refused to set aside a verdict because the *nisi prius* record did not contain an entry of the plea in abatement on which a judgment of *respondeat ouster* had been given, because such proceedings were by the subsequent pleadings wholly immaterial.

In *Wadsworth* v. *Brown*, 3 Dowl. 698, the court made absolute a rule for a repleader, or for the plaintiff to amend, setting aside the verdict, when the plaintiff to a plea concluding with a verification, had not taken issue, but had only added a similiter.

In *Codrington* v. *Lloyd*, 8 A. & E. 449, there were issues of law and in fact. The plaintiff had got judgment on the issues in law. He then delivered the issue and notice of trial. The award of jury process in the issue was that the jury were to try the issues in fact, and not to assess the damages on the demurrer. It was contended that as the issues in fact went to the whole cause of action, the jury would of course assess damages on the whole cause of action, and so a direction to them to assess the damages on the demurrer was unnecessary. Lord Denman, C. J., apparently assented to that argument, if there had been no judgment on the demurrer, and if the damages had to be assessed contingently, for he says (p. 456), "This argument is quite just in the event of the jury finding for the plaintiff; but if they should find for the defendant it is still possible that the plea may be held bad, and that the court may give judgment for the plaintiff notwithstanding the verdict; if they should do so, and also give judgment for the plaintiff on the demurrer, he will be entitled to damages, and a second jury must be summoned to assess them. . . . . And as there is a possible state of circumstances which may lead to the necessity of summoning a second jury, if that form be not adopted (*i. e* to award a *venire tam quam*), this issue is incorrect in not adopting it."

In the case referred to there could have been no assessment of contingent damages, even if judgment had not been given on demurrer, if the plaintiff failed on the issues in fact.

That case is then an authority that a general venire to try the issues in fact will be sufficient, although there are issues in law on the record, if judgment has not been given on them, and if the issues in fact go to the whole cause of action. It is very strongly an authority by implication also, that the issues in law must be actually entered on the record, so that damages may be assessed on them, contingently or otherwise, according to the fact. In *Ferguson* v. *Mahon*, 2 Jur. 820, a notice of trial was set aside because the issue book had been made up and served, omitting the issue in law. The court will not, when damages have not been assessed at the trial, award a writ of enquiry—it must be a *venire de novo: Clements* v. *Lewis*, 3 B. & B. 297.

It is the duty of the attorney in the cause to make up the record, and it is quite clear that the issues in law as well as in fact should have been entered, and that the officer of the court should not have passed and signed the record in its present form.

In this case the cause of action is founded on a promissory note made by Palmer, payable to his co-defendant Winstanley. Winstanley pleaded payment. Palmer pleaded three special pleas on which the plaintiff joined issue, and the plaintiff demurred to the first and the third pleas of Palmer. The plaintiff succeeded on all the issues in fact, so that the issues in law are of no moment, excepting as to costs, and since the trial the court has given judgment for Palmer on the demurrer to his first plea, and for plaintiff on his demurrer to Palmer's third pleas.

If judgment had been given before the trial for the plaintiff, on the demurrer, he should have entered it to have an assessment of damages, for, as in *Codrington* v. *Lloyd*, 8 A. & E. 449, the plaintiff might have failed in the issues in fact, and then he would be obliged of necessity to assess his damages on the issues in law. That would have been an argument against allowing the cause to go to trial, under such circumstances as in the case just referred to. But is it any argument after the trial has taken place, and the plaintiff has succeeded on the issues in fact and assessed thereon all the damages he can ever get? I am not satisfied that it is. As judgment was not given on the issues in law at the trial, the case stood thus. If the plaintiff succeeded on the issues in fact, he would get his damages assessed thereon, and as much as he could ever get even if his issues in law had been there as well. But the defendant might have succeeded on one or two of the issues in fact, and the plaintiff on the third issue, or the defendant might have succeeded on all three of his issues in fact, and the plaintiff on the issue of fact joined with Winstanley; in any of which cases the plaintiff should have been in a position to have assessed his contingent damages, so that if he got judgment afterwards on the demurrer, there would have been no necessity for any new assessment of damages to be made. It so happens that the result of the trial has not made a *venire de novo* necessary. But as a matter of practice is it expedient that causes should be so dealt with that they should be taken down to trial in this imperfect and improper manner? I do not think it is.

If this were an application before trial to set aside the notice of trial and the service of the issue book, I should certainly, on the express authorities before referred to in 8 A. & E. 449, and 2 Jur. 820, be obliged to do so, for the mischief apprehended might happen. Here, however, the trial is over and no mischief has happened. No new assessment of damages is required.

I am desirous to sustain the proceedings if I can; yet I am afraid of introducing a confusion and laxity of practice that may be very embarrassing.

The amendment too might have been made at the trial. Nothing has been said of waiver by not being objected to at the trial. Perhaps it might have been useless, as the cause was tried in the County Court. I think it can only be properly cured by amending the record now, if it is an amendment which I ought to make. It is true, as Williams, J., said, in *Ferguson* v *Mahon*, 2 Jur. 820, "Throwing a demurrer at the jury does not appear to be of much use, however ancient the practice may be." But there is