A title under a Sheriffs deed is a very common one in this and every other British Colony, any judicial decision therefore relating to their validity or to the forms which are essential to the perfecting such conveyances ought to be thoroughly known. No apology is we trust required for giving the judgment of the Supreme Court in *Doe d.* Yeo, *vs.* Betts, &c., which will in future constitute a leading case in the subject of selling lands by the Sheriff under writs of execution. Many people imagine that a Sheriffs deed gives an indefeasible title of itself, but this is a mistake, from the case now reported it will be seen, that unless the Sheriff follows out the requisites of the statute his deed is worthless. The judgment is well worth the perusal of all our readers to whom the purchasing of land is an object. A verdict had been given for the Lessee of the Plaintiff and a rule nisi to set aside the verdict and enter judgment of nonsuit had been obtained it was after having the rule argued at great length that the judgment was given.

IN THE SUPREME COURT.

Easter Term, A. D., 1856.

Doe d. James Yeo, vs. Silas Betts and others.

Judgment of the Court delivered by Mr. Justice Peters.

This was an action of ejectment brought to recover lands sold by the Sheriff, under 11 Vic., cap. 7, for non payment of land tax. And two questions were raised.

1st. It is contended that the plaintiff was bound to prove that the notices of sale required by the Act had been duly given by the Sheriff.

2d. That it appeared that the land was not described at the sale by metes and bounds as directed by the 7th sec. of the Act.

For the Plaintiff it was contended that the provision respecting notice is merely directory; and that if not, the want of notice is cured by the 22d Sec., and that even if it were not in the absence of any evidence to the contrary it will be presumed, that the Sheriff acted rightly and gave due notice.

In Rex. v. Lonsdale, 1 Bur. 448, Lord Mansfield says, "there is a known distinction between circumstances which are of the essence of a thing required to be done by an Act of Parliament and clauses merely directory—The precise time in many cases is not of the essence, while no one ever thought that the number of overseers was directory."

In Doe d. Philips, v. Evans. 1 C. and M 456, the Insolvent Act 1 Geo. 4, c. 119, s. 7, directed that the general assignee should sell any real estate of the insolvent within two months after the assignment by public auction, in such manner and at such place as the major part of the creditors of the insolvent who should assemble together on any notice in writing published in the London Gazette, should under his, her or their hands approve; in an action of ejectment on a conveyance from an assignee, made two years after the assignment, and no proof of a compliance with the provisions of the Act the notice and meeting of creditors, &c., 30 days before the sale, the provisions were held merely directory and the plaintiff recovered. In that case the essence of the thing to be done was the sale and conveyance of the property, the preliminary notices and meetings were only collateral matters: it must however be remarked that the legal estate in that case was vested in the assignee by virtue of the assignment from the insolvent, and the assignee did not therefore convey under a statutable power.

In Perry vs. Bowes Ventris 360 and Elliot vs. Danby 12, Mod. Rep. 3, a lease from Comissioners of a Bankrupt was held not to pass the estate until the enrollment required by the statute, because the Commissioners had not the legal estate, but only executed a power given by the statute, and must therefore execute it with all the circumstances required, and this distinction is alluded to in Doe d. Phillips, *vs.* Evans, where on the Counsel observing that the enrollment in these cases did not go to the essence of the thing, Bailey B., observed "that was a statutable conveyance not allowed by the Common law; the whole estate is here vested in the assignee; he is not a mere conduit pipe;" and again, "this is not the mere exercise of a power; the exercise of a power is where I have a right to appoint over your property, if I have the legal estate I do not exercise a power." In Rex. *vs.* Heslingfield, 2 M. and S. 561 and Nanny *vs.* Gore. 3, M. and W. 322, which arose under English Inclosure Acts, the Commissioners acted under a statutable power and the provisions of the Act with respect to notices was held imperative.

In the case of sales of land by a Sheriff, Chancellor Kent says, "the deed connected with the sale operates by way of execution of a statutable power," 4 Kent Com. 431, and the same doctrine, viz: that the Sheriff has no estate, but acts under a power (though not statutable) prevails in England, on sales of leasehold interests in land under a Fi. Fa. Doe d. Hugs *vs.* Jones, 6 Jur. 302.

