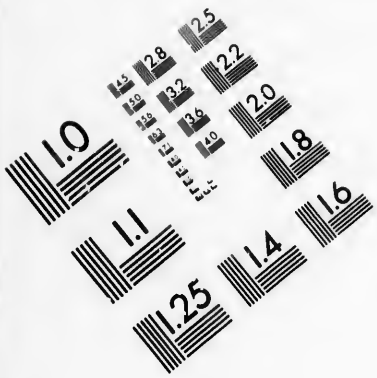

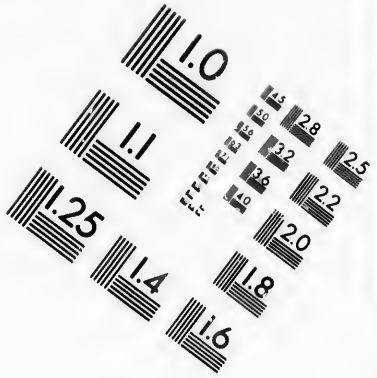

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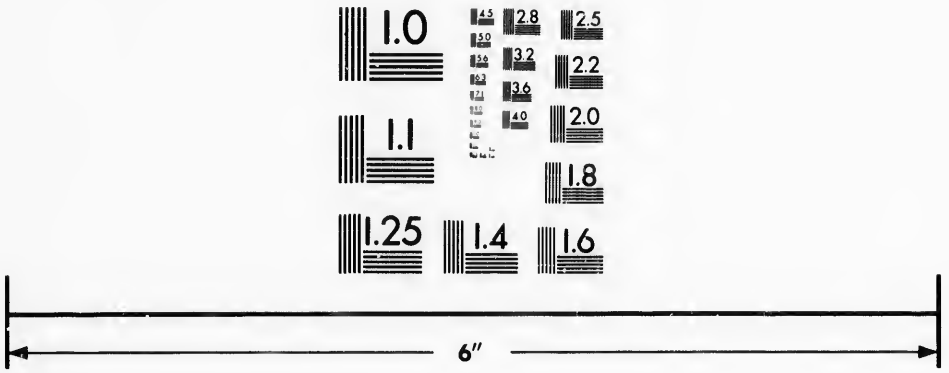

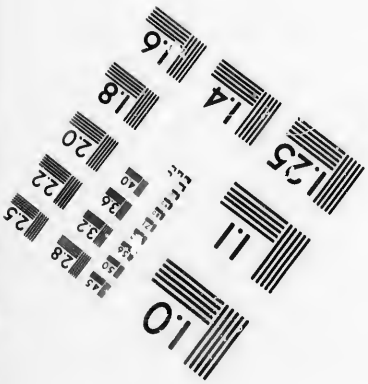

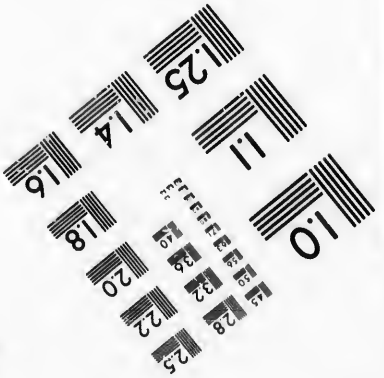

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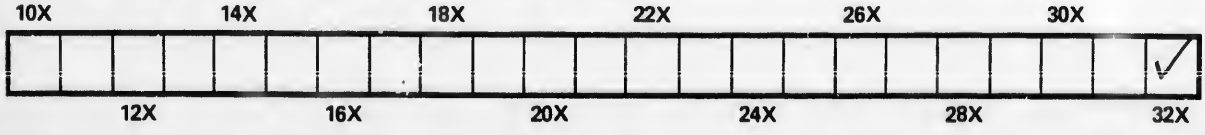

