There had been no order of reference to the Master to ascertain the amount, nor any assessment by a jury, nor any *sci. fa.* to enquire as to goods:

Held, on application to set aside the judgments and writs, that the judgment was a final judgment, and that no reference or assessment was requisite.

Held, also, that the writ against goods on a judgment of assets *quando* was irregular, there having been no writ of *sci. fa.*, or revivor; but that notwithstanding the writ against lands was not irregular, as the record shewed there were no goods.

Held, also, that the proceedings on the suggestion were regular, without any leave to enter such suggestion or judgment thereon; and that the discrepancies between debt and damages were mere defects in form, and amendable.

Quære, whether any suggestion of lands at all was requisite?

[C. P., T. T., 1866.]

In Easter term last *F. Osler* obtained a rule calling on the plaintiff to shew cause—

1. Why the judgment herein entered on 19th of February, 1866, and the writs *fieri facias* against goods and against lands issued thereon should not be set aside with costs, for irregularity, on the following grounds:

Because the judgment was a final judgment in assumpsit and not in debt, and was not signed for default of plea, but after the filing and service of an admission of the defendant's plea and of a prayer of judgment for the plaintiff's damages; yet there was no order referring it to the Master to ascertain the amount of damages to which the plaintiff was entitled and for which the judgment was to be signed, nor were such damages assessed by a jury or ordered to be calculated by the Master; and it did not appear from the judgment, or from any papers or proceedings filed in this suit, how or by what authority the damages were ascertained, or judgment signed.

2. Why the *fieri facias* against goods and the sheriff's return thereto should not be set aside and quashed on the further ground, that the said writ was issued on a judgment of assets *quando acciderint* before any writ of revivor or *scire facias* had been issued on the judgment, and because the said writ did not follow the judgment.

3. Why the writ of *fieri facias* against lands of the intestate, Eli Gorham Irwin, deceased, in the hands of the sheriff of the united counties of York and Peel, should not be set aside on the further grounds, that no proper writ of *fieri facias* against goods was ever issued or returned herein to ground such *fi. fa.* against lands, and that the writ against lands did not follow the judgment on which it purported to be issued.

4. There was no award of judgment or execution on the roll of judgment, which warranted the writ of *fierie facias* against lands until the return of an execution regularly issued against goods, and that there was no award of judgment on the suggestion entered on the roll.

5. Why the said suggestion and all subsequent proceedings had thereon should not be set aside, as aforesaid, on the ground that the said suggestion was entered on the roll without the leave of the court or a judge, and that there was no award of judgment thereon.

In Trinity term last *Leith* shewed cause:

The judgment was a judgment by default, as for want of a plea displacing the right of action, and consequently was final, and no reference or assessment was requisite.—C. L. P. A. secs. 57, 147; Wms. Exrs. 5 Ed. 1794; *Sickles* v. *Asseltine*, 10 U. C. Q. B. 206, per *Draper*, C. J.

The discrepancies as between debt and damages are immaterial, since under the C. L. P. A. it need not appear either in the writ, the declaration, or the judgment, what is the form of action: secs. 9, 73, 76, 240; and although the form of execution given by the rule of court uselessly keeps up the distinction, it is not peremptory, and may be departed from.—*Lowe* v. *Steele*, 15 M. & W. 380.

The discrepancies are amendable as mere form. —*Emsley* v. *McKenzie*, 9 U. C. Q. B. 559; *Short* v. *Coffin*, 5 Burr. 2730; *Hall* v. *Thomson*, 9 U. C. C. P. 260.

Even though the *fi. fa.* goods be irregular, still the *fi. fa.* against lands is regular, and may well have issued without any prior writ against lands, as the record shews there were no goods, and so there was no necessity for any sheriff's return of no goods. To hold that a writ against goods must precede the writ against lands would be to preclude the plaintiff from all execution, since under the English practice no writ against goods can issue until a return to a *sci. fa.* that there are goods, and thus, if there never were goods, the plaintiff could never reach lands.—Wms. Exrs. 1807.

The suggestion was proper without leave of the court, and no judgment was required thereon—*Mein* v. *Short*, 9 U. C. C. P. 244, 11 U. C. C. P. 430; *Hogan* v. *Morrissey*, 14 U. C. C. P. 443.

No suggestion at all was required, lands being made subject to the same remedies and process for satisfaction of debts as goods, under 5 Geo. ch. 7, sec. 4, 27 Vic., ch. 15, and no suggestion is ever made or required in regard to goods. Such suggestion, if made, is not traversable—*Mein* v. *Short*, 9 U.C. C.P. 244, *per Draper*, C. J., and so no judgment is required thereon.

Osler, contra:—

The *fi. fa.* against goods here could not be rightly issued without a *sci. fa.*: *Goodtitle d. Murrell* v. *Badtitle*, 9 Dowl. 1009.

Forms of actions are not wholly dispensed with—*Kingan* v. *Hall*, 24 U. C. Q. B. 248; *Hunt* v. *McArthur*, 24 U. C. Q. B. 254.

The judgment here was only interlocutory, and an assessment or computation should have been had or made before final judgment could be entered—*Hayward* v. *Radcliffe*, 4 F. & F. 500; *Crooks* v. *Dickson*, 15 U. C. C. P. 523. The *fi. fa.* against the goods was irregular—C. L. P. Act, s. 310; Arch. Pr. 11th ed. 1122, 1132; 2 Saund. 219.

It is not contended that if the plaintiff could rightfully issue an execution against lands, it was necessary to issue one first against goods; perhaps, a *fi. fa.* against goods need not have been issued—27 Vic. ch. 15.

Judgment should have been signed here, as in *Gardiner* v. *Gardiner*, 2 O. S. 520; *Holton* v. *Macdonald*, 12 U. C. C. P. 246; *Hogan* v. *Morissey*, 14 U. C. C. P. 441.

The suggestion of lands could not be rightly made without the leave of the court or of a judge, and judgment should have been signed on the suggestion.—*Watson* v. *Quilter*, 11 M. & W. 760.

A. WILSON, J. delivered the judgment of the court.