CIHM
Microfiche
Series
(Monographs)

ICMH
Collection de
microfiches
(monographies)

Canadian Institute for Historical Microreproductions / Institut canadien de microreproductions historiques

Technical and Bibliographic Notes / Notes techniques et bibliographiques

The Institute has attempted to obtain the best original copy available for filming. Features of this copy which may be bibliographically unique, which may alter any of the images in the reproduction, or which may significantly change the usual method of filming, are checked below.

L'Institut a microfilmé le meilleur exemplaire qu'il lui a été possible de se procurer. Les détails de cet exemplaire qui sont peut-être uniques du point de vue bibliographique, qui peuvent modifier une image reproduite, ou qui peuvent exiger une modification dans la méthode normale de filmage sont indiqués ci-dessous.

- [x] Coloured covers/ Couverture de couleur
- [x] Covers damaged/ Couverture endommagée
- [ ] Covers restored and/or laminated/ Couverture restaurée et/ou pelliculée
- [ ] Cover title missing/ Le titre de couverture manque
- [ ] Coloured maps/ Cartes géographiques en couleur
- [ ] Coloured ink (i.e. other than blue or black)/ Encre de couleur (i.e. autre que bleue ou noire)
- [ ] Coloured plates and/or illustrations/ Planches et/ou illustrations en couleur
- [ ] Bound with other material/ Relié avec d'autres documents
- [x] Tight binding may cause shadows or distortion along interior margin/ La reliure serrée peut causer de l'ombre ou de la distorsion le long de la marge intérieure
- [ ] Blank leaves added during restoration may appear within the text. Whenever possible, these have been omitted from filming/ Il se peut que certaines pages blanches ajoutées lors d'une restauration apparaissent dans le texte, mais, lorsque cela était possible, ces pages n'ont pas été filmées.

- [ ] Coloured pages/ Pages de couleur
- [x] Pages damaged/ Pages endommagées
- [ ] Pages restored and/or laminated/ Pages restaurées et/ou pelliculées
- [x] Pages discoloured, stained or foxed/ Pages décolorées, tachetées ou piquées
- [ ] Pages detached/ Pages détachées
- [x] Showthrough/ Transparence
- [x] Quality of print varies/ Qualité inégale de l'impression
- [ ] Continuous pagination/ Pagination continue
- [ ] Includes index(es)/ Comprend un (des) index

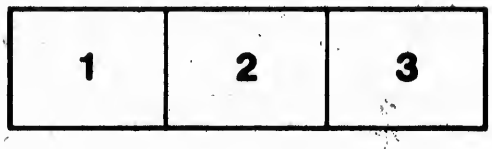
Title on header taken from:/ Le titre de l'en-tête provient:

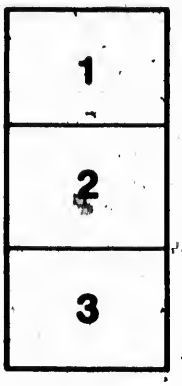
- [ ] Title page of issue/ Page de titre de la livraison
- [ ] Caption of issue/ Titre de départ de la livraison
- [ ] Masthead/ Générique (périodiques) de la livraison

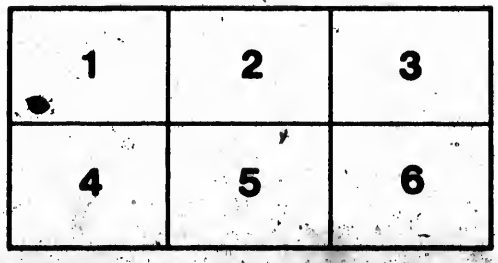
- [x] Additional comments:/ Commentaires supplémentaires: Wrinkled pages may film slightly out of focus.

This item is filmed at the reduction ratio checked below/
Ce document est filmé au taux de réduction indiqué ci-dessous.

10X	12X	14X	16X	18X	20X	22X	24X	26X	28X	30X	32X
						✓					







CASES

ARGUED AND DETERMINED

IN THE COURT OF KING'S BENCH

AT

YORK, UPPER CANADA,

IN

MICHAELMAS TERM,

IN THE FOURTH YEAR OF THE REIGN OF GEO. IV.

No. II.

JUDGES:

The Hon. W. D. POWELL, Chief Justice.
The Hon. WILLIAM CAMPBELL.
The Hon. D'ARCY BOULTON.

JOHN B. ROBINSON, Esq. Attorney General.
HENRY J. BOULTON, Esq. Solicitor General.

BY THOMAS TAYLOR, Esq.

Printed by JOHN CAREY,
YORK.
1824.

CASES

ARGUED AND DETERMINED IN THE

COURT OF KING'S BENCH,

YORK, &c.

SAUNDERS *against* [redacted]AYTER.

1823

November 6th

Where a plaintiff suffers a nonsuit voluntarily the Court will not afterwards set it aside.

THIS was an action of trover brought against the deputy Sheriff of the Home district. The circumstances proved at the trial were, that the plaintiff who had several years ago been married to one Saunders, had upon his decease taken possession of his effects without proving a Will or taking out any letters of administration,—she was afterwards married to one Elrod then supposed to be an unmarried man, but who it was afterwards conjectured, had a wife living in the U. States; no proof was however produced at the trial, of Elrod's former marriage, or of his first wife being alive at the time of his marriage with the plaintiff. The plaintiff cohabited with Elrod for several years, and they continued in the possession of the property until it was seized by the defendant under an execution against Elrod. Upon this evidence the counsel

1823

Saunders against Playter.

for the plaintiff permitted a nonsuit at the trial, and now moved for a rule to shew cause why it should not be set aside. Sed per curiam where a party voluntarily suffers a nonsuit it cannot afterwards be set aside.

