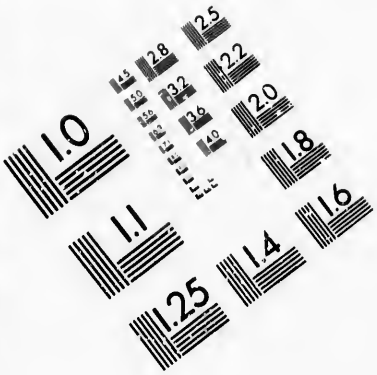


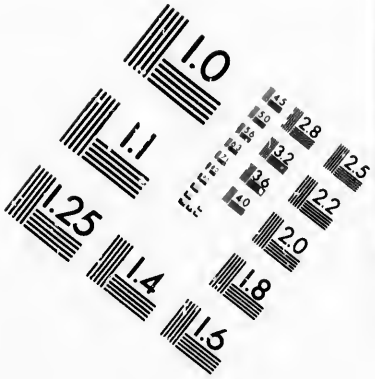
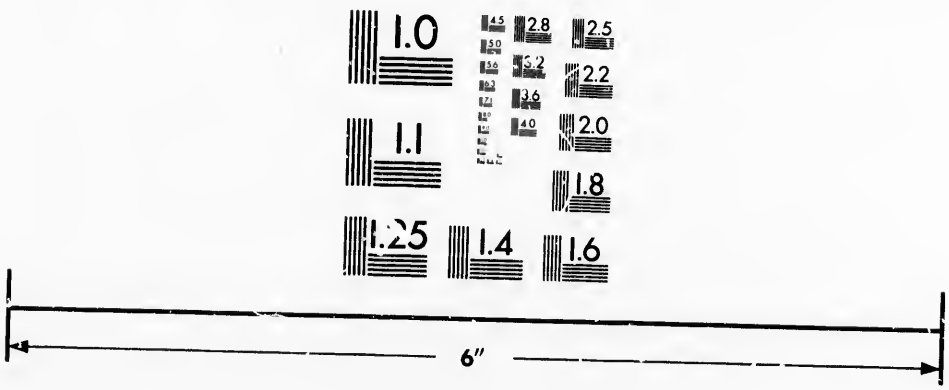
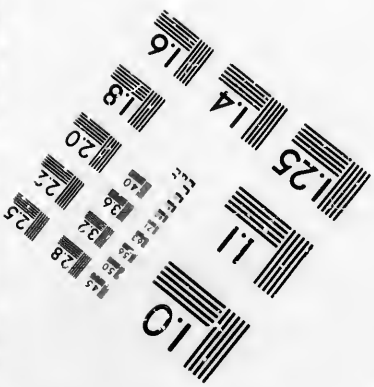
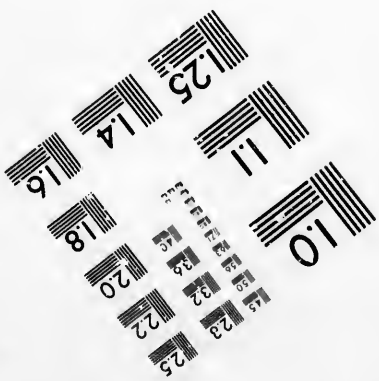


IMAGE EVALUATION TEST TARGET (MT-3)







Photographic Sciences Corporation

23 WEST MAIN STREET
WEBSTER, N.Y. 14580
(716) 872-4503

Technical and Bibliographic Notes/Notes techniques et bibliographiques

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

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

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

- ☐ Coloured pages/ Pages de couleur
- ☑ Pages damaged/ Pages endommagées
- ☐ Pages restored and/or laminated/ Pages restaurées et/ou pelliculées
- ☑ Pages discoloured, stained or foxed/ Pages décolorées, tachetées ou piquées
- ☐ Pages detached/ Pages détachées
- ☑ Showthrough/ Transparence
- ☐ Quality of print varies/ Qualité inégale de l'impression
- ☐ Includes supplementary material/ Comprend du matériel supplémentaire
- ☐ Only edition available/ Seule édition disponible
- ☐ Pages wholly or partially obscured by errata slips, tissues, etc., have been refilmed to ensure the best possible image/ Les pages totalement ou partiellement obscurcies par un feuillet d'errata, une pelure, etc., ont été filmées à nouveau de façon à obtenir la meilleure image possible.

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

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

The copy filmed here has been reproduced thanks to the generosity of:

National Library of Canada

The images appearing here are the best quality possible considering the condition and legibility of the original copy and in keeping with the filming contract specifications.

Original copies in printed paper covers are filmed beginning with the front cover and ending on the last page with a printed or illustrated impression, or the back cover when appropriate. All other original copies are filmed beginning on the first page with a printed or illustrated impression, and ending on the last page with a printed or illustrated impression.

The last recorded frame on each microfiche shall contain the symbol → (meaning "CONTINUED"), or the symbol ▽ (meaning "END"), whichever applies.

Maps, plates, charts, etc., may be filmed at different reduction ratios. Those too large to be entirely included in one exposure are filmed beginning in the upper left hand corner, left to right and top to bottom, as many frames as required. The following diagrams illustrate the method:

L'exemplaire filmé fut reproduit grâce à la générosité de:

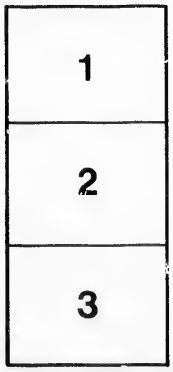
Bibliothèque nationale du Canada

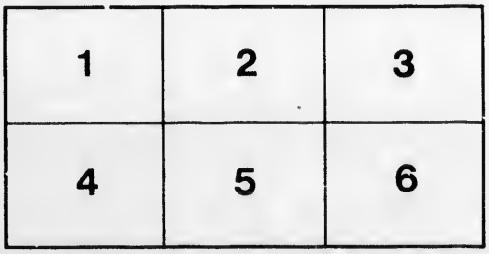
Les images suivantes ont été reproduites avec le plus grand soin, compte tenu de la condition et de la netteté de l'exemplaire filmé, et en conformité avec les conditions du contrat de filmage.

Les exemplaires originaux dont la couverture en papier est imprimée sont filmés en commençant par le premier plat et en terminant soit par la dernière page qui comporte une empreinte d'impression ou d'illustration, soit par le second plat, selon le cas. Tous les autres exemplaires originaux sont filmés en commençant par la première page qui comporte une empreinte d'impression ou d'illustration et en terminant par la dernière page qui comporte une telle empreinte.

Un des symboles suivants apparaîtra sur la dernière image de chaque microfiche, selon le cas: le symbole → signifie "A SUIVRE", le symbole ▽ signifie "FIN".

Les cartes, planches, tableaux, etc., peuvent être filmés à des taux de réduction différents. Lorsque le document est trop grand pour être reproduit en un seul cliché, il est filmé à partir de l'angle supérieur gauche, de gauche à droite, et de haut en bas, en prenant le nombre d'images nécessaire. Les diagrammes suivants illustrent la méthode.





LAW REPORTS:

CONTAINING

DECISIONS

OF THE

BENCH OF THE SUPREME COURT IN NOVA SCOTIA,

BETWEEN THE YEARS 1834 AND 1851.

SECOND EDITION,

WITH MANY ADDITIONAL REPORTS.

BY

JAMES THOMSON, Q. C.

HALIFAX, N. S.:
A. & W. MACKINLAY, PUBLISHERS,
1877.

Entered according to Act of Parliament of Canada,
In the year 1883.
By A. & W. MACKINLAY,
In the office of the Minister of Agriculture.

To the Honorable BRENTON HALLIBURTON, *Chief Justice of the Supreme Court for the Province of Nova Scotia.*

SIR,—

In dedicating to you these reports, I perform a duty which is as agreeable to myself as to the whole profession to which I have the honor to belong. For half a century the public of this Province has had the inestimable advantage of your sound common sense and legal learning in determining litigated rights. From the high estimation in which your decisions have ever been held by the profession, it is a source of great regret that so few are in existence in a tangible form. The fear that even those might be swept away in the Lethean stream, and the juridical learning of yourself and the other Judges who have illustrated the Bench of Nova Scotia, become merely traditional, has induced me to attempt the present compilation of judgments, delivered during a long course of years.

I am,

Sir,

With the highest respect,

Your most obedient,

Humble servant,

JAMES THOMSON.

HALIFAX, December, 1853.

PREFACE.

Every man owes as a duty to his profession, that he use his best exertions to leave it better than he found it. Even where talent is wanting, industry may do much to catch the rays which genius sheds in its meteor-like course, and stamping them in a book, preserve them for futurity. The stores of knowledge are increased, and the powers of original thinkers no longer misspent in working out problems that genius has already solved. The humblest member of a profession may thus contribute to aid the progress of science by setting down that which has already been the subject of thought.

These views have led me, in pursuing the line of duty which nature had pointed out, to collect and arrange the more important decisions of our Supreme Court. To the profession, I felt such reports must be exceedingly valuable, since they render doubtful points certain, and enable its members to advise with promptness and accuracy. To the public, it is a boon of still more importance. It prevents the recurrence of suits on similar questions; for few lawyers will be found who would advise clients to prosecute or defend a suit in opposition to a settled decision of the court. Thus, by the publication of faithful reports, much of the ill-feeling engendered by long and harrassing litigation—of the amount expended in prosecuting and defending suits—of the time of counsel, parties, witnesses, jury, and court, would be saved to the country.

LAW REPORTS.

MASON vs. CHAMBERLAIN.

Easter Term, 1834.

Where an Auctioneer received an article with instructions not to sell it under a certain price, held that if he shall sell it for a less sum, he was liable to make good the loss.

This was an appeal from the Commissioners' Court, where judgment had been given for plaintiff. The plaintiff had sent a table to the defendant—an auctioneer—to be sold at auction, with directions not to let it go under 40s. The defendant received the table, with the directions, and sold it for a less sum. He refused to make good the deficiency upon the ground that it would have been a fraud, if, upon the sale, the auctioneer had bid, or provided a bidder for the owner.

HILL, J.—This, like the case of Bexwell v. Christie, in Cowper, (p. 395) must be viewed as an action on the case against an auctioneer for carelessly and negligently selling at auction the property of the plaintiff for a less sum than he was directed, and undertook to sell it for. The case of Bexwell v. Christie seems to have been decided on the broad ground that the owner of goods sent to auction cannot employ a person to make a bid for him, unless in the conditions of sale he expressly reserves a bid for himself. The doctrine, however, to the extent laid down in that case, has not been approved of in later cases, and indeed has been overruled in many cases in Chancery; and by those to which we have been referred, it appears to be now put beyond doubt that an owner of goods may employ a person to bid for him with a view to prevent his goods being sold at an undervalue; and in doing this there is no offence, as it strikes my mind, against the laws of morality, fair dealing and good faith. In Bramby & al.

[3 Ves. 620,] the owner of property sold at auction employed a person privately to bid for him up to a certain sum; the property, however, was sold for a greater price to the defendant, who refused to complete his purchase on the ground of the plaintiff's having employed a person privately to bid for him. The Master of the Rolls, however, decreed a performance to the contract. In the case of Connolly v. Parsons [3 Ves., 625] an objection was raised to the completion of the purchase of an estate at auction, because the plaintiff had employed persons to bid at auction for the purpose of advancing the price above its fair value; but the Lord Chancellor did not hold it any objection to a sale by auction, that a person had been employed by the vendor to bid for him, although he had not given notice. The same doctrine is held in Smith v. Clarke. [5 Ves. 477.] From all the cases and books, I collect this to be the true principle,—that it is lawful for the owner of goods sold at auction to employ a person to bid for him, with a view to prevent a sale at an under value; but that it is not lawful to employ persons to take advantage of the eagerness of bidders to screw up the price, or get up what is called a trap auction. [6 T. R. 642, 3 Benj., 368.]

There being therefore nothing illegal or immoral in the instructions given by the plaintiff in this case to the defendant, nothing to uphold or encourage fraud—nothing done with a view to screw up the price of the article beyond its fair value, or to take advantage of the eagerness of buyers, it was the duty of the defendant, after he had consented to receive the article under those instructions, to have complied with them.

I think, therefore, the judgment ought to be *affirmed.*

N. B.—This decision, though in conformity with the rules and principles of the Court of Equity, is contrary to the practice prevailing in Courts of Common Law. The conflict between the Courts was settled in England by 30 & 31 Vic., Cap. 48.

McLEAN vs. JACOBS.

Where the owner of a lot sold a part, and in the deed to the grantee described the dividing line as running in a certain direction by compass; and the course of the line was pointed out on the land, agreed to, and acquiesced in for a number of years: held that such line could not be disturbed, though shewn not to be the same as that in the deed.

This was an action of trespass tried before the Chief Justice, at Liverpool. Verdict for plaintiff. Rule Nisi to set aside verdict.

The trespass complained of was committed on land covered with water. The description in the deed of land was inaccurate. In the deed, which was made in 1818 to plaintiff's father, one of the lines of the lot was to commence at the street and run N. 27° 30′ W. to the harbor. The probable turning point of the line running in such a direction was pointed out by a surveyor, and acquiesced in for 16 years by Mrs. Hamilton, the grantee, who sold to the defendant the other portion of the lot, of which the line just mentioned formed the dividing line. If the line had been run accurately by the compass, the line would have terminated at a different point. The trespass complained of was committed on land covered with water, situate between the course of the line acquiesced in by the original grantee and the course of a line running N. 27° 30′ W.

CHIEF JUSTICE.—The question in this case is, whether boundaries can be settled by agreement.

Were we to pursue in this country the precision demanded by strict legal principle, it would be attended with most mischievous results. It is quite unnecessary to controvert the principles advocated by the Solicitor General, for it is quite clear that land cannot be conveyed by parol.

The possession of the plaintiff's father was a possession of the whole lot.

UNIACKE, J.—The case was left open upon the acquiesence of Mrs. Hamilton. It would be a very dangerous principle to permit boundaries to be disturbed after such an acquiescence. The agreement of the parties to a particular line is the most desirable mode of settling boundaries.—The acquiescence explains the deed.

HILL, J.—As this presents itself to my mind, the whole of the argument addressed to the Court is beside the real point. Authorities have been cited to shew that the statute of Frauds requires that freehold interest in lands should be conveyed in writing by deed; but surely that position requires no argument.

