Loftus Tottenham in the execution of his office as justice of the peace as in 2nd and 3rd pleas alleged.

The facts proved at the trial were as follows: The plaintiff, Rose Kearney, was tenant of a house and yard to the defendant Tottenham. The defendant M'Gowan was Tottenham's bailiff, and as such came to the plaintiff's house on the 25th of August, 1863, and said he was authorized to open a pass in the plaintiff's wall and through her yard for a person who lived in the next house. She refused to permit him to do so, and went to Tottenham to complain. Tottenham desired her to permit the pass to be made, or he would send her away. After this interview M'Gowan and another person came and attempted to throw down the wall, whereupon the plaintiff resisted them, and in doing so was assaulted and beaten by M'Gowan. The police then arrived, and on being shown a letter by M'Gowan they arrested the plaintiff and took her to the barrack, where she was confined for three hours. After this time had elapsed, she was taken before Tottenham in his magisterial capacity and committed to prison again. A letter of authority from Tottenham to M'Gowan to throw down the wall, and the record of a former action of *quare clausum fregit* for the same trespasses, in which damages had been recovered by the plaintiff from the same defendants, were read on behalf of the plaintiff.

Evidence on behalf of the defendant having been given, the learned judge directed the jury to leave out of their consideration everything that happened after and including the arrest of the plaintiff by the police, who had arrested her in execution of what they considered their duty, without the direction of the defendants, and that if they believed that the plaintiff was assaulted and beaten before that time by M'Gowan, they were to find for the plaintiff against both defendants, the defendant Tottenham being responsible for the acts of McGowan.

Counsel for the defendant Tottenham called on the learned judge to direct the jury that if they believed the defendant, in the execution of his duty as a justice of the peace, committed the plaintiff to prison, the plaintiff not having new assigned, they should find for the defendant. The judge having refused to do so, the jury found for the plaintiff in both issues.

The Court of Common Pleas having granted a conditional order for a new trial, which was made absolute in Trinity Term, 1865, the plaintiff now appealed from that decision.

The question for the Court of Appeal was whether the direction of the learned judge was right, or whether, under the circumstances, it was necessary for the plaintiff to have new assigned.

Dowse, Q. C., and *J. P. Hamilton*, for the plaintiff. 1. A new assignment is made unnecessary here by the Common Law Procedure Act, 1853. Formerly a new assignment was necessary in cases where it is no longer so, because the replication *de injuria* only put in issue the substance of the plea and not the identity of the trespasser. But the object of the Common Law Procedure Act was to prevent further pleading after the defence, and, therefore, by the issue i here tendered the identity of the trespassers in issue. The defendant accepted the issue that the very same trespasses complained of were done by him as a justice of the peace. 2. But even under the old law no new assignment would be necessary. If the declaration was perfectly general, and two trespasses were proved, both answering to the description of the trespasses in the declaration, then a new assignment was necessary; but here the plaint is specific in this: that a joint trespass is alleged, and an assault, battery, and imprisonment described. Here there are not two trespasses proved which answer to the description of those in the plaint. The trespasses which the defendant justifies as a magistrate are not joint-trespasses, but single and committed by himself alone. And the trespasses so proved do not include a battery, which is here alleged. The defendant has not proved a battery which needed this justification, and to which it was applicable. If we had new assigned here we must have admitted a battery justified, and a joint-trespass justified; and we could not prove another battery and another joint-trespass, as there was only one. Defendant might have asked for particulars of the trespasses if he had any doubt: *Nicholl* v. *Glennie*, 1 M. & S. 588; *Greene* v. *Jones*, 1 Wm. Saund. 299b; *Barnes* v. *Hunt*, 11 East. 451; *Freeman* v. *Crofts*, 4 M. & W. 4; *Hall* v. *Middleton*, 4 Ad. & El. 107; *Cocker* v. *Crompton*, 1 B. & C. 489; *Cheasley* v. *Barnes*, 10 East, 80; *Moses* v. *Levi*, 4 Q. B. 413; *Rogers* v. *Spence*, 12 Cl. & Finn. 719; *Atkinson* v. *Matthews*, 2 T. R. 176; *Oakley* v. *Davis*, 16 East, 82.

Armstrong, *Serj.*, and *Carson*, for the defendant.—The fact of two defendants being sued does not specify the trespass in any way, because each is entitled to regard himself as the defendant in a separate action with a separate summons and plaint, charging him individually with the trespasses complained of And the fact that there is only one battery proved does not alter the case, as every imprisonment imports a battery: *Phillips* v. *Howgate*, 5 B & Ald. 220. Imprisonment is the gist of the action. [Pigot, C. B.—If you had pleaded only to the imprisonment, your plea would be bad.] But if an imprisonment only were proved the plaintiff would recover. There is a distinct action for assault and battery, and there might have been a count for it here. But the question of false imprisonment is put on the record by charging assault, battery, and false imprisonment. The defendant has proved and justified and imprisonment which imports an assault and battery, and, as there is no new assignment, was entitled to a verdict: *Bannister* v. *Fisher*, 1 Taunt. 357. The identity of the trespasser is not in issue here. Nothing is in issue except the doing as a magistrate.

Cur. adv. vult.

July 1.—Fitzgerald, B., delivered the judgment of the Court.—I have been unexpectedly called upon to deliver judgment in this case, but I think I can state in a few words the reasons for our decision, which is that the decision of the Court of Common Pleas should be reversed. The case was in effect this. Two distinct imprisonments of the plaintiff by the defendant were proved to have been made upon the same day, one a joint imprisonment by the two defen-