UPPER CANADA REPORTS.

QUEEN'S BENCH.

(*Reported by* C. ROBINSON, Esq., Q.C., *Reporter to the Court.*)

MOFFAT v. BARNARD.

Action against J. P.—Conviction under C. S. C. ch. 92, sec. 18—Right to commit without distress—C. S. C. ch. 103, secs. 57, 59, 62. C. S. U. C. ch. 126.

Defendant, a Justice of the Peace, convicted the plaintiff, under Con. Stat. C. ch. 92. sec. 18, of making a disturbance in a place of worship, and committed him to gaol without first issuing a warrant of distress, whereupon the plaintiff brought trespass. It appeared at the trial that the plaintiff was well known to defendant, as a boy living with his parents and having no property.

Held, that the action would not lie, for defendant was authorized by Con. Stat. C. ch. 103, sec. 59, to commit in the first instance, that statute applying to this conviction; and the warrant was sufficient, as it followed the form given by the Act, which contains no recital of the ground for not first issuing a distress.

Quære, whether defendant would have been liable if he had not proved, as he did, the facts which justified him in dispensing with distress.

The warrant committed the plaintiff also for the charges of conveying him to gaol, but omitted to state the amount.

Held, following *Dickson* v. *Crabb*, 1 L. C. G. 171, that this would not make defendant a trespasser.

[Q. B., T. T., 1865.]

Trespass, for assaulting the plaintiff and giving him in charge of a constable, and causing him to be imprisoned in gaol. *Plea*, not guilty, by statute.

At the trial, at Cobourg, before Adam Wilson, J., at the last spring assizes, the gaoler was called, who proved that the plaintiff was brought to gaol on the 17th of September, 1863, under a warrant signed by defendant, and remained in gaol until the 26th of September, when he was discharged on *habeas Corpus*, by an order of Mr. Justice John Wilson.

The warrant was addressed, as usual, to all constables and the keeper of the gaol, and recited that the plaintiff and another were convicted before the defendant, one of her Majesty's Justices of the Peace, &c., for that they, the said Charles Moffat and W. H., did on Friday night then last past, enter the Baptist Church during divine service, in South Monaghan, and disturb the solemnity of said meeting, by talking and making a noise, and acting in a disorderly manner; and it was thereby adjudged that the said Charles Moffat and W. H. for their offence should forfeit and pay the sum of five dollars each, and should pay to Benjamin Halsted the sum of ten dollars, for his costs in that behalf; and it was thereby further adjudged, that if the said several sums should not be paid before the 15th inst., the said Charles Moffat and W. H. should be imprisoned in the common gaol of the said United Counties at Cobourg, for the space of 21 days, unless the said several sums and costs, and charges of conveying the said Charles Moffat and W. H. to the said common gaol, be sooner paid; and that the time in and by said convictions appointed for payment of the said several sums had elapsed, but Charles Moffat and W. H. had not paid the same or any part thereof, but therein made default. "These are therefore to command you, the said constables, &c., to take the said Charles Moffat and W. H., and them safely convey to the common gaol at Cobourg aforesaid, and there to deliver them to the keeper thereof with this precept. And I do hereby command you, the said keeper, &c., to receive the said Charles Moffat and W. H. into your custody in the said common goal, there to imprison them for the space of 21 days, unless the said several sums, and costs and charges of conveying them to the said common gaol, amounting to the further sum of dollars, shall be sooner paid," &c.

A rule of this court of Michaelmas Term, 27 Vic., was also put in, quashing the conviction made by the defendant upon which he issued the warrant.

At the close of the plaintiff's case it was objected, on the part of the defendant, that trespass would not lie, as the defendant had jurisdiction over the offence as a justice of the peace, and that he did not exceed this jurisdiction, although he might have proceeded irregularly. The plaintiff contended that there was an excess of jurisdiction by the defendant, in his having issued a warrant of commitment in the first instance, he having no authority under Con. Stat. C. ch. 92, sec. 18, to issue a warrant to arrest until after he had issued a distress warrant and no distress found; and that that enactment was not affected by Con. Stat. C. ch. 103, sec. 59, and that in any event defendant did not profess to act under it. The plaintiff also contended that defendant exceeded his jurisdiction in directing the gaoler to detain for the charges of conveying defendant to gaol, the amount not being mentioned in the warrant.

The learned judge was of opinion that the defendant had jurisdiction to issue the warrant to commit, and that, without first issuing a distress warrant, and also that it was not an excess of jurisdiction in the defendant to include the costs of conveying to gaol in the warrant, although as a fact he did not do so; but on this point, not being clear as to the effect of the case of *Leary* v *Patrick*, 15 Q. B. 266, he ruled in favour of the plaintiff. Several other objections were taken at the trial and in the rule nisi to the right of the plaintiff to recover, which it is not necessary to advert to.

Leave was reserved to defendant to move to enter a nonsuit, on the grounds taken; and the plaintiff had a verdict for $10 damages.

J. D. Armour, pursuant to leave, obtained a rule nisi to enter a nonsuit on several grounds, the first of which was that trespass was not maintainable against the defendant, the act complained of being an act done by him in the execution of his duty as a justice of a peace, with respect to a matter within his jurisdiction as such justice, and that he did not exceed it.

Nanton shewed cause, citing *Leary* v. *Patrick*, 15 Q. B. 266; *Barton* v. *Bricknell*, 13 Q. B. 393; *Massey* v. *Johnson*, 12 East 68; *Hardy* v. *Ryle*, Q. B. & C. 603.

Armour supported his rule, citing *Cronkhite* v. *Sommerville*, 3 U. C. Q. B. 129; *In re Allison*, 10 Ex. 561; *Regina* v. *Shaw*, 23 U. C. Q B. 616; *Haacke* v. *Adamson*, 14 U. C. C. P. 201.

MORRISON, J.—Upon the first objection, that trespass will not lie, I am of opinion that our judgment should be in favor of the defendant. The cause of action was an act done by the defendant as a justice of the peace, with respect to a matter within his jurisdiction, and he is entitled to the protection of our statute (Con. Stat. U. C. cap. 126, sec. 1).