It is plain that no freehold interest in the premises purchased from Mrs. Hamilton could have passed to McLean, the father of the plaintiff, unless by deed in writing, pursuant to the statute; but that is not the case here, for a deed has passed, executed with the usual formalities, and the only question is, as to the boundaries or the dividing line between the lot of the plaintiff and the adjoining lot.

One way of transferring property is by deed or matter in pais, an assurance transacted between two or more private persons in pais, in the country, that is, upon the spot to be transferred. It is a writing signed and sealed by the parties in evidence of some prior agreement. The land does not pass by the words of the deed, and it is therefore only evidence of the will and direction of the parties; and a preceding or accompanying ceremony (as livery of seisin, &c.) transfers the land. Now it appears, in this case, that in the 25th July, 1818, the father of the plaintiffs purchased the lot, the subject of the present dispute, from Mrs. Hamilton, who then owned the adjoining lot, both then forming one entire and undivided parcel of land,—that a deed of the premises was then executed—that a fence dividing the two lots was put up by McLean, the plaintiff's father, assisted by a surveyor,—that Mrs. Hamilton, though not actually directing this fence and its line of course, knew of it and saw it,—that her sons, afterwards, assisted McLean, the father, in repairing the fence put up on this line, as traced by the surveyor and McLean, and made no objections whatever; and, in fact, that in the lifetime of the ancestor of the plaintiff, and for a period of 16 years, the line upon which the fence stood was held by all parties as the true dividing line between them. Now I consider the proof in this case, the jury having negatived fraud, to amount to this,—that McLean and Mrs. Hamilton having bargained for the purchase, by the former, of a lot of land, the latter executes a deed of what was intended to be conveyed, and with that deed in her hand, goes in upon the property, makes livery of seisin, and with the assistance of a surveyor who, we must take it, ran the line, as he thought, according to the deeds, points out the bounds of the property sold and the courses of the lines. What, then, can so well explain the intention and will of the parties as their acts at the very time, and their subsequent acts for a period of 16 years, accompanied by a quiet and uninterrupted enjoyment. It is asked, however, would you allow parol testimony to explain or contradict the words of a deed, when the words themselves are plain and unequivocal. No! and if Mrs. Hamilton had by a deed conveyed a house and premises in Lunenburg, the Court

could not, perhaps, consistently with the authorities, have allowed parol testimony to shew that the house intended to be conveyed was situate at Liverpool. But will it be said that if by accident, mistake, or under an erroneous impression, the parties, in tracing a line, step a little out of its true and accurate direction, and so establish and agree to it, that either can revoke what has been done under such agreement, after such a long acquiescence as in the present case? I think not. From the plan, however, accompanying the report, it appears that, as described in the deed, the line was to commence at the street, and run to the harbor north 27° 30′ west, so that where that course would place the line was to be ascertained by the parties afterwards. The line of McLean's lot was not to run alongside of any known, established, or natural boundary, but was to be ascertained by a surveyor with the aid of a compass. A surveyor at the time is called, who points out, as we must suppose, where the course by compass would lead: it is acquiesced in and assented to; and, after 16 years, another surveyor is called, who, by *his* compass, and according to his measurement, ascertains that a north 27° 30′ west course would, by nice measurement, give rather a different line. We may then have a third surveyor, who, by his compass, and his measurement, will determine both lines erroneous, and there will be no end of the matter. If it were necessary, I would not, as at present advised, hesitate in saying, that it would be competent for the plaintiff in this case to call in parol testimony to shew what the parties meant by the course described in the deed, what they both took as north 27° 30′ west; but that is not necessary. We must here decide whether the acquiesence of Mrs. Hamilton for so many years in the line claimed by the plaintiff will bind her, though that may not in every minute particular agree with the precise line as described in the deed; and as I know of no principle of law that prevents parties from consenting to a line as a boundary between their contiguous properties, I am of opinion that Mrs. Hamilton was bound by the facts as reported, and that the directions were right. In a country like ours where deeds are often written by ignorant and unlettered persons, where lines are often, from various causes, not traced and run with the nicest accuracy, we must and ought to keep our eyes steadily fixed on possessions, and especially if for a long period, and that too by consent and agreement, and under the very eyes of all parties concerned. If Mrs. Hamilton, then, was concluded from disputing the line established, much more so the present defendant, who purchased from her after an adverse possession against her of 16 years.

Now as to that particular part where the trespass was committed, which is land covered with water, and never fenced off from the adjoining property. The line given by the deed was a straight one, and it was to terminate in the water beyond the point where the trespass was done; but the possession of a part is a possession of the whole. The case cited from Cro. Eliz. shews that the possession of the land was and is the possession of the water up to where the line terminates, and to be continued in the direction of the line on the land.

Rule discharged.

N. B.—The principle established by this case was recognized and approved of in Woodbury v. Gates and Davison v. Kinsman. In the latter case, decided in Easter Term, 1853, the court stated that the doctrine of conventional boundaries was settled in this Province.

GRANT vs. PROTECTION INSURANCE COMPANY.

Easter Term, 1835.

The Plaintiff may become nonsuit at any time before Verdict.

This was an action on a Policy of Insurance. After the case had been gone through, the judge had charged the jury, and the jury had declared they had agreed, the plaintiff's counsel asked to be nonsuited. The judge declined, and a verdict was taken.

A rule was granted to set aside the verdict which had been taken and for leave to enter a nonsuit.

HILL, J.—By the old doctrine, if a plaintiff commenced an action and did not appear at the return of the writ, or after he had appeared, at the day of continuance he was called or demandable by the defendant, and was amerced by the court if not forthcoming for his false clamor, for instituting a suit which he refused to prosecute. In Co. Litt., 138 b, where the difference is shewn between a *nonsuit* and *retraxit*, we find it stated: "The difference between a *nonsuit* and *retraxit* on the part of the defendant is this,—'a nonsuit is ever upon a demand so made when the demandant or plaintiff should appear, and he makes a default. A retraxit is ever where the demandant or plaintiff is present in court, (as regularly he is ever by intendment of law,) until a day is given over, unless it be where a verdict is to be

given, for there he is demandable."' At common law, upon every continuance or day given before the judgment, the plaintiff might have been nonsuited, and therefore before the stat. 2, Hen. 4, even after verdict, if the court gave a day to be advised, at that day the plaintiff was demandable and might have been nonsuited. The plaintiff, then, at common law, would be nonsuited wherever he was demandable; and the passage from Coke shows he was demandable to hear a verdict. In the case of O'Mealy et al. v. Wilson, [1 Camp. 482,] where there was a nonsuit at the request of the plaintiff, after the case had been gone through, Lord Ellenborough says, "At any period where the plaintiff is demandable, if he does not appear, there shall be judgment of nonsuit against him, unless there be something on the record inconsistent with such a judgment. Nothing of that sort appears in this case to prevent the plaintiff from abandoning his suit when he is called upon to hear the verdict."

It has been said that a nonsuit can only be at the instance of the defendant, but the reason given shows in what sense we are to understand that position in the books; for, say they, "where the case at Nisi Prius was called, and the jury sworn, but no counsel, attornies, parties, or witnesses appeared on either side, the only way was to discharge the jury, for nobody had a right to demand the plaintiff but the defendant. The Judge could not order the plaintiff to be called."

I think a nonsuit ought to be entered.

BLISS, J.—Whatever may have been the origin and ground of the judgment of nonsuit, I am of opinion that wherever the plaintiff is liable to have such a judgment entered against him adversely, he may obtain it for his benefit.

What is a nonsuit? In the language of Lord Ellenborough, in Paxton v. Popham, [10 East, 868,] "a nonsuit is a judgment against the plaintiff for not appearing on a day when he is demandable." By neglecting then to appear and prosecute his suit further, he puts a stop to all proceedings and thus entitles the defendant to the judgment of the court against him. But the act which so entitles him to the judgment proceeds wholly from the plaintiff, he can at all times, when he is demandable, by absenting himself, bring about such a judgment. It is obvious, therefore, that the plaintiff can, when so disposed, avail himself of this proceeding for his own advantage, provided it is not inconsistent with his previous proceedings as they appear on the record.

Nor have such proceedings on the part of the plaintiff, for his own benefit, grown very lately into use; for we find so far back

as the reign of Henry 4, a statute passed to restrain the right of the plaintiff. By this statute it was enacted, "that whereas upon verdict found before any Justice in assize of novel disseisin mort d'ancestor or any other action whatsoever, the parties before this time have been adjourned upon difficulty in law, upon the matter so found, it is ordained and established, that *if the verdict pass against the plaintiff*, the plaintiff shall not be nonsuit."

Before this statute, then, it is evident that even after the verdict against him the plaintiff might become nonsuit by not appearing at the day given him to hear the judgment of the court. And to this effect is the language of Lord Coke, [Co. Litt,, 139 (b)] "at the common law, upon every continuance or day given over before judgment, the plaintiff might have been nonsuited, and therefore before the statute of Henry 4, after verdict given, if the court give a day to be advised, at that day the plaintiff was demandable, and therefore might have been nonsuited, which is now remedied by that statute."

And even since that statute, after a special verdict it was held that the plaintiff might still become nonsuit at the *dies datus* [Cro. Car., 575,] the reason of which seems to be, that until the judgment of the court was given no verdict had passed, since it depended on that judgment of the court what the verdict should be.

The courts have, indeed, extended that statute beyond what the words of it might appear to warrant; [Keat. v. Barker, 5 Mod., 208,] and where a plaintiff being dissatisfied with the amount of the verdict in his own favor, wished to become nonsuit; which, having a day given him to hear the judgment, he undoubtedly might have done before the passing of the statute; the court refused him leave, and referred to the statute as if it clearly prohibited him. It passed against him as to the higher damages which he wished to claim by a new trial.

This position, that wherever the plaintiff is demandable he may be nonsuited, except after the verdict, under the statute of Henry 4 appears perfectly consistent with all the cases to be met with on the subject. Where the proceedings are in the same term with the appearance, and the parties are already before the court, no day is given over; and they are, of course, not further demandable for any purpose. Such is the case where the defendant offers to wage his law upon his first appearance, and there the plaintiff cannot be nonsuit. [Lilly Prac.]

So it is said that after demurrer, if the court give a day over, the plaintiff may be nonsuited because he is demandable at that day; but not after the demurrer has been argued, and the court

are giving their judgment—although only two of the Judges have given their opinion—the plaintiff cannot be nonsuit; [1 Sid. 84, 2 Sid. 113, 3 Leon. 28,] because such a case has been likened to that where a verdict has passed. But as the above statute does not at all apply to such a case, I can scarcely think that a sufficient reason; and a better one, it appears to me, may be given. The entry on the roll in such a case would state the demurrer, and the continuance over to the *dies datus* to hear the judgment of the court; it would proceed to shew that at the said day given, (and when the plaintiff was demandable,) came the said parties, &c. Here then the plaintiff is before the court, and being there he has no further day given, and consequently under the above rule cannot then become nonsuit. If the court had not commenced with their judgment, such entry on the roll could not be made; and having commenced, decency and respect for the court require that they should not be interrupted by any motion which is to cut short the decision of the court in the very act of its being delivered. I can well understand, then, why this motion should not be permitted, and that the court should refuse to allow the plaintiff to become nonsuit, which would no longer here be matter of right indeed, but of favor; and that could only be granted by their consenting to take no notice of their having commenced their judgment, that it might be no longer necessary to state on the record the appearance of the party at the day.

It was, to be sure, once held that a nonsuit could only be had at the instance of the defendant; and accordingly in Arnold v. Johnston, [1 Strange, 267,] where the cause was called, and the jury were sworn, but no counsel, attorneys or parties appeared on either side, the Judge thought that the only way was to discharge the jury, for that nobody had a right to demand him but the defendant, and as he did not the Judge could not order him to be called. And in the late edition of Saunders, [1 Saund., 195 (c), n. (f),] the learned annotators remark, "that in the old books discontinuance and nonsuit are frequently used as having the same import; but in modern times it has been held that a nonsuit can only be had at the instance of the defendant;" (for which the above case of Arnold v. Johnston is referred to,) "which doctrine," it is added, "has completely distinguished the term."

It does appear, certainly, that in the older cases these terms are used almost indiscriminately; but it appears a mistake to say that a nonsuit cannot be had but at the instance of the defendant, although the above case from Strange, and that of

Harris v. Butterly, [Cowper, 484,] show that such opinion was at one time held. In O'Mealy v. Wilson, [1 Camp., 484,] in *scire facias* against the bail, the plaintiff was nonsuited, although the Attorney General, for the defendant, *opposed it.* Lord Ellenborough then said, "I have no doubt he may be nonsuited in the action." "At any period when the plaintiff is demandable, if he does not appear, there will be judgment of nonsuit against him, unless there be something on the record inconsistent with such judgment."

In Hulhead v. Abrahams, [3 Taunt., 81,] which was an undefended cause, Bayley, J., nonsuited the plaintiff for a variance between the proof and the declaration.

In Symes v. Larby, [2 Car. & P., 357,] in replevin, Best, C. J., nonsuited the plaintiff where no counsel appeared for him, on the authority of a case so decided by Abbot, C. J., though it was objected to by the defendant's counsel on the ground that it was the defendant's record, and that a verdict must be taken for him; and another case to the same effect is added in a note to this case. And in Murphy v. Donlan, [5 B. & Cr., 178,] it was decided after argument, and therefore against the wishes and not at the instance of the defendant, and overruling other cases and the established practice that where judgment by default had been suffered by one defendant, the plaintiff on a trial of an issue joined with the other defendant may become nonsuit.

The plaintiff's right to become nonsuit must, after these cases, be admitted to be wholly independent of the defendant's acquiescence or instance. It rests solely, as before stated, on this ground, wherever he is demandable he may be nonsuited before verdict has passed in the cause.