Rule refused.

TULLY *against* GRAHAM.

November 8th.

This court will give leave to withdraw a demurrer upon payment of costs & pleading issuably though the plaintiff may have lost a trial

BOULTON, *Solicitor General*, moved for leave to withdraw the demurrer filed in this cause, and to plead the general issue although the plaintiff had lost a trial. He contended that although it was not the practice in England to allow a demurrer to be withdrawn after trial lost, the reason did not apply here. In England a party upon obtaining judgment upon demurrer assessed his damages immediately by writ of inquiry directed to the Sheriff, whereas, in this country, he could only do it at the Assizes, the consequence of which was, that a plaintiff would enforce his judgment (if he obtained one) at as early a period by going to trial as by arguing a demurrer.

That as the plaintiff would not be prejudiced by the demurrer being withdrawn, the

court would allow it; for he contended that prejudice did not mean that the plaintiff would be deprived of any advantage he had obtained of preventing a defendant's making so good a defence, but that a plaintiff would not obtain the fruits of his judgment at so early a period. 1823

Tully against Graham

MACAULEY, contra.—Contended that it was quite contrary to the practice to withdraw a demurrer after a trial lost*. That if this demurrer which was merely filed for delay, were argued the plaintiff would have a judgment in his favour, and would only have to assess his damages at the Assizes, whereas, if this procedure were allowed, a plaintiff might sustain serious injury by absence of witnessess occasioned by the defendant's filing a frivolous demurrer, merely for the purposes of delay—sed.

Per Curiam. The demurrer may be withdrawn upon payment of costs and pleading issuably.

ORSER *against* STICKLER.

November 10th

BOULTON, Solicitor General, moved for a rule nisi for a new trial in this cause though

The motion for a new trial must be made within the first four days of the term succeeding the trial, i. e. before the expiration of the rule for Judgment.

* Tidd.

1823

Oyer against Belcher.

the first four days after the commencement of the term had elapsed. He stated that it had not been unusual to allow motions for new trials to be made after the expiration of the rule for judgment, and that the english rule in that respect had not been strictly adhered to,—that he had not been able to make the motion earlier, not having received his brief.

Jones contra.—It is not in the breast of the court to allow motions for new trials to be made after the four days have expired—the English practice has been adopted by rule of this court.

Chief Justice.—The rule for moving for new trials has been considered as extending to the first four days on which the court actually sat, but the practice has lately become more rigid.

Per Curiam. *Rule refused.*

PATERSON *against* M'KAY.

November 10th

A scire facias will not issue against an heir under the provisions of the 5th Geo 2d, although an execution may have issued against the goods and chattels in the hands of the Administrator, and a return of nulla bona has been made.

AFTER a judgment and execution against the Administrators of M'Kay deceased,

and a return of nulla bona, the plaintiff issued a scire facias under the provisions of 5th Geo. 2d against the defendant his heir, to shew cause why execution should not issue against the lands and tenements to which he had become entitled, as heir to the deceased. To this scire facias, the defendant demurred generally—Boulton, Solicitor General, in support of the demurrer. There is no instance which I can find of a scire facias having issued in this case either in the colonies or in England; it might, indeed be convenient to the parties but can only be authorized by an act of the legislature, this court as the matter now stands, have no authority to issue it; there are only two cases in which a scire facias can issue, where a judgment has not been proceeded upon within the time prescribed by law, which raises a presumption that it may have been satisfied; or where the party to the original action is deceased to revive the judgment against his representatives; neither of which is the case here, if this writ could be supported it would be to place two distinct defendants upon the same record, there would be two distinct judgments operating at the same time, one against the goods and chattels in the possession of the Administrator, and the other against the lands and tenements of the

1823

Patterson against M'Kay.

1823

Paterson against M'Kay.

heir; a scire facias must be accompanied with privity, either of blood, estate, contract or representation. By the common law there was no privity even between executors and administrators, though now there is by express statute,* there is no privity in this case, ergo the writ cannot lie. As to inconvenience the same exists in many cases, for which writs are constantly issued in England, but which cannot issue in this country; as that of dower, summons in severance and perhaps the beneficial writ of account, but those as well as that in the case which is now before the court, can only be remedied by the legislature.

MACAULEY, contra.—The application of general principles to particular cases is not always strictly correct, as in this case. The argument that because no scire facias has issued in a case of this sort, and therefore cannot issue, is insufficient; it perhaps would not have been necessary to resort to this remedy, unless this court had determined that no action would lie against the heir under the statute for the simple contract debts of the ancestor, and I conceive that the intention of the statute should be effected in one way or other. The

* 17 C. 2. Ch. 8. Sec. 7.

act of parliament by fair implication creates a sufficient privity between the parties—the proceeding is quite analogous to that in England against the heir upon judgments recovered against the ancestor. 1823

Peterson against M'Kay.

