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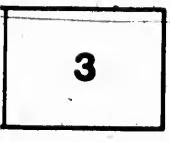

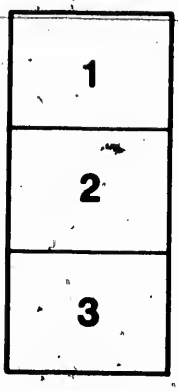

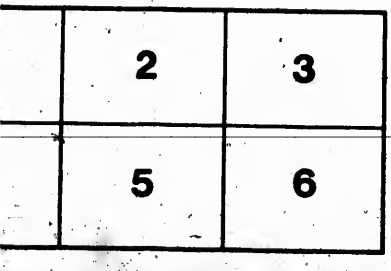

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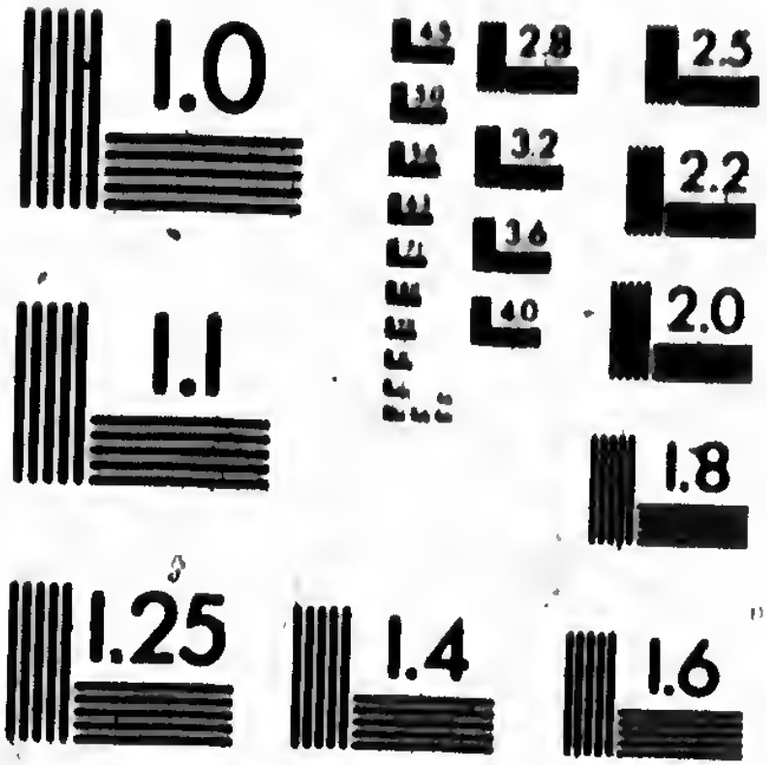

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CASES

ARGUED AND DETERMINED

IN THE

COURT OF KING'S BENCH,

AT

YORK, UPPER CANADA,

IN

TRINITY TERM,

IN THE FIFTH YEAR OF THE REIGN OF GEO. IV

No. V.

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.

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CASES

ARGUED AND DETERMINED IN THE

COURT OF KING'S BENCH,

YORK, &c.

1824

M'GILVRAY & WIFE *against* M'DONNELL. July 9th.

Where to a declaration in debt upon bond the plea stated that the plaintiffs had not made a Conveyance *according to agreement*. The plea held bad upon special demurrer for want of shewing *what the agreement* was although the agreement was referred to and its contents might be collected from the condition of the bond as set out upon oyer.

Declaration in debt upon bond for £900.

Oyer prayed of bond and condition.

Bond set out in common form. Condition as follows: Whereas the above John and Jane M'Gilvray have by agreement bearing equal date with these presents, and for and in consideration of £850, bargained, sold, aliened, and transferred unto the said Allan Ban M'Donnell, and unto his heirs and assigns for ever, all that certain parcel or tract of land, situate, &c. and have entered into a bond with the said Allan Ban M'Donnell, the condition whereof is, that the said John and Jane M'Gilvray shall and will execute and deliver a good and perfect deed of conveyance and title in

1824

M'Gilvray & Wife *against* M'Donnell.

the law of the said premises, unto the said Allan Ban M'Donnell, his heirs and assigns for ever. And, whereas, the said Allan Ban M'Donnell, hath paid unto the said John and Jane M'Gilvray the sum of £400 part of the above mentioned consideration, and the further sum of £450, the rest thereof, still remains to be paid, now the condition of the above obligation is such, that if the above bounden, Allan Ban M'Donnell, shall and will, well and truly pay, or cause to be paid, unto the said John and Jane M'Gilvray, or either of them, their heirs, &c. the aforesaid sum of £450, which remains still due to them, for the said lands by the instalments, and at the periods following, that is to say, £100, part thereof, when, and as soon as a deed of conveyance, *according to agreement*, shall be executed and delivered by the said John and Jane M'Gilvray for the above mentioned lands unto the above named Allan Ban M'Donnell, one hundred pounds more, another part thereof, at the end of one year, one hundred pounds, another part thereof, at the end of two years, and one hundred pounds, another part thereof, at the end of three years, and the fifty

1824

M'Gilvray Wife against M'Donnell.

pounds, the rest part thereof, at the end of four years, all which terms of years are to commence from the day that the above mentioned deed of conveyance shall be delivered according to the true intent and meaning of the agreement entered into, concerning the premises, and in case the said payments shall be well and truly made according to the true intent and meaning of the agreement entered into concerning the premises, and in case the said payments shall be well and truly made agreeable to the above arrangement, then this obligation to be null and void, but otherwise shall remain and be in full force, virtue and effect.