But the plaintiff is not merely demandable when a day is given over; he was always demandable when a verdict was about to be given. And it was the old practice; and, as stated by Lord Tenderden in Murphy v. Dolan, [5 B. & C., 179,] it was so followed in some cases within his memory (and it may be added that such is the common, and I believe the invariable practice which prevails in this Province,) for the officer of the court to ask the jury, after they had considered of their verdict, if they had agreed in their verdict. If they answer in the affirmative the officer then called the plaintiff by name to hear the verdict, and if he appeared the verdict was pronounced,—if he did not appear to prosecute his suit he was nonsuited. The reason of this was [3 Bl. Com., 376] that the plaintiff should appear in order that he might be amerced for his false claim if the jury gave their verdict against him. If he did not appear, a nonsuit was entered, for a verdict cannot be given in the absence of the plaintiff.

Notwithstanding, therefore, that the plaintiff had a day given him in court, and that he was thus during the trial in court, it was further necessary, according to the ancient practice, to demand or call him when the jury were about to give their verdict after they had stated that they were agreed.

The plaintiff having been called in this case at the instance of the defendant, before the verdict was given in, cannot preclude him from the right to be called at the proper time when he should be called, viz., when the jury are about to give their verdict; for his answering then does not put him more completely before the court than he was previously to his being so called. At the return of the jury process, when a day is given him, unless he then made default, he is in court, and the very language of the postea shows it: "Afterwards at that day, before the Justices aforesaid, *come the parties* aforesaid, &c.; and the Jurors of that Jury being summoned also come, who to speak the truth of the matters within contained, being chosen, tried and sworn." Thus far it is the same whether a verdict is given or the plaintiff suffers a nonsuit. If a verdict *is* given it is unnecessary to repeat that the plaintiff is present, because that already appears on the record; and therefore, although the practice has been to call him to see if he be there, if he answers the verdict is taken without that unnecessary repetition on the record; but if he should not answer then a different judgment is necessarily entered, for the verdict cannot be pronounced in his absence. But the record first goes on to state, that the jury withdrew from the bar to consider their verdict, and after they had considered thereof, and *agreed* among themselves, they returned to the bar to give their verdict in this behalf; upon which the said plaintiff solemnly called, comes not, nor does he further prosecute his bill against the defendant, therefore, &c.

This form of the record however, shows that it is for the purpose of his being present at the delivery of the verdict that the plaintiff is called; and therefore that the true and only time to call him is just when the verdict is to be pronounced, as indeed all the authorities state; and that this right to be called continues up to the last moment until the verdict has actually been pronounced, or as the statute of Henry, which has abridged the plaintiff's right, has stated until the verdict *has passed* in the cause. The fact, therefore, which appears in the case before us, that the jury stated they had agreed upon their verdict, is what, according to the practice which did exist in England, and does exist here, should be first ascertained by the officer before he calls the plaintiff; and is also precisely the language entered in the

record before it is there stated that the plaintiff was called and made default. And it can by no means therefore be used as an argument against the right of the plaintiff to become nonsuit after the agreement of the jury had been so stated by their foreman.

Whether the jury do, in fact, withdraw from the bar or not, is in itself wholly immaterial, in my view of the case.

I am therefore of opinion that the plaintiff's counsel had a a right to require that his client should be called when he did, and that the court should now direct a nonsuit to be entered.

Rule to enter nonsuit made absolute, the Chief Justice dissenting.

JACKSON vs. CAMPBELL.

Easter Term, 1855.

This was a motion to make a rule absolute against the Sheriff to bring in the body of a party against whom a capias had issued, and who had been enlarged by the Sheriff on bail. Both the party who had been arrested and his bail had absconded. It was however held that no such rule could be made absolute,—that no attachment could issue against the Sheriff in this province for not bringing in the body of a party whom he had enlarged on bail.

Semble that an action would lie against the Sheriff for taking insufficient bail.

HALLIBURTON, CHIEF JUSTICE.—This case comes before the Court under a motion for a rule upon the Sheriff of Halifax to bring in the body of the defendant.

The facts are briefly as follows:—The writ of capias against the defendant was issued against the defendant on the 22nd September, 1834, returnable on the 21st October, the first return day of Michaelmas Term under which the defendant was arrested and released on bail of two persons who, it is positively sworn, and this is in nowise contradicted, were considered quite sufficient and were in good credit and possessed of considerable personal property. The writ was returned at the return day, and special bail was put in on the 24th, of which notice was immediately given. On the 10th November, which was after the term had ended but within the time allowed for excepting, the bail was excepted to, and not having justified on the first day of the following term, the rule to bring in the body was obtained. By the affidavit upon which this rule is opposed it further appears that since Michaelmas Term both the defendant and the bail to the Sheriff have left the Province, leaving the Sheriff without any remedy in case he should be made liable, and against the effects of which liability he could have secured himself if proceedings had been taken against him during Michaelmas Term.

Although I do not think the decision of this case will rest on those which have taken place in England under the 23rd Hen. 6, Cap. 10, it will not be useless to trace those decisions and the change of practice which has taken place in the Courts of Westminster under them.

The statute Hen. 6 directs that the Sheriff shall let to bail all persons arrested by any writ, bill, or warrant in any personal action, and upon offer of reasonable surety of sufficient persons having sufficient within the County &c.

But notwithstanding the statute thus obliged the Sheriff to enlarge those he had arrested upon their giving the bail required, it still compelled him to have the bodies at the return of the writ, by the following clause, viz.:—"And if the said Sheriff return upon any person *cepi corpus* or *reddidit*, &c.,—that they shall be chargeable to have the bodies of the said persons at the days of the return of the said writ, bill, &c., *in such form as they were before the making of this Act.*" If however the Sheriff failed to produce the body after having enlarged the defendant upon bail, the plaintiff would not proceed against the Sheriff, who was only answerable to the Court as for a contempt.

In Barton v. Aldworth [Cro. Eliz., 624,] the plaintiff brought an action against the Dep. Sheriff of Bristol, who had arrested a party against whom the plaintiff issued a latitat and had returned *cepi corpus et paratum habeo*, which was false, whereby plaintiff was delayed in his suit. To which the Sheriff pleaded that he had enlarged the party arrested upon bail under the statute Hen. 6, and on demurrer all the Court held the plea to be good, "for the statute appoints him to let at large on bail, and therefore he is compellable to take bail, and when he answers that he took bail of J. N. & J. D., having sufficient within the County, that shall excuse him against the party—*and it is not reasonable that he should be chargeable in an action upon the law for doing that which the law appoints.*" And in the case of Bolis v. Lassels, [Cro. Eliz., 852,] which was also an action against the Sheriff who, after arresting and bailing a party under a latitat, returned *languidus in prisonâ*, the Sheriff pleaded that after the arrest he had let the party at large upon bail under the 23 Hen. 6, and the plaintiff demurred because he answered not to his false return that he was *languidus*. The Court held the plea to be good for when he took bond according to the statute, which he was compellable to do, and returned that he took him, it is not material to the plaintiff although he returns *languidus*, for that is only for his excuse that he had not the body, and he is only finable by the

Court *if he have not the body, and the party shall not have any remedy against him.* See also Postome v. Hanson, [2 Saund., 51,] where the same doctrine is confirmed.

Thus stood the law or rather the practice until the early part of the reign of Geo. 2, as appears by H. Blackstone's note to the case of *Bengough v. Rossiter*, [2 H. Black., 434.] In that case, which however turned upon another point, Lord Chief Justice Eyre (who differed from the Court upon the question under consideration, viz.: whether a bond given to the Sheriff for the appearance of persons arrested on process issued upon an indictment at the Quarter Sessions was void) says: "If the Sheriff has let the party out on bail he must return *cepi corpus*, and when he has made that return *he is by the express order of the 23 Hen. 6 chargeable to have the body at the day of the return;* if he has not the body he is to be amerced, and when amerced he may put the bond in suit. "This I take," says His Lordship, "to have been the ancient course of proceeding in all cases when the Sheriff had not the body ready after his return of *cepi corpus*, though (he adds) *I have not hitherto been able to trace when the mode of proceeding by attachment against the Sheriff was first substituted in the room of the amercement.* It is to this latter observation that Mr. Blackstone has appended his note in which he asserts that this practice commenced about the early part of the reign of Geo. 2. In the third year of that reign an attachment was granted against the Sheriff in the case of Smith v. Norton, [1 Bernardist, 246,] and the reporter adds that the Court said in another case "that amercements only used to be the method of enforcing rules to bring in the body, but lately they had granted attachments.

It was indeed said by Lord Holt in Church v. Cowper, [1 Salk., 99,] that the Sheriff was liable to an action for taking insufficient bail as well as to amercements, but the reporter notes that it had been otherwise decided a few years before, and this dictum of his Lordship's is in opposition to the whole current of the authorities upon the subject. It may be therefore safely asserted that up to the commencement of the reign of Geo. 2 the Sheriff was only amerced by the Court for not bringing in the body after a return of *cepi corpus*, and that the plaintiff had no action against him.

While the Sheriff continued only liable to the amercement and was neither subject to an attachment nor to an action at the suit of the party, he stood in a more favorable situation than he now does. Under the 23 Hen. 6 he undoubtedly remained bound to bring in the body after having once arrested the defendant,

although he had let him at large upon bail; but as he was only punishable by the Court, and the amount of the amercement went to the King and not to the plaintiff, the plaintiff had no interest in preferring a repetition of the amercement in cases when he saw it was impossible for the Sheriff to produce the defendant. In such cases also the Court would naturally apportion the punishment—for such it was—to the degree of the offence, and when they saw that without any fault of his own he was placed in a situation in which he could not comply with the positive directions of the statute they would not we may suppose amerce him as heavily as they would in cases when his non-compliance was owing to his own default.

It is not, however, difficult to discover the reasons which induced the Courts to adopt the practice of granting attachments instead of pursuing the old course of amercement. The latter, however often repeated, would do no good to the plaintiff; he might indeed adopt the more expensive and uncertain course of petitioning the Crown to allow his debt to be paid out of the amercements; but in hard cases it is much more probable that a petition from the Sheriff to have the fine remitted would be successful. As the suit in which motion was made was for the plaintiff's benefit, as the Sheriff was bound both by common law and by statute to have the body of the defendant to answer that suit, and as the plaintiff could not proceed until the defendant appeared, instead of making it necessary to repeat applications to the Court to amerce the Sheriff when he neglected to obey the rule to bring in the body, the Court adopted the process of attachment. This process being for a contempt in disobeying the rule could only be got rid of by purging the contempt upon the terms which the Court imposed. As under the English statute bail below is emphatically bail to the Sheriff and not to the plaintiff, the Court would not discharge the Sheriff from the attachment until he had paid the debt and costs which the plaintiff had lost the opportunity of recovering from the defendant by the Sheriff's neglect to bring in the body. The Court took this line,—*whenever they found a Sheriff taking part with the defendant they saddled him with the whole debt and costs upon attachment*, and left the Sheriff to seek his remedy against *his* bail. [1 T. R., 557.]

Now this attained the object both of the common law and of that clause of Hen. 6 which compels the Sheriff to produce the body more directly and expeditiously than the amercement, and it operated also at once in favor of the plaintiff who, in most cases, was justly entitled to look to the Sheriff to shield him

against the consequences of any neglect of his own or his deputies. The alteration therefore was in general an improvement, but like all other material changes it was liable to produce inconveniences which were probably not foreseen at the time it was adopted. Under this practice the plaintiff had a direct interest in pursuing the Sheriff even in cases when the non-production of the defendent was owing to circumstances over which he had no control. Formerly the Court, as I have observed, could deal tenderly with him upon such occasions, and the plaintiff had no direct interest in pursuing him severely, but now the Court cannot relieve him without violating the general rule they have adopted—that when the Sheriff was in contempt for not bringing in the body he should not be discharged without paying the debt and costs.

The consequence has been that the Courts have tried to remedy the evil in hard cases by tying up the plaintiff to the strictest pursuit of his right, and if he has been guilty of any delay or laches they will not grant the attachment. The expressions of Lord Ellenborough in Rex v. Sheriff of Surrey, [9 East., 468,] and the case then cited, leave a wide field open for the discretion of the Court in the protection of the Sheriff. "If there be no established practice (he says) in such cases, there is at least a rule of right, reason and justice which ought to be applied to the case before us." In that case his Lordship rested the application of these observations upon the delay, but they are very strong and might well apply to other cases of hardship. I have not, however, been able to discover that they have ever gone so far as to relieve the Sheriff even in those hard cases when there has been no neglect or delay on the part of the plaintiff, nor could they well do so, for as Lord Chief Justice says in the case before cited, "*by the express words of the statute the Sheriff is chargeable to have the body at the day of the return.*"

I think it can scarcely be contended that if those words had not been introduced into the statute the Sheriff would still have been liable to produce the body as he was at common law before the statute passed, because he was not then bound to enlarge the defendant upon bail. The writ commanded him to take the body, and if, after taking it, he let it go upon such bail as he chose to take, and had it not on the day of the return, it was his own act, his own default, for which he was liable to be amerced by the Court for disobeying the writ, and also to an action by the party either for an escape or a false return. [2 Saund., 51-51A., n. 44.] But after the act passed the Sheriff was compelled to enlarge the defendant on bail, and if the clause had

not been added which obliged him to have the body at the day of the return notwithstanding the enlargement, the Court would not, I think, have held him answerable for its production in any case in which he had acted bonâ fide within the scope of the act.

As we have seen, they protected him from the suit of the party (see cases before cited from Cro. Eliz. & 2 Saund) and the same position before cited that "*it is not reasonable that he should be chargeable for doing that which the law appoints*, would (had the clause in the act been omitted) not only have sheltered him from an action at the suit of the party but from any punishment whatever in cases where he had fully and faithfully complied with the act.

In all cases subsequent to the act, when the Sheriff has enlarged defendants upon any other security than that directed by the act, the Courts have not protected him but have left him open both to process of contempt and to an action at the suit of the party. There are numerous cases in support of this. I only cite Fuller v. Priest, [7 T. R., 109,] and Webb v. Matthew, [1 B. & P., 225.]

None of the cases that I have met with go directly to show that the Courts of Westminster have decided that the Sheriff shall positively be responsible for the continued solvency of bail who were solvent and had sufficient within the County at the time he took them, yet they do show that in cases where such bail had become insolvent the application on behalf of the Sheriff for relief has been made and granted upon other grounds. and the Courts have only noticed the insolvency of the bail as an additional motive for extending the relief on the ground on which it was sought.