By the statute real property is liable to the simple contract debts, in like manner as real estates are by the law of England liable to the satisfaction of debts due by specialty, and are subject to the like remedies, proceedings and process in any court of law or equity in any colony, for seizing or selling them, and in like manner as personal estates in any of the Colonies are seized extended, sold or disposed of, for the satisfaction of debts. The words "in like manner" do not mean by a like proceeding, but that the lands shall be liable in the same manner or equally so as they are in England. The Court have decided, that no action will lie against the heir in the first instance, upon the principle, I presume, that so an heir might be ruined without resort having been had to the personal estate. This proceeding after a return of nulla bona as directed by the provincial Statute 43 Geo. 3. remedies this inconvenience; under it the heir has an opportunity of shewing fraud distri-

1823

Peterson against M'Kay.

bution of assets to specialty Creditors, (who too, without this proceeding, might be defrauded of their priority over simple contract debts) or any other circumstances, which an heir could show in a scire facias upon a judgment against his ancestor: It appears to me that the proceeding we have adopted, is well calculated for the ends of justice and is authorized, though not in express terms, by the spirit of the english and provincial statutes, and that not to support it would be to render these statutes of no effect.

ROULTON, Solicitor General, in reply. The question is whether the remedy adopted is a proper one. I think the counsel on the other side concludes himself when he says that an action will not lie against an heir at law upon a simple contract debt, for a scire facias is an action to which a defendant may plead. Should this proceeding be supported there would be a judgment and execution against the defendant; could this be without his being sued? The latter part of the statute does not contemplate the death of the party debtor.—How are lands and tenements to be assets under the statute? In like manner as they

are assets liable to debts by specialty, and in no other way. They are liable to simple contract debts during the life of the party, but after his decease, only to specialty debts, with this difference that here the lands may be sold, but in England the proceeding is by elegit or extendi facias. 1823

Paterson against M'Kay

No argument can be drawn from the provincial statute requiring a return of nulla bona that must be intended to apply to those cases where there is a judgment against the testator or intestate. The counsel on the other side has certainly mistaken his remedy, where there is no privity there can be no sci : fa ; statutes have been passed to remedy the want of privity in several cases, and nothing but a legislative provision can create a privity in this case.

CAMPBELL JUSTICE.—I have no doubt but that it was the intention of the legislature, to place lands in the colonies upon the same footing with goods and chattels. In other colonies they have followed up the British statute* by several enactments point-

* 5 Geo.

1823

Peterson against M'Kay.

ing out the mode by which it is to be carried into effect; only one writ issues upon the judgment, directing the Sheriff in the first place, to sell the goods and chattels, if they are insufficient to sell the lands, and in case of their insufficiency, to attach the person. This method appears to me to be a very good one, and would perhaps be salutary here, if we had authority to make use of it, but as it is I think the only remedy is an action de novo.

Chief Justice.—By the law of England, in England the administrator is considered as having assets as long as any colonial lands remain unsold. In this province the executions which issued under the British statute went at once against the lands, as well as the personal property, but a provincial statute † was afterwards made to save the lands, by directing that they should not both be included in the same writ, but that a fi: fa: should first issue and be returned against the goods. I lament the passing this act, for I think a rule of court restraining the Sheriff would have been better.

† 3 Geo. 3. C. 1.

1823

Peterson against M'Kay

The administrator of an intestate is the person to resort to for payment of a debt as he has possession of the goods, unless where the heir is bound by specialties. It has been determined that lands cannot be sold in an action against the administrator, and yet I do not see why the party should be driven to a second action. These difficulties furnish a strong inducement to some legislative provision, but as it is, the scire facias does not appear to me to be a remedy within our power.

Per Curiam.

Judgment for defendant.

THE KING *against* PHELPS.

November 19th

Where an inquisition had been found against the defendant under the provincial Statute 54 Geo 3, the court refused to set the same aside on the ground that the lands vested in the crown by that inquisition had been granted by the Mohawk Indians to the defendant, for a term of 999 years, in trust for the support of his wife (a Mohawk woman) and three children.

AN inquisition in this case had been found against Epaphrus L. Phelps in favour of the Crown, under the provisions of the provincial Statute, 54 Geo. 3d. for declaring certain persons therein described aliens and

1823

The King against Phelps.

vesting their estates in his Majesty. By a subsequent statute, Esther Phelps had been permitted to traverse the inquisition found against her husband Epaphras Lord Phelps. The record which was of Trinity Term, 1821, stated, that it had been found by an inquisition indented, &c. at the Township of Grimsby in the district of Niagara, on the 28th day of January in the 58th year, &c. before Abraham Nelles, Esquire, one of the Commissioners of the late King, &c. to enquire, &c. by the oath of William Nelles and others (the Jury,) that Epaphras Lord Phelps in the commission named, on the day of committing the high treason in the said commission specified, to wit, on the first day of June in the 53d year, &c. and also on the day of the outlawry of the said Epaphras L. Phelps, was seized of certain parcels or tracts of land, to wit, the [illegible] term of lease for 999 years made to him by Captain Brant of 1000 acres of land, and of other land on the grand river (in the record and inquisition described) being part of the Indian lands, &c. and that the commissioners, the premises aforesaid, into the hands of the said late Lord the King had taken and caused to be seized, &c. as by the commission was commanded, &c. That on Satur-

last instant day of Trinity Term by force 1823
of an act of the provincial parliament of this
province, made and passed in the second
year, &c. entitled, an act to afford relief to
one Samuel Hull and the said Esther Phelps, comes the said Esther Phelps in said act named, wife of the said Epaphrus L. Phelps in said commission named, by her Attorney and prays oyer, &c. which being read, &c, she complains that she by colour of the premises is grievously vexed and disquieted, and protesting that the commission and inquisition are not sufficient in law and to which she has no necessity nor is bound by the law of the land to answer, for plea saith, that on the 25th day of October in the year 1724, the grand river in the said district of Gore in the said province of Upper Canada, constituted and formed part of the Province of Quebec, that the Mohawk Indians, and others of the six nations of North American Indians being on the same day, &c. and long before, the faithful and attached allies of His late Gracious Majesty, King George the third, and especially in the war then lately before that time carried on between His said late Majesty and the United Sates of America, by the event and pressure of