Plea, That the said John and Jane M'Gilvray, or either of them, have not at any time heretofore, executed and delivered to him, the said Allan Ban M'Donnell, a good and perfect deed of conveyance and title in and to the said before mentioned premises *according to their agreement, &c.*

Demurrer assigning for cause that it is stated in the said plea that the said John M'Gilvray and Jane M'Gilvray, or either of them, have not at any time heretofore,

1824

M'Gilvray & Wife *against* M'Donnell.

executed and delivered, or caused to be executed and delivered, to him the said Allan Ban M'Donnell, a good and sufficient deed of conveyance and title in the law in and to the premises in the said plea mentioned, *according to their agreement;* and yet it does not appear in and by the said plea *what the said agreement was:* JOINDER.

Boulton, Solicitor General, in favour of the demurrer, contended, that defendant to be relieved from his bond, must shew that he has performed the condition or an excuse for the non-performance. This excuse is that the plaintiffs have not made a deed *according to their agreement.*

But in order to shew that they have not done it *according to agreement*, the defendant must shew the agreement, which must necessarily be in his own possession; and the agreement appears to be in writing by the recital in the bond. 4 East. 346.

And as the bond gives a prima facie demand to plaintiff, defendant must discharge himself by shewing that he has done all he could. Now the agreement may be that the plaintiffs were to make

a deed at a given place, on a given day, in which case it would be necessary for defendant to say he was at the place, on the day with the money, ready to receive the deed, but that no deed was tendered; and the counsel cited 4 East 340. Douglas 688. Com. Dig. Pleader 640-1.—Croke James 360.

1824

McGillvray & Wife *against* M'Donnell.

Robinson, Attorney General, contra,—considered the arguments and authorities produced not as quite in point. They applied to cases where *the party pleading them was to perform them;* in the present case the defendant pleads a nonperformance by the plaintiff.

The agreement to be performed by the plaintiff in this case, was clearly set out in the condition of the bond, and it was unnecessary that the court should intend any other agreement. That referred to, was a mere minute and subsidiary to that set out in the bond. The reference to it may be considered as surplusage, which does not vitiate a plea in bar.

The plea states, that they have not made a title according to agreement, viz: according to the agreement recited and set out in the condition of the bond.

1824

M'Gilvray & Wife against M'Donell.

That the Courts have relaxed in requiring the common averment of readiness to perform. At any rate, to take advantage of its absence, the want of it must be set down as a cause of demurrer, it being only matter of form.

Boulton, Solicitor General, in reply.—That it was impossible to take issue upon a recital. That the defendant by erroneous pleading, had prevented the plaintiff from taking those objections to the agreement referred to, which a more authorized course of pleading would have enabled him to do. If the whole agreement had been set out he might have pleaded non est factum—forgery &c. That its construction might have been different. That it might have embraced matters of defence for its nonperformance. That the plaintiff might have had oyer as it was not for him to set out a deed in the possession of the adverse party. That the plea being bad for uncertainty and one upon which it was impossible to take issue, the plaintiff was entitled to judgment.

The Court gave their opinion in favour of the demurrer, but allowed the defendant to amend.

KINNERLEY *against* GOULD.

1824

13th July.

Where with a view to give a defendant time, the plaintiff had upon the misinformation of the deputy Sheriff given a receipt for the debt, as the only proper mode of staying the execution and which receipt the Sheriff had stated in a return to the writ of fi. fa., the Court ordered an alias to issue.

Robinson, Attorney General, applied for leave to take out an alias writ of fieri facias against the goods and chattels of the defendant, to levy the residue of the debt and costs in this action, notwithstanding the return of the Sheriff to the last writ of fieri facias upon matters disclosed to the court on affidavit, suggesting that the same is yet unsatisfied.

The sheriff's return stated, that by virtue of the writ he had the plaintiff's receipt for £675 10 1, and had levied of the goods and chattels of the within named Seth B. Gould £17 10 0, and his fees.

The affidavit of the plaintiff stated the issue of the execution.

That he the plaintiff was applied to by the defendant to delay proceedings thereon for a certain specified time.—That plaintiff being willing to do so, wrote to the Sheriff to that effect.

That he was informed by the deputy Sheriff that proceedings could not be delayed beyond the return thereof, unless plaintiff would execute a receipt written

1824

Shewerley against Gould.

by the said deputy, which he accordingly signed, supposing that the same was intended merely as a stay of proceedings.

That deponent had not received any money under said execution except the costs paid to his attorney.

The deputy Sheriff's letter requiring the receipt as a means of staying proceedings, was annexed to the affidavit, and sworn to be written by him.

Application Granted.

BROWN *against* STUART.