We may therefore infer that the Courts would not have absolved the Sheriff from all liability on that ground alone, nor do I see how they could have done so while the words of the statute Hen. 6 are so imperative that he shall be chargeable to have the bodies at the return of the writ, as he was before the passing of the statute.

But it is curious to observe how the course pursued by the Courts for the protection of the Sheriff may, if rigidly adhered to, prove most prejudicial to him. They would not allow him to be subject to the suit of the party for doing *what the law appoints him to do*, but at first held him only liable to be amerced (of course at their discretion) for not having the body; but now they have substituted the proceeding by attachment for the amercement, and have ruled that nothing but paying the debt and costs shall purge the contempt when once incurred.

They have in some instances placed the Sheriff in a much worse situation than he would have been if his case had been left for the determination of a jury under an action at the suit of the party.

If an action had been brought and could be sustained it must have been *on the case*, as for an escape under mesne process the plaintiff would not have been entitled to an action of debt under the statute of Westm., [1 Ric. 2, Cap. 12,] and in an action on the case the plaintiff would recover such damages only as the jury were inclined to give, and no jury would give *ruinous* damages against a Sheriff for having done nothing more than the law compelled him to do. Under the rule which the Courts at Westminster have latterly acted upon, if the debt were £100,000 and the Sheriff had enlarged the party, as he was bound to do, upon *good* bail, and that bail subsequently became insolvent, and could not produce the defendant at the return of the writ, the Sheriff is bound by the rule to pay the whole debt, which no jury, under such circumstances, would ever have compelled him to do. For as Grose, J. says in Bonafous v. Walker, where an *action on the case* is brought for an escape, the jury are at liberty to give such damages as they shall think right under all the circumstances of the case, and a shilling is frequently sufficient, for many cases arise of great hardship against the gaoler.

What course the Court at Westminster will pursue whenever such an extreme case arises it will be for them to determine. I am happy to think that we are not reduced to such a dilemma, for although our statute is more imperative in its language upon the Sheriff to allow defendants to go at large upon sufficient bail than the statute of Hen. 6—the latter using the words "*shall let to bail*," and the former "*that the Sheriffs shall be obliged and are hereby respectively required, upon sufficient bail being offered to let such defendants go at large, &c.*," * yet, our legislature did not enact any such clause as that contained in the 23 Hen. 6, rendering the Sheriff answerable and chargeable for the body of the defendant after he had thus enlarged him, but omitting such clause altogether merely directs him if the defendant does not appear at the return of the writ to assign the bail bond to the plaintiff *if the plaintiff requests it*, and permits the plaintiff to make a default against the defendant for his non-appear-

* The words under the Revised Statutes are quite as imperative. They are as follows:—"A defendant, having been arrested, shall be discharged, if at any time before the return day of the writ he enter into a bail bond to the Sheriff with two sufficient sureties, &c." [Vid R. S., Cap. 133, § 10.] - Ed.

ance, and proceed to judgment against a course which the plaintiff cannot pursue against the defendant in such cases in England. Indeed the whole course marked out by our Provincial act for Sheriffs, the plaintiff and the Court varies so much from that pursued at Westminster, that I feel convinced that the local legislature meant to legislate, and I think though the act is not drawn with technical nicety they have wisely legislated for the whole matter.*

It is of importance to observe that an act passed a few years after the decision of Lord Mansfield in Hanson v. Davies, [5 Burr., 2683.] In that case defendant had been arrested and enlarged upon bail, after which, *and before the return of the writ*, the defendant had surrendered himself to the Sheriff, plaintiff notwithstanding took an assignment of the bail and brought an action upon it against the bail; a rule then was obtained to show cause why the proceedings on the bailbond should not be stayed, on the ground *that the Sheriff had the body at the return of the writ which was all the writ commanded him to do.* But Lord Mansfield ruled *that nothing can be a performance of the condition of the bailbond but putting in bail*, and the rule to stay proceedings was discharged.

This case was decided in 1771, and was never over-ruled until 1796, when. in the case of Jones v. Lenbec, [6 T. R., 754,] the Court thought that when the defendant voluntarily surrendered himself to the Sheriff *before the return of the writ* it was a legal surrender, the Sheriff having the defendant in custody to answer the exigency of the writ, and this latter decision was confirmed in the following year in the case of Stamper v. Melborne, [7 T. R., 122.]

But when our Statute to reduce into one the several acts relating to bail passed, the decision of Lord Mansfield was in full force, and I think there can be little doubt that the strong expression that the bail should be liable for the *personal appearance only of the defendant* on the first day of the Court to which the writ was returnable, was introduced for the express purpose of sheltering the bail from the effects of that decision, and this manifests one instance of the then intention of the Legislature to vary from the practice in such cases in England.

They next, as I have observed, instead of pursuing the English statutes of Hen. 6, and making the Sheriff liable for the production of the defendant he has bailed at the return of the writ omits

* In the Revised Statutes the 11 § of Cap. 133 merely says that "The Sheriff at the request of the plaintiff or his Attorney shall assign the bailbond to the plaintiff by endorsing his name thereon, &c.;" but there is nothing further in the Chapter respecting the mode of appearance or of making a default, as in the Act referred to by his Lordship in this decision.

any such regulation, and merely enact, "if such defendant shall not appear *i. e.* on the first day of the Court to which such writ is *returnable*, or give in sufficient bail to abide the final event of the suit, judgment shall be entered against the defendant by default, and the Sheriff shall then and there in Court, upon the request of the plaintiff or his attorney, assign the bail-bond for the benefit of the plaintiff, which assignment shall not debar plaintiff from proceeding to final judgment and execution in the same Court against the defendant."

Now the statute of Hen. 6 made no provision for the assignment of the bail-bond to the plaintiff. The plaintiff's security under that Act was that the Sheriff remained liable for the production of the defendant, nor was it until the 4 Ann. cap. 16, passed that the Sheriff was bound to make the assignment, but this latter statute, when it gave the plaintiff this additional security still left the liability of the Sheriff as it was under the clause so often mentioned of the 23 Hen. 6.

But our Provincial statute, legislating as I conceive, for the whole matter has given to the plaintiff the security contemplated by the 4 Ann., but has not given him the security which a plaintiff has in England under the 23 Hen. 6,—and I must acknowledge that I think our Legislature has given to the plaintiff all that he can justly require. The Sheriff is bound to take two sufficient sureties for the appearance of the defendant. If the defendant does not appear the plaintiff can at once proceed against their sureties, and also against the defendant himself. If the sureties are sufficient why should the Sheriff after having performed his duty as the law directs, be further involved in the transaction? If being sufficient at the time he took them they have in consequence of those sudden fluctuations of fortune to which all are liable, and which the Sheriff could not prevent, subsequently become insufficient why should the Sheriff be made responsible for their continued solvency? If special bail is put in and perfected in England, the risk of their continued solvency rests with the plaintiff, and why should it not also rest with them in the former case as well as in the latter? The imperative words of the statute Hen. 6 throw the responsibility upon the Sheriff in England; but those words are not to be found in our statute, and therefore neither law nor justice throw it upon him here. It is said that the policy of the law requires that Sheriffs should be made thus liable lest they should become negligent and careless in taking sufficient bail. I can see no weight in this observation. In the first place mere policy should never be upheld so as to lead to manifest and positive injustice; in the second place it will

always rest upon the Sheriff in cases when the bail ultimately prove insufficient to show that they were sufficient at the time they entered into the bond. If he should discharge any person he had arrested without taking sufficient bail he would not have discharged him under the Act, and would therefore, I should hold, be liable to an action for an escape or for a false return as the case might be, and not only so, but if he had not the defendant at the day, and could not shelter himself under the Act, he would be liable to be punished by the Court for disobeying the writ. This security I conceive to be ample—to be all that the plaintiff ought in justice to have.

I feel confirmed in this opinion by the decisions which the Courts in England have made upon the 11 Geo. 2 c 19—the 23 section of which enacts "That to prevent vexatious replevins, Sheriffs and other officers granting replevins shall take from the plaintiff and two responsible sureties a bond in double the value of the goods, &c., before any deliverance be made of the distress." This statute does not proceed upon the principle adopted in that of 23 Hen. 6, and make the Sheriff liable for the goods after he has delivered them upon bail, and therefore the Courts of Westminster have pursued a very different course under the two statutes. First, they permit actions to be brought against the Sheriff for taking insufficient sureties under the statute of Geo. 2, which they will not do under the 23 Hen. 6, and secondly, they permit the Sheriff to defend himself by shewing that the sureties were responsible at the time he took them: thus shewing that the liability of the Sheriff under the latter statute depends altogether upon the clause so often referred to.

Now when we consider the different objects of our statute, 18 Geo. 3, and the English statute, 11 Geo. 2, how much stronger shall we find the case in favor of the Sheriff.

Our statute says that the Sheriff *shall* discharge the defendant upon giving the required bail. The 11 Geo. 2, says the Sheriff *shall not deliver* the goods before he has got sufficient bail.

The object of the first is to favor personal liberty and compel the Sheriff to let the defendant out of custody. The object of the second is to secure the landlord's rights by procuring sufficient pledges for the goods. And yet in the case of Hindle v. Blades, [5 Taint., 225,] where an action was brought against the Sheriff for taking insufficient sureties, the replevin plaintiff proved that both the sureties had been bankrupt a short time before the replevy of the goods, and were *in fact insufficient*, but the defendant proved that at the time he took them as sureties they were in apparent credit, and witnesses swore that they would have trusted one of them to

the amount of £1,000; the Court held that the Sheriff was not liable. Mansfield, C. J., said I cannot think the statute meant to throw on the Sheriff this onus. Suppose he had taken an eminent banker as surety a week before he failed, when no one had reason to suspect his circumstances. according to the same doctrine the Sheriff would have been liable for taking him as surety—Heath, J. The mischief before the statute was the Sheriff used to accept mere men of straw for sureties, but the Sheriff cannot cast up a man's accounts to see the real state of his property, and (he adds) we ought not to load the Sheriff with more duties and burthens than he is already charged with—Dallas, J. The question is whether the Sheriff who is bound to take two responsible sureties has not done so. He makes proper inquiries and finds that these are considered as responsible persons. Is not this sufficient? It cannot be that the Sheriff should be bound to know that which nobody else knows, and if the rest of the world would trust the surety, it is a sufficient justification to the Sheriff if he also consider them responsible persons."

If these learned Judges could hold such language as this in an action brought against the Sheriff under such circumstances under a statute, the object of which was to compel the Sheriff to hold the goods until he got responsible sureties, surely they would deem the Sheriff much more entitled to their protection under the circumstances stated in the affidavit in this case where the Sheriff was acting under a statute which compelled him to let the defendant go upon his giving him such bail as it is verified he did give him upon this occasion.

It has been satisfactory for me to learn that the Supreme Court in Massachusetts have decided that an action for taking insufficient bail will lie against the Sheriff there, although they admit it would not in England. And they found their decision upon the difference of their statute regulating bail from the Act of Hen. 6, notwithstanding that the defendant's right to be bailed in that county still depends principally upon that ancient statute. They also notice that in England the Sheriff is liable to an action on the case for taking insufficient bail in replevin.

Now I conceive that in this Province the defendant's right to be bailed rests altogether upon our Provincial Act, 18, Geo. 3. That as that Act has not made the Sheriff chargeable to have the body of the defendant at the return of the writ after he has bailed him the Sheriff has no further power over the body of the defendant unless he receive him again into custody upon a render or under a committitur—that he cannot therefore be ruled to bring

in the body of the defendant after he has returned that he has enlarged him under the Act, and that if the sufficiency of the bail is disputed, the fact of the bail being sufficient or insufficient must when so disputed be submitted to a Jury.

For these reasons I think the plaintiff can take nothing by his motion.

WILKINS, J. concurred with the opinion given by the Chief Justice.

HILL J.—(After going over the facts already stated in the beginning of the opinion of the Chief Justice.)

The whole question turns on the English statute of 23 Hen. 6, and our Provincial Statute of the 18 Geo. 3, and really when considered with attention is not attended with any difficulty or doubt, and after consideration it strikes me with some astonishment that the liability of Sheriffs under our statute has not been long since solemnly settled.

Previous to the statute of Henry, a Sheriff was not obliged unless on a writ of mainprize, to admit to bail a person arrested on mesne process. In fact, however, they did take bail from parties so arrested and for such indulgence, for indulgence it was, they exacted large sums. This practice was found so grievous as to induce the interference of the Legislature. The Sheriff was bound at common law to have the body of the defendant at the return of the writ, and he could offer no excuse if it were not forthcoming, for the Court would amerce him until he produced the body. Then came the statute of Henry, which recited the great extortion and oppression that had been in the realm by Sheriffs, under Sheriffs and their clerks, and enacted that the said Sheriffs and all other officers and ministers aforesaid, shall let out of prison all manner of persons by them, or any of them, arrested or being in their custody by force of any writ, bill, &c., upon reasonable sureties of sufficient persons having sufficient within the Counties where such persons be so let to bail." And the 14th section enacts that "if the said Sheriffs return upon any person *cepi corpus* or *reddidit se*, they shall be chargeable to have the bodies of the said persons at the days of the return of the said writs, bills or warrants in such form as they were before the making of the said Act."

We gather then from the very preamble of this Act, that the officers enumerated therein did not stand in a very favorable light before the Legislature, and that it was not its intention to make any enactment in their favour, but in favour of the subject upon whom great extortion appears to have been practised, nor can we find anything to lead to the supposition that it was

intended to relieve the Sheriff from any of the responsibilities he was under at common law, though the statute compelled him to do that which the common law did not. But as if to put the matter beyond all doubt and to have no possible ground for mistaking the meaning of the legislature the 14 section was introduced.