By analogy to the rule which prevails in the execution of powers contained in Indentures it would seem that where a statute giving a power to sell and convey land requires notice it must always be held imperative. In Sugden on Powers 267 it is laid down, "If notice is required to be given the execution of the power will be void, if notice be not given accordingly, so every case that the sagacity of man can divine, the terms of the power must be complied with."

In Rex. *vs.* Croke, Cowp. 26, where a statute empowered Commissioners to take land for a Road and it was amongst other things objected that the required preliminary notices had not been given, Lord Mansfield says, "This is a special authority delegated by Act of Parliament to particular persons to take away a man's estate against his will, therefore it must be strictly pursued.

The impression has we believe been, that the provisions respecting notices in statutes empowering Sheriffs to sell lands, are not directory but imperative, and which seems recognized by the Legislature as by 7 W. 4, c. 4, the onus of proving want of notice is thrown on the party impeaching the Sheriff's deed; and that the same strictness of proof was deemed necessary under similar Acts in New Brunswick appears from the judgment of Parker J. in Linton *vs.* Wilson 1 Kers. Rep. 243, who in speaking of an Act similar to our Act of 7 W. 4, c. 4, says, "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. Still it may be doubtful whether the rule laid down by Lord Mansfield in Rex. *vs.* Lonsdale, viz: that unless the thing to be done is of the essence of the provision is directory, is not equally applicable to all conveyances made under the directions of statutes whether the party making them has (as in the case of Insolvent assignees) the legal estate or acts as the donee of a statutable power. In Pearce *vs.* Morris, 2 A. and E. 96, Taunton says, "The distinction between directory and imperative statutes has been long known, an early instance in which it was taken was Rex *vs.* Sparrow, 2 Strange, I understand the distinction to be that a clause is directory where the provisions contain mere matter of direction and nothing more, but not so where they are followed by such words as are used here, viz: that any thing done contrary to such provisions shall be null and void to all intents." The legal estate in this was in the trustees, but the language of the Judge seems to apply to all cases where negative words are not used, and Dwarris in his treatise on statutes seems to put both classes of cases on the same footing. And in Doe d. Roberts *vs.* Moysten, 11 Com. Law. Rep. 505 (17 Jur: Dig. 30) where an inclosure Act directed that the award should be made within 6 years, an award made after that time was held good, Craswell J. says, "This statute is not like the case of an ordinary submission to arbitration with a proviso that the awards shall be made within a certain time. The Act directs certain land to be inclosed and certain persons are to be appointed Commissioners to make allotments; then the clause follows enacting that an award shall be made within a certain time, I think this clause is directory only."

It is however unnecessary to decide the point in the present case, as we think the want of notice is cured by the 22d sec. which enacts "That no omission of any direction contained in this Act relative to notices or forms of proceeding previous to any sale shall extend to render such sale invalid, but the person guilty of such omission or neglect shall be liable to punishment therefor and shall answer the party injured, &c" It was argued by the Dfs. Counsel that this does not extend to a case where no notice of sale had been given, but only to cases of defective notice, but it is impossible so to render the plain words of the Act, a notice of 20 days previous to the rule would be defective, if the section would cure such a notice, so it would a notice of one day, and if so, why not entire want of notice.

As to the 2d point, the 7th sec. enacts, "That the Sheriff or Coroner before proceeding to sell such lands shall ascertain and *at the sale* publicly declare *the metes and bounds thereof*, as particularly as the same can or may be described, and shall make and execute to such purchaser a conveyance *thereof*." It was urged that this provision was directory also, but this describing at the sale, the land he is selling, is clearly of the essence of the thing, the Sheriff is directed to do, viz: to sell the land, and it is the deed as connected with the sale which operates to pass the title to the purchaser, without such *sale* therefore, no title passes by the Sheriff's deed, and if the land sold was, when the hammer fell uncertain, how is it possible to say that the land described in the deed is afterwards given was the identical piece of land sold, and if it was not, then the land described in the deed never having been sold, cannot pass by the deed. The provisions of the 11th sec. (which was not adverted to in the argument) also show, that this provision was intended to be imperative. By that sect. the Sheriff in selecting the quantity of a defaulter's land to be sold, is required to have regard to the buildings and improvements of such defaulter which he is not to sell, if there is sufficient land remaining to realize the levy and expences. Now if the precise lands are not known and pointed out at the sale, how could the owner if present or any bidder know, whether the buildings and improvements were selling or not! The former under the impression, that his buildings and improvements were safe, might allow the land to be knocked down at a small sum and afterwards (if the description given at the sale could be at all departed from) a slight variation in the deed of a course or distance might include buildings and improvements worth hundreds, and which is in fact argued to have been the case in the present instance, the plaintiff having bought the land for £4, and now claiming the Dfs. mill and improvements which must be worth a very much larger sum.

