous, and extra hazardous; powder is not excluded from insurance, but is only required to be insured in a particular way; the having of more than twenty five pounds of powder in the store at any one time does not make void the policy *in toto*, but only for such time as the powder may be in the store endangering the premises, and on removal the liability continues. [PARKER, J. I cannot see how the fact of the plaintiff intending to send it to *Windsor* could affect the question.] That is connected with the fact of removal, which would revive the policy. The meaning of the policy is, where the store is distinctly appropriated for the purpose of storing such article, not when it comes there by accident or for a temporary purpose, doing no damage, and removed before hand; in the disappointment of shipping the goods. they could not be left in the street. [PARKER, J. Why could the plaintiff not send the powder back to the magazine at *Carleton*.] It is conceived the Court will look at the reasonable construction of the policy, and give effect to it accordingly; otherwise if more than twenty five pounds of powder should happen to be in the store at any one time of the policy, for only five minutes, months before the fire, and no way connected with it, the policy must be deemed void.

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Now this could never have been the intention of the parties: one part of the policy must be construed with reference to the other. [PARKER, J. You may go further, and argue that hazardous and extra hazardous goods may be stored in the premises to any extent, provided they are removed the instant before the fire approaches them; but it is evident that though the fire might be in the next store, people would fear to approach the building containing the powder; the article gunpowder is in the policy ranked differently from other articles, for there is an express condition relating to it, viz.: "If there shall be at any time more than twenty five pounds "weight of gunpowder in the premises insured, or wherein "any goods are insured, such insurance shall be void."] Goods are denominated not hazardous, hazardous, and extra hazardous: this condition concerning powder applies to an extra hazardous article; and as this policy is confined to goods not hazardous and hazardous, the condition concerning powder does not affect it. [CARTER, J. You contend that a hundred pounds of gunpowder is one of the extra hazardous articles.] Yes: if insurance had been gotten for extra hazardous articles, the condition would have applied to it; but it is not so—the true reading of the policy is, if the article is left on the premises, then and then only can the policy be affected. [CHIPMAN, C. J. It is conditioned that if the powder is sold by artificial light or not kept in tin cannisters, the policy will be void. You may as well contend that these conditions are not to be regarded in expounding the policy. PARKER, J. What words could the makers of the policy have used stronger to prohibit the keeping of more than twenty five pounds of powder at any time in the store? CHIPMAN, C. J. These conditions are used to explain the policy, and are a substantial part of it: the condition concerning powder is express to render the contract void.] The case of *Dobson* v. *Southley (a)* supports the argument relied on; for it is there said that in a policy of insurance on premises of a certain description, "where no fire is kept, "and where no hazardous goods are deposited," these words must be understood, of the *habitual* use of fire and

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deposit of hazardous goods; where therefore the loss on such policy happened in consequence of making a fire and bringing a tar barrel in the premises for the purpose of repairing them, it was held that the insured was entitled to recover. In this case the rate of premium paid by the plaintiff was the lowest rate, and was only payable for buildings of a certain description, wherein no fire is kept and no hazardous goods are deposited; there were other articles fixing a higher rate of premium for buildings of other descriptions, with the same proviso against hazardous goods; and a proviso that if buildings of any description insured with the company shall at any time after such insurance be made use of to stow or merchandize any hazardous goods, without leave from the company, the policy shall be forfeited; and *Pollock*, for the defendant in this cause, contended that the plaintiff could not recover, because lighting a fire within the building (which was done) was a contravention of the terms of the policy, which required that no fire should be kept in the building on which the rate of insurance in the present case was paid; and that a tar barrel, which was found, and caught fire, on the premises, came under the description of hazardous goods; but Lord *Tenterden* said, "If the company intended to stipu- "late not merely that no fire should habitually be kept on "the premises, but that none should ever be introduced upon "them—they might have expressed themselves to that "effect; and the same remark applies to hazardous goods "also. In the absence of any such stipulation, I think the "condition must be understood as forbidding only the habi- "tual use of fire, or the ordinary deposit of hazardous goods, "not their occasional introduction, as in this case, for a "temporary purpose connected with the occupation of the "premises; the common repairs of a building necessarily "require the introduction of fire upon the premises," &c. [*Per Curiam.* That case makes against you; for here there is an express stipulation, according to the suggestion of Lord *Tenterden;* nor was it necessary here to bring the powder into the store, as in that case to make the fire for the purpose of repairing the premises.]