This statute then, though it imposed a duty on the Sheriff of admitting the party to bail, left him with respect to the returns of the writs, and the having the body precisely in the same situation as he was at common law. And for that very reason and in virtue of the express words of the 14 Section have all the decisions in England since the statute of Henry, held that the Sheriff was bound at all events to bring in the body when he returned *cepi corpus* or be subject according to the earlier practice, to amercement, according to the modern, attachment. The cases of Page v. Tulse, [2 Mod., 83,] and Ellis v. Yarboro, [2 Mod., 177,] show clearly that the Sheriff is bound to have the body under the statute. Porteru v. Hanson, et al, [2 Saund, 59,] was case against the Sheriff of Middlesex for taking insufficient bail upon a bill of Middlesex, sued out by the plaintiff against Michael Drew who did not appear to the action at the return of the Bill. They pleaded the statute of Henry, and that by force thereof they admitted Drew to bail on the security of Lee & Allen, then having sufficient within the County, whereupon they returned *cepi corpus*. To this plea there was a demurrer. It was agreed for the plaintiff that the action might be sustained upon the 14 section, which makes the Sheriff chargeable with the body of the prisoner, for before the passing of the Act if the Sheriff had taken a prisoner by writ and let him at large, and afterwards returned *cepi corpus*, he was chargeable with escape or false return. But it was resolved by the Court that the action did not lie, because the Sheriff was compellable by the statute to let the prisoner at large upon reasonable sureties, and as to the clause of the statute that if the Sheriff return *cepi corpus*, he shall be chargeable to have the body, it is to be understood that the Sheriff may be amerced for not having the body at the day, and because he is liable to be amerced, the statute gives the sureties for his indemnity. And at common law if the Sheriff returned *cepi corpus* and had not the body he was amerced, but no action lay.

Here there is a decision with those already mentioned, and many more might be given, showing very distinctly and clearly that the Sheriff, after the statute of Henry, could be amerced for not having the body *only* in virtue of the very words of the 14

section. And the inference is it seems to me inevitable that if that section were not to be found in the statute, the Courts in England would not have held the Sheriff chargeable with the body as before it passed. The cases cited shew that in England an action on the case will not lie against the Sheriff for taking insufficient bail, and the decisions commend themselves at once to our reason, for as the Sheriff is absolutely chargeable to have the body at the return of the writ and will be amerced *ad infinitum* until it is produced, whether he took sufficient or insufficient bail (the bail-bond being for the appearance of the party) it would be absurd and unjust to punish him for taking insufficient bail for the appearance of the defendant, when in fact the Sheriff himself was bound to have the body forthcoming. Had the statute relieved the Sheriff from having the body at the return of the writ, or rather had it been silent, then there might have been a good reason for supporting such an action, for otherwise there might be a failure of justice, because the Sheriff who is the sole judge of the sufficiency of the bail might take very insufficient ones, and if no action could be supported against him, and he could not be chargeable with the body the plaintiff might be without remedy.

The statute makes no provision it will be observed for the assigning to the plaintiff the bail-bond taken to the Sheriff, for whose benefit alone it was, and therefore if he did not chose to assign he could be got at only by amercement for refusing, and if he did assign, as the action might have been brought in his own name, he might have released it and thus at law defeated the plaintiff.

These then I consider as good reasons why the Sheriff was by the statute held chargeable with the body. It was not until the 4 and 5 Ann. that the Sheriff was bound to assign the bail bond to the plaintiff, but neither this nor any prior or subsequent statute has altered the provisions of the 23 Hen. 6 as regards the liability of the Sheriff to have the body. It remains therefore in full force.

So that in fact as far as the present case is concerned the common law was in no respect altered by the statute of Henry. The same duties and indeed greater were imposed upon and the same liabilities attached to the Sheriff. It is clear then that in England the Sheriff would be bound to bring in the body, and if the statute under which the Sheriff must if at all be liable, should be found similar in its enactments to the statute of Henry, I should hold myself bound by the decisions in England, provided they are founded upon the same facts and circumstances as those brought before us.

It cannot be disputed that the duties and liabilities of the Sheriff in this Province with respect to bail arise out of our statute of 18 Geo. 3, before mentioned. That statute gives the subject arrested upon mesne process a right to be bailed, it prescribes the mode of taking it, the nature and tenor of the bail-bond, and the manner of proceeding in the action.

But it is widely different from the statute of Henry. The one obliges the Sheriff to admit to bail, but obliges him also to have the body. The other compels the Sheriff to admit to bail, but does not compel him to have the body. Upon the omission of the 14 section of the statute of Henry, in our statute I entirely build my opinions.

From that omission I can draw no other conclusion than that it never was the intention of our Legislature to fix upon the Sheriff those liabilities to which he is subject by the statute of Henry, and the practice thereunder was before the framer of our statute. But whether it was or was not so intended, our statute obliges the Sheriff to let the defendant to bail, and does not oblige him to have the body, and we should by making this rule absolute punish the officer for obedience to the law. The King's writ commands him to take the body, and a law of the land compels him to release that body on sufficient bail. The statute of Henry has been felt to bear hard in many cases upon the Sheriff, and therefore the Courts in England have constantly relieved him when there has been delay or irregularity in the proceedings, and we ought not unless upon strong grounds to add other duties to those already sufficiently onerous upon the Sheriff.

Although I might content myself with having gone thus far, it may not as the question is new be unnecessary to remark that there are other essential differences between the two statutes.*

But without deciding upon this or making any further remarks upon the difference between the two statutes. I repeat we are called upon to impose a penalty upon an officer of this Court, and before I could assent to do so a clear case must be shewn to warrant it. Such case has not been presented to us, on the contrary, I think for the reasons already stated the Sheriff under our statute is not bound for the forthcoming of the body, he is *functus officio*, when he has taken what our statute compels him to take, a bond with two sufficient sureties. This under the statute he might assign to the plaintiff *for his benefit* who may

* As the peculiarity in the clause to which the learned Judge alludes, viz., the personal appearance of the defendant in Court no longer exists, I have omitted that portion of his decision.

bring an action thereon in his own name. By this decision no injury will be worked to the plaintiff, for we shall then leave him to pursue his action on the case against the Sheriff for taking insufficient bail, as in the case under the English statute of 11 Geo. 2, Cap. 19, relating to replevins. Such was the action of Hundle v, Blades, [5 Taunt., 255.] As to what might be considered sufficient sureties under our statute, I give no opinion: the plaintiff, however, is entitled to such sureties, and with them he ought in justice to be satisfied, without any resort to the Sheriff.

Though as I have already said, an action on the case for taking insufficient bail will not lie under the statute of Henry because of the 14th Section, yet such actions have been held to be maintainable in the United States of America under a statute somewhat similar to our own, as will be found in the case of Sparhawk v. Bartlett, [2 Mass., R., 188,] where the statute of Henry is brought under the notice of the Court.

The bail-bond, then, under the statute of Henry, is taken for the benefit of the Sheriff, who is bound to have the body at all events, and against whom no action for taking insufficient bail can be maintained. The bail-bond under our statute is taken for the benefit of the plaintiff, and the Sheriff not being chargeable with the body is liable to an action at the suit of the plaintiff for taking insufficient bail.

The rule, therefore, ought to be discharged.

BLISS, J. (after shortly detailing the facts) said:—

In seeking to obtain from the Court an attachment against the Sheriff, the plaintiff, in fact, requires that it should substitute the Sheriff in place of the real debtor for the payment of the full amount of debt and costs. [7 T. R., 370.] Before granting, then, a process of this nature, it is incumbent on the Court to look well to the grounds upon which the general practice is founded, that we may see whether it can be justly demanded of us to subject the Sheriff in this case to such liability. [2 H. Black., 434, note.]

The process of attachment against the Sheriff which, about a century ago, was introduced in place of the more ancient method of proceeding by amercement, and which it has now wholly superseded, is like that founded upon the misconduct of the Sheriff in not having the body of the defendant whom he has arrested at the return of the writ. The rule against him to bring in the body not having been obeyed, he is, for that disobedience, in contempt, and becomes punishable for it. But this, which is in the nature of a criminal proceeding, has been con-

verted into a civil remedy as it were, for the plaintiff, who is allowed to make use of it for the recovery of his debt, when he was thus, by the misconduct of the Sheriff, unable to proceed further against the defendant himself. This, it must be allowed, is a severe penalty on the Sheriff, and, in some respects, a very disadvantageous proceeding for him, and on the other hand one highly beneficial for the plaintiff. For though in some cases the Sheriff might be very properly subjected to such a liability, yet in others he may not have acted with that wilful misconduct or culpable neglect which would call for so heavy a punishment, and again, the plaintiff by substituting him for his debtor, may thus obtain a surer mark and more expeditious remedy than could have been derived from having merely the body of the defendant in custody. Yet such circumstances and the like do not appear ever to be taken into consideration by the Court with a view of mitigating the unbending rigour of that rule which requires, as the only way of obtaining his discharge from the attachment, that the Sheriff should pay the entire amount of the original debt with the costs incurred. It is not improbable, however, that the very severity has, in some cases which are to be found on the subject, led the Courts to avail themselves of such circumstances as occurred in the course of the cause for refusing the attachment altogether, and certainly with great reason. Among such are the cases cited at the argument [7 T. R., 452,] [3 B. & P., 151,] [1 Taunt., 111,] [9 East., 467,] when an unreasonable delay had taken place in the proceedings of the plaintiff against the Sheriff, by which the latter had been prejudiced. So where the plaintiff had been guilty of other irregularities, such as in his notice of excepting to the bail, of entitling the cause improperly or of not entitling it at all, the Court has refused the attachment, although, as appears in one case, [1 Chit., R., 374,] [2 Chitty, R., 741,] the defendant to whom the exception was given could not have been misled, for a declaration in the same cause was delivered at the same instant. In these cases the Sheriff had equally incurred the contempt for which he was liable to be attached, but the Court would not permit the plaintiff to take the benefit of it. And yet in another case [3 T. R., 133,] where the Sheriff had incurred the contempt and an attachment had been granted, the Court would not set it aside, though the suit had abated by the death of the defendant and the attachment had been issued after this, because the contempt had been incurred before; and thus the plaintiff was allowed to receive from the Sheriff that which he could not have received if the defendant had remained in custody.

Without, however, disputing the policy or propriety of such practices, it is at least proper to inquire into the origin and foundation on which it stands, for the reasons which support such practice in England may be indisputable, and yet be wholly inapplicable to this Province.

Now this mode of proceeding in England owes its existence entirely to the statute of 23 Hen. By the common law the Sheriff who had arrested a party under mesne process was under no necessity whatever of discharging him on bail, but he was compellable to have his body at the return of the writ. The consequence of leaving the power of taking bail to the arbitrary will of the Sheriff alone was productive of great extortion and oppression, to remedy which the statute of Hen. 6 was passed, which directs that "Sheriffs shall let out of prison all manner of persons by them arrested or being within custody by force of any writ, bill or warrant in any action, personal or by cause of indictment of trespass upon *reasonable sureties of sufficient persons having sufficient within the Counties where such persons be so let to bail or mainprize*, to keep their days in such place as the said writ, bill or warrant shall require." By this clause a most important change was made as regarded the duty of the Sheriff as well as the right of the defendant, and whereas the former, who could have no excuse for not having the body of the defendant at the day, so long as he was in no case obliged to let him out of his custody, was now compelled to discharge him on sufficient sureties, he would naturally enough, and with great reason, make his obedience to the statute a valid excuse for fulfilling that which under very different circumstances was his duty at common law. But it was thought right to subject the Sheriff still to the same obligation under which he originally was held, of having the body at the day, even though he had released him on bail by direction of the statute, and in order to make this still more incumbent on him the same statute proceeding with that intention expressly enacted further in the 14th clause: "and if the Sheriffs return upon any person *cepi corpus* or *reddidit se* they shall be chargeable to have the bodies of the said persons at the days of the return of the said writ, bill or warrant, in such form as they were before the making of this act." And upon this last clause of the statute it is that the liability of the Sheriff anciently to be amerced, and by the modern practice, to be attached, altogether depends. For it appears from this clause that no other return of the writ was to be made than such as must have been made before the statute, even when the defendant had been discharged on bail, which the

Sheriff was not allowed to return. And in Parker v. Welby, [1 Vent., 85,] Twisden, J. cited a case of Franklyn v. Andrews, where it was resolved "that the Sheriff could return nothing but *cepi corpus*, and he was amerced because he offered to make this special return that he had let him at large upon sureties." And in Ellis v. Yarborough, [2 Mod., 81,] North, C. J. gives the same opinion that the Sheriff cannot return that he has let the party to bail but must return *cepi corpus*, and the proceedings against the Sheriff follow from this return. The practice is thus stated by C. B. Gilbert. [Gilbert, C. P., 21.] The Sheriff having returned *cepi corpus*, it is a breach of duty in him not to bring him in according to his return for which the Court amerces him, as one of their officers who had been disobedient to their writ which is returned and filed. The Court amerces him *because it appears on record* that he has disobeyed the King's writ. So in Burrough v. Rossiter, [2 H. Bl., 434,] Eyre, C. J. says: "If the Sheriff has let the party out of prison upon bail he must return *cepi corpus*, and when he has made that return, he is by the express words of the statute of Hen. 6, in the 14th branch of the 1st section, chargeable to have the body of the person at the day of the return according to the course of the Court; if he has not the body to produce he is to be amerced, and being amerced, he may then and not till then put the bond in suit to reimburse himself. The practice and authority of the Court in this proceeding against the Sheriff resulted therefore entirely from the statute of Hen. 6.

But next comes the important point of our enquiry. How stands the law here? and have we the same authority to sanction the adoption of the practice?

If we were without any enactment of our own on this subject, there might have been, as I confess there would have been in my own mind, great difficulty in deciding that we should not be governed by the statute of Hen. 6.

What was our earliest statute on this subject I have not been able to ascertain. An act concerning bail passed in the 6 Geo. 3, the title of which only is printed. The first now to be found in our statute book is [P. Laws, vol. 1, p. 140,] 8 Geo. 3, Cap. 7, entitled "an Act for taking special bail in the County upon actions depending in the Supreme Court of this Province," which authorizes the appointment of Commissioners *to take affidavits to hold defendants to bail* and to mark *the writ for bail accordingly*, Two other acts it appears were passed soon after this, viz.: 8 and 9 Geo. 3, Cap. 13, and 9 and 10 Geo. 3, Cap. 6, concerning bail, of which the titles only are printed. Then follows

the 15 and 16 Geo. 3, Cap. 4, [P. Laws, vol. 1, p. 198, taken from Eng. stat., 12 Geo. 1, Cap, 29,] "in amendment of the several laws concerning bail," which enacts that in all causes where the sum or demand shall exceed £3 the Provost Marshal or his Deputy may arrest, imprison or *hold to bail* any debtor or debtors upon affidavit of the defendant, and the sum specified in the affidavit shall be endorsed on the writ for which the Provost Marshal, Sheriff, Coroner, or their deputies *shall take* bail, and for no more.