It is further argued, that even if the sec. is imperative the maxim *omniarite esse acta* applies, and that it must be presumed that the sale was properly conducted. In Wms. *vs.* the East India Comp. 3 East 199 Lord Ellenborough says "that the rule of law is, that where any act is required to be done on the one part, so that the party neglecting it would be guilty of a criminal neglect of duty, in not having done it, the law presumes the affirmative and throws the burthen of proving the contrary, that is in such case of proving a negative on the other side." In Doe Nanny *vs.* Gore, 2 M. and W. 322 the notices under the Insolvent Acts were presumed. So in Doe d. Milburn *vs.* Edgar 3 B. and C. 393 the notices under the Insolvent Act were presumed—So in Manning *vs.* the Eastern Counties Railway, 12, M. and W. 237 (8 Jur. dig. 45) where an Inclosure Act authorized the Commissioners to stop up a road with a proviso that no road should be stopped without the order of two Justices of the Peace, it was held that the award and recital of the order was sufficient *prima facie* evidence that the road was stopped by order of the Justices. Mr. Starkie, p. 935, lays down the rule, "that upon proof of title every thing which is collateral to the title will be intended without proof, for although the law requires exactness in the derivation of the title, yet where that has once been proved, all collateral circumstances will be presumed in favor of the right."

In Fenwick *vs.* Floyd cited Tingl Adams Eject. 301 (N. 1.) it is said in an action of Ejectment by the purchaser under a Sheriff's sale against a debtor who refuses to give up the possession of the land, it is incumbent on the plaintiff to produce the judgment and the Fi. Fa. and to prove the sale, which may be done either by the deed from the Sheriff or a return of the Fi. Fa., they are sufficient to entitle him to recover."

It would be attended with the greatest inconvenience, if it were necessary in order to make out a title to lands under a Sheriff's deed, to prove that all collateral matters required by the Act respecting the sale had been complied with; such a title would not only be always doubtful, but would become more insecure as it grew older, since though it might not be difficult to prove what the Sheriff declared or did at a sale 12 months ago; it might be very difficult to prove, what was declared or done at a sale which had taken place 18 or 20 years ago? It appears to us, that in all cases depending on titles of this kind where the action is brought recently after the sale, or where the purchaser is in possession, and there are no circumstances to rebut the presumption, the maxim *omnia rite esse acta* applies. In the present case, the plaintiff's title was derived from the judgment, Fi. Fa. and sale which last being proved by the deeds, the mode of conducting it and the particular circumstances attending it (however necessary to its validity) were merely collateral matters, which under the authorities referred to, would be presumed to have been rightly done. But this is merely a presumption, and where, as in this case, the matter is essential, negative evidence may contradict it by showing positively that the thing presumed was not done, or circumstances may raise a contrary presumption, and thereby throw the *onus* of proving that it was rightly done, back on the party in whose favor the presumption would otherwise have been made. Thus in Rex *vs.* Haslingfield, 2 M. and S. 501 where an Inclosure Act gave Commissioners power to set out boundaries of Parishes and ascertain the parochial locality of roads giving certain preliminary notices to the Parishes interested, it being shown that the Parish of Haslingfield had continued to repair for 16 or 17 years, was held to do away with the presumption, that all had been rightly performed and to raise a presumption that the notices had not been given according to the Act, because if that were so, Haslingfield ought not to have continued to repair, so in the King *vs.* inhabitants of Wastbrook 4 B. and C. 735, the description of the boundaries inserted by inclosure Commissioners in the Newspapers, differing from the description in the award proved that they had not followed the requisites of the Act and therefore had not pursued their power and consequently the award was held void.