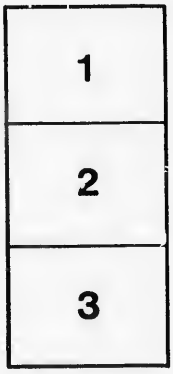

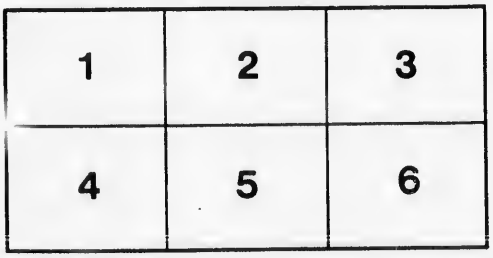

In the Privy Council.

IN AN APPEAL FROM THE COURT OF APPEAL OF THE PROVINCE OF UPPER CANADA.

GRANT POWELL, ELIZABETH POWELL, and SAMUEL PETERS JARVIS, the Executors of WILLIAM DUMMER POWELL, deceased . . . . . } Appellants;

SIMON WASHBURN, the Administrator, with the Will annexed of JAMES MONK, deceased . . . . . } Respondent.

CASE FOR THE RESPONDENT.

DAWES & SONS,
RESPONDENT'S SOLICITORS,
Angel Court, Throgmorton Street.

Baine, Printer, 38, Gracechurch Street.

IN THE PRIVY COUNCIL.

IN AN APPEAL FROM THE COURT OF APPEAL OF THE PROVINCE OF UPPER CANADA.

GRANT POWELL, ELIZABETH POWELL, and SAMUEL PETERS JARVIS, the Executors of WILLIAM DUMMER POWELL, deceased; } Appellants;

SIMON WASHBURN, the Administrator, with the Will annexed of JAMES MONK, deceased. } Respondent.

CASE

OF THE RESPONDENT.

In the year 1826, James Monk commenced an Action of Debt in the Court of King's Bench, of the Province of Upper Canada, against William Dummer Powell, to recover a sum of money, and interest thereon, due to him.

1826. K. B. Upper Canada, Action of Debt, "Monk *v.* Powell."

The proceedings in that Court are similar in form to the old proceedings by Bill in the Court of Queen's Bench, in England, and the Declaration contained several Counts, (it is set out at length in the Appendix, No. 1, page 5,) which is the transcript of the Record in the Court of Appeal of Upper Canada, from which Court this Appeal is brought.

Appendix, No. I, page 5. (E)

The first Count was upon a Judgment obtained by Mr. Monk, against Mr. Powell, in the Court of Common Pleas, of the Province of Lower Canada, upon the 27th of November, 1794, whereby Mr. Monk recovered against Mr. Powell £413. 5*s*. 2*d*. currency of Lower Canada, with interest thereon, from the 1st of April, 1789, until actual payment.

Declaration.

The second Count was upon a Bond, or single Bill, under Seal, bearing date the 27th of April, 1789, whereby Mr. Powell acknowledged that he had received from Mr. Monk £413. 5*s*. 2*d*., which sum he promised and bound himself to pay, with lawful interest at the rate of £6. per cent. from the 1st of April, 1789.

The third Count was upon an Instrument or Agreement in writing, dated the 27th of April, 1789, by which Mr. Powell acknowledged that he had received, at his own request,

from Mr. Monk £113. 5*s.* 2*d.*, which he promised, and obliged himself to pay, with lawful interest thereon, at the rate of £6. per cent. from the 1st of April, 1789.

The fourth, fifth, and sixth Counts were respectively for money lent, money had and received, and upon an Account stated.

Appendix, No. 1, page 7, (F.)

To this Declaration, Mr Powell pleaded—

Pleas.

First. As to the first, third, fourth, fifth, and sixth Counts,—*nil debet.*

Secondly. As to the second Count, That the writing obligatory, therein-mentioned, was not his deed.