Now these two acts appear plainly to recognize the law as introduced by the statute of Hen. 6, viz.: that it was obligatory on the Sheriff to take bail; but yet that statute is neither enacted here up to the period to which the above act refers, nor were any other statutory regulations in force, unless contained in some of those expired laws. The English statute then, and the practice founded upon it, may have been considered to have been brought to this Province: at all events, they must, in some measure, have been adopted from necessity, or some other express regulations must have been made, since Sheriffs here could no longer, after the two acts above mentioned, be considered as having the common law right of taking or rejecting bail at their pleasure.

But however the law may at that time have been held, and whatever may have been the Provincial practice under it, as it then stood (if any settled practice indeed did exist, which is rather questionable) all uncertainty with respect to this particular subject was soon removed by an express statute, that of 18 Geo. 3, Cap. 6, which was passed about three years after the one last mentioned: "to amend, render more effectual, and reduce into one act the several acts of the Province concerning bail." The first and second sections of which are of similar import with the then existing act of 15 and 16 Geo. 3, Cap. 4. The third section is exceedingly important. To a certain extent it in fact re-enacts and incorporates together the substance of the English statute of 23 Hen. 6, relative to taking bail, and that of 4 Ann, relative to the assignment of the bail-bond. It certainly, however, differs from both, and from the former in several respects, not, perhaps, wholly unimportant to the present inquiry. But the chief and most remarkable point of difference between this and the statute of Hen. 6, is that ours wholly omits that identical clause which makes it imperative on the Sheriff to have the body at the return of the writ, and under which he is punishable by the Court in England by attachment for a breach of that duty. In framing the Provincial Act the English statute

must have been had in view, for substantially in other respects it is borrowed from it. The omission of a clause so important could therefore have only been from design. And that intention, it appears to me equally clear, must have been to alter the responsibilities of the Sheriff which resulted from the omitted clause. Instead of compelling him first to take bail and to return *cepi corpus* as if he had not done so, and then making him liable to punishment as for a breach of duty and contempt, which would not, I think, be the most obvious means of giving the plaintiff redress against the Sheriff if a remedy by statute were now for the first time to be provided, our act has pursued a more plain and direct course. It prescribes alone the conduct which the Sheriffs must pursue in taking bail, namely: that they must be *sufficient*, leaving to the plaintiff, if he is injured by a neglect of duty in this particular on the part of the Sheriff, the remedy by action which necessarily results to him therefrom. Nor was it without a precedent directly in point derived from the English Statutes themselves. [11 Geo. 2, C. 19, § 21.] The statute of 11 Geo. 2 which compels Sheriffs, for the benefit of landlords, to take proper replevin bonds, may have been adopted by our Legislature as their guide on this occasion, under which the Sheriff is not punishable by attachment for taking insufficient securities; but the plaintiff's remedy is by action: [2 T. R., 617] a further and very convincing argument, I think, that under our statute, as it is, no attachment can be granted, but that the plaintiff must resort to his action as in that case. In England, it is true, the remedy under the statute of Henry is different, and the reason is because that statute is itself so different from the statute 11 Geo. 2. And, on the other hand, in this Province the English practice and proceedings ought not to be pursued against the Sheriff, but the plaintiff should be left to his action, not only because our Provincial act differs from the statute of Hen. 6, but because it agrees with the other statute of 11 Geo. 2. Nor can there assuredly be anything unjust either to the plaintiff or to the Sheriff in sending them to the same tribunal—the jury—on a question of taking insufficient sureties on a bail-bond, which is the true one to decide, the similar point in a replevin bond. For the jury may award such damages as may be reasonable and proper, while the Court has, according to the rule in England, no middle course to pursue, but must either reject the application altogether or subject the Sheriff to the payment of the whole debt and costs. It may also be noticed that our act does not, like the English statute, require the Sheriff to let the defendant on bail only when he gives sureties of *suffi-*

cient persons having sufficient within the County, and it seems the Sheriff could not be compelled to take such as did not answer this description. [13 East. 320.] Our Act is much more general, and is at once more in ease of the defendant, and imposes also a greater difficulty on the Sheriff, who cannot so well satisfy himself of the sufficiency of those whose sufficiency is not confined to his own County, and yet who cannot reject them without the hazard of an action by the defendant. This is an additional reason for not extending his liability beyond what it is expressly made by the statute. His being liable to an action is, on the other hand, a sufficient protection to the plaintiff against any misconduct of the Sheriff. But the very words used in our act so nearly resemble those in the statute of Geo. 2, that they strengthen my impression that our Legislature meant the remedy under that should also be followed under our own. The language of that statute is that the Sheriff shall take the bond of *two responsible persons*, in ours the words are *two sufficient sureties*. At all events it is rather singular that we should have departed so much from the wording of the statute of Henry, and adopted so nearly that of Geo. 2, and it would, I think, be still more remarkable if this was purely accidental when the object of the two statutes are taken into consideration.

But there is another branch of our act which deserves also to be noticed, viz.: that which requires the bail-bond to be assigned to the plaintiff. In England the sufficiency of the bail was required solely for the benefit of the Sheriff, and was introduced into the statute for his indemnity and protection as stated in Clifton v. Web, [Cro. Eliz., 308,] "that if he be amerced for the non-appearance of the party, he may have his remedy over against the bail," or, to use the language of Postern v. Hanson, [2 Saund., 60 c.,] "because he is liable to be amerced to the King for not having the body, the statute gives him advice that the sureties shall have sufficient within the County for his indemnity." In reading such expressions and numerous other authorities to the same effect, we must not, however, forget that the opinion of the Courts as to the effect and meaning of this clause of the statute, did not depend on that clause alone, but was greatly, if not entirely influenced by the decided language of the 14th clause, compelling the Sheriff still to have the body at the day. When that statute passed, the bail might reasonably be said to be for the Sheriff's security. He was not compellable, it must be recollected, to assign the bail-bond, and however sufficient the bail may have been, it would have been of little

advantage to the plaintiff if the Sheriff did not think proper to assign it. And one principal benefit derived from the practice of amercing the Sheriff was, in fact, to compel him to make an assignment of the bail-bond which he had taken. The statute of Ann, which at length compelled the Sheriff to do this, gave the plaintiff certainly an interest in the sufficiency of the bail, but still that statute left the former one of Hen. 6 wholly unaltered, and, consequently the construction which it had received remained as it had always had been. If, however, the statute of Ann, instead of providing only for the assignment of the bail-bond by the Sheriff at the request of the plaintiff had, at the same time, gone further and repealed the 14th section of the statute of Hen. 6, how completely would it have shown that the legislation no longer meant that the bail should be considered as taken for the benefit or for the protection of the Sheriff alone. They could not be for his indemnification, because there would be no liability against which he could require indemnity. His duty would be performed and ended by taking sufficient bail and by the assignment of the bail-bond when demanded of him. Now our Act has just done this; it at the same moment directs the Sheriff to take sufficient bail, and to assign the bond. And the entire omission of that clause which imposed the further duty on him of having the body at the return is as strong and intelligible an interpretation of its meaning as a repeal of that clause would have been of the views of the English Legislature, if it had been made by it when the statute of Ann was passed.

The ground work of the attachment as we have seen is the Sheriff's return of *cepi corpus* which he was obliged to make; he falsifies his own return if he has not the body, and for this he is punishable. Upon referring to the writ in this cause, I find that the return is that he had discharged the defendant on bail. If this were an improper return the attachment against the Sheriff should have proceeded upon that ground—it would, if not sanctioned by law, be no return; but it could not support the rule for bringing in the body, which the Sheriff returns he has not got, nor an attachment against him for not bringing it in. Is such a return then no return under our statute? To say nothing of the common usage which supports that adopted in the present case, the only answer which need be given is that on which I have already so much dwelt; viz., that our Act is without that clause which made such a return of *cepi corpus* necessary. But our Act it appears to me furnishes even some positive proof of the correctness of the present return. It directs that "the Sheriff shall then and there in Court, upon the request of the plaintiff

or his attorney, assign the bail-bond by endorsing his name thereon for the benefit of the plaintiff." Is it not then most reasonable if the advantage of the plaintiff himself be alone considered, that where the Sheriff has taken bail which he is then to assign over, that his return should apprise the plaintiff that such is the case. I have myself no doubt that the return made in this case was the correct and true one, which the duty enjoined on the Sheriff by our act required him to make. And this return may also help to establish the point more immediately under consideration, that with us the remedy against the Sheriff in such cases is by action on the case. The opinion of North, J. C., in Ellis v. Yarboro, is to this effect, in which, after some doubt, it was finally settled that an action would not lie against the Sheriff for taking insufficient bail—"there would (said he) be some color for the action if the Sheriff might return that he let the defendant to bail, for then it might have been necessary to have alleged the sufficiency of them, which might have been traversed, but now he must pursue the substance of the statute; so far as to take bail he is the proper judge of the sufficiency. And when the bail is taken he must return a *cepi corpus*, so that he is only to be amerced till he bring in the body." The inapplicability of this latter part of this opinion to our statute has already been pointed out.

On these grounds, I have no doubt whatever that the attachment cannot be granted and that an action will lie in this Province against the Sheriff for taking insufficient bail. We but decide the law as we find it, and if the policy of it should be questioned, as I am far from saying it is by me, I can only add, in the language of Eyre, C. J., in the case of Burrough v. Rossiter: "Let the Legislature, if the matter is of sufficient weight to merit its interposition, alter the law."

WHEELOCK vs. McKOWN.

Easter Term, 1835.

Where plaintiff claimed under a Grant from the Crown, containing a condition that Grant shall be void if not settled on within a certain time, held that a subsequent Grant from the Crown for the same locus, under which defendant held, was void, there having been no inquest of office previous to the issuing of such subsequent Grant.

This was an action of trespass *quare clausum fregit*, and for cutting down and carrying away trees; tried at Annapolis. Pleas the general issue, and also that the *locus in quo* was the soil and

freehold of Francis Smith; and that the defendant, as his servant and by his command, entered and cut down the trees. Verdict for the plaintiff. Rule to set verdict aside and for a new trial.

HILL, J.—The place where the trespass was committed is Lot No. 47, at Nictau, in the County of Annapolis, and is called Steele's Lot, from having, as it appears, been originally granted to a person called Steele. The only point to which the attention of the court ought now to be directed is, as to the operation of the two grants that have made their appearance upon the trial; the case evidently being with the plaintiff, provided the latter grant to Smith shall be considered as having no operation to give him a title. The jury have found the possession to have been in the plaintiff, and upon testimony quite sufficient to warrant such finding; and they had the whole testimony before them. The case lies within a narrow compass, and may, I think, be disposed of without much difficulty after the able argument it has undergone, in which it is but justice to the gentleman who opened it on the part of the plaintiff, to say he bore a creditable part.

Now as regards the grants to which I have adverted, how does the case stand. On the 30th October, 1765, a grant of confirmation is made by the Crown, to various persons, of certain lands, including the locus and forming the township of Annapolis. The lands were granted in common and undivided, and each grantee was entitled to a share or right. Steele being one of the grantees, appears to have drawn lot 47 as his share or right, or part of it; for I have not discovered that this lot formed the whole of his portion. This grant contains the following words:

"And for the more effectual accomplishment of His Majesty's intentions of settling the lands within this province, the grant hereby made is upon this further condition, that if each and every of the said grantees shall not settle either themselves or a family on each of their respective shares or right, with proper stock and materials for the improvement of the said lands, on or before the last day of November which will be in the year 1767, then this grant shall be null and void and of none effect to such of the said grantees as shall fail to settle the premises in manner aforesaid, and within the time above limited. And the Governor, &c., may at his pleasure grant the rights and shares of all and every of the grantees mentioned in this deed so failing, to any other person or persons whatsoever in like manner as if this grant had not been made."

Grant dated 30th October, 1765.

Grant to Francis Smith dated 1st July, 1803.

The grant conveys a freehold upon condition that the grantee shall perform such and such things. The very clause that I have read, and in which the defendant has placed so great reliance, contains the word *condition*. This is by no means like the cases where an estate is granted *durante viduitate*, or *dum casta et sola vixerit*, or where words of limitation are used, such as *dummodo, quamdiu, donec, quousque*, and the like; nor where a man by will devises land to his heir upon condition that he pays or does such an act, and for non-payment devises it over. On the 1st July, 1803, the Crown made a grant of the same lot No. 47, being the Steele lot, to Francis Smith named in the second plea, without office found; and the question is, had the King a right to grant to Smith.

I feel no difficulty in saying he had not.

It cannot be denied that before the Crown can make a second grant the condition of the first grant must be unfulfilled; and that that fact must be shewn by some testimony and before some tribunal, and at some time. If the Crown is not bound before the second grant to shew the conditions of the first broken, it must shew it afterwards, or at the least afford the grantee an opportunity of shewing that really he kept his contract with the crown.

The condition of the grant of 1765 is: "That if each and every of the said grantees shall not settle either themselves or a family on each of their respective shares or rights, with proper stock and materials for the improvement of the said lands, on or before the last day of November, 1767, then the grant shall be void." Now I can find no proof in the case that Steele did not settle either himself or a family, with proper stock and materials, on his share or right in this grant of the township; nor do I find that he has had any opportunity afforded him of shewing, if that burthen lay on him, that he had performed the conditions. To strip this man of his freehold on presumptions, does not meet my view of either the law or justice of the case.

The verdict might be sustained on this consideration alone, and the argument stopped *in limine*. But the grant of 1803 to Smith is a nullity; no office has been found, and the King had not in 1803 reinvested himself with the title that passed out of him in 1765, and therefore not being in possession he could no more grant than an individual out of possession could grant. I do not feel it necessary to advert to what has been urged on both sides as to the construction of grants from the Crown; they are to be construed according to the evident import of the words used, and those of the present grants are too plain to be mistaken.