CHIPMAN, C. J. I have not the slightest doubt on the question

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question in this case. We have only to look at the terms of the policy, and preserve the rights of the parties agreeably to their own stipulations. In the conditions of the policy the different classes of goods are described; then follows a particular clause relating to gunpowder, viz. "that if there "shall be at any time more than twenty five pounds weight "of gunpowder on the premises insured, or wherein any "goods are insured, or if the said gunpowder shall not be "enclosed and kept in tin cannisters, or if it shall be sold by "artificial light, in any or either of the said cases such insu- "rance shall be void." This is a positive and unqualified condition, inserted by the parties to prevent the introduction of gunpowder. In the case cited there was no express clause against making a fire on the premises, but in the case at the bar there is an express condition against the introduction of gunpowder; and it seems by the parties to have been considered a necessary clause, and we cannot but give effect to the words of a contract which seem clearly to manifest the intent of the parties which they have used. I think, therefore, according to the meaning of the parties, to be collected from the express words of the contract, that on the introduction of this gunpowder the policy became void.

CARTER, J. I am quite of the same opinion. The parties must be bound by their positive stipulations. The argument pressed by the learned counsel for the plaintiff that powder of any quantity is to be classed among the extra hazardous goods, is inconsistent with the terms of the policy; for it expressly provides that if at any time more than twenty five pounds of gunpowder be on the premises, the contract shall be void. This seems to have been the express intent of the parties, and I think any other construction would be perfectly at variance with the words and meaning of the policy. If there shall be at any time, says the contract, more than twenty-five pounds of powder, then the policy shall be void: the replication acknowledges there was a time when more than twenty-five pounds was on the premises; wherefore I think the policy became void.

PARKER, J. I am of the same opinion. There has been an express breach of one of the conditions, the consequence of

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of which is to make void the policy; the excuses assigned in the replication cannot do away with the effect of the condition; the gunpowder is even admitted to have remained on the premises with the knowledge of the plaintiff. If policies are made and accepted with conditions like these, what protection would there be for insurance offices if they could be violated with impunity under the circumstances set forth? How can this Court decide that the plaintiff is entitled to recover upon the facts as they stand admitted on this record?

Judgment for the defendants.

HAYWARD *against* MAINE.

Where a seaman shipped at *Liverpool, England*, and signed articles, which thus described the voyage, "To come out to *Saint John* in a ship called the *Portland*, to be under the command of the master of the *Portland* until her arrival in *Saint John, New Brunswick*, there to leave the *Portland*, and go in a new ship, commanded by the master, and to continue by her until her arrival at her port of discharge in the *United Kingdom*:" Held, that an avowed intention to go to *Savannah* previous to a completion of the voyage, was an intended departure sufficient to justify the seaman leaving the ship, and suing for his wages.

THIS was an action brought in the City Court of *Saint John*, for the recovery of seaman's wages, under the Act of Parliament, 6 *Wm. 4.* It appeared by the return of the sitting magistrate, *John Humbert*, Esquire, before whom the cause was heard, that the plaintiff brought his action to recover a balance due him, from the defendant, for work and labour on board the ship *Wallace*, of which the defendant was captain, from the 14th day of *October* until the 18th day of *December* last. The plaintiff was a seaman, and had been employed in rigging the vessel, and his services were proved to be worth two shillings and three pence per day. It appeared on cross examination that articles had been entered into at *Liverpool*, in *England*, with the plaintiff and others of the crew, and the defendant as captain, that they should come out to *Saint John* in a ship called the *Portland*, and to be under the command of the master of the *Portland* until her arrival in *Saint John, New Brunswick;* there to leave the *Portland*, and go in a new ship commanded by the defendant, and to continue by her until her arrival at her port of discharge in the *United Kingdom*. The articles also contained a clause that neither the officers, seamen, mariners, nor others, should demand or be entitled to his discharge, or any wages, until the completion of the voyage, as above stated. The wages agreed on were three pounds per month.