The King against Phelps

1823

The King against Phelps

which war, the said Indians were obliged to withdraw from their settlements and possessions within the said States, and his said late Gracious Majesty, in consideration of that fidelity and attachment so early manifested to his interest, by the said Mohawk indians, and of the loss of their settlements and possessions which they thereby sustained, was pleased to direct, that a convenient tract of land under his protection should be chosen as a safe and comfortable retreat for them the said Mohawks, &c. who had either lost their settlements within the territory of the said American states, or who wished to retire from those states to the British; and Sir Frederick Haldimand his said late Majesty's captain general and Governor in chief of the province of Quebec and the territories depending thereon &c. having in obedience to such his said late Majesty's directions. and at the desire of many of the said Indians &c. purchased a tract of land from the Indians, that is to say, the aboriginal Indians, occupying the same, situate between the lakes Ontario, Erie and Huron, did afterwards, to wit, on the same day &c. and while the said province of U. Canada formed part of the province of Quebec, at the castle of Saint Lewis at Quebec, &c.

by Instrument under his hand and seal at Arms, as Captain general &c. and in his said late majesty's name, authorise and permissive said Mohawk nation &c. to take possession of and settle upon the banks of the river commonly called the Ouse or Grand river, running into lake Erie, that is to say, the said grand river &c. allotting to them for that purpose, six miles deep from each of the said rivers beginning at lake Erie and extending in that proportion to the head of the said river To THEM and their posterity for ever, by which said authority, permission and allotment, the said Mohawk nation &c, afterwards on the same day &c. did enter upon and take possession of the aforesaid allotment; and being so possessed &c, they the said six nation indians, afterwards to wit, on the first day of May in the year 1804, at the grand river &c. by Indenture bearing date the same day and year &c. and made between them the said six nation Indians residing &c. by Captain Joseph Brant, principal chief and agent for them the said six nation Indians duly authorized, DID in consideration of the rents covenants and agreements in the said Indenture mentioned &c. grant, demise, lease and to farm let unto the said Epaphrus Lord Phelps his heirs executors, administrators

1823

The King against Hodge.

1823

The King against Phelps

and assigns, All that certain tract &c. (land mentioned in the inquisition) TO HOLD the same for the term of 999 years, *for providing for one of the women of the said Mohawk nation, and three children born of her the said woman*, by the said Epaphrus, that is to say, in trust for the purpose of providing for and maintaining the said woman and the said three children according to the custom of the said nations—Averments that the lease mentioned in the inquisition and the Indenture last set forth, are one and the same; and that the traverser is the woman mentioned in the Indenture, and that the land mentioned in the Indenture is the same with that mentioned in the inquisition,—That the traverser on the first day of June, in the 53d year &c. and also on the day of the outlawry of the said Epaphrus Lord Phelps, and also at the time of taking the said inquisition, was and still is by virtue of said Indenture, possessed of the issues and profits of the parcels and tracts of land in said inquisition mentioned, to wit, &c. and all and singular which things, &c. The traverse concludes with a prayer for judgment, that the hands of our said Lord the King be thence amoved, and that the traverser to her possession, together with the issues and profits therein in the mean

time perceived be restored. The Solicitor General on the part of the crown demurred to the traverse generally, as not being sufficient in law to amove the hands of the said Lord the King from the possession of the tenements aforesaid, and prayed judgment and that the tenements, &c. in the hands and possession of the said Lord the King may remain, &c. 1823 The King against

Boulton, Solicitor General, in support of the demurrer,—The traverse in this case is insufficient. It sets out that the traverser is an Indian woman and that there is a custom among the Indians, to bestow lands in the manner stated, and that Brant made such a conveyance for her benefit, but it shews no good title in him, or the Indians to do so. By the traverser's own shewing, she is a foreigner and consequently no more entitled to hold lands than a frenchman, or any other foreigner; for the Indians are bound by the common law.

Even if the title were good, it only conveyed a chattel interest which a man cannot hold in trust for his wife.

Should the inquisition have been ill found,

1683 yet the lands being once vested by the finding in the crown, they cannot afterwards be divested without the intervention above a better title, as appears in Dyer.

The King against Phips.

Baldwin contra.—Where both parties claim under the same deed neither can impugn it for defects, and therefore defects in title under those deeds (if such there are) cannot be set up by the crown.

The foundation of the title from General Haldimand is evidently a treaty, and as such must be recognized by the court, for all courts of justice will recognize treaties as is constantly seen in cases of seizures, &c.

The indians must be considered as a distinct, though predatory people; they were transported here by compact; they are not subject to mere positive laws, to statute labour, or militia duty, though perhaps to punishment for crimes against the natural law or law of nations.

It may be considered as a ridiculous anomaly, but it appears from Vattel* that

* L. 1. c. 2. s. 6. C. 18. s. 204. s. 4.

these sort of societies, resident within and circumscribed by another territory, though in some measure independent of it, frequently exist, and that the degree of independence may be infinitely varied; and however barbarous these indians may be considered, the treaty under which they migrated to and reside in this country, is binding.