Our decision in this case may be wholly rested upon that of Doe on the several demises of J. Hayne, of His Majesty King George the third and others vs. Elizabeth Redfern, 12 East, 95, and cited at the bar. The doctrine as applicable to this case is there fully discussed, and all the leading cases gone into; and the court decided that the statutes of 8 and 18 Hen. 4, ch. 16 and 6, restrained the King from granting until office found, and that all grants made without office were void.

The first of these statutes recited as a grievance that the lands and tenements of many of the King's subjects were seized into the King's hands upon the inquest of escheators, or let to farm by the Treasurer or Chancellor before such inquests were returned; and to remedy that, the statute enacted that no lands seized into the King's hands upon such inquests should be let or granted to farm by the Chancellor or Treasurer, or any of the King's officers, until the inquests and verdicts be fully returned into the Chancery or Exchequer, but that they should remain in the King's hands a month after the return, and patents made to the contrary should be void. The latter statute recites the provisions of the former act, and sets forth that, to evade them, persons had obtained grants before inquisition or title found, pretending that such were not prohibited by the act; and then enacts that grants so obtained should be void. The object was that the possession should be open to all claimants against the King till the final decision of the right, and that no grant should be made to obstruct any person who might traverse the inquest. Here, then, we find a grant made to Smith in opposition to both these statutes. Not only has the King granted before the time limited after office found by the first statute, but he has granted without the formality of office. The subject has been deprived of this freehold without any notice whatever These two statutes are highly beneficial, and cannot be too closely adhered to. It is due to the honor and dignity of the Sovereign that his name should not be made use of by interested parties ever ready to grasp at possessions of this kind, and to put forward false representations to accomplish their own views. The very grievances intended to be remedied and redressed by the statutes of Henry, are those under which the subjects of this Province might well say they labored, if we were to hold that they could thus unceremoniously be deprived of their possessions. An inquest of office is the constant barrier between the Crown and the subject.

Our own Provincial statute of 59, Geo. 2, c. 6, will be found to have some bearing on this, for by that (which by-the-bye does not seem even to contemplate for a moment that the Crown can

re-invest itself of lands without office,) the Legislature have guarded most particularly against improvident grants. Three months' notice must be given of the escheat in the Gazette—a copy of the notice must be fixed on the church and court-house door of the county where the lands be, and a copy of the notice must be served upon any person who may be living on the land.

The object of this act is to protect the subject in his possession, and to prevent the Crown from being surprised into inconsiderate grants—such a grant as that to Smith. The case in 12 East., gives a complete answer to all those cited by Mr. Johnston, wherein the Crown granted without office. The cases which sanction grants from the Crown without office on condition broken, will all be found to be those wherein the condition *appeared of record* to be broken, as where a lease was granted by the Crown for 70 years, with a proviso that it should be void if the rent should be in arrear. The rent was payable at the Exchequer, so that the non-payment appeared of record, and the King's title was therefore *found of record*. So where a grant of the lands of a person attainted of high treason was good without office, the ground was that as the statutes had in some cases vested the *actual possession* and seisin in the King without office, it would have taken them out of the operation of the statute 18 Henry. I do not find any case where the King claims upon a condition broken that he is entitled without office found or other matter of record. In Com. Digest, Prerogative D, 67, 68 and 70, it is shewn where office is necessary to entitle the King; and Stamford is cited as saying in all cases where a subject shall not have possession in deed or in law without entry, the King will not be entitled without office found or other matter of record, as if the King's tenants, aliens in mortmain, or without license, the King's title must be found by office, if he claims upon a forfeiture or a condition broken; but if the King's title appears by other matter of record, an office is not necessary. So if a possession in law be cast upon the King, no office is necessary, but the King may seize without it, as if the King has a title by descent in remainder or reverter, for the freehold is cast upon the King by law.

The King in the present case, if entitled, is so for condition broken. This does not appear by office found nor other matter of record, and therefore, according to all the cases, the Crown had no right to pass the grant to Smith, and he can consequently derive no title under it.

TARRATT vs. SAWYER.

Mich. Term, 1835.

A Bill of Sale given to a bona fide Creditor in preference of other Creditors, is valid. Fraud or no fraud is a question that belongs entirely to the Jury.

This was an action of trespass for breaking and entering the store of plaintiff, and for seizing and carrying away certain goods. Pleas general issue; and special pleas justifying the taking, under a writ of attachment, sued out against Henry Austin, to whom the goods belonged. Replication *de injuria*. Issue.

In July, 1834, H. Austin being largely indebted to plaintiff, executed several bills of sale to him, one of his stock in trade, another of his real estate, and another of his household furniture. Plaintiff verbally agreed to pay several small debts due by H. Austin, which he did. The debt for which the writ of attachment issued, was not included in the list. A few days after these bills of sale were executed, an attachment was sued out by the Executors of Hill against H. Austin, and on the proceedings of the Sheriff, in executing that writ, the present claim is founded. The Judge left the case to the jury on the question of fraud or no fraud. Jury found verdict for plaintiff—damages £558. There was a rule Nisi granted to set aside verdict,—1st, because contrary to evidence; 2ndly, for misdirection of the Judge; 3rdly, because bills of sale under which plaintiff claimed were fraudulent and conveyed no right to him. The grounds on which bills of sale were attacked were as follows:—1st, because the true consideration for which they were given was not the same as that which appeared on the face of them; 2ndly, because a much larger sum was secured by Austin to the plaintiff than the amount of the debt due to himself, and the surplus which was for the benefit of the other creditors did not appear and was not mentioned in the bills of sale; 3rdly, that there was no such possession taken by plaintiff of the property assigned as was necessary to the assignment, nor such notoriety as might be equivalent to a possession; 4thly, that it was an assignment of all the debtor's property to some favored creditors to the exclusion of others, and is on that account fraudulent.

HALIBURTON, CH. JUS.—If we were trying the honesty of the transaction would we not arrive at the same conclusions as the jury? This is the case of an honest debtor securing to honest creditors their just debt. The transaction was made public. Tremain makes it known to the Rev. W. Crawley—it is talked of in the street. Tarratt is pointed out as the man who shut up Austin. Hartshorne was preparing an advertisement, the insertion of which was prevented by the levy of the attachment. It is said that the furniture was allowed to remain in the possession of Austin, and that we are bound to set aside the verdict because this is a glaring badge of fraud. In Woodall v. Smith, [1 Camp., 332, 1808,] where after assignment the assignor continued in possession, and carried on his business as a Publican, and the money received for the sale of beer was put into a till to which both assignor and his wife had access, Lord Ellenborough told the jury that it was a mere mockery to put in another to take possession jointly with the former owner. There must be a substantial bona fide change of possession—that the possession must be exclusive, or it was fraudulent and void against creditors; and the jury, under these directions, found for the plaintiff. That is the strongest case that has been decided since that of Edwards v. Harben, [2 T. R., 587,] in which Bullen, J., does certainly lay it down in the strongest language, as the opinion of the twelve judges, that if possession does not accompany and follow an absolute bill of sale of goods, the bill of sale is fraudulent and void *in law*. This case was decided in 1788, but subsequent cases by no means support this broad position; for in Steele v. Brown, 1 Taunt., 381,] Mansfield, C. J. says: "No case has decided that a bill of sale, unaccompanied by possession, may not, under certain circumstances, be fair and valid." Lawrence, J., in the same case says that the case of Edwards v. Harben is good law, but he makes a distinction of the case of creditors, which the broad position itself does not refer to, as it pronounces the want of possession under an absolute bill of sale to be of itself fraudulent and void. In the case of Reed v. Black, [5 Taunt., 215, 1813,] it would have been unnecessary to have gone into the long argument which took place upon it if the naked broad position laid down in the case of Edwards v. Harben is the rule to guide courts in all subsequent cases. But the circumstances of this case are dwelt upon largely both by the counsel and the court; and how does Mansfield, C. J., dispose of the question relating to the bill of sale to, and the lease from, Sandell? He does not say no possession accompanied it, and therefore it is void, but he goes into an enumeration of many circumstances,

viz: that there was no proof of the judgment and execution under which he purchased—no proof of any consideration paid, nor of any rent paid under the lease; and even then he does not say the court, therefore, held the instruments to be void, but he says the *jury might well consider* whether that lease was ever made, or for any other purpose than to protect the goods of Taylor. Dallas J., in giving his opinion, says expressly: "This was exclusively a question of fraud for a jury to decide," and he adds in that case, (as I should say in this), *I should have found as they did.* Armstrong v. Baldock, and Woodham v. Baldock, Gow, N. P., Rep. 33, 1818,] are instances that the position laid down in Edwards v. Harben cannot be maintained to its full extent, and the questions arising in those cases were properly referred to a jury to decide upon the fact of fraud or no fraud, although the court gave them their instructions to guide them. In these cases much stress was laid upon the notoriety of the transfer when the possession is inconsistent with the ownership claimed. In the latter case, Dallas J., in his instructions to the jury, says: "As a general position, it is not true that the possession of goods proves the ownership of them;" and again he says: "In transactions of this sort, secrecy is a badge of fraud, but it does not of itself prove fraud." The reporter's note to this case and the cases he there cites, particularly Hoffman and Pitt, [5 Esp., N. P. C., 25], shew that the want of possession in the case of an absolute agreement, is not such a circumstance *per se* as makes the transaction fraudulent,—it is only indicative of fraud, and therefore a question for the jury to decide. In Eastwood v. Brown, [1 Ry. & Moody, 312,] possession did not accompany the bill of sale, but the goods remained in the possession of the vendor, yet the bill of sale was sustained, and the vendor recovered in action against the Sheriff, who had taken them under a fi-fa, issued against the vendor. Abbot, C. J., said: "I cannot agree to the doctrine, laid down in Woodall v. Smith. The circumstance of an assignee who is under pecuniary embarrassments remaining in possession of the property assigned, is always suspicious; but if it does not appear that this takes place under a *fraudulent arrangement* between the parties for the purpose of delaying creditors, it is not of itself a conclusive badge of fraud." In Martindale v. Booth, [3 B. & Adol., 498, 1832,] Comyn, counsel of defendant, who was contending against the right of an assignee who had permitted the goods he claimed under a bill of sale to remain with the assignor, commences his argument by saying: "It is not necessary to contend that every bill of sale is void where the vendor continues in possession, but this he said was

void under the peculiar circumstances." The court, however, thought otherwise. The jury had found a special verdict, and had thereby referred the question of fraud to the court, which they might have decided themselves. The equitable case of the parties who were resisting the bill of sale in the name of the Sheriff, was very strong. The assignor had married the widow of their debtor, who owed them £1,100 at the time of his death, and by such marriage had become possessed of the debtor's effects. Subsequent to his marriage he had executed a warrant of attorney to these creditors for the amount of their debt; yet a subsequent bill of sale of the furniture of the assignor, the consideration of which was a debt subsequent to that of the real defendants, in this case was upheld *by the court*, (although the assignor remained in possession of the goods,) so as to defeat the claim of the creditors under a fi-fa issued upon a judgment entered up on the warrant of attorney. It is true that Lord Tintenden, in giving his opinion, lays some stress upon the possession by the assignor being consistent with the deed, which contained a condition permitting him so to do until default was made in the payments; but the main foundation of his opinion was that the deed of sale was *not* absolutely void for want of possession. Parker, J., in citing Benton v. Thornhill, [2 Marshall, 247], which was the case of an absolute bill, says: "It was said in argument that want of possession was not only evidence of fraud, but constituted it; but Gibbs, C. J., dissented; and although the vendor there after executing a bill of sale was allowed to remain in possession, he left it to the jury to say whether, under the circumstances, the bill of sale was fraudulent or not; and in this case Parker, J., talks of the *dictum* of Buller, J., in Edwards v. Harben, and thus evidently makes a distinction between his general position and the decision of the court in the particular case: but I must admit that the decision itself, independent of the strong expressions of Judge Bullen, would be a strong case in support of the defendants here if it had not been shaken by so many subsequent cases.

It has also been urged that the assignment is fraudulent, because some creditors were favored and others entirely excluded. The case of Nunn v. Wilson [8 T. R., 521,] has been cited in support of this position; but I think the case much stronger in favor of the plaintiff than of the defendant. There Lord Kenyon says: "Putting the bankrupt laws out of the case, a debtor may assign all his effects for the benefit of particular creditors." In deciding questions of this kind the courts have always disavowed enquiring whether the consideration be equivalent; they will not

weigh it in very nice scales if it be an honest transaction. In Tolpot v. Wells, [1 M. & S., 395,] which was also cited for the same purpose, all that was decided was, that an executor could not take upon himself to alter the whole arrangement and invalidate the rights which the law has given to the creditors of his testator in their several degrees, and virtually convert such of them as he thought proper into judgment creditors, (to the prejudice of others,) by confessing a judgment to one for a larger amount than was due to him, in trust for others. The case of Pickstock v. Lyster [3 M. & S., 371] decides nothing more than that a general assignment for the benefit of all the creditors of an insolvent debtor shall be sustained, although for the purpose of delaying a judgment creditor, and the honesty of securing such equal distribution of the insolvent's effects is properly commended by the court; but it does not deny the right of a debtor to assign his effects to a particular creditor or creditors to whom a debt or debts is or are really due. Indeed the case was decided upon the authority of Holbred v. Anderson, [5 T. R., 235,] where such preference was actually given. It was true it was given there by a warrant to confess judgment; and in this case by a bill of sale, a distinction on which much stress has been laid; it being contended that as a judgment is matter of record it is of itself notorious, which is not the case of a bill of sale executed between the parties, The plain answer to this is, that as secrecy is one of the indications of fraud, the jury are the tribunal to pass upon that fact, and to draw their inferences accordingly. It cannot be questioned that in the case of Tarratt v. Sawyer, there was abundant evidence for them to consider as to the notoriety of the assignment. In Wadeson v. Richards [1 Ves. & Bea., 110,] the Master of the Rolls says, "the court always lean in favor of equal payment of all debts." Undoubtedly they do; but they must not lean so hard as to upset the legal rights of the parties. In Spooner v. Whiston, [8 Moore, 580,] the question of fraud was most properly left to the jury, who decided it according to the views which the court took of it. I do not see how it bears upon the case under our consideration. In that case there was an express stipulation in the deed that it should be void if all the creditors did not execute it, and thereby consent that all the debtor's effects should be equally divided without any priority or preference, and yet the debtor gave a preference to one. This was rightly held a fraud upon the rest. The case of Baddock v. Watson, [3 Price, 16,] like that of Wadeson v. Richards, shews that courts, both of law and equity, favor assignments for the benefit of all the creditors equally. The case of Eastwick v.