Held that the entry of the incipitur upon the roll, is a sufficient entry to enable the defendant to move for Judgment as in case of a nonsuit.

Boulton, Solicitor General, had obtained a rule *nisi* in this cause for Judgment, as in case of a nonsuit for not going to trial pursuant to notice.

Macaulay, shewed cause and contended that the issue should be entered at length upon the roll before this motion could be made and cited—1 Archbold 132—2 Tidd 801.

The defendant's counsel contra, contended that the incipitur being entered upon the roll, was sufficient, as may be col-

lected from Tidd, who lays down that the record is a transcript of the issue roll, and that the record cannot be passed until the issue is entered, but *that the incipitur answers to the issue.* 1824

Brown against Stewart.

Chief Justice.—With regard to trial, an incipitur is sufficient; but when an application is made to the court above, the issue should be entered and the roll completed.

Per Curiam—(*Dns. C. T.*)—*Rule discharged upon Plaintiff's paying costs and undertaking peremptorily to go to trial at next assizes.*

BOULTON *against* RANDALL.

Washburn moved for the allowance of a writ of error coram nobis.

The proper style of this court is "before His Majesty's Justices" not before the King himself "coram vobis" not "coram nobis"

Boulton, Solicitor General, objected that the writ should have been coram vobis—that all writs here, should be returnable before His Majesty's Justices. In England, the Court of King's Bench is ambulatory following the person of the King, but here it is stationary. In England the Parliament may sit in Westminster, and the Court of King's Bench, where the King himself is; but in this

1824

Boulton against Randall.

country, the court must sit where the parliament sits.

The *Attorney General* observed, that if the writ was defective it might be quashed in this court or in the Chancery.

To this observation the *Chief Justice* assented—observing, (with the court) that the style of the court hitherto adopted in writs, was improper, but that they would not interfere with a practice which had obtained for such a length of time.

Per Curiam—*Writ Allowed.*

July 17th

The statute vesting the property of a particular bank in the hands of Commissioners with power to hear & determine claims made upon the bank by creditors—though stated in the preamble to be made "on behalf of a great portion of the inhabitants of the province," was not considered by this court as a public statute.

THE HON. G. H. MARKLAND, JOHN KERBY, AND JOHN MACAULEY, Commissioners and Trustees, the Board for settling the affairs of the PRETENDED BANK OF UPPER CANADA, *against* BARTLET.

Robinson, Attorney General, had, in last Easter term, obtained a rule to shew cause, why a nonsuit should not be entered upon several points stated and insisted upon at the trial, the first ground for the application, was, that the provincial statute,* under which the plaintiffs acted, was a private and not a public

* 4 Geo. 4 c. 29.

statute, and therefore should have been set out in the declaration, and proved at the trial.

1824

Markland and others against Hartley.

Boulton, Solicitor General, shewed cause. The first point reserved for the decision of the court, is whether the provincial statute which vests in the hands of the plaintiffs as commissioners, all the stock of the pretended Bank of Upper Canada, lately established at Kingston, is a public or private statute. The intention of the Legislature, I contend to be the ground which should decide this question, and that, if it appears from the statute itself, that the Legislature intended it to be a public statute, the court will give it that construction.

This act states in its preamble,—"that the bank association had stopped "payment, whereby a great portion of "the inhabitants of this Province, hold-"ing their bills or notes, and who had "taken their stock, as well as others, are "defrauded of the same, and are likely "to be without redress, unless some le-"gislative remedy should be provided "for their relief."

For whose relief? For that of a great

1824

Markland and others against Hamlet.

portion of the inhabitants of this province, as well as others. These words are so general, that I am surprised it could ever have been doubted whether a statute having such a preamble, was public or private.

It is the practice and law of parliament not to make private acts, except upon petition; it is evident that this statute could not have been so made, it purports to be for the benefit of a great portion of the inhabitants of the province, and others, and no individuals are, or indeed, could be pointed out or designated, for whose benefit, or upon whose petition, it could have been framed.

This act is not at all confined, either in its language or its objects, as many british statutes are, whose provisions affect a great many individuals, such as those relating to particular associations of different trades, as butchers, chandlers, &c. which are considered as private acts because their operation is confined to certain designated persons, pointed out, if not by their names, as individuals, by that of their profession or mystery, but this statute applies to the public *eo nomine*.

1824

Maitland and others against Bartlet

The board established by it, is a court of record, with power to hear and determine, open to all the King's subjects, not restricted, either as to amount or persons, possessing an authority as to its generality equal to that of the King's Bench, inasmuch, as every member of the public body may become a suitor in it.

It is laid down in Bacon's abridgment* that although the words of a statute may be particular, its general application may make it a public statute. The act before the court is particular as applied to the bank, but general as it affects the public at large, in the same manner as a statute, regarding a particular trade, if made expressly for the benefit of the country in general, is a public act.

Again, what inconveniencies would arise by considering this as a private act? No person could take advantage of its except by pleading it specially, it would be a nuisance instead of a benefit; its object is to afford an expeditious and easy remedy, for the holders of bills, bank paper, or securities, to enable them,

* Tit. Statutes 874.

1824.

