Duty of Justices when admitting to bail.—In all cases where a magistrate or magistrates admit to bail any person in prison charged with the offence for which he is so admitted to bail, it is the duty of the magistrate or magistrates to send the keeper of the prison a warrant of deliverance, in the form above given, under his or their hand and seal, or hands and seals, requiring the keeper to discharge the person admitted to bail, if detained for no other offence.*

Duty of Keeper of Prison.—Upon the warrant of deliverance being delivered to or lodged with the keeper, it is his duty forthwith to obey it.†

Inspectors and Superintendents of Police, &c. — Any inspector and superintendent of police, police magistrate, or stipendiary magistrate appointed for any territorial division, has power to do alone whatever is hereinbefore authorized to be done by any two or more magistrates. In such case the forms may be varied so far as necessary to render them applicable.‡

U. C. REPORTS.

QUEEN'S BENCH.

Reported by C. Robinson, Esq., *Barrister-at-Law.*
TRINITY TERM, 1858.

Powley v. Whitehead.

County court—Title to land in question—Practice.

In an action of trespass in a county court defendant pleaded pleas bringing the title to land in question, accompanying them with the affidavit required by 8 Vic, ch 13. sec. 13. A nonsuit having been ordered,—

Held, upon appeal, that the effect of the pleas was to oust the jurisdiction of the court altogether: that the judge should therefore have refused to entertain the case; and that the judgment of nonsuit must be reversed.

Appeal from the county court of the County of Perth.

The first count of the declaration charged that the defendant, being engaged in constructing the Buffalo and Lake Huron Railway across the plaintiff's lands, and in making a certain bridge and embankment across a stream near to his close, intending to injure the plaintiff, so carelessly and improperly executed the work that the waters of the stream were thereby dammed back, and overflowed the plaintiff's land.

The second count was for breaking and entering the plaintiff's close, and encumbering the same with stones and other materials &c.,

Defendant for a fourth plea, pleaded to the first count, that the land was the soil and freehold of the Buffalo and Lake Huron Railway Company, and that he committed the alleged trespass as their servant, and by their command; and fifthly, a similar plea to the second count. These pleas were accompanied by an affidavit of defendant, as required by the 8 Vic., ch. 13, sec. 13, that they were not pleaded vexatiously, or for the mere purpose of excluding the court from having jurisdiction, but contained matter which the defendant believed was necessary to enable him to go into the merits of the case.

At the trial it was objected by defendant's counsel that the pleadings put in issue title to land, and that the plaintiff, should be nonsuited. The learned judge took the evidence, reserving leave to move to enter a nonsuit, and a verdict was found for the plaintiff, with £8 15s. damages.

A rule *nisi* having been obtained to enter a nonsuit pursuant to leave reserved, after hearing the parties the following judgment was delivered in the court below:

"Burrit, J. — The defendant's third and fourth pleas are pleaded under the 13th section of 8 Vic. ch. 13, and the 20th section of the County Courts Procedure Acts of 1856, with the necessary affidavits therein prescribed, which I take to be my guide in determining whether this court has jurisdiction. See *Latham* v. *Spedding* (17 Q. B. 440, 20 L. J. Q. B. 302), where, under a plea of not possessed, Lord Campbell intimated an opinion that a county court would try, and it was on the ground that the jurisdiction of the county court was not ousted because the defendant had so pleaded that the title might possibly come in question, though it would be if the question actually came on at the trial, and was really and *bona fide* in issue I take the pleadings and affidavit for my guide as to whether the jurisdiction of this court is ousted or not in this cause. There may however be instances where the pleadings would be no guide, such as not possessed, and then the court would go on until title was *bona fide* in issue.—See *Trainor* v. *Holcombe* (7 U. C. R. 549), *Lilley* v. *Harvey* (11 Law Times Rep. 273). In this last case the court said, where there are special pleadings, and the question is raised upon them as to the title to land, the judge can go no further; and this seems to be precisely the case in the matter upon this motion. It is true the defendant offered no proof of title, but I apprehend it was not attempted from the fact that I told counsel I would hear no more. I took the facts under a very strong apprehension that I had no jurisdiction, which I then intimated. On further investigation I think I did wrong, and assumed an unwarrantable stretch of jurisdiction. The verdict rendered must be set aside, and a nonsuit entered, with costs."

From this judgment the plaintiff appealed.

C. Robinson, for the appellant, cited *Wheeler* v. *Sime*, 3 U.C. Q.B. 266; *Hamilton* v. *Clarke*, 2 U.C.P.R. 189; *Lilley* v. *Harvey*, 5 D. & L. 648; *Trainor* v. *Holcombe*. 7 U. C. Q. B. 548.

J. Duggan, contra, cited *Sewell* v. *Jones*, 1 L. M. & P, 525.

Robinson, C. J,—The statute which defines the jurisdiction of the county court, 19 Vic, ch. 90, has these words: "Provided always, that the said county courts shall not have cognizance of any action where the title to land *shall be brought in question*," &c.; and the 13th section of the 8 Vic., ch. 13 provides, that no plea whereby the title to land shall be brought in question shall be received without an affidavit thereto annexed that such plea is not pleaded vexatiously, *or for the mere purpose of excluding such court from having* jurisdiction, but that the same does contain matter which the defendant believes is necessary for the party pleading to enable him to go into the merits of his case.

This shews that, in the understanding of the Legislature, the pleading a plea which brings the title to land in question (I do not say which *may* bring it in question, but which absolutely and in direct terms does so) necessarily puts an end to the jurisdiction of the county court; for if it did not, the requiring an affidavit would be an unnecessary provision against abuse, since it might be left to the judge to go on and try the cause, in order to see whether the title did really come in question, or whether the putting in that plea was not a mere contrivance to oust jurisdiction.

The fourth and fifth pleas pleaded in this case in the strictest sense brought the title to land in question, and nothing else. The judge could not try a part of the issues: he could not dispose of the issues on these pleas, and therefore was bound to stop. The case of *Latham* v. *Spedding* (17 Q. B. 444), cited for the plaintiff in the argument, is not in point, nor any of those which regard certificates for costs as between the superior courts and the county courts, because there is no pleading in the courts referred to in those cases, and the judge is to say, after hearing the evidence, whether anything has been shewn which should take away his jurisdiction; and they hold that either party merely saying that he claims the land, or has a right to possession, is not enough, unless the course of evidence in the cause raises such a question. But here a plea is pleaded, and issue is joined upon it, setting up as a defence a matter of which the statute disables the court from holding plea, and that necessarily takes away the jurisdiction of the court. After the defendant has sworn that his pleas are not pleaded vexatiously, the judge is not at liberty to entertain the surmise that they mean nothing. The defendant has pleaded them at his peril, and the inferior court has no jurisdiction to enquire into the truth of them.

In the case of *Lilley* v. *Harvey* (5 D. & L. 653) *Wightman*, J., rests upon this distinction, "When there are special pleadings," he says "and the question is raised upon them, the judge can go no further; but where the question is not raised upon the pleadings

* Ib. s. 16. † Ib. ‡ Ib. s. 21.