year and a half after; and whether this judgment could be executed without a *sci. fa.* was the sole question. Holt, C. J., said, "You may sue out execution in ejectment within a year after judgment, in the name of a defendant who has died within the year, without a *sci. fa.*; because, in the writ *hab. fac. poss.* you do not say against whom the execution is to be had, but it is only to have the possession."

In Adams on Ejectment it is said, "Where a sole defendant in ejectment dies after judgment and before execution, it has been doubted whether a *sci. fa.* is necessary, because the execution is of the land only, and no new person is charged; but the surer method is to sue out a *sci. fa.*"

In *Newnham, jun., v. Law* (5 T. R. 577), one of two plaintiffs died before judgment, but the suit went on to judgment and execution in the name of both of them. The defendant applied to set aside proceedings. The plaintiff surviving sued out a new rule to strike out the name of the deceased from the execution, and to suggest the deceased's death on the roll. Lord Kenyon, C. J.: "This objection should not have been taken by the defendant at all. The plaintiff might have made the suggestion as a matter of course, and he ought not to be permitted to make the amendment. Rule absolute to amend without costs, the defendant's rule being discharged."

In personal actions, then, there is no defect in one plaintiff, as survivor of his deceased co-plaintiff, who has died since judgment, proceeding to enforce that judgment by execution in the names of himself and of the deceased plaintiff; because there is a survivorship in law of the rights of the deceased to the one who is living; and there is no one, in the language of the cases, "to take benefit by or become chargeable to the execution of the judgment."

It is argued, however, by Mr. Patterson, that that is not the fact here, for it does not necessarily follow that the two original plaintiffs had such an interest as would accrue on the death of one to the survivor; that they might have sued under the statute as tenants in common, or in some other capacity, character or interest, which was individual, and not joint; and that by the act of 1851, under which this action was begun, "the names of all persons claiming the property are to appear as plaintiffs, which may apply to separate interests," and that the question at the trial should be (except in certain cases), whether the statement in the writ of the title of the claimants is true or false, and if true, then which of the claimants is entitled, and upon such finding, judgment may be signed and execution issue for the recovery of possession and costs, as at present in the action of ejectment, and the said judgment having the same and no other effect than at present.

All this shows rather that although plaintiffs may join personally now (which in effect they did under the former law as fictitious lessors of the fictious plaintiff), the recovery shall be to the same effect and in the same manner under the present law, according to the respective rights and interests of the claimants, as it would have been under the former law by the same persons stating joint or several demises, according to the nature of their estates, so that if joint tenants join now as plaintiffs, they shall recover the entirety; and if tenants in common join, they shall recover in severalty, as they could by proper demises under the old law.

This I take to be the meaning of the statute, for the jury are to say which of the claimants is entitled, and then judgment and execution are to follow, as under the old law. The case of *Davy & Russell* v. *Cameron* supports this view.

Under the old law, tenants in common could not unite in a joint demise. Their proper way was to state their interest in severalty, although each one might state a demise for the entirety (2 Chit. on Plg. 6th ed. 630). Joint tenants could lay a joint demise, but they could also lay individual demises for the entirety. If tenants in common proceeded each in the one action for their undivided shares, the recovery of judgment would show on the face what portion went to each lessor; so that on the death of one, the survivor could not have execution for the share which belonged to the deceased. And if they proceeded in the one action by separate demises for the entirety in each demise, they could only recover according to the fact and nature of their title, and not for the entirety which each claimed; so that here again the recovery would, notwithstanding the larger demand, shows what each lessor was entitled to; so that one, on the death of the other, could not claim the deceased's share. So if joint tenants proceeded on a joint demise, as they might, the recovery would follow the nature of the demise, and show a joint title, which would therefore, on the death of one, devolve entirely upon the survivor, and entitle him, according to the above decisions, to execution for the whole; because it would appear on the face of the record that no one else than himself was to take benefit by or become chargeable to the execution of the judgment. But if joint tenants, instead of joining in the demise, proceeded each on a separate demise for the whole, as they might, this would not entitle each one to a recovery for the entirety, but only to his own particular share, and would amount to a severance of the tenancy, which, appearing upon the record, would prevent the survivor from claiming the entirety or more than his own share upon the decease of his co-tenant.—*Doe dem Raper* v. *Longsdale*, 12 East. 39; *Doe dem Marsack* v. *Read*, 12 East. 57; *Doe dem Brown* v. *Judge*, 11 *East*. 288; *Doe dem Whayman* v. *Chaplin*, 3 Taunt. 120; *Doe dem. Hillyer* v. *King*, 6 Exch. 791; *Doe dem Poole* v. *Goungton*, 1 A. & E. 750; which last case contains some of the above, and many other authorities bearing on the subject.