1823
The King against Phelps.

Phelps had not such an estate as he could forfeit, it is a trust limitted to him for providing for the traverser, Esther Phelps, and her children, plainly expressed in the words of the deed, and as laid down in Shepherds touchstone, not forfeitable for his treason,* though it perhaps might be by that of the cestui que trust. Should the court consider this instrument as a trust deed founded upon sufficient consideration, namely, that expressed in it, of supporting Mrs. Phelps, then they will decide in favour of the traverser, and on the other hand, if insufficient, the inquisition will be quashed as nugatory, Phelps having nothing to forfeit, as the trust resulted for the benefit of the Grantors. †

* Touchstone 501 n. 8. † Touchstone 2 509.
Spe. abt. uses and trusts 82. Preston 251

1823 — The King against Phelps.

BOULTON, Solicitor General, contra.—If the title placed in the crown by this inquisition is at all consistent, it cannot be disturbed,* though special circumstances might induce the crown to regrant the land. The supposition that the indians are not subject to the laws of the country, is absurd; they are as much so as the French loyalists who settled here after the French revolution, who came to this province from a country perfectly independent & of which the independence was never doubted; and supposing them not to be so, confesses the grant from General Haldimand to be (as it was in fact) not warranted by law—as to the pretended consideration of the deed, it is perfectly nugatory; it purports to be made for the support of Phelps's wife and children, whom he was bound to support himself, nor could a husband be a trustee of a chattel interest to the use of his wife—and even supposing her to be a bona fide cestui quie use, she could not dispute the legal estate of the crown once vested.

Per Curiam. (*Absente Powell, Chief Justice.*)

Judgment in favour of the crown.

* Com. Dig. prerogative.

GARDNER against BURWELL. 1823

November 4th

Where the witness who proved the notice required by the statute to be given to a J. P. before action brought, had in his examination in chief, sworn that he had served a true copy of the notice produced in court, but upon his cross examination said that it might vary a word or two, and the Judge at nisi prius had in consequence directed the jury to find a verdict for the defendant—the Court granted a new trial.

This was an action against a justice of the peace, requiring the notice of one month prescribed by the statute.[1] The witness who was called to prove the notice at the trial, deposed that he had served a true copy of that produced in court, but upon his cross examination, said, that he did not know if it was an exact copy, it might vary a word or two. Upon this evidence, the judge who tried the cause, directed a verdict for the defendant upon the ground, that the exigency of the statute had not been complied with. On a former day, in this term, Baldwin had obtained a rule to shew cause why a new trial should not be granted on the ground of misdirection in the judge who tried the cause, but the rule had been discharged—he contended that the evidence was sufficient to prove the notice, that if there was any defect in it, that should be shewn by the defendant who has in possession of it.

Boulton, Solicitor general, and Rolph, on the other side, had argued, that, though if the

[1] 24 Geo. 2 C. 44 S. 1.

1823 plaintiff had given notice to produce the copy, and the defendant had not done so, the plaintiff might perhaps have given viva voce evidence of its contents; yet as no such notice had been given, the evidence of service was not sufficient to answer the exigency of the statute; that the words omitted might be those most particularly required by the statute, the nature of the action, or the name or address of the Attorney. On this day the court (dissentiente Boulton J.) gave their opinion, that the evidence given answered the exigency of the statute; that it was too violent a presumption to infer that the notice was incorrect after the witness who had proved the service, had sworn it was a true copy, merely from the scruples he expressed upon his cross-examination, and the more especially as it was in the power of the plaintiff to shew the defects, if any, by its production; they therefore directed

A new Trial.

M'GREGOR against SCOTT.

1823

November 26th

Where a plaintiff had arrested a defendant for a considerable sum of money and evidence had been given in court of a larger sum being due to the plaintiff, & the cause was then referred, with other matters, to arbitration, & the arbitrators award ed the possession of a mill to the plaintiff & six or 7 pounds only in money, the court refused to give costs to the defendant under the provincial statute for preventing vexatious arrests.

and semble the words of the statute "being arrested and held to special bail" are satisfied by a defendant being arrested & imprisoned.

This was an application by RIDOUT for costs to be ordered to the defendant, under the provisions of the provincial statute 49 Geo. 3 Cap. 4, for the more effectual preventing frivolous and vexatious arrests.

This cause had been brought into court at the assizes for the Western district, and evidence given of a much larger sum being due to the plaintiff than the sum sworn to, but a juror was withdrawn by consent of the parties, and this and two other suits referred to arbitration. The arbitrator only awarded six or seven pounds to the plaintiff with the possession of a mill of considerable value. The defendant had not put in special bail to the action.

ELLIOT, against the application, contended that to entitle a defendant to costs under the statute, he must have put in special bail, the words of the statute being "arrested and held to special bail," and that at any rate under the circumstances of this case, the defendant was not entitled to costs.

1823

Mr. Draper against Ross

RIDOUT, contra.—There is no distinction between special bail and bail to the Sheriff.

CHIEF JUSTICE.—I consider that if a party is put in prison, it is the same thing in effect, the operation of this act, as if he had put in special bail, but under the circumstances of this case, I do not consider the defendant as entitled to the benefit of this statute.

CAMPBELL, Justice.—The question is whether the plaintiff had sufficient justification at the time he took the affidavit.

Per Curiam.

Application refused.

M'INTOSH *against* WHITE.

