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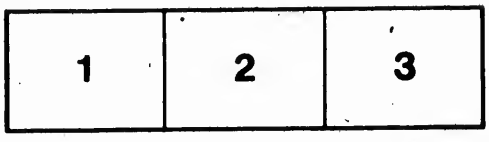

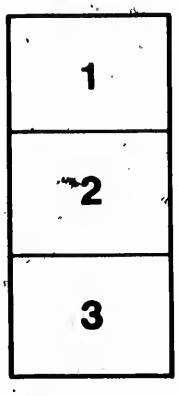

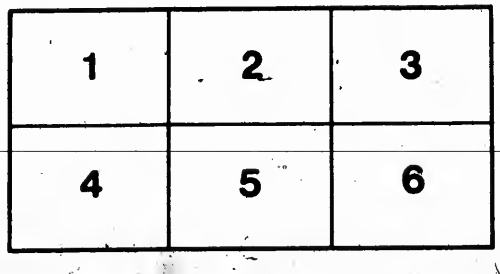

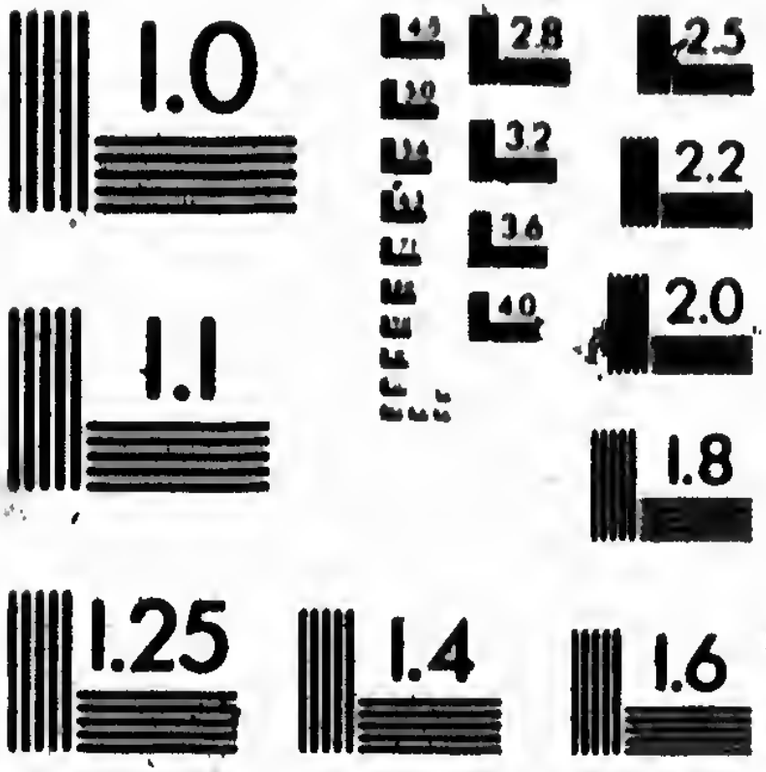

CO

CASES

ARGUED AND DETERMINED

IN THE

COURT OF KING'S BENCH

AT

YORK, UPPER CANADA,

IN

MICHÆLMAS TERM,

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

No. VI.

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.

1825.

CASES

ARGUED AND DETERMINED IN THE

COURT OF KING'S BENCH

YORK, &c.

SHUTER & WILKINS *against* MARSH & UX EXECUTRIX.

1824

November 24.

Where husband and wife Executrix are sued, service of process upon the husband only is sufficient as well as in other cases.

In this case process had been taken out against the husband and wife as Executrix, but the husband only had been served in time, the process having been served upon the wife after the return.

Washburn moved to set the proceedings aside on the ground of irregularity. He contended that though in ordinary cases, service upon the husband alone, was sufficient, yet that where the wife was sued as Executrix, it was necessary she should be served also.

That the plaintiff having undertaken to serve the process upon the wife, should have served it in time.