Thirdly. As to the first Count, That after the recovery of the Judgment therein-mentioned, Mr. Monk, on the 27th December, 1794, for obtaining satisfaction thereof, caused to be sued out a Writ of Execution against the goods and chattels, and (in case the same should not be sufficient to satisfy the debt, interest, and costs,) against the lands and tenements of Mr. Powell, directed to the Sheriff of the district of Montreal; and upon which the Sheriff caused to be made the said debt, interest, and costs.

Fourthly and *Fifthly.* As to the first and second Counts, respectively,—payment.

Sixthly. As to the third, fourth, fifth, and sixth Counts, a period of limitation,—That the causes of action therein-mentioned did not accrue within six years; and,

Seventhly. As to the whole Declaration,—a set off.

Mr. Monk, by his replication, joined issue upon the first and second Pleas, and traversed the third, viz.—That he did not cause to be sued out the said Writ of Execution, nor did the Sheriff cause to be made the said debt, interest, and costs, in manner, &c.; and he also traversed the other Pleas, respectively, in the form usually made use of in the Courts at Westminster.

Replication.

The following is a Copy of the Replication:—

Appendix, No. 1, page 8, (G.)

" And the said James Monk, as to the said Pleas of the said William, by him firstly and secondly above pleaded, and whereof he hath put himself upon the country, doth the like. And the said James, as to the said Plea of the said William, by him above pleaded, saith, that he the said James Monk, by reason of any thing by him the said William in that Plea alleged, ought not to be barred from having and maintaining his aforesaid action thereof, against him the said William, because he saith that he the said James did not cause to be sued out of the said Court, in that Plea mentioned, the said supposed Writ of Execution, in that Plea mentioned; nor did the said Sheriff, in that Plea also mentioned, cause to be made the said debt, interest, and costs of Suit, in form aforesaid, recovered, or any part thereof, in manner and form as the said William hath above, in his last-mentioned Plea, alleged; and this he prays may be inquired of by the country, &c.

" And the said James, as to the Plea of him the said William, by him fourthly above pleaded, saith, that he the said James, by reason of any thing by the said William in that Plea alleged, ought not to be barred from having and maintaining his aforesaid action thereof, against him the said William, because he saith that the said William did not pay to him the said James the said debt, interest and costs aforesaid, in form aforesaid recovered, in manner and form as the said William hath above, in his said Plea in that behalf alleged; and this he, the said James, prays may be inquired of by the country, &c.

"And the said James, as to the said Plea of him the said William, by him fifthly above pleaded, saith, that he the said James, by reason of any thing by the said William in that Plea alleged, ought not to be barred from having and maintaining his aforesaid action thereof against him; because, he says that the said William did not pay to him the said James, the said sum of four hundred and thirteen pounds, five shillings and two pence, together with all interest due thereon, according to the form and effect of the said writing obligatory, in manner and form as the said William hath above in that Plea alleged in that behalf; and this he prays may be inquired of by the country.

"And the said James, as to the said Plea of him the said William, by him sixthly above pleaded, saith, that he the said James, by reason of any thing by the said William in that Plea alleged, ought not to be barred from having and maintaining his aforesaid action thereof against him; because, he says the said several causes of action, in the said third, fourth, fifth, and sixth Counts of the said Declaration mentioned, and each and every of them, did accrue to him the said James within six years before the exhibiting of the Bill of him the said James, against him the said William, in manner and form as the said James hath above complained against the said William, to wit, at York as aforesaid, in the Home District aforesaid; and this he, the said James, prays may be inquired of by the country, &c.

"And the said James, as to the plea of him the said William by him lastly above pleaded, saith, that he the said James, by reason of any thing by the said William in that Plea alleged, ought not to be barred from having and maintaining his aforesaid Action thereof against him, because, he says that he the said James was not nor is indebted to the said William in manner and form as the said William hath above in his said last Plea in that behalf alleged, and this he the said James prays may be inquired of by the country, &c."

The Cause came on to be tried at the Sittings of the Court after Hilary Term, 1826, when a Verdict was found for Monk (the plaintiff) upon all the issues. Debt, £740 7s. 9¾d. Damages, One Shilling, subject to the opinion of the Court in Banco on certain points reserved.