November 14th

An application for costs under the provincial statute 49 G. 3 Cap. 4 must be supported by affidavit, stating that the defendant was arrested without reasonable and probable cause.

Made an application for costs for the defendant under the provincial statute, 49 G. 3 C. 4, but it was not stated in the affidavit to ground the application, that the defendant was arrested without reasonable or probable cause.

Per Curiam.

Application refused.

TERRY against STARKWEATHER.

1823

November 14th

Where in an action for defamation brou't by a person describing himself in the declaration as a druggist, vender of medicines and apothecary, the witnesses proved that several persons practicing physic had purchased medicines from him; this evidence upon a motion for a nonsuit was considered as sufficient to support the verdict.

This was an action tried at the Assizes for the Niagara District, for defaming the plaintiff in his business of a druggist, vender of medicines and apothecary. The facts of defamation were satisfactorily proved, the evidence adduced to support the introductory part of the declaration, namely, that the plaintiff exercised the profession of a druggist, vender of medecines, and apothecary was, that he kept a drug store, and that several persons practicing physic had purchased medicines from him; a verdict was found for the plaintiff with £10 0 0 damages. A nonsuit had been moved for at the trial, but had been refused and now BOULTON, Solicitor General, moved for a rule to shew cause why the verdict should not be set aside, and a nonsuit entered on the ground that no evidence had been produced of the plaintiff's having exercised the business of an apothecary. In actions of this kind the whole gist depends upon the fact of exercising the trade set out in the introductory part of the declaration, as laid down

1823

Terry against Cockerton

in Smith against Taylor,* where for want of that proof, the verdict was set aside, the whole allegation must be proved, viz: that the plaintiff was a druggist, vender of medecines, and apothecary at the time of the supposed injury, and has ever since continued so. If a person alledge more than necessary he must prove it: the evidence in this case only goes to prove that the plaintiff kept a druggist shop. An apothecary, as appears by the explanation of the term in dictionaries and encyclopedias of repute, is one who practises the art of pharmacy, which is a very different business to that of a mere druggist, who only sells the article in its rude uncompounded state. An apothecary in England not only compounds medecines, but prescribes them, and should therefore be a person of skill, to injure whose reputation would call for much heavier damages, than to defame that of a mere vender.

This plaintiff has chosen to designate himself of three trades or professions, each of which has its individual meaning, but he has merely proved his keeping a druggist's

* 1 Bos. and Pul. 196.

shop and cannot, therefore, maintain this verdict. 1823

WARMINGTON, contra.—These matters of inducement the books say, may be omitted, as well in the action of slander, as in other actions on the case. It was clearly proved at the trial that the plaintiff kept a druggist shop, and as to distinctions arising from the three terms in the declaration, two are synonimous. The pleading the general issue with a justification, admits, that the plaintiff, is the character which he describes himself to be, and the general reputation of his practicing physic, was proved.

BOULTON, Solicitor General, in reply. It is extraordinary that counsel on the other side should consider these words as matter of inducement only. A person cannot read the authorities without seeing that they are matter of substance, the very gist of the action, the way to ascertain whether an allegation is material or not, is to strike it out of the declaration, and observe whether it has its full effect without it.

CHIEF JUSTICE (Assentiente CAMPBELL J.) There is a specific and distinct meaning to the term apothecary as well as to that of

1823

Terry against Stentwether

druggist, and where terms of art are in question, reference may be had to dictionaries of authority; it however appears to me, that proof of having sold *medecines* as well as drugs, having been adduced at the trial, is sufficient to entitle the plaintiff to maintain his verdict.

BOLLTON I. I do not consider that there is sufficient evidence to support the allegation of the plaintiff being an apothecary, which I think is a sine qua non.

Per Curiam.

Rule refused.

November 15th

BEDSTEAD *against* WYLLIE.

Where in an action for seduction of the plaintiff's daughter, evidence had been given of connivance on the part of the mother, and great negligence on the part of the father, and the Jury found a verdict for the plaintiff with 200*l.* damages, the court granted a new trial.

THIS was an action brought to recover damages for loss of service by the seduction of the plaintiff's daughter, and tried before the Chief Justice at the assizes for ——, and a verdict for the plaintiff for £200. The facts of service and criminal intercourse were proved, and that the plaintiff's daughter had borne a child to the defendant. On the part of the defendant it was proved, that the witness (the son-in-law of plaintiff) had

previous to his marriage, slept with another young man in one bed, and the two daughters of the plaintiff in another bed in the same room, (a two bedded room.) That he had lain in bed with both the daughters previous to his marriage—that the indecencies which took place between plaintiff's daughter and defendant, were notorious to the family—that they were laying in every corner of the house to be stumbled over. That the mother had been informed of the indecencies which took place between her daughter and the defendant, but did not discountenance them—that the plaintiff had also been informed of them, and though he reprobated the defendant's conduct greatly, he took no means to prevent it.

1823

Bedwell against Wyllie.

The Chief Justice observed at the trial, that this was a state of manners which could not, at least in England, be considered as affording a ground for this action, although it had been admitted that the plaintiff was a decent orderly man and had family prayers in his house every day.