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The articles were offered in evidence, but were objected to as void, on the ground that they did not sufficiently describe the voyage as directed by the act of parliament, 5 & 6 *W.* 4, *c.* 19; but the objection was overruled, and they were put in. It was proved by one of the seamen, who signed the articles when the plaintiff did, to have been understood that after coming to *Saint John* and joining the new ship, she was to proceed direct back to *Liverpool;* but on coming out and joining the new ship, an advertisement appeared in the paper that the ship was going to *Savannah.* The captain was interrogated concerning this, but he gave no satisfactory answer—wherefore the plaintiff refused to continue on board of the ship, and demanded his wages, which the defendant refused to pay; and for which this action was brought. The balance claimed by the particulars was £5. It was contended, that these articles were not shipping articles under the act of parliament, but a special agreement between the parties to do certain services; that the defendant had not broken the agreement on his part, and as the plaintiff had not performed his, he was not entitled to recover. On the other hand it was contended, that the act of parliament required the voyage to be explicitly stated; and not being so in these articles, they were void; and that the plaintiff was entitled to recover for his work and labour performed. The magistrate decided that the articles could not be considered as shipping articles under the act of parliament, inasmuch as no such ship as the *Wallace* was at that time in a condition to be within the operation of the act to have articles executed; and this could only be considered as a mutual agreement between the parties; and as it did not appear that that agreement had been violated by the defendant, and the plaintiff had not performed his part, he was not entitled to recover. The case was brought up for review before *Chipman,* C. J., who referred it to the full Court.

G. Botsford now argued for a reversal of the judgment, principally on the ground that the articles not being sufficiently explicit, according to the act of parliament, were void, and did not stand in the way of the plaintiff recovering his wages

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wages under the provincial act; but if they were sufficiently within the act, the intended departure justified the plaintiff in leaving the ship; and cited 1 *Hagg. Adm. Rep.* 182, *(case of the Eliza)*; 347, 356, *(case of the Minerva)*; 363, *(case of the George Home.)*

D. S. Kerr, in support of the judgment, chiefly relied on the grounds taken at the trial, and also that, even considering the agreement to be ship's articles, they sufficiently described the voyage, and there was no sufficient proof of an intended departure from the voyage to justify the plaintiff in leaving the ship; and that it would be contrary to good policy to allow him under such circumstances to recover; as all crews, under such pretence, would leave a ship in the greatest emergency: that the words in the articles were as explicit as the act required; and that it contained no provision declaring the articles to be void in consequence of not complying with its terms.

CHIPMAN, C. J. I think the case is very clear, and that the voyage is sufficiently expressed in the articles; and if it is sufficiently defined, and the master intended to deviate from it, it was not a desertion on the part of the man in leaving the vessel. There is a vast difference between a voyage from *Saint John* to *Liverpool*, and one from *Saint John* to *Savannah*, and thence to *Liverpool*. If it were intended that the vessel should touch at an intermediate port, the voyage should have been so described in the articles; but that is not the case, and the master was not justified in deviating from the voyage described. Whenever there was a declared intention on the part of the master to deviate from the agreed voyage, the seaman was justified in leaving the vessel, and has a right to recover the wages due to him. He was not bound to go on board the vessel, and proceed to any part of the world; he might have been taken to *New South Wales*—the voyage might never terminate. The vessel was advertised to go to *Savannah*, and when the captain was asked for information he refused to give any. This was a breach of the articles, and the sailor had a right to take immediate advantage of it. We are bound to decide according to the very right and justice of the case. I there-

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fore think the judgment for the defendant must be reversed, and judgment entered for the plaintiff.

BOTSFORD, J. was absent.

CARTER, J. I am of the same opinion. The articles describe a voyage from *Saint John* to *Liverpool* direct, and would not justify the master in deviating from that voyage and going to a foreign country. I am of opinion, therefore, that the judgment below must be reversed.

PARKER, J. I think the voyage is sufficiently described in the articles to be from *Great Britain* to *Saint John*, and back to *Liverpool*, without touching at any intermediate port, otherwise the sailor might be taken to some distant part of the world. Whenever there was a declared intention by the captain to deviate from the specified voyage, the seaman was justified in leaving the vessel, and can recover his wages, and he may sue in a magistrate's court without specially declaring on the contract. I think the judgment for the defendant cannot stand; and from the words of the act we may alter it, and order judgment to be entered for the plaintiff with costs: for if the case were sent down to the Justice again he would be bound to decide in that way.

Judgment reversed with costs, and judgment to be entered for the plaintiff for £5.

END OF HILARY TERM.