Markland and others against Barker.

in person, to go before the board constituted by it, and to obtain a quick judgment at a trifling expense; its intention is not to take away any remedy which may be had under the 1st & 2nd Geo. 2d C. 37, but to furnish an additional one to the proceedings under that statute, being expensive and inconvenient, but should it be construed to be a private statute, it would furnish no additional remedy whatsoever.

The act authorizes the board to issue subpœnas, an authority incidental to it indeed, as a court of record, but if the act is to be considered as a private one, a witness might refuse to attend unless the suitor obtains a subpœna or exemplification of the statute under the great seal, and this is not an ideal inconvenience, but one which would frequently arise.—The same observation applies to Commissioners in the King's Bench, who are authorised to take affidavits touching matters before the board, who need not recognise this act (if it is a private one) without a similar authority.

The King is interested in the proceedings under this statute, which as laid

down in Skinner* makes it a public act. The board constituted by it, is authorised to take recognizances, the forfeitures of which go to the crown. 1824

[redacted] and others against Bartlet.

The act creates the public offence of perjury, the fine upon a conviction upon which, would also go to the king.

The ancient doctrine which affected to confine every thing to genera and species is now exploded, and many statutes, which would, by Lord Coke and other lawyers, have been considered as private, are now considered as public.

The statute regarding all Sheriffs,† would have been considered as a private one, because, say these ancient lawyers, all officers are a genus, but all Sheriffs are only a species.

But this exposition is now changed to one more rational as appears in Lord Raymond‡ who lays down that the act for the discharge of poor debtors, is a public act, because all the people of England may be concerned as creditors to these poor debtors, and so may all

* King v. Bage, Skinner 428.
† 23 Hen. 8 C. 9.
‡ Jones v. Axtell, 130.

1824

Markland and others against Bartlet.

the people of Canada, or of the United States, be creditors to this poor bank. Another very important ground of the decision in Lord Baymond and which applies most forcibly to the act before the court, was that the expence of pleading the poor debtor act specially, would put the insolvents to so great an expence as to disable them from taking advantage of it.

The Sheriffs act would now be considered as a public statute, and that does not affect the interest of every member of the public body, for there are many large divisions of it, as peers, lawyers, and others, who are not subject to be arrested.

On these grounds, namely, that the act it made expressly for the benefit of a great portion of the public—without petition—the very general jurisdiction which it establishes—that the King is interested in its provisions—and the great inconvenience which would arise from a contrary construction, I contend that the act of legislature before the court should be considered as a public statute.

Robinson, Attorney General, contra.—

1824

Markland and others against Bartlet.

Immediately after the trial of this cause I insisted upon the distinction which takes place between public and private statutes, in the proceedings which are had upon them in courts of justice, viz: that the former are recognized, but that the latter must be set forth and proved.

To lead to the decision of the question before the court, viz: whether the statute under consideration is public or private, I will first refer to Bacons abridgment, where we find the following summary.

That a statute which relates to all the subjects of the realm, is a public statute.

That a statute which concerns the King, is a public statute.

That a statute which concerns the public revenue, is a public statute.

That a statute which concerns trade in general, is a public statute.

And which is to be observed as applicable here, it is there laid down that the statute of Henry 6th by which *all* corporations and licences granted by that prince are declared to be void, is a *private* statute.

1824

Markland and others against Bertlet.

The act under consideration does not concern *all banks*, for if a similar institution were to arise to-morrow, it would not be affected by it. It is impossible that an act so confined in its operation, can be entitled to the privileges of a public statute, without the clause, so frequently inserted, with a view to entitle private acts, to be considered as public.

It acts relating to such bodies as the universities, are to be considered as private, is it at all reasonable to suppose that one relating to a single obscure bank, should be treated as a public one.

It concerns only certain creditors of the Kingston Rank. It is not a general law of the land, but made to relieve certain individuals, and cannot, upon any principle be considered other than a private act.

An act relating to all trades, would be considered as a public statute, but one relating to a company of grocers, butchers or other specific trade, would be private acts, although in their operation, such acts might materially affect the public, but this statute does not even relate to banking associations in general.

1824

Markland and others against Bartlet.

and did it relate to all banks in Kingston, it would still be private.

The British statutes relating to the chartered charitable corporations of London* were regarded upon general principles as private statutes—the first, similar in its provisions to the act in question, was made a public act by an express clause, the second is printed in the statutes as a private act. [C. J. that statute was made public by the clause, because it was brought into the house upon petition.] If your Lordship means to infer that where statutes are not brought in upon petition, they are public statutes. I should conceive such inference as not founded upon authority, for if that were the case, we should never hear of long arguments to shew whether a statute was public or private, but the court would direct the rolls to be searched.

In the discussion which is stated in the term reports* respecting a particular trading company Mr. Justice Buller does not hint at a distinction of that sort. Among our own paovincial statutes

* 6 G. 2 C. 36.
7 G. 2 C. 11.