Bourne, Solicitor general, had in a former part of the term, obtained a rule nisi to set aside the verdict and grant a new trial; and now Robinson, Attorney general, shewed

1823

Rodwell against Phillips.

cause. This is a question altogether for the consideration of juries; it is a moral and not a legal one. The damages in this case can by no means be considered as outrageous or excessive, which alone would warrant the interference of the court, as laid down in all the authorities. In a case of crim con (between which and the present there is no essential difference), though the real injury was merely nominal, a jury gave £5,000 damages, and the court refused to interfere. *

This vice, which is so mischievous to the morals of a Country, has become too prevalent, and though parents should guard the conduct of their daughters, how great an opening may be made for inroads on the other side, by courts interfering with the verdicts of juries? In this case there is nothing to exhibit the defendant to consideration; he lived in the house of the parent, was a man of forty or perhaps older, was guilty of daily indecencies in the presence of the family, to which the mother was not privy—these circumstances have all been considered by the jury, and I cannot conceive they were wrong in their determination.

* Duberly v. Gunning.

1823

Bedstead against Wyllie.

Boulton, Solicitor General, and Jones, contra. Actions of this nature are supported on the ground of injury to the parent's feelings; but where such transactions take place under his own eye, his conduct is much worse than weak or silly if he does not prevent them. If a father opens a door for misbehaviour he cannot say where it is to stop, and he shall not afterwards come and say to a jury, I have by my own folly brought this inconvenience on myself, and now I come to you for damages. If this jury have not acted upon vicious, they have acted upon erroneous feelings; they must have supposed they were to punish the error of the defendant, whether the father had received any injury to his feelings or not. In the case of Smith and Beck in this court, a new trial was granted because the plaintiff had permitted her daughter to lay upon a bed with the defendant, a case in its general circumstances by no means so strongly calling for a new trial as the present.

Per Curiam.

Rule made absolute upon payment of costs.

1823

November 5th

LARGE *against* PERKINS.

In an action for goods sold, and upon an account stated, where the plaintiff's demand had been of several years standing, and the Jury gave a verdict for 18l. the court upon a motion for a new trial considered, that evidence of an acknowledgment by letter of an account being due, and of an account having been read over to the defendant to which he made no objection, complied with evidence that an item of two pounds which was contained in the bill of particulars produced in court, was the same with that contained in the account to read over to the defendant, and with the witnesses belief that the accounts were the same, was sufficient to support the verdict though one principal ground of the witnesses belief of the accounts being correspondent arose from his knowledge of the plaintiff's character.

THIS was an action of assumpsit for goods sold and upon an account stated, tried at the assizes for the Home district, and a verdict for the plaintiff for £ 18.

THE material part of the evidence as it appeared upon the judges notes, was, that there were dealings between the plaintiff and defendant, commencing in the year 1817, and continued until the year 1819.

That the defendant had written to the plaintiff acknowledging an account and apologizing for the neglect of payment—that the defendant being near the plaintiff's store, requested his account, upon which the plaintiff called him in, and read over an account to him in the presence of the witness (Kellar)—that he listened attentively to it, and made no objection. That after the commencement of the suit, the same witness copied an account out of the plaintiff's book, which account being produced in court, he

1823

Large against Perkins.

swore he believed to correspond with that read over in the presence of the defendant; he also recollected one item for two pounds as composing a part of the account read over to the defendant. Upon his cross-examination he said, that he believed the account which he copied from the plaintiff's book and produced in court, corresponded with that read over to the defendant, because the plaintiff had told him so, and he believed him to be an honest man.

Boulton, Solicitor General, had in the former part of the term, obtained a rule nisi to set aside the verdict and to enter a nonsuit, or to have a new trial, upon the ground that improper evidence had been received at the trial, or, if the evidence was admissible, it was insufficient to support the issue; and now Baldwin shewed cause: he contended that the evidence appearing upon the judges notes, was properly received and sufficient to support the verdict, a letter acknowledging an account, an account read over and no objection taken, a long tacit acknowledgement—the account produced in court, sworn to be the same as that read over to the defendant, to the best of a witnesses belief.

1823

Large against Perkins.

BOULTON, Solicitor general, contra.

The first question is whether Kellar the witness should have been allowed to produce this account, I contend that he should not, an account or memorandum can only be produced to assist the memory of a witness, but he cannot be permitted to produce an account, that he may swear he believes it to be true, because another person told him so, more particularly the plaintiff in the action; it would be receiving proof in fact upon the plaintiff's own ipse dixit, the witness could only remember an item of two pounds, which does not at all prove the truth of any of the other items, he should have been able to identify the account read over with the one proved, or should have sworn to the particular items. The admission of evidence of this sort, which is mere hearsay, and that from the plaintiff, would subject every person in the country, to the greatest frauds and impositions. In this case the plaintiff might have added new items or altered the sums after the account was read over. Upon this evidence, which I contend should not have been admitted, the plaintiff has obtained a verdict which he could not have obtained without. The account should have been ta-

ken from his hand, unless he used it merely to refresh his memory; but he was allowed to read it, merely upon the plaintiff's assertion that it was correct, his opinion of whose honesty can be no evidence at all. The inconvenience, difficulties and hardships of proving accounts by persons who have no clerks, have been urged, but they have it in their power to take notes or memorandums, and it would be a much greater hardship upon the country and more productive of fraud, if accounts were allowed to be proved by this sort of evidence.

1823

Large against Perkins.

Bolleton, Justice.—There is no positive proof in this case of the delivery of the goods except to the value of two pounds. I should be sorry that merely being present at the hearing of an account, without acquiescence, should be considered as proof of the items contained in it. I dare say we all consider the plaintiff as an honest man, but it appears to me, that in this case the necessary evidence is wanting, that there is not the slightest testimony of the delivery of the goods, and that the verdict cannot be supported.