Shuter & Wilkins against Marsh and Ux Executrix

Boulton (George) denied that there was any distinction between a wife sued as executrix or otherwise, there being no authority to that effect, and the principle being the same in both cases, of which opinion was the Court.

Application refused.

November 9th

LOGAN *against* SECORD.

This Court will not order satisfaction to be entered up on a judgment without payment of interest.

Washburn had obtained a rule last Trinity Term to shew cause why upon payment into court of the sum of £125 13 3 balance of the judgment in this cause, satisfaction should not be entered on the roll, and why in the mean time, all proceedings should not be stayed on the writ of fieri facias issued therein.

A judgment for the sum of £1861 17 11 had in the year 1812, been entered of record in this court by the plaintiff against the defendant.

The affidavit in support of this application, stated that the defendant had paid to the plaintiff upon this judgment, the sum of £1736 14 3.

1824

The affidavits against the application, stated that the deponent who was the agent of the plaintiff, had always considered and intended that the payments made by the defendant, were in satisfaction of interest accrued as well as the principal, until both principal and interest should be fully paid, and that one payment in particular, viz: 400 acres of land valued at £150, was by the defendant tendered to the deponent, and by him accepted in part satisfaction of the interest on the subsisting debt, further that an agreement or agreements had taken place between the deponent and the defendant, as to what period some particular payments should draw interest for.

The amount due upon a calculation of principal and interest amounted to £821 17 3.

Robinson, Attorney General, shewed cause. The judgment upon which satisfaction is required to be entered by the defendant in this case, is dated in 1812. A number of payments have been made upon it, but the agent of the plaintiff has insisted, and the defendant has agreed,

Legon against Secord.

that those payments should be placed to account of the interest, and even had there been no agreement to that effect, natural justice would entitle him to it. He was entitled to interest upon the account upon which the judgment was founded, and a fortiori he must be entitled to interest upon the judgment itself.

A jury would give it by way of damages in an action upon the judgment, and it would be unjust that the plaintiff should be deprived of it by an application of this sort.

The right of a plaintiff to interest upon a judgment is clearly established in Saunders,* where it is laid down that the court itself will with the consent of the plaintiff tax interest by way of damages, and if by a direct exercise of authority, they will enforce the payment of interest, they cannot by granting an application of this sort, deprive a plaintiff of that which he would be entitled to by the verdict of a jury, or by the summary interference of the court.

The late provincial statute too, I con-

* Holdipp v. Otway, 2 Saund 106.

order has a retrospective operation,* not confined to judgments obtained since its enactment.

The right of plaintiffs to interest upon judgments is alike laid down in the Term reports,† in Easts reports,‡ in Maule and Selwin,§ and in Atkins.¶

Washburn contra—In actions upon bonds there is no doubt but that interest may be allowed upon the judgment without the intervention of a jury, but there is no case of interest being allowed by the court upon judgments in actions of assumpsit without a verdict. The case cited from Saunders was one of debt upon bond, and in the other cases, interest was considered as matter of consideration for a jury.

The passing the late provincial statute directing Sheriffs to levy interests upon judgments clearly shews that it was not considered that a plaintiff was before entitled to it. If the plaintiff is entitled to it in this case why does he not levy it?

* Provincial statute.
† Stephenson v. Flemming 7 T. R. 448.
‡ Sparkes v. Hankin, 1 East 490.
§ M. and S.
¶ Godfrey v. Watson 3 Atkins 518.

1824

Lowe against Powell.

If the counsel on the other side could produce a report where interest has been given by the court in judgments upon assumpsit, I should not contend for an entry of satisfaction in this case, but none of the cases cited are against this application.

Attorney General, contra—The counsel on the other side allows that interest would be in the discretion of a Jury, and yet by this application he would deprive us of that right.

The new act is to facilitate the recovery of interest—to enable a plaintiff to recover his due at a less expence, and rather shews that he had a former right than creates a new one.