1824

Markland and others against Hartlet

there are many of a private nature, which have not been brought in upon petition, as the acts for erecting gaols and courthouses, giving sums of money to particular individuals or districts. And on the other hand, if the great body of the province were to petition for the redress of some public grievance, could it be said that a statute redressing it, was private? So that I should infer that the circumstance of an act being brought in, either upon or without petition, does not furnish sufficient ground to make it public or private, but that the distinction must evidently be drawn from the statute itself, and not from the manner in which it originated.

Many British statutes have given very extensive and general remedies and powers, fully equal to those in the act under consideration; but which are evidently upon general principles, considered as private statutes, as a clause has been added to give them the advantages of public acts; as the charitable corporation act before referred to, and our own back acts [C; I. that clause was necessary to prevent their being considered as pri-

1824

Markland and others against Bartlet.

vate acts because they arose upon petition] your Lordship will never find that petition or no petition, has been the ground of decision, surely A. B. or C. petitioning for a public bill could not make it private, as for instance for an act of habeas corpus or a reform in parliament, the object of, and not the manner of bringing it in, must decide its character.

I will refer to a number of British Statutes acknowledged to be private, and I am convinced that the Court upon comparing them with the one under consideration, will not hesitate to declare it to be a private act.

The 55th Geo. 3d. c. 3, is for the establishment of the London Dock company and gives very large powers of fining.

The same statute c. 9, for building a Court House, &c. for the County of Hereford gives very large powers, and yet both these acts have the clause.

There is not one argument, the counsel has adduced to shew this a public

1824

Markland and others against Bartlet.

act, and which he has drawn from the powers given to the commissioners under it, but which might be applied to these two statutes which are acknowledged to be private.

The same statute c. 45, for preserving the public records of the County of Sarry, and which gives fees to the Clerk of the peace; which all persons may be interested in the payment of, is considered as private.

The same statute c. 91, for enlarging Cheapside and establishing the new post office establishes a court of record authorizes imprisonment—fines—the summoning juries, &c. This statute I take it for granted did not arise upon petition yet it has the clause.

The same statute c. 99, regulating the assize bread within the bills of mortality and within ten miles of the royal exchange, general as it is, has the clause.

These clauses are added to prevent inconvenience, but if the argument which the counsel attempts to draw from inconvenience were applicable, the clause in these statutes would be quite unnecessary.

1824

Markland and others against Barker.

The 46th G. 3d. establishing the philanthropic society arose probably upon petition from the long string of facts; and from the purport of the act now before the court; it might reasonably be inferred that it also arose upon petition, yet neither in the one case or the other should I conceive that as a ground of decision.

This last statute uses the word "public" as ours does "a great portion of the public," from which I infer that the use of either of those terms as designating the object of a statute, would not constitute it a public act.

The 46th G. 3 c. 32, for preventing frauds in the admeasurement of coals in several parishes in Surry, an act giving great and very general powers, has the clause.

In the 2d and 3d of Anne, establishing a registry in the county of York, there are clauses that would overturn all arguments which attempt to shew that the act before the court must be a public statute, merely on account of the powers vested in the board or the proceedings to take place under it; yet it was thought necessary to declare this to be

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Markland and others against Bartlet.

a public statute by the special clause.

I consider that this act has no more title to be considered as a public act, than one which would for the benefit of creditors, make a person subject to the bankrupt laws, who was not so before.

Every one might, by possibility, be a creditor to the bankrupt, but that would not make it a public act.

The counsel's argument as to the number of persons who might be interested as creditors to this self-constituted bank, applies much more strongly to ferries and high-ways, all acts relating to which, are nevertheless private unless aided by the clause.

I agree that many acts which would formerly have been considered as private, would now be considered as public—they have been pointed out by the counsel on the other side, but there is no authority to shew that an act relating to a particular company of trading men, is to be considered as a public act, however numerous their creditors may be.

The act respecting weavers is in Lev-

ins[a] determined to be a private statute, and yet that as well as similar acts contain certain rules for the government of different trades which are highly beneficial to the public, but as their immediate objects are certain trades only, and not trade in general, they are private statutes, unless made otherwise by the special clause. The same distinction is laid down in Gilbert's evidence by Lofft—and the doctrine laid down in Coke is referred to in those authorities.

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Hartland and others against Bartlet.

In none of the arguments, respecting the nature of a statute, can I find any question made, as to whether it arose upon petition or not.

[*Chief Justice*—It is the modern practice of parliament not to entertain private acts without petition.]

I should doubt whether the rule is so general as to determine that a private act could not be entertained without petition; I should conceive it possible that a member in his place asserting a grievance, would be attended to, though it might be of a private nature.

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[a] 1 Levins 296.

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Merchant and others against Hamilton.

When a counsel rises at nisi prius, and asserts for the first time, that an act is private, I should not expect that the court would inquire how it originated, or require that the counsel should have searched the rolls of parliament before his circuit.

If the act before the court even extended to all banks set up since a certain period, it would be private upon the same principle that the statute declaring all charters made in the reign of Henry 6th, is construed to be so.

Any restriction as to time or place makes a statute private.

A statute affecting a single bank in Kingston, is certainly more particular than one which takes in a whole King's reign, and much more so if confined to individuals, even though its enactment, might be beneficial to the province at large.