The following Indorsement was made in the usual form on the Nisi Prius Record, by the proper officer at Nisi Prius, after the finding of the Jury.

Indorsement on the Record of Nisi Prius, in B. R. Upper Canada. Appendix, No. 2, page 28. **(Q.)**

> "Verdict for the Plaintiff, seven hundred and forty pounds, seven shillings and nine pence three farthings debt, and one shilling damages, subject to the opinion of the Court above on points reserved."
>
> (Signed) "L. P. Sherwood, J."

Postea Appendix, No. 1, page 10. **(H.)**

The points reserved at Nisi Prius for the opinion of the Court in Banco were nine in number, and are as follow:

The first was—That the Judgment produced in support of the first Count was void upon the face of it, and therefore insufficient to sustain the first Count.

Points Reserved. Appendix, No. 2, page 28. **(R.)**

The second was—That if the Judgment be not void on the face of it, it is irregular and void under the Laws of Lower Canada; viz.—The Ordinance and Statutes of the Province, which were admitted in evidence on production of the copy printed by authority in that Province, and if so void, the first Count founded thereon could not be sustained.

The third was—That it appeared on the face of the evidence produced, that the Instrument declared on the second Count was the same upon which the Judgment was

obtained, which Judgment was unreversed, and that it was consequently merged in the higher security, and could not be produced in support of the second Count.

The fourth—That it appeared on the face of the evidence, that under the Judgment in Lower Canada which the Defendant maintained to be irregular, the real Estate of the Defendant upon which the Debt was originally secured, as well as upon such other effects as the Defendant possessed at the time, or should become possessed of, was seized in execution, and being exposed by the Sheriff at public auction, was sold and conveyed to the Plaintiff as the purchaser at such auction, and that such transfer must be taken to be a satisfaction of the debt and a bar to recovery upon the second Count.

The fifth—That it appeared on the face of the evidence that the Instrument declared on in the third Count, was the same on which Judgment was yet unreversed, and that such Instrument was therefore merged in the Judgment, and could not be produced to entitle the Plaintiff to recover on the third Count.

The sixth—That Plaintiff's right to recover upon the third Count, was barred by the transfer of the Defendant's property in execution upon the Judgment, as contended with regard to the second Count.

The seventh—That the Instrument produced by the Plaintiff in support of the third Count, was the same Instrument upon which the Plaintiff relied in support of the second Count, and which the Defendant admitted upon the issue on that Count to be his bond, as stated; and that it, therefore, could not be received as evidence of parole agreement under the third Count.

The eighth—That no admissible evidence was given to prove an acknowledgment of a debt within six years, and that the Plaintiff's recovery upon the third, fourth, fifth, and sixth Counts, was, therefore, barred by the Plea of the Statute of Limitations.

And the ninth—That if the evidence adduced was admissible to prove an undertaking within six years, nevertheless the Plaintiff having replied *actio accrevit*, and not a subsequent undertaking specially, did not support his issue by such proof.

Evidence alluded to in the Points reserved.

The evidence alluded to in the points reserved, were certain Exhibits which are set out in the Appendix, viz.—

Appendix, No. 2, p. 16. **(A.)**

The Bond executed by the Appellant to the Respondent, dated the 27th of April, 1789.

Appendix, No. 2, p. 17. **(B.)**

The proceedings in the Court of Common Pleas of Lower Canada, on the part of the Respondent in November Term, 1794.