In the present case, the Plaintiff called the Deputy Sheriff to prove that he sold the land conveyed by the deed; in one part of his testimony he states, that he sold the identical piece of land mentioned in the deed, but in another part he says, the locality was pointed out, and it is quite clear from the whole of his evidence that he did not declare the precise metes and bounds of the land he was selling, or give such a certain and particular description of them as would enable it to be distinguished from other lands by which it was surrounded. We do not mean to say that it is necessary that the precise courses and distances should be declared, that would be one proper way of doing it, but if the Sheriff declared that the land was bounded by certain known bounds, such for instance as bound by such a road or river in the front, on the one side by the land of A. and on the other by the land of B, and in the rear by some other known and ascertained boundary, we think that would be sufficient, even perhaps though the exact quantity was know, but when he merely declares the locality, or that it is part of such a piece or tract of land without particularly describing what part, which appears to have been what was really done here, that is clearly insufficient, both under this section of the Act and also we think under the law as it stood before, of which this section seems to us only an affirmance.

Thus in Fanny *ex dem.* Masters *vs.* Durant, 1 B. and Ald. 40, when the Sheriff's return to an Elegit stated that he had delivered an equal moiety of a horse, the return was held void for not setting out the moisty by metes and bounds.

In a note to Til. Adams Eject. 301, it is said "a Sheriff's return to a Fi: Fa: which states a levy on part of a tract called, &c., is void for uncertainty cannot be set up by matter *dehors* the return and sale under it presses no title. But a levy on a tract called, &c., under a Fi: Fa: against a person who was seized of a part of such tract, and a sale under it will pass his interest to the purchaser."

It was urged by the plaintiff's Counsel that this defect was also cured by it 22 sec., but that sec. only applies to proceedings *previous* to the sale, and can have no effect on what should be done at the sale, if it did, it would enable the Sheriff to evade the requisites of the 7th sec. and open a door to all the evils and unjust practices which existed under the old mode of selling, and which the 7th sec. was intended to prevent.

We have considered this matter at greater length than was necessary for the decision of the case immediately in hand, but from the frequency of these sales and the increasing number of titles depending upon them, it seemed to us expedient that the construction of the Act, the duty of the Sheriff in conducting them, and the general principles of the law of evidence applicable to them, should be considered somewhat at large.

The Rule must be absolute.

HOME—is the residence not merely of the body, but of the heart; it is a place for the affections to unfold and develope themselves: for children to love and learn, and play in; for husband and wife to toil smilingly together and make life a blessing. The object of all ambition should be to be happy at home: if we are not happy there, we cannot be happy elsewhere. It is the best proof of the virtues of a family circle to see a happy fireside.

"MY wife is very attentive to the pigs," said a gentleman the other day, in the presence of several ladies. "That accounts for her attachment to you," responded one of the fair damsels. The gentleman suddenly recollected having some business out of doors to transact.

WHAT is it you must keep, after you have given it to another?—Your word.

WHY is a lady engaged in netting like a ship in full sail?—Because she is making so many knots per hour.

A MAN, boasting of his temperate habits said, he never saw a glass of wine without his mouth watering.

A DECEPTIVE TRUTH.—"Paddy, honey, will ye buy my watch?" "What's the price?" "Tin shillings and a mutchin of the cratur." "Is the watch a decent one?" "Sure, and I've had it twenty years, and it never yet desaved me." "Well, here's your tin, and now tell me, does it go well?" "It goes faster than any watch in Connaught, Munster, Ulster, or Leinster, not barrin' Dublin." "Bad luck to ye, Mike, then you have taken me in! Didn't you say, it nivir desaved you?" "Sure and I did—nor did it—for I *niver depinded on it.*"

"Dick, how is it you, are always possessed of such a store of fun? Where do you get it?" "I manufacture it. I can make it out of nothing; for instance I could make fun of you, but for friendship's sake."