[*Chief Justice*—Modern times does not sustain private acts, unless upon petition, and it is acknowledged in Comyns, that such a proceeding makes them private.]

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Blackstone does not recognize the distinction, and even were it so, your Lordship may infer more from it than the fact would warrant, it is not a British statute, which is under consideration, therefore nothing could be drawn from that practice, unless it was also a rule of this legislature.

Maitland and others against Horton.

[*Campbell*, J.—The legislature may make arrangements for convenience to the house.]

Can a court be bound by a rule of the houses of legislature. A statute must be construed as a will must, from itself looking at itself only. An inference drawn from its being brought in by petition or otherwise, would go too far. It would follow that all acts brought in upon petition, however general, would be private, and one upon the most trifling matter, if brought in without petition, must be declared a public statute by the Judges; but there is nothing in Comyn or Dyer, to lead to a supposition, that petition or not, was ever considered, in adjudging an act to be public or private.

If this act gave an authority to try all

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Maitland and others against Martin.

causes, that might arise in the province, it would be public, but it must neither be confined to place or persons,

The act for the relief of all friendly societies* did not arise upon petition. yet it has the clause.

It is upon principle quite impossible to consider that act as private and ours as public.

The same may be said of the act in favour of the Globe Insurance company.

My learned friend says, look at the intention. I say so too, but that we are not to go out of the act. If he means to say that we are to consider the probable intention of the legislature collected otherwise than from the act itself, he goes too far.

The legislature may have supposed they knew the distinction between a public and a private act, and have been mistaken.

What says the preamble to this statute. "That certain persons set on foot an association." What is the title "an "act vesting in the hands of certain

* 38 G. 3, C. 84.

"commissioners all the stock and pro- 1824
"perty of the pretended bank of Up- Blackburn and others against Du Vernet.
"per Canada." In every member there is a particularity.

It does not in its provisions, establish a general court of record, but one to wind up the bank concerns. If the parliament were to make an act to settle any one man's affairs, it might equally claim to be a public statute if his creditors happened to be numerous.

Look, the counsel says, at the inconvenience of its being construed a private act. The legislature should have remedied that, as they have done in our own bank act by a clause.

As to the King being interested, he is equally so in most of the acts I have cited.

In fact, all my learned friend's arguments I consider as answered upon principle, strengthened as it is by the numerous British acts avowedly private, but possessing infinitely more claim to the priviledge claimed for this statute, than it possibly can.

Boulton, Solicitor General, in reply.

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Blackburn and others against Bartlet.

From the well known practice of parliament to frame private acts upon petition, and the fact that the act under consideration, was brought into the house without petition, I argued it to be a public statute, but this was only one of several grounds of argument.

The learned Attorney General has referred to the registry act and many British statutes, and wishes it to be inferred, that if statutes of so great importance as to the objects they embrace, and of so general an influence in their operation, are to be considered as private statutes, that it is quite unreasonable to suppose the act before the court, can be deemed a public one; but the evident distinction is, that the acts he has referred to are necessarily confined in their operations, to certain individuals, as the Yorkshire Registry act to persons holding lands in that county.

The act respecting friendly societies, to the members of each particular society.

As if an act was made to establish a bank in each district of this province, it would be a private act.

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Markland and others against Bartlet.

The acts respecting ferries and high-roads have been referred to as of great public concern, yet private acts.

They are of public concern in as much as all travellers may be interested in them, but the provisions in the acts relating to them have for their objects the persons concerned in their management, and those acts are therefore private. The same may be said of acts relating to the management of fund of theatres. It is the pecuniary benefit to individuals, and not the pleasure or convenience which spectators or travellers may derive from them which the law considers.

The relief proposed by the statute, is not confined to the holders of bills, but is intended for many others, as for persons who may have deposited money, plate, title deeds, or other valuables, in the bank.

It is true as urged by Mr. Attorney General, that courts of pretty extensive jurisdiction, have their origin from private statutes, but however extensive, they are local; whereas the jurisdiction given

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Jarvis, Marshall and others against Bartlet.

by this act is not confined to Amherstburgh or Cornwall, but extends over the whole province.

The act respecting poor prisoners is very similar to this, and the principle upon which Lord Raymond decided upon that act, fully applies to this "that every person in the country might be a creditor under it," and "that without considering it as a public statute, it would be useless."

The counsel on the other side has in argument assumed, that all the statutes which he has referred to, would have been considered as private if the clause had not been added to them, but as applying to several of them, the inference is not warranted; it may have been inserted ex abundanti cautela, to prevent a possibility of doubt.

The post office act which has been remarked upon, though an act very beneficial to the public, immediately affects the property of individuals.

That respecting the admeasurement of coals however important, is nevertheless local.

Acts relating to courts of justice in

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particular counties are private, because they cannot affect all the King's subjects but there is a legal possibility of all the inhabitants of this province becoming suitors in the court established by this statute.

The title to an act is no key to its construction, though the preamble is as far as it goes: there are, nevertheless, clauses and provisions in many statutes quite unconnected with the preamble.

Some clauses may be public, others private, but it would be absurd to consider the clause in this statute respecting affidavits, as public and the rest of the statute as private.