Appendix, No. 2, page 13. **(E.)** page 17. **(C.)** page 18. **(C 2.)** **(D.)** **(E.)**

The Judgment of the said Court, dated 27th of November, 1794, whereby the Court ordered the Defendant to pay to the Plaintiff the sum of £413 5*s*. 2*d*. current money of the Province, with the interest upon this sum from the 1st day of April, 1789, until payment, and costs of Suit. But inasmuch as it appeared by the Sheriff's return, that the service of the said Writ was made by leaving a copy of the same and of the Declaration annexed, at the last domicile and place of residence of the said Defendant, It is ordered that before execution issue in consequence of the said Judgment, the Plaintiff do give good and sufficient security, to be approved by the Court, to refund to the Defendant or his legal Representatives, as much as the Defendant appearing by himself or his legal attorney within a year and a day from that date, might be able to set aside, and reverse of the said Judgment, upon a reconsideration of the merits thereof.

The Security given in pursuance of the said Judgment, dated 26th of December, 1794. Appendix, No. 2, p. 19. **(F.)**

The Writ of Execution on the said Judgment, dated 27th of December, 1794, and the Indorsement thereon of the same date, to levy £339. 16*s.* 11*d.*, and interest from the 7th of November, 1789, till payment; the Plaintiff, on the said 7th of November, 1789, having received £73. 8*s.* 3*d.* in part of the said principal sum. Appendix, No. 2, p. 20. **(G.)**

The Return thereto, and the proceedings in the Court upon the said Return, whereby, after disposing of an interlocutory claim set up to the property, seized by certain third parties, the sum of £112. 4*s.* 8*d.* was directed to be paid by the Sheriff to the Plaintiff towards the satisfaction of his debt, interest, and costs, saving to the Plaintiff his recourse against the Defendant for the residue of his demand. Appendix, No. 2, pages 20 and 21. **(H and I.)** and page 26, **(N and O.)**

In the following Easter Term a rule was obtained on behalf of the Defendant (Powell) in the Court in Banco, calling upon the Plaintiff (Monk) to show cause why the verdict above-mentioned, rendered for him, should not be set aside, and a nonsuit entered upon the points reserved at the trial, with leave to move afterwards for a new trial, should the opinion of the Court be with the Plaintiff on those points, on the ground of the verdict being contrary to evidence. Appendix, No. 2, p. 29. **(S.)** 21st of April, 1826. Motion to set aside the Verdict, and to enter a Nonsuit on the points reserved, or for a new trial.

The rule was argued in the same Term, and in the following Trinity Term was discharged by the Court. Appendix, No. 2, p. 30. **(T and V.)** 28th of June, 1826.

In Michaelmas Term Judgment was given for the Plaintiff for his debt, damages, and costs; which Judgment was duly entered and docketted as of that term. 30th of November, 1826. Appendix, No. 1, p. 11. **(I.)**

The following is a copy of the Judgment, as entered on the record, and of the Memorandum of the Docket thereof:

"And thereupon all and singular the premises being seen, and by the Court of our said Lord the King, before the King himself, now here fully understood, and mature deliberation being thereupon had, IT IS CONSIDERED by the same Court, that the said James do recover against the said William his said debt and his damages aforesaid, to one shilling, by the Jury aforesaid in form aforesaid assessed; and also, forty-four pounds, eighteen shillings and ten pence, for his costs and charges by the Court of our said Lord the King, now here adjudged of increase to the said James, and with his assent; which said damages, costs, and charges, in the whole amount to forty-four pounds, nineteen shillings and four pence. And let the said William Powell, inasmuch as he hath denied his deed, be taken, &c.; and as to the sum of four thousand six hundred and seventy-seven pounds, three shillings and eight pence farthing, parcel of the said sum above demanded, let the said William Dummer Powell be acquitted, and go thereof, without day, &c."

"Judgment signed, entered, and docketted, the 30th day of November, 1826, as of Michaelmas Term, in the 7th year of the reign of King George the Fourth."

(Signed) "CHARLES C. SMALL,
"Clerk of the Crown."

In the beginning of the year 1827, Powell applied to the Court of Appeal of the Province of Upper Canada, for a Writ of Appeal upon the above Judgment.

