but is merely suggested, by the defendant, the judge must enquire into the circumstances before he can be satisfied that title does come in question." In *Timmiswood* v. *Pattison* (3 C. B. 248), a case of replevin commenced in the county court, in which the proceedings were reviewed in error upon a writ of false imprisonment, the court held clearly that the jurisdiction of the county court was at an end the moment the title to the freehold was pleaded.

In my opinion there was an end of the case legally speaking, in the county court when these pleas were put in, for then there was an issue raised which the court could not try, and as a consequence I conclude that what was done afterwards was *coram non judice*. We have not a judgment of the court before us that we can examine into for the purpose of reviewing the correctness of that judgment in itself; but under the power given to us by the statute 8 Vic., ch. 13, sec, 57, we reverse the judgment of nonsuit, because that was a proceeding which we think it was not competent to the court to adopt in a case in which they had no jurisdiction; and then the case will rest in that court, and nothing further can be done in it.

If the plaintiff should again bring it forward in that court a prohibition might be applied for, or the judge, when the record is again brought before him, should refuse to entertain it. It may be considered whether a *certiorari* would not be an expedient course.

McLEAN, J.—When the issue on the record related wholly to trespass or injury to land, and was sworn to as material to the merits, I think the learned judge should at once have declined to proceed in the suit; but when the evidence on behalf of the plaintiff was called and he interrogated as to the trespass complained of in the declaration, with respect to which issue was joined, he surely should have stayed all further proceeding in a matter over which he could exercise no jurisdiction whatever. It appears to me that all the orders made, and the rules granted, are wholly nugatory and invalid, and that the judge has no power to enforce any of them. I concur fully in the judgment, that the order for, and taxation of, costs as upon a nonsuit must be reversed, and the case dismissed.

BURNS, J.—It is very unfortunate for these parties that so much expense has been incurred uselessly, for the plaintiff will have to retrace his steps, and take the course now that he should have done when the defendant put in the two pleas, the 4th and 5th, to the 1st and 2nd counts of the declaration. These pleas are not pleas to the jurisdiction of the court, but they are pleas in bar to the merits of the action, though they involve an issue—namely, the title to the land—a point which the legislature has declared shall not be investigated in the county court. The 13th section of 8 Vic., ch. 13, enacts, that when such a plea shall be put in, it shall be accompanied by an affidavit that the plea is not pleaded vexatiously, or for the mere purpose of excluding the court from having jurisdiction, but that the same contains matter which the deponent believes is necessary to enable the party to go into the merits of the case. The judge was quite right when he finally came to the conclusion that he had no jurisdiction. I take the meaning of the legislature to be this—that when a plea is put in, involving the title to land, accompanied by the affidavit prescribed, immediately the jurisdiction of the court ceases.

If the plea were not accompanied by such an affidavit, the court would order it to be taken off the file because of its irregularity, but when the defendant swears that it is necessary for his defence upon the merits to have the title brought in question, then the jurisdiction ceases. The judgment ordered by the judge of the county court of nonsuit cannot be sustained. He had no jurisdiction to do that, and therefore his judgment must be reversed. Upon a plea to the jurisdiction of the court there can be no judgment which involves the question of costs in the defendant's favour. If the judgment be in the defendant's favor, then it should be that the defendant go thereof without day, &c.—See *Dempster* v. *Purnell* (3 M. & Gr. 375). In this case no judgment whatever can be given. A nonsuit cannot be ordered, for it cannot be told whether the plaintiff may not sustain his case in the proof, and the defendant cannot go into evidence, because it brings the title in question, and he has sworn that it is necessary to the merits of his defence that he should bring the title in question. In this case it appears the plaintiff did sustain his case *prima facie*, for the jury found in his favor, but the defendant offered no evidence to sustain his pleas, for the judge told him he would not receive it. The judge ultimately ordered a nonsuit to be entered, for that he had no jurisdiction. This course was wrong, for the effect of that is to give the defendant costs, and that because he has pleaded a defence which the court cannot dispose of, or say whether it affords a defence or not. The judge of the court should have said to the parties that the whole proceedings from the plea down were *coram non judice*, and he should have refused to proceed with the case, and should not have given any judgment whatever. The course which the plaintiff should have pursued was, upon the plea in bar being put in, the trial of which could not take place in the superior court, to have removed the cause into the superior court by *certiorari*, and have proceeded with the case there; and if he had succeeded he would have been entitled to the costs of the superior court, as far as the case had proceeded in that court. We should pronounce now the opinion which the judge of the court should have expressed to the parties as soon as he saw the state of the record—namely, that all the proceedings upon the pleas were *coram non judice*.

Appeal confirmed.

---

MICHAELMAS TERM, 1858.

MARTIN v. KNOWLES.

*Arrest—22 Vic ch. 96.—Construction of.*

Defendant, against whom a Ca. Sa. had issued, was surrendered by his bail on the 1st. of September, 1858.

*Held*, that he was not entitled to his discharge by the provisions of the 22 Vic. ch. 96, for abolishing arrest in civil actions.

*Phillpotts*, obtained a rule upon the plaintiff, to shew cause why an order made by the Chief Justice of the Common Pleas, discharging a summons which had been granted, calling on the plaintiff to shew cause why the defendant Knowles should not be discharged from the custody of the Sheriff of the United Counties of Lanark and Renfrew, or why the arrest of Knowles should not be set aside, on the grounds that he was not liable to be arrested or detained, under the statute for the abolishing of imprisonment for debt, and on the ground that the debt for which he was arrested, did not exceed £25. and because the said act repeals the clauses of the Common Law Procedure Act authorising the issuing of a *Ca. Sa.*

On the 19th of December, 1857, the plaintiff made an affidavit of debt for the arrest of defendant Knowles for £14 6s. On the 27th of August 1858, a *Ca. Sa.* signed against Knowles on the judgment obtained in that action, and was on the same day filed in the office of the sheriff of Lanark and Renfrew, as notice to the bail of Knowles.

The *Ca. Sa.* was for £21 19s. 10, damages and costs, the costs being £7 13s. 10.

On the *1st of September*, 1858, Knowles was surrendered in discharge of his bail to the sheriff of Lanark and Renfrew, and in close custody.

The defendant relied on the 22nd clause of the statute abolishing imprisonment for debt, 22 Vic. ch. 96, repealing the sections of the Common Law Procedure Act, under which the affidavit of debt was made, and the *Ca. Sa.* in this case issued, upon which Knowles was in custody.

The Chief Justice of the Common Pleas considered that Knowles being on the 1st of September, 1858, surrendered by his bail to the sheriff of Lanark and Renfrew, who had then the *Ca. Sa.* in his hand, was from the time of his render a prisoner under the writ; that the *Ca. Sa.* was warranted by the 48th section of the Common Law Procedure Act 1856, and that it could not be taken to be meant by the statute 22 Vic. ch. 96, to make that illegal which was legally done before it passed. It was contended before him that the 2nd and 6th sections of the act evinced a clear intention that no person should be held to bail or taken on a *Ca. Sa.* for a less sum than £25. exclusive of costs, and that the defendant should, on that account be discharged. But he considered that a retrospective effect should not be given to the 22nd Victoria in that respect. The *Ca. Sa.* when it was delivered to the sheriff was legal and regular. The provisions of the act came into effect on the *1st of September*, 1858, and the first section enacted that *after* the 1st of September 1858, no person should be arrested except as provided for in that act, but Knowles being legally in custody on the *Ca. Sa. on the 1st of September*, could not be said to