Our act has recognized, and as it were made a part of itself, the public British statute 14th Geo. 2d. which is another reason for its being considered a public statute.

The distinctions respecting the British acts, have been so various and contradictory that the court are left to decide upon the general broad principle, whether the act is made for the benefit of the public, or for that of individuals.

I consider that I have shewn this stat-

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Maitland and others against Bethune.

statute to be public from the great public benefits it had in view, as well as from the other grounds I before laid before the court.

Chief Justice—On the first view of this point made for the opinion of the court in this case, I considered that the act of assembly in question, must be taken to be a public act, but I have endeavoured to catch the distinction, as found in the books, where I find much to doubt, and little to fix my opinion.

It appears to me, however, that the same act may be in some parts private and particular, to be pleaded or given in evidence, and in others public and general, to be noticed by the Judge as such.

The enactment transferring the stock and credits of the bank to the commissioners, I consider a particular provision, which as relating to the parties only is particular and private, and therefore must be pleaded, or at least given in evidence.

The terms of the reference rendering such construction fatal to the verdict, I hold it unnecessary to offer any opinion on the other points, unless the majority of

the court should be against me on this.

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Markland and others against Bartlett.

Campbell, J.—It appears that the plaintiffs have by an act of the provincial legislature, been constituted a board of commissioners or trustees, for the special purpose of settling the affairs of a certain insolvent, unauthorized association, called the pretended bank of Upper-Canada, and in that capacity have brought the present action under authority of said statute, to recover the amount of two bonds, for the benefit of the creditors of the said banking association. And the question now under consideration of the court, arises on a point reserved at the trial, stating that the statute under which the action is brought is a private act, and as such ought to have been specially pleaded and set forth by the plaintiff.

Similar questions have heretofore undergone much discussion in the courts at Westminster, attended in some instances with such difficulty as to have produced contradictory decisions. A circumstance which has in the present case afforded to the learned counsel on both sides, an ample field for argument and a more than usual opportunity of citing authorities in

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Shakeshaft and others against Gratrix.

support of their respective positions, and of which they have certainly availed themselves with much ingenuity and talent.

The broad distinction between public and private statutes is, that the former are general laws which regard the whole community, and of which the courts must *ex officio* take judicial notice, without being specially pleaded—the latter are such only as regard either individuals or distinct parts of the community, and therefore must be specially set forth, or shewn in the pleadings by those who claim remedy under them. Many however of the latter description are so complex, in their provisions and enactments, or so extensive in their operation as to render it extremely difficult to ascertain the precise line of distinction, and this has been the cause of the differences of opinion I have alluded to, amongst judges of great eminence, such as Rolle, Glynn, Hale, Twisden, Montague, Mansfield, and others. In order to avoid such serious inconveniences in the administration of justice, the legislature have in modern times been much in

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Maryland and others against Harris.

the habit of stamping the character of public acts, on statutes of very extensive although not of general operation. This is done by adding an express clause to that effect. Such are the 2d and 3d of Anne c. 4, for the registry of deeds in the west riding of the county of York—the 33d Geo. 3d c. 3, for regulating the trade and business of pawn-brokers, and c. 54 for the relief and encouragement of friendly societies, and many other british acts besides our own Bank act—all which the courts of law would be under a necessity of considering as private, were they not made public statutes, by the addition of those special clauses.

The act now under our consideration, has no such clause, consequently, we are left to decide its public or private character, by comparing the act itself and its avowed purposes, with the doctrine and principles laid down in the best authorities on the subject. A very great number of british statutes of much more extensive operation in regard of persons and property, than the act before us, are nevertheless private acts.

Mr. Justice Buller lays it down as the

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distinguishing characteristic, that public acts of parliament, are such as concern *the whole kingdom*, and must be judicially noticed by the courts, without being set forth. And private acts such as do *not concern the whole kingdom*, and therefore must be exhibited to the court.

If, however, the matter be ever so special, yet if it relate equally to all, it is a general law and need not be shewn; but if it relate only to some particular *county*, or *parish*, or *trade*, it is special and must be set forth. A law that concerns all *lords*, is a general law, because it affects the whole property of the kingdom, which is holden under lords mediate or immediate; but a law that concerns the nobility or lords spiritual, is but a particular law, because it relates only to a particular set of persons. A law however that relates to all spiritual persons, is a general law, in as much as the religion of the kingdom is the concern of the whole kingdom. Such are the acts, 21st Hen. 8th—13th Eliz. c. 10—and 18th Eliz. c. 11; but the 14th Eliz. concerning Bishops' leases is but a private act, for it relates only to the

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concerning one set of spiritual persons.—An act that relates to all trades is a general law, because it relates to traffic in general—but an act that relates to any one trade, as grocers, butchers, &c. is but a private act.

This principle is acted upon by the same eminent person in his judicial capacity in the case of Kirk, vs. Nowell, 1 T. R.

If this be so as regards a *whole trade* or *parish* or *county* in *England* many of which, we know, embrace the interests and concerns of a much greater portion of His Majesty's subjects than the whole population and wealth of this province, how much more forcibly must the principle apply to the concerns of an obscure association of speculative adventurers, and the comparatively few individuals, who have foolishly placed confidence in their credit and stability? Acts of parliament relating to all officers are public acts, because they concern the general administration of justice; but an act relating only to particular officers, is a private act.