The Writ of Appeal for this Province is in the same form as the ordinary Writ of Error, upon a Judgment in the English Courts at Westminster; but Powell applied that, in Appendix, No. 1, page 2 **(A.)** 1st of January, 1827.

addition to the matter contained in the common form, the Court below should be required to send with the Record, "*all the original papers and proceedings found in the Record or Registers of the Court.*"

Upon the 5th of March in that year, the Court of Appeal, after deliberation, refused to permit a Writ of Appeal to issue in the form proposed; and thereupon Powell sued out a Writ of Appeal in the usual form, (in fact, an ordinary Writ of Error) which was tested upon the 9th of March, 1827, and returnable on the 2nd of April in the same year.

Appendix, No. 1, page 2. **(B.)**

Appendix, No. 1, page 3. **(C.)**

Application to the Court of Appeal to direct Court below, to certify all Documents and Evidence on which the Judgment was founded.

No return was ever made to this Writ, and upon the 23d of January, 1830, an application was made by the Defendant Powell to the Court of Appeal, reciting the Defendant's application for the first proposed Writ of Appeal; the refusal of the Court of Appeal to comply with that application; the second Writ of Appeal in the usual form, and that the Judges of the Court of King's Bench had not sent the said Writ of Appeal to them in that behalf directed, nor had they done any thing thereupon, and praying that the Court of Appeal should command the Court below to certify to them, (the Court of Appeal,) "*all evidence and documents remaining in their custody upon which the said Judgment was rendered.*"

27th of January, 1830. The Court *refused* the application.

Appendix, No. 1, page 4. **(D.)**

The Court of Appeal, after deliberation, *refused* to issue such command, and thereupon another Writ in the usual form of an alias writ was sued out by Powell, directed to the then Judges of the Court of King's Bench, which, after reciting the former Writ, and that before any return was made, the Chief Justice to whom it was directed had ceased to be Chief Justice; and that it was prayed by Powell, that an alias writ might issue directed to the then Judges. The writ proceeded in the form of a Writ of Error, to command the Court below to send up the Record and proceedings, &c., to the Court of Appeal. This Writ was tested the 2nd of April, 1827, and made returnable on the 28th of January, 1830.

Appendix, No. 1, Declaration, p. 5 **(E.)**
Pleas, p. 7 **(F.)**
Replication, p. 8 **(G.)**
Postea, p. 10 **(H.)**
Judgment, p. 11 **(I.)**
Appendix, No. 1, p. 11. **(J.)**

Upon the day prescribed, the Court below made their return in the usual form. The Record returned is in all respects similar to a Record of the English Court at Westminster; containing, an entry of the Pleadings—the award of the Jury Process—the entry of the Clause of Nisi Prius—the return of the Postea—and the Judgment.

Upon the 11th of August, 1830, Powell assigned reasons of Appeal: they are several in number.

The first is the Common Assignment of Errors: namely,—That in the Record and Proceedings, and also in the giving the Judgment, there was manifest error in this, to wit, that the Declaration and the matter therein contained, were not sufficient in law for the said James Monk to have or maintain his action thereof, against the said William Dummer Powell; and that there was also error in this, that by the Record aforesaid, it appeared that Judgment had been given for the said James Monk, against the said William Dummer Powell, whereas by the Law of the Land, Judgment ought to have been given for the said William Dummer Powell, against the said James Monk.

Secondly,—That there was also error in this, to wit, That the said Judgment of the Court of King's Bench was erroneous, illegal, and unjust, inasmuch, that the Action was by Bill against the Chief Justice, comprising divers Counts, none of which contained just cause of Action.

Thirdly,—That there was also error in this, to wit, That the first Count was upon a Foreign Judgment of the Court of Common Pleas, at Montreal, bearing date more than thirty years before, and in part executed in the year 1795, by Sheriff's sale, in execution of the real Estate of the Appellant.

Fourthly,—That there was also error in this, to wit, That the second Count in the said Bill was on the same writing obligatory, which had been cancelled by the said Judgment of the Court at Montreal, and was therefore no just cause of Action.