Campbell, Justice.—This is an action for goods sold and delivered, the sum sought to

1823

Large against Parlin.

recovered is small but nevertheless the verdict ought to be supported by proper evidence, if not, a new trial should be granted. As to hearsay evidence no one would be less inclined to receive it than myself, and if I thought this verdict depended upon such, I should not consider that it ought to stand, but I conceive that it depends in no degree upon it, what has been considered as such is not so; if it were it would be of the very worst kind as coming from the plaintiff himself, but I attribute to it a different character. There is evidence uncontroverted of a subsisting account, of a subsisting debt, no less than a letter acknowledging it, and an apology for delay of payment; this is followed by the evidence of Kellar, that about two years ago he heard the defendant ask the plaintiff for his account, that plaintiff took him into his house and read over his account, to which the defendant listened attentively and made no objection, nor did it appear that he did make any afterwards, until the action was brought. I do not consider that silence is always a mark of consent, but I think that in this case, under these circumstances, it was.

1823

Large against Perkins.

The more objectionable part of the evidence is that which connects this account with the bill of particulars; the witness is asked if it is the same as the account in the plaintiff's book; he says he has no doubt but it is, and his ground of belief is, among other grounds, that the plaintiff told him so, and that he believes him to be an honest man; this, which has been called hearsay, I consider no more than a person accounting for his ground of belief, he was so convinced from the plaintiff's character that the account was the same with that read to the defendant, that he did not hesitate to give it as his belief upon oath; there was also an item for two pounds which he identified as being in the account read over to the defendant, as well as in that produced in court. This evidence was left to the Jury, and I consider that justice has been done between the parties.

Chief Justice.—In this case there was full evidence of transactions between the parties; upon application for payment, apologies were made for delay, the defendant went into plaintiff's house and heard the account read over, and I think his silence, in some sort, admitted the account; a long

1823

Large against Perkins.

time afterwards, the action is brought, and the same witness in whose presence the account was read, copies an account out of the plaintiff's book, which he verily believes to be the same. I think under all the circumstances, that the evidence was fairly left to the Jury, and as the Judge who tried the cause is satisfied, I am of opinion that the verdict should stand.

Per Curiam. *Rule discharged.*

GENERAL RULES

PUBLISHED THIS TERM.

Many of the Rules of this Court, having become unnecessary in consequence of Legislative provisions, and others inconvenient, the following are published as standing orders of this Court, all others being rescinded.

1st—In future the practice of this Court, as well as the quantum of costs to be allowed in all proceedings, are to be governed (where not otherwise provided for) by the established practice of the court of King's Bench in England.

2d—When the Attorney in any cause depending in this court, resides without the District where the action is brought, all notices, demands, and other papers and pleadings, to be served on such Attorney, shall be deemed regular by being put up in the Crown office, in the District, wherein such action is brought, unless such Attorney have

a known agent within the said district, in which case, service on the agent shall be required.

3d.—As soon as may be after filing any Inquisition taken under authority of the Statute, passed in the fifty-fourth year of Geo. 3. The clerk of the crown shall cause an extract therefrom containing the name of the person found to be an alien, and describing the land found to have been in his possession, or to which he had a title subject to forfeiture, in order that any person having claim may traverse the said Inquisition, and he shall expose such extract in his office from the date thereof to the end of the year from the date of the Inquisition.

4th—Some person competent to the duties of the office of the clerk of the crown and pleas, is to attend there in vacation, from nine in the morning until three in the afternoon, and in Term from nine till three, and from six to eight in the evening.

5th—Neither the clerk of the crown and pleas, or any of his deputies are to file any affidavit, declaration, plea, roll, record, or other paper or proceeding in any cause, which shall be printed in part, or in the whole, except the ordinary writs and process of the court.

6th—All rules, which by the English practice may

[illegible] as a matter of course upon signature of [illegible] at nisi bas, or are given by the Master clerk of the papers, or clerk of the rules in England, are to be given by the clerk of the crown and pleas, *or his Deputies* in this province, in the same manner, and the same may issue either in term or vacation.

7th—No judgment is to be entered up on any warrant of Attorney to confess judgment, or upon any cognovit actionem, unless the same has been obtained through the intervention of some practising Attorney, whose name shall be endorsed on the warrant or cognovit, at the time of taking thereof, and such endorsement stated in the affidavit of the execution of such warrant or cognovit to have been made thereon, at the time of taking thereof.

8th—No less than eight days inclusive shall intervene between the teste and return of all mesne process hereafter to be sued out in any personal action, to be henceforth instituted in this court.

9th—The Sheriff to whom any execution, or process in the nature of an execution, shall be directed, shall include in the returns of such execution or process, the amount of his fees levied by virtue thereof, and shall specify in the margin the particular items of the same.

10th—In all causes pending, or hereafter to be brought in this court, defendants shall plead within [illegible] days after common bail and declaration shall have been filed and the plea demanded.

11th—Every Attorney not resident in the Home district, shall enter in alphabetical order, in a book to be kept for that purpose by the clerk of the crown, his name and place of abode, and also in an opposite column, the name of some practising Attorney, resident in the town of York, as his agent, who may be served with notices, summonses, and all other papers (not required to be personal); and if any Attorney shall neglect so to enter his name, with that of his agent as before mentioned, fixing up the notice, summons, or other paper in the crown office, shall be deemed good service.

A