The observation that the cases which relate to interest do not apply, in the present, is not warranted, for Lord Kenyon has declared in the case of M'Clure & Dunkin, which I have before cited, that he saw no difference in this respect between our own and foreign judgments, and the latter are in express terms called assumpsits in the books.

1824

Logan against Secord.

If natural Justice as well as legal decisions, strengthened as in this case by the parties agreement, give us a right of interest, this application cannot be sustained.

Chief Justice—It appears to me that if a party defendant applies to have satisfaction entered upon a Judgment, this court may say he should pay interest. And I am also of opinion that the court cannot be called upon to order an entry of satisfaction where the nature or amount of payments are disputed by the parties.

Per Curiam—Rule Discharged.

PRIOR *against* NELSON.

November 9th

An Affidavit to hold to bail stating that the defendant is indebted to the plaintiff upon a certain bond or obligation is insufficient.

The affidavit to hold the defendant to bail in this cause stated that the defendant was indebted to the Plaintiff in £135 *upon a certain bond or obligation.*

Ridout moved to cancel the bail bond and to enter common bail, the affidavit being insufficient as not stating that the sum sought to be recovered upon the bond *was due and payable.**

Per Curiam—Application granted

* 4 M. and S—330.

1824 BINKLEY against DEJARDINE.

November 24. An application for a judges certificate that a cause is a proper cause for a special jury must be made immediately after the trial on the same day the cause is tried.

This cause was tried by a special Jury at the assizes for the Gore District. The Jury retired at ten o'clock at night to consider of their verdict. Some time afterwards they returned to court in the absence of the plaintiff's counsel and gave a verdict in his favour.

On the following morning no business having been entered into, the plaintiff's counsel at the opening of the court moved for the Judges certificate "that the cause was a proper one to be tried by special Jury."

The Chief Justice refused to grant the certificate not being as he considered authorized by the statute so to do*

Robinson, Attorney General, now applied for a certificate or an order upon the Master to allow him his costs of striking the special Jury.

He referred to the court. Whether, although the statute directs the application to be made *immediately after the trial*, those

* Provincial statute, 48 G. 3, C. 18.

words might not by a liberal construction be considered to intend *before any other trials were gone into.*

1824

Blakley against Dejardin.

The court considering the words of the act as not capable of extension, concurred with the decision of the Judge at nisi prius.

Application Refused.

—oo—

against HUGHES.

November 9th

Where a plaintiff has special counts in his declaration, but abandons them and recovers upon counts within the competence of a district court the court will order judgment to be entered on those counts only.

In this case the plaintiff had declared upon *a special agreement*—an account stated; and other common counts.

The special count had been abandoned by the plaintiff at the trial—and he had taken a general verdict for £20, 8, 11

Mr. Justice Campbell who tried the cause had refused to grant a certificate under the provincial statute* to enable the plaintiff to receive the costs allowed in this court.

Such costs would have been taxed by the Master on view of the proceedings, the verdict appearing to be in a special

* 56 G. 3. C. 4.

1824 — — against Hopton.

action above the competence of a district court—but,

Boulton, Solicitor General, had obtained a rule to show cause why the verdict should not not be entered upon the common counts agreeable to the Judges notes, no evidence having been given upon the special counts.

Macaulay shewed cause—He contended that the plaintiff by a verdict upon an account stated, might recover King's Bench costs.

That the district court act, which confines its jurisdiction in sums above £15, to accounts liquidated, is to be considered to intend those settled by note or some express acknowledgment of the parties—as a certain price for a piece of goods—The principle does not apply to accounts stated where there may be £80 upon one side and £120 upon the other—for though parties may have stated their accounts, they may contend against and correct inaccuracies, as laid down in the term reports*

That the plaintiff having brought his

* 1 T. R. 49.

action bona fide upon the agreement should not be deprived of his costs because he had been obliged to abandon it perhaps upon some nice construction upon the statute of frauds. 1824

Boulton, Solicitor General, contra—contended that in this case the plaintiff having given no evidence upon and having abandoned his special counts the court could not give judgment upon them.