Caillant [5 T. R., 420] was cited in support of the position, that as this assignment was made by Austin to Tarratt, with the knowledge of Hill's debt in both parties, and with the intention of excluding Hill, that it is on that account fraudulent. Now I think so far from supporting such a position, it is a strong case against the defendant. Lord Kenyon says, "it was neither illegal nor immoral to prefer one set of creditors to another." It is only in reference to the bankrupt acts that he makes the distinction between assignments that exhaust the whole estate of the assignor, and those which do not. Ashurst, J., says, "there is no objection to a debtor preferring one set of creditors to another, unless in certain cases on the bankrupt laws."

In this case, Buller J., makes some observations which well apply to another ground on which defendants have sought a new trial,—that of misdirection. I do not conceive that objection can be sustained, for I think my brother Hill's directions, as contained in the report, were quite right. It is true he told the jury that if they were convinced that there was a real debt due bona fide to the plaintiff, at the time of the assignment, there was an end of the defence; yet that was said after he had laid the facts of the case before them, and had commented upon the evidence. Not only the fair but the necessary inference to be drawn from what he said is, that if, under such circumstances, they were of opinion that there were a real debt due to the plaintiff, there was an end to the defence; and in that I entirely concur with him. A Judge cannot open his mouth and present a panorama of his charge to be taken in, if I may use the expression, at a single *coup d' oreille*. His words must be uttered consecutively; but they must not, on that account, lose their relation with each other, or we should be reduced to the difficulties, which Swift has humorously ridiculed, of *totidem verbis et totidem literis*. But even in cases where the Judge may have made a slight mistake, Buller, J., says: "On an application for a new trial the only question is, whether, under all the circumstances of the case, the verdict be or be not according to the justice of the case; for though the Judge may have made some little slip in his directions to the jury, yet if justice be done by the verdict, the court might not interfere to set it aside. Now I am so fully of opinion that justice has been done by this verdict, that had it been found for the defendant under such proof, and an application had been made to set it aside, I should have thought there would be much for the grave consideration of the court. The jury are undoubtedly the judges to decide upon questions of fraud; but had they decided that this assignment

was fraudulent, without any further proof than what was produced in this case, I think I should have been disposed to submit the question to another jury. Neither Judges nor Juries can make laws,—that power is vested in the Legislature alone. And if by the law of the land a debtor may, *without any fraudulent intent*, assign his property to a particular creditor, and does make an assignment under circumstances which completely negative fraud, (as I think is the case here), a jury have no right to deprive him of that power which the law allows to him. In Meux v. Howell, [4 East., 1,] Lord Ellenborough says, "it is not in every feoffment, &c., which will have the effect of delaying creditors of their debts, that is fraudulent within the statute; for such is the effect, *pro tanto*, of every assignment that can be made by one who has creditors." Every assignment of a man's property, however good and honest, must diminish the fund out of which satisfaction is to be made to his creditors; but the feoffment, &c., must be made of malice, fraud, or the like, to bring it within the statute.

I have not overlooked the American cases which have been cited, for, although we are not bound to defer to them as we must to the decisions at Westminster, we derive great satisfaction and advantage from the views taken by the able lawyers who sit upon many of the Benches in that country, of transactions so similar to those which frequently occur in this. Chancellor Kent, however, in those Commentaries which are probably destined to carry down his name to posterity as an ornament to the profession, observes that the law upon questions of this nature is still more unsettled in America than it is in England. And if by the term *unsettled* he means that no fixed and positive rule has yet been adopted in either country, by which assignments of personal property, unaccompanied by possession, shall be invariably bound, unsettled, I imagine it must long remain. The transactions of life are too various, and the ingenuity of those who are disposed to take a devious course, is too great to prevent any general rule from being either advantageous or effectual. The undesigning would be often entrapped by it, while the designing would continually evade it. The safest principle is to consign the determination of each particular case to a jury, who will consider it under all its circumstances, while the court by their instructions to them, and where necessary by their control over the verdicts, will endeavor to preserve as much uniformity and certainty in the decision as the nature of such transactions will allow.

I think therefore that the rule should be discharged.

HILL, J.—This case was tried before me in Easter Term last, and a verdict was found for the plaintiff. A rule Nisi was obtained to set this verdict aside and obtain a new trial upon four grounds: 1st, that the verdict was contrary to the evidence: 2nd, that there was a misdirection of the Judge; 3rd, that the bills of sale were not sufficient in law; 4th, that there was no notoriety of the transaction.

The argument, however, has turned principally upon the question whether the bills of sale, dated respectively on the 1st and 2nd July, 1834, and executed by Henry Austin, conveying the one all his stock in trade, the other all his household furniture therein enumerated to the plaintiff, are or are not, under the circumstances of the case, fraudulent and void in law as against the creditors of Austin; for if the defendant has made out that these instruments are so fraudulent and void, there ought, perhaps, to be a new trial, because I put the question of fraud to the jury for their consideration. It may be here remarked, that if the doctrine contended for on this argument by the defendant be sound, then a motion for a non-suit would seem to have been the proper course at the trial. The case ought to have been arrested, and not sent to the jury, for the purpose of enquiring into a pure question of law. No such motion, however, was made.

It is insisted that both these bills of sale are fraudulent and void, because they transferred all the debtor owned, and were made upon an express condition to exclude two debts due by Austin, the one to the executors of Hill—the other to Kidston. Now not one case has been cited to shew that such a transfer has been held void, nor has any text book been produced in support of this position. The utmost that any of the cases have proved is, that the courts in England have supported bills of sale, transferring the goods of a debtor to trustees for the benefit of all his creditors, though such transfer were made with the express intent of delaying a particular creditor. Such is the doctrine in Pickstock v. Lyster, [3 M. & S, 373,] and the other cases cited on this point; but it by no means follows that, though such deeds are supported, those conveying all a debtor's property to one creditor for the payment of a just debt, are void. The case, however, of Benton v. Thornhill, [2 Marsh, 427,] satisfactorily disposes of this objection to the bills of sale under consideration. In that case, (which was approved of by Parker, J., in Booth v. Martindale,) a debtor, by a bill of sale, transferred *all* his property to a creditor, and yet the question of fraud was put to a jury, whose verdict being in favor of the transfer, was upheld by the court upon a motion for a new trial. But it is

argued: supposing a transfer of all a man's property may be made to pay one creditor, yet there must not be an express motive, compact or design, between a debtor and a creditor to whom an assignment is made to exclude a particular creditor. The parties in fact, though they may intend to, and actually exclude a particular creditor, must not declare their intention. Now, if the act of transferring to a particular creditor all the goods of the debtor be not of itself fraudulent as against other creditors, I confess it seems difficult to me to come to the conclusion that a declaration of the parties that they did the act with the view to pay one and exclude others, is fraudulent. If, in the present case, Austin, previous to the execution of bills of sale, had exhibited the list of his creditors to Tarratt, and, without any declared intention as to exclusion, all Austin's creditors had been included, except Hill and Kidston, here certainly would have been exclusion intentional though not declared. How are we, then, to come at the intention but by the acts, and if these do in fact exclude, are words necessary to shew intention? Let it once be granted that a creditor may, to pay a just debt, assign all his property to one creditor, which must have the effect of excluding others, and which effect must be known to the debtor, the declaration of the *quo animo* cannot alter the legal position of any of the parties. But it is urged, this previous compact—this declared intention to exclude, is evidence of fraud. Granted. But what then, why according to the very cases cited, this is referable to a jury as was done in Pickstock v. Lyster.

It is then insisted that the secret agreement between Austin and Tarratt as to the payment of Austin's debts ought to have been reduced to writing and to have formed part of the deeds, and that the omission operated injuriously as against Austin's creditors; but to me the cases cited in support of this appear to have no application. Those of Knight v. Hunt, and Britton v. Hughes, in 5 Bing., (pages 432 and 460,) that of Leicester v. Rose, 4 East., decide nothing more than that no legal effect can be given to an agreement by which certain creditors are to have a better security for the same sum than the rest of the creditors, after having entered into an agreement with them importing that all were to have the like satisfaction. The scope and object of these decisions were to ensure the strictest good faith and fair dealing between creditors entering into agreements for compositions with their debtors. But who is complaining here, and where is the bad faith. If Austin had the right to transfer all his effects to Tarratt, which I think he had, then it will be quite time enough to discuss the tendency of the verbal agreement to

pay some other of Austin's creditors, when those creditors come here or apply to some other court by way of complaint.

The moral right of the creditors to share equally the effects of the debtor, has been brought forward also on this point of the argument; and it is strenuously contended that in all cases creditors have a just right equally to share, or, in other words, that all are equally meritorious. But if we were to be influenced by this question of ethics rather than law, I know not whither we should be led; for then if Austin has turned all the chattels in question into money, and paid that over to Tarratt, the latter ought to have refunded, and that was not contended for in the argument. But if I felt myself at liberty (which I do not) to enter into that question, I cannot say that I find anything in this case deviating from the principles of morality in the strictest sense of the term.

If then we find no authority for the position, that transferring all a debtor's property to a creditor, and an agreement to exclude particular creditors, is fraudulent and void in law, the bill of sale assigning Austin's stock stands free from any other objection, because possession as to that did accompany and follow the deed, and so the jury have found; and it cannot for a moment be said that the fact of possession was not for them, and that there was not ample testimony of possession in Tarratt.

The remaining question, therefore, arises upon the bill of sale of the household furniture, the possession of which, it is said, did not accompany and follow the transfer; and upon this part of the case the bold position—and that indeed which comes to the real point—has been taken, that, with some exceptions, in transferring chattels, immediate possession must accompany and follow the deed transferring,—that there must be an actual exclusive possession in the assignee; otherwise, that the fact of the assignor remaining in possession, makes the deed void in law. As to this, Twyne's case, and that of Edwards v. Harben, have been relied on. We must not forget, in discussing this matter, that a verdict has passed for the plaintiff, and that the question of fraud, upon the whole circumstances of the case, has been submitted to and negatived by a jury. Now, after a jury have pronounced their deliberate opinion that the transfer was bona fide, the court, unless they saw clearly that injustice had been done, would and ought to require a decision directly in point before they would interfere and disturb a verdict founded upon a consideration of facts submitted to them for their determination *by the defendant himself*,—for I have already noticed that there was no motion for a non-suit. Now, both these cases of

Twyne and Edwards v. Harben, were decided upon special cases submitted to the court for their decision, upon a statement of facts agreed on. Twyne's case was decided in the Star Chamber, and the question of fraud was expressly submitted to the court for their decision, as to the fraud, upon the facts stated; and they came to the decision, upon the whole matter, that the deed of gift was fraudulent, and so perhaps the jury would have come to the same conclusion in the case under consideration had Austin remained in possession of the furniture and sold part of it, and used it in all respects as his own. It is expressly stated in Twyne's case that the bill of sale was made in secret, and during the pendency of a writ against Pierce at the suit of C. That it was a general deed of all Pierce's goods and chattels. That Pierce remained nevertheless in possession—that he sold some of them—that he sheared the sheep and marked them with his own mark. Here secrecy was expressly negatived, for it is in proof that Austin had on more than one occasion declared his intention to transfer, and he followed up that intention by transferring. Austin's bill of sale enumerated the goods transferred. Austin's transfer was before any writ sued out against him, so that the facts of the case are widely different. This case, therefore is no authority for the general proposition that in transfers of the description under consideration, possession must accompany and follow the deed transferring; indeed I draw the contrary inference, for had that been the doctrine held by the court, they would probably have so resolved, whereas the very first resolution is that the deeds had the signs and marks of fraud because it was general without exception of his apparel or anything of necessity. The case of Edwards v. Harben has then been pressed upon us. It is material to observe that that case came before the court upon a special case reserved for its opinion, and it was the duty of the court to give their judgment upon it. A very different conclusion was drawn from the facts stated in that case, from that which I should feel inclined to draw. The court in that case admit that if the bill of sale is not absolute but conditional, and the delivery is to take place at a future day and not immediately, it is not fraudulent; for the vendor's remaining in possession is consistent with the deed. Now, if the doctrine, that possession must accompany and follow the deed transferring chattels, is to subserve the interests of society, by upholding fair dealing and by preventing fraudulent covert transfers, it is difficult in my mind to draw any distinction between absolute and conditional bills of sale. The vendor remaining in possession under an absolute bill of sale is surely

not more calculated to deceive the world than when his possession is under a conditional one. If Tarratt had stipulated that Austin should have remained in possession for six months, and then that he should enter, it must be conceded under Edwards v. Harben that the transfer had been good, and yet Tarratt would have had these transfers locked up in his desk, Tarratt and Austin being the only persons cognizant of the matter; and yet the moment the Sheriff came to make the levy the bill of sale would have been brought to light and the Sheriff must have stayed his hands. How this mode of transfer can operate to prevent fraud, I cannot discover. There is no magic in words; and the good sound sense of the thing requires that if immediate possession must follow, it must in all cases, for the world will be equally deceived. But are we so fettered by the case of Edwards v. Harben, that we cannot support the verdict in this case? Eastwood v. Brown, *et al.* [1 Ryan & Moody, 312,] would of itself be sufficient authority for me to uphold the transfer unless I saw the principles of justice wounded. It seems decisive. One Pope assigned a leasehold, house, and all his furniture and household effects to the plaintiff, who was his *creditor*. Pope, out of the purchase money, paid several of his creditors. There was no direct evidence of fraud, and the full value was given. Pope continued in the occupation of the house and furniture after assignment precisely in the same manner as before. Abbott, C. J., left it to the jury whether, under all circumstances, they were satisfied the assignment was made to delay or defeat the creditors in the recovery of their debts. He expressly dissented from Edwards v. Harben, and told the jury that the assignor remaining in possession of property assigned was always suspicious; but if it did not appear from other facts in the case that this took place under a fraudulent arrangement between the parties for the purpose of delaying creditors, it was not of itself a *conclusive* badge