Fifthly,—That there was also error in this, to wit, That the third Count in the said Bill, was upon a note of hand for £413 5*s.* 2*d.*, bearing date the 3rd day of April, 1789, and cancelled on the 27th day of April, 1789, by passing before notary-public Papineau, at Montreal, a writing obligatory for the amount of the said note, whereby the said note was legally and virtually cancelled, although fraudulently retained by the Respondent, and then used as a demand for its amount.

Sixthly,—That there was also error in this, to wit, That the fourth Count in the said Bill, was for account of monies paid and received, and services rendered before the 3rd of April, 1789, at which time the said account was settled, and the balance, £413 5*s.* 2*d.* paid by the same note of hand for that sum, which was on the 27th day of April, 1789, cancelled and rendered void by the execution before notary, of a writing obligatory for the amount equivalent to a bond and mortgage, being the same bond or writing obligatory in the second Count of the Bill, on which the Judgment then appealed from, was given by the Court of King's Bench against law and erroneously, and which ought to be reversed.

Lastly,—That there was also error in this, to wit, That it was agreed between the parties, and sanctioned by the Court, that any verdict to be received from the Jury, should be subject to certain points of law to be argued before the Judges, and the opinion of the Court had upon their legal effect, according to which legal opinion the verdict of the Jury was to be received or rejected. That the said legal points were argued before the Court, and the opinion of the Court was then severally pronounced erroneously, and contrary to the law of the land, and thereupon the verdict of the jury, erroneously and illegally, was confirmed by the Judgment of the Court from whence Appeal was made. And the Appellant prayed in the usual form of the conclusion of an Assignment of Errors, that the Judgment aforesaid for the errors aforesaid, and other errors in the Record, and proceedings aforesaid might be reversed, annulled, and altogether held for nothing, and that he might be restored, &c.

On the 10th of December, a suggestion was made to the Court that Monk was dead, (in fact he had died upon or about the 10th of November, 1826,) and the Court ordered that unless answer to the said Reasons of Appeal were filed within four days, the Court would proceed *ex parte;* and the Court directed, that Notice thereof should be given to Monk's Administrator, and a further day was given until the 17th of December.

Appendix, No. 1, p. 13. Suggestion of death of Monk.

Upon this day it appeared that Notice had been given to Simon Washburn, the Administrator of Monk, and the present Respondent, but he did not appear, or answer the said reasons.

Appendix, No. 1, p. 13. Notice given to Washburn.

Upon the 31st of December, another application was made to the Court of Appeal on behalf of Powell, viz.: That the judges of the Court below, be directed to cause the return of the said Writ of Appeal to be amended, by sending up therewith, or attached thereto, *the original papers and documents filed at Nisi Prius, and then on the files and in possession of that Court,* with the points reserved at Nisi Prius, subject to which the Verdict was given.

Appendix, No. 1, p. 13. Application to Court of Appeal to amend the return by sending up the original documents filed at Nisi Prius.

The Court took time to deliberate.

On the 7th of January, 1832, the Court *refused* the above application.

Appendix, No. 1, p. 13. The Court *refused* the application.

On the same day, the Court of Appeal *affirmed* the Judgment, and the entry thereof, upon record, is as follows:—

"And hereupon, as well the Record and Proceedings aforesaid, and the Judgment

Appendix, No. 1, p. 13.

given in form aforesaid as the matters aforesaid, by the said William Dummer Powell above for reasons of Appeal assigned, (but without reference to the points reserved at Nisi Prius aforesaid,) being seen and by the said Court of Appeal here fully understood, and mature deliberation being thereupon had, it appears to the said Court of Appeals here, that there is no error either in the Record and Proceedings aforesaid, or in giving the Judgment aforesaid. THEREFORE IT IS CONSIDERED that the Judgment aforesaid in form aforesaid given, be in all things affirmed and stand in force and effect, the several matters above as reasons of said Appeal in anywise notwithstanding. And the said William Dummer Powell in mercy, &c."