That the defendant was entitled to have the verdict entered upon those counts to which evidence had been given, not as a matter of grace but as a matter of right.

An action upon an account stated is clearly of the competence of the district court, although it may be contested, and so may the amount of a note.

Macaulay contra. The object of this application is to deprive the plaintiff of costs which he is equitably entitled to—looking at that object the court will refuse the application.

As I have brought authorities to shew that accounts stated may be opened, I consider that it may be inferred that an

1824 account stated if above £15, need not be brought into the district court.

Against Hughes.

The defendant should have insisted upon the right now applied for at the trial. As the granting it would be attended with injury to the plaintiff, it ought not to be allowed at this stage of the proceedings.

Rule Absolute.

November 13. MEAD *against* BACON.

A rule to plead is necessary in bailable actions.

Rolph had obtained a rule nisi to set the interlocutory judgment signed in this cause aside for irregularity, the same having been signed for want of a plea, no rule to plead having been entered.

Robinson, Attorney General, shewed cause.—He contended that the late act for regulating the proceedings of the court of King's Bench, had dispensed with the necessity of giving a rule to plead.

That statute* directs that in all actions or suits where the defendant had appeared, the plaintiff or his Attorney should af-

* Provincial Statute, 2 Geo. 4 C. 5.

ter filing a declaration in the office from which the writ issued and service of a copy thereof on the defendant by a demand in writing, call for a plea, and that if after the expiration of eight days from the service of such demand no plea is filed, the plaintiff may sign judgment. 1825

Hood against Bacon.

That though these directions of the statute were given in that part of it which more particularly applies to actions not bailable, yet there was no reason to require a rule to plead more in those actions that were bailable than in others.

The statute intends to take away the necessity of the rule to plead in both cases, as it could only have been taken out at the principal office, a circumstance very inconvenient in the outer districts.

That if a rule to plead was considered as necessary, it would follow that a defendant in a bailable action would not be entitled to a demand of plea of eight days, which was a beneficial arrangement in his favour.

Robb contra—Contended that in this point of practice, we must be governed by that of the King's Bench in England, it be-

1824

Mead against Mason

ing a case not provided for by our own statute, the provisions of which respecting the time for pleading are expressly confined to actions not bailable. That in all cases not provided for by our own statute we are referred to the English practice by the rule of this court.

As to the inconvenience of taking out a rule to plead from the office in York, that has been remedied by rule of this court.

Rule Absolute.

HATHAWAY *against* MALCOLM.

November 19.

Evidence of a promissory note although varying from that set out in the declaration [illegible] admissible.

This was an action by the payee against the maker of a promissory note, and tried before the Chief Justice at the assizes for the London district.

There was a material variance at the trial between the note as declared upon and given in evidence.

The plaintiff closed his case with the proof of the note, and insisted that such proof was sufficient to entitle him to a verdict upon the money counts, and took a verdict accordingly for the amount of the

note proved, subject to the opinion of the court.

Robinson, Attorney General, now contended that a nonsuit should be entered.

That the note alone was not sufficient evidence of the money counts, but that the plaintiff after failing upon the note count, should at least have proceeded to give such evidence as would have shewn that it was given for some of the considerations stated in the declaration.

He cited a case from Buller's nisi prius* where Eyre, Chief Justice, after demurrer and Judgment for the defendant upon the note count, refused to allow the note to be given in evidence at the assizes to support the count for money lent.

That the present case was a fortiori in favour of the defendant, as the plaintiff might set out his note properly in a fresh action; whereas in the case cited he had no remedy, he also cited Lavinz.

Rolph contra, contended—That proof of a note being given by the defendant to the plaintiff, though varying from that set

* Randolph v. Reynolds Bull N. P.—157.

1824

Hathaway against Malcolm.

out in the declaration, was sufficient to entitle the plaintiff to a verdict upon the account stated or other money counts.

