entered *nunc pro tunc* under the circumstances. My brothers inclined to the contrary opinion; and as the cause of delay was rather an accident than *laches*, and there are some modern cases which shew a disposition in the courts to extend the indulgence, in their discretion, to cases where it cannot be said that the delay arose from the act of the court (*a*), I do not oppose the allowing judgment to be entered as of the term after the trial. This, however, will only give to the personal representatives of Russell the means of recovering the costs of the action. The most important object is to obtain possession. It is no longer possible to give possession to the plaintiff Mr. Russell, in whose favour the verdict was.

If this case could be treated as coming under the Common Law Procedure Act, sec. 218, we should have to consider whether the words, "legal representative of such claimant," as they stand in that clause, mean the representative of the title, or the heir or executor of the deceased plaintiff, according as he died seised of a freehold or a term. Considering the nature of the proceeding directed by the statute, and that it affords fair opportunity to the defendant to put the party who is dispossessing him to the proof of his title, I think the legislature probably intended that a person claiming from the deceased plaintiff as devisee, should be allowed to sue out a writ of revivor; and if so, that leaves no other difficulty than that which I have stated, that this proceeding given by the act can hardly be extended to a case where not only the action was brought, but the plaintiff's death also occurred before the act was passed.

I doubt whether we can properly carry it back, but as I understand my brothers do not feel any difficulty on that point the rule can go, and the question can be brought up formally, if it shall be contended on the other side that the Common Law Procedure Act cannot be applied to this case.

BURNS, J.—I think the rule should be made absolute, that the judgment may be entered *nunc pro tunc* in favour of Colin Russell, for whom the verdict was found. The court granted a rule *nisi* on the application of the defendant, in the term after the verdict was rendered, which rule could not be brought on to be argued by reason of the exhibits filed at the trial having been mislaid, and the rule was enlarged from time to time. Now although it may be argued that it was not the act of the court that the exhibits were mislaid, and could not be found, yet it was certainly the act of the court in granting the rule *nisi*, which prevented the plaintiff from entering up judgment upon the verdict; and if that rule had not been granted, the plaintiff could have entered up the judgment, whether the exhibits had been forthcoming or not. The want of the exhibits both parties have felt impeded their pressing an argument upon the court, and if they had argued the case without them the court would have felt it impossible to give any satisfactory decision. The cases are all collected in Evans v. Rees (12 A. & E. 167.) Six years later Mr. Justice Wightman, in Miles v. Bough, (3 D. & L. 105, 10 Jur. 390) considered the point again. There, as in this case, there was an argument upon the death of the plaintiff. It was a case involving questions of law and fact. After the trial of the issues in fact, the defendant moved for a new trial, and obtained a rule *nisi*, which upon argument was disharged, and then the plaintiff set down the issues in law to be argued, which did not come on to be argued till a year afterwards, before which time the plaintiff died. Mr Justice Wightman said, "It was contended for the defendant, that the only cases in which judgment could be entered *nunc pro tunc*, were those in which nothing remained to be done at the time of the death of the parties, but to pronounce judgment; and the case having been heard, the court, instead of giving judgmeut immediately, took time to consider, and the death intervened before the judgment was pronounced. Upon examination, however, of the cases which are reported on this point, it appears to me that the practice is of far more liberal extent; and in such cases as the present the court has allowed judgment to be entered *nunc pro tunc*, unless the delay was occasioned by the *laches* of the plaintiff, or some prejudice arose to the other party, to which he would not otherwise be subject."

Suppose then the judgment to be entered *nunc pro tunc*, the next question is whether, the judgment having been entered, and the death of the plaintiff having happened before the passing of the Common Law Procedure Act, the parties claiming through the plaintiff are entitled to the benefits of the 248th section, to enter a suggestion upon which to have the benefit of the judgment, without being driven to a new action. I do not think that the representatives of the deceased plaintiff would be driven to a new action, even if the Common Law Procedure Act had not passed, for it appears to me their course would be to sue out a *scire jucias quare haberent possessionem non* as respects the land, joining the personal representative in the writ as plaintiff, in order to have execution for the costs. See Foster on *Scire Facias*, 189, quoting Bac. Abr. "*Scire Facias*," C. 5.; Roll. Abr. 889, where it is said that in a real action the heir shall have the *scire facias*, and in a mixed action, if the lands to be recovered be fee simple, the heir and executor shall join in the *scire facias*, and the heir shall have the execution as to the lands, and the executor execution as to the damages. I understand the meaning and effect of the Common Law Procedure Act to be, that the writ of revivor and suggestion, the truth of which may be tried, are substituted for the *scire facias* It appears to me the 248th section affected the state of the case as it then would have stood, if judgment had been entered and no delivery of possession thereupon had taken place. I see nothing to prevent the claimants having the benefit of entering a suggestion, and if the defendant denies the truth of it, then of course there must be a trial thereupon. It would be absurd to compel them to go over the same ground again in establishing their title, upon which the court has given judgment in favour of the person from whom they claim.

MCLEAN, J, concurred.

Rule absolute.

(*a*), See Evans v. Rees, 12 A. & E., 167; Miles v. Bough, 3 D. & L., 105

(Easter Term, 20 Vic)

GRIMSHAWE v. THE GRAND TRUNK RAILWAY CO. OF CANADA.

14 & 15 Vic., ch. 51, sec. 11, sub-sec. 16—Arbitration—Notice of desistment.

Under the 14th & 15 Vic. ch. 51, sec. 11 sub-sec. 16, a notice for lands may be desired from, and new notice given for the same lands, even after the arbitrators named in the first notice have met, and are engaged in the arbitration; and an award made by them after such notice of desistment is void.

Quære, whether the arbitration under the second notice can also be desisted from, or whether the power extends only to the arbitrators first appointed.

Per McLean, J.—The award made by the first arbitrators was also bad in this case, for under sub-sec. 15, an award cannot be made by two arbitrators, when the third refuses to act.

This was a special case, stated in effect:—

This is an action brought by the plaintiff against the defendants for the recovery of £3,116 5s. 9d., which sum was awarded to the plaintiff upon referenee pursuant to the Railway Clauses Consolidation Act, in manner and form as set forth in the declaration and plea in this cause (which was referred to as part of the statement of this cause), and by the consent of the parties and by the order of the Honourable Sir John Beverley Robison, Baronet, Chief Justice of our Court of Queen's Bench, dated the 29th of May, 1857, according to the Common Law Procedure Act, 1856 the following case has been stated for the opinion of the court, without any pleadings.

The plaintiff was seized in fee of certain lands in the township of Hamilton, in the county of Northumberland, being part of lots Nos. 3, 4 and 5, in concession B; and the defendants laid out their railway over and across the same, and occupied a portion of the same, containing seven acres and twenty-nine hundredths of an acre of meadow land, and served the usual notice requiring the same for the purposes of their railway, said notice having been so served on the 14th day of March, 1856.

And they, the defendants, immediately thereafter took possession of the land mentioned therein, and enclosed and fenced the same, and made their railway theroon, long before the said award was made, and long before the service of the said notice by them, the defendants, of their intention to desist from their said first notice; and the defendants have continued ever since to possess and use the said land for their said railway.

That the notice so served on the 14th day of March was in the words and figures following, that is to say;

"Notice.—To Thomas Grimshawe, of the township of Hamilton, in the county of Northumberland, Esquire. Take notice, that