Appendix, No. 1, p. 14. Appeal allowed.

Upon the 23rd of February, in the same year, an Appeal was made on behalf of Powell to His late Most Excellent Majesty in Council, and the same was allowed by the said Court of Appeal of Upper Canada.

It appears, from a certified copy of the Proceedings in the Court of Appeal in Canada, not being matter of record, transmitted along with the transcript, that an application was made on behalf of Powell, that in addition to the ordinary transcript of the Record, all the proceedings had in the Cause, or with reference to it, from the commencement to the conclusion, including the entries from the Minute Book, should be certified under the Great Seal and transmitted to His Majesty in Council. The Court however *refused to depart from Law and Usage, and determined that nothing could be certified as the Record under the Great Seal, except the Record of the Judgment of that Court upon the Record sent up to them.* But the Court, at the suggestion of Counsel, instructed the Clerk that there would be no objection to his giving to the Appellant a certified copy of all the proceedings, whether the same were properly matters of Record or not, namely, of any motions or applications whether granted or refused, and of any collateral or interlocutory proceeding had in that Court on the Case.

Such certified copy was accordingly given by the clerk, but there is nothing in it material to the merits.

It has been already stated that Mr. Monk is dead, and Mr. Simeon Washburn, the Respondent, is his Administrator with the Will annexed.

Mr. Powell has also died since the Appeal; and his executors, Grant Powell, Elizabeth Powell, and Samuel Peters Jarvis, have obtained leave to prosecute the same.

It is submitted with the utmost confidence, that the Judgment of the Court of Appeal is perfectly correct. The jurisdiction of that Court is obviously that of a Court of Error, and it is of first principles that a Court of Error cannot look beyond the Record. In the present case, no error of any kind appears upon the face of the Record: it seems to be correct in every particular, both of form and substance.

As to the points reserved at Nisi Prius, (if it were competent for the Court to entertain them,) there would be little difficulty in showing that Monk (the Plaintiff below) was entitled to the Judgment of the Court, which he obtained upon them. Not one of them go to the merits of the case—they are all founded upon supposed technical difficulties, for which, when they come to be examined, there is not any foundation; and it seems to be admitted that the money sued for and recovered by Monk, was really due, and had never been paid.

But it is not competent for any Court of Appeal to entertain these points. The form of proceeding of taking a verdict for a Plaintiff, and giving the Defendant leave to move to enter a Nonsuit, is of ordinary occurrence in the Courts at Westminster, from whence no doubt it was adopted by the Court of King's Bench, in Upper Canada. This practice is

comparatively of modern origin, and was introduced for the express purpose of saving to suitors the expense necessarily incurred by putting points of law upon the Record, in order to give jurisdiction to a Court of Errors, and its object was to avoid the necessity of going to a Court of Appeal at all.

It is not obligatory upon any suitor to adopt this form of having points of law decided—it is entirely a matter of agreement from which either party may dissent; but when entered into, its substance is, that the parties agree to submit the matters of law in controversy between them, to the Judgment of the Court in which the suit was *originally* brought, and to be bound by their decision. That there was such an agreement in the present case, is distinctly stated by the original Appellant himself in the last reason of Appeal, or alleged special error assigned; and it would be of the most obvious injustice that one party should be permitted to depart from an agreement of this kind, into which he himself voluntarily entered, merely because the result was different from what he expected.

Inasmuch, therefore, as in the present case, all the proceedings in the way of Appeal are not only groundless and futile of themselves, but in opposition to the agreement voluntarily entered into by the original Respondent himself; it is hoped that the Judgment of the Court below will be affirmed, and the Respondent adjudged to be entitled to interest upon the debt for the very long period which has elapsed during the proceedings, and the present Appeal dismissed with costs for the following Reason, (among others:)—

That no error or default of any kind appears in any of the proceedings, and the Judgment of the Court of Appeal, affirming the Judgment of the Court below, was just and right.