That as before the statute of Anne it was competent to a plaintiff to give a note as evidence upon these counts, so it might clearly be done now as that statute did not take away any remedy which a plaintiff had before its enactment, but gave a concurrent one.*

That the principle reason for inserting the common counts in the declaration, was to enable a plaintiff to give his note as evidence upon those counts in case he should from variance or other cause, fail to recover upon the note count.

That it is laid down by Lord Ellenborough† that in an action by the payee against the maker of a note the note itself is evidence of money lent; and in Bayley, that it is evidence of money paid by an holder to the use of a drawer,‡ and in the same author that it is evidence of money *had and received* by the drawer to the use of the holder, and that an acceptance is

* Storey v. Atkins, Strahan 719.

1824

Hathaway against Malcolm.

evidence of money had and received by the acceptor to the use of the drawer,* and in the case of Israel against Douglas† it is laid down that an acceptance is evidence of an account stated.

That these determinations are decisive in the present case, as it is well known that the maker of a promissory note and the acceptor of a bill of exchange, are upon the same footing.

That in many of the cases it has been decided that the note was evidence without being declared upon, and the reasoning is stronger in favour of a plaintiff where his note, as in the present case, has been declared upon.

Per Curiam—Application refused.

McLEAN *against* CUMMING.

November 13.

The rule of this court requiring the name of an attorney to be indorsed upon a cognovit does not apply where an attorney is plaintiff. An affidavit not considered as insufficient because the place of taking it was omitted in the Jurat.

Motion to stay proceedings upon a Judgment entered upon a cognovit—Actionem.

Boulton, Solicitor General, objected that

* Bayley on Bills.

† 1 H. B. 230—13 East 100.

1824

M'Loss against Cumming.

the name of a practising Attorney had not been indorsed upon the cognovit at the time of taking it, and that such indorsement was not stated in the affidavit of execution agreeable to rule 7 of this court.

The court overruled this objection observing, that the plaintiff being an Attorney was sufficient—the reason and intention of the rule being to prevent persons from taking cognovits who were not amenable to the court.

The counsel also objected to the reading an affidavit because the place where the same was taken had not been inserted in the Jurata, which he contended was necessary as clearly determined in the case of.

That to dispense with this rule of practice would only be to perpetuate inaccuracies from year to year.

On the latter point the Attorney General contended that in cases where persons are called upon to perform a duty it is to be prima facie supposed, that they have performed it properly. The court here would not suppose that the Commis-

sioner had exceeded his authority, by administering an affidavit in a place where he had no right to do so. The court here knew all the Commissioners which made the case different to that of a Commissioner in England. That the principle in the case in Maule and Selwyn* might well be applied in this. That it had not been usual in this court to examine the Jurata of affidavits with that nicety which had lately taken place in England—nor were we bound to alter our own practice to make it conform to an overstrict regard to the niceties of practice there.

1824

M'Loan against Cumming.

The court overruled the objection and allowed the affidavit to be read, considering the principle of the case of an affidavit sworn before a Chief Justice in Ireland where his jurisdiction had not been inserted in the Jurata, and which was allowed notwithstanding the objection, to be read in England,† as sufficient to warrant the decision.

Per curiam—*Application refused.*

* 1 M. and S.

November 19.

Proceedings against an Attorney set aside the rule to plead having been given before the Bill served.

Macaulay had obtained a rule to shew cause why the assessment of damages and interlocutory Judgment in this cause should not be set aside for irregularity with costs.

The defendant had been proceeded against as a privileged person. The Bill had been filed on the 10th of the Copy had been served on the 13th, but the rule to plead had been entered on the 10th before the service of the Bill. The interlocutory Judgment was signed upon these proceedings for want of a plea. No appearance had been entered according to the statute.

The court considering these proceedings as irregular, set the interlocutory Judgment aside.

CROSS & FISHER *against* CRONTHER.

Costs allowed by this court for not proceeding to assessment of damages pursuant to notice.

Smith obtained a rule to show cause why the plaintiff should not pay costs for not proceeding to assessment of damages pursuant to notice.

The rule was afterwards made absolute without argument.