The misapplication, or rather the misapprehension of this distinction has here-

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Markland and others ag. Earl Harcourt.

tofore occasioned a difference of opinion respecting the 23rd. Hen. 6th. c. 9, requiring sheriffs to take bail, which has at different times, and by different judges, been considered a public and a private act, particularly before the statute of Anne, authorising the assignment of Bail bonds; but the better opinion seems to have been that it was always a general law, for although it relates only to officers of a certain description, yet all the King's subjects are within the benefit of it, but without this universal effect, it undoubtedly must always have been considered a private statute.

There is also another mode of rendering a private statute public, which is by some recognition of it (however slight) by any subsequent public act, either expressly or impliedly, confirmatory, or even alternative of its provisions or enactments, and on that ground amongst others, it is intimated to us, that this act should be considered public—this ground however entirely fails, for there is no *such* recognition, nor indeed any recognition at all of it by any public act of parliament It is true the act in question

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contains a clause referring to or recognizing a previous public act of the British parliament; but what is the nature and effect of this recognition. it is merely to this effect, that this provincial private statute, shall not alter, or repeal, that previous public British statute.

The application of that principle of law is therefore out of the question in the present case.

The statute before us is entitled "An "act vesting in the hands of certain com- "missioners therein named, all the stock, "debts, bonds and property of the "pretended bank of Upper Canada, "lately established at Kingston, for the "benefit of the creditors of that institu- "tion." So far as the title explains the purpose and intention of the act, it is no more than would have been the title of an act vesting the property of A. B. in the hands of C. D. for the benefit of the creditors of A. B. and which I imagine no professional man would, for a moment, consider a public statute.

The preamble states in substance, that *certain persons* did, in the year 1819,

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set on foot an association under the style and title of "the president, directors "and company of the bank of Upper "Canada, and procured subscriptions "to a considerable amount for the "avowed purpose of raising a joint and "transferable stock," upon the credit of which to issue bank bills, and carry on the business of banking, which adventurers, afterwards stopt payment of their bills, and became insolvent, whereby a great portion of the inhabitants holding their bills and notes have been defrauded and are likely to be without redress; without any reference at present to the truth or fallacy of the latter allegation, or to the legality or criminality of the association itself, I see nothing in this description essentially different from the case of any insolvent individual or company, and his or their specific creditors, except perhaps the very extraordinary assertion that the defrauded persons are likely to be without remedy.

This statement, however, whether true or false, can make no difference in the nature of the transaction, nor in the parties, debtors and creditors, whose

interests and affairs it concerns. Unless perhaps it might have afforded to the legislature, a pretext for conferring upon this act the character of a public statute—this however they have not thought fit to do, nor do I conceive it to be in the power of this court, to supply the defect, if I am right in my conception of the doctrine laid down in all the authorities on the subject. 1824

As to the specific enactments and provisions of the act, they do not appear to me, to contain or embrace any matter whatever that can alter or enlarge the character given to it in its title and preamble, the whole having relation only, to the private concerns of *certain specific insolvent debtors*, and *their creditors*, with whose affairs the community at large have no more to do, than with the object of the associated adventurers, which appears to have been a matter of private gain and emolument, undertaken not only without authority, but in direct violation of a positive and highly penal act of the British Parliament.

I am therefore of opinion that the statute in question is a private act, and as

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such ought to have been specially set forth.

Houlton, J.—In this case there are ten points reserved, but as the determination on one in favour of the defendant will answer the end of arguing the whole, it is considered sufficient to argue one material point.

The one selected for that purpose, is whether the act of parliament appointing the commissioners, is a private or public act?

Having given this question my best consideration, I am of opinion it is a public act. Private acts are those which concern only particular things or persons, of which a Judge will not take notice without being pleaded. Some acts are called public general acts, others public local acts, such as canals, &c c. 9, a statute for the discharge of poor prisoners, the same exception was taken viz:—"It is a private statute and should have been pleaded." But per cur. This shall be construed to be a public act because all the people of England may be interested as creditors of the prisoners, so in this case all the peo-

ple in the province of Upper-Canada may be interested as creditors of the pretended bank, bringing it most clearly within the decision in Lord Raymond. 1824

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Trueb, C. J. says in the case of Jones v Axen, If the act concerning Bishops were to be determined now it would be determined a general act.*

The act in question having embraced the English act on the same subject, places the point beyond doubt.

Rule absolute for amount.

EXPARTE LYONS. 17th July,

A certificate from the master, and an affidavit of the person, entitled, stating "that he had during his clerkship done every thing required of him," held not sufficient to entitle him to be admitted an attorney of this court.

Mr. John Lyons applied to be admitted an Attorney of this court. His own affidavit and the certificate of service, from the Attorney with whom he had been articled stated, his having entered into articles for the time of five years, and that he had always been ready during that time to perform any services that had been required of him, or to that effect.

The court considered the certificate and affidavit as insufficient.

Application refused.

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