The conclusion to be drawn from my view of the law is, that the joint claim by two under the act of 1851, and a joint recovery, is evidence of a joint estate and title in the two plaintiffs so recovering; and that a separate right, title or interest, if it existed, should, however the writ was framed, have been found by the jury, and so entered on the record, to show incontrovertibly, for the purposes of execution, that the rights of the plaintiffs were several. In fact, in the absence of such several recovery, I must take the recovery, for the purposes of execution, to have been and to be a joint recovery, and therefore a title which does survive, and to which no other person can take benefit or become chargeable.

This disposes of the first objection, and, from the cases before mentioned, it disposes also of the second.

The third question, I think, is determined by the fact that an execution did in this case in fact issue, and was also returned and filed within the year The sheriff's return, that none came to receive possession, does not, I think, raise the presumption, which want of an execution altogether raised in law, that the plaintiffs had released the judgment. Nothing done upon a judgment might well raise this presumption, but something done upon it could not raise such presumption contrary to the act done.

As to the fourth objection, I think, without determining the abstract right of how far the sheriff may proceed in executing a writ of possession, that he was justified in removing Mrs. Williamson, the actual occupant of the premises; because she was in possession by right of her husband, who did claim title under Sylvester McKenna, the defendant in this action, or those in privity with him. In such a case an action for mesne profits would, under the old law, have been maintainable against her.—*Doe* v. *Whitcombe*, 8 Bing. 46, *Doe* v. *Harvey*, 8 Bing. 239, *Doe* v. *Harlow*, 12 A. & E. 40.

And lastly, that although the plaintiff's recovery is for the whole lot against the defendant, when in fact he proved title only to the east half, and should have recovered for that only, the recovery itself is not regular, although the court will restrain the plaintiff on motion from taking possession of more than he actually proved title to if he offers to exceed that limit, but in this case the plaintiff has not offered to do this, but has limited his endorsation to the sheriff to deliver the east half only, and this is all which the sheriff has delivered.

Upon the whole, I think, therefore, the summons must be discharged, with costs.

Summons discharged, with costs.

In the Matter of Geoffrey Hawkins.

Habeas Corpus—Common Law—Power of judge to issue—Con. Stat. U. C. cap 24 sec. 41—Not applicable to plaintiffs against whom defendants obtain judgments for costs—Form of order of committal when made by junior judge of county court.

Held, 1. That at common law the judges of the Superior Courts of Common Law for Upper Canada have power to direct the issue of writs of *habeas corpus ad subjiciendum* in vacation, returnable either in term or vacation.

2. That a plaintiff against whom a defendant has recovered a judgment for costs only in either of the superior courts of common law or a county court, is not liable to be examined or committed under sec. 41 of Con. Stat U C. cap. 24

Quære. must an order of committal made by a junior judge of a county court, under sec 41 of Con Stat U C. cap 24. on the face of it show the death, illness, unavoidable absence or absence on leave of the senior judge.

Semble. it need not, for the maxim *omnia presumuntur recte esse acta* will be held to apply.

(Chambers September 14, 1863.)

The Sheriff of the united counties of York and Peel brought up the body of Geoffrey Hawkins, under a writ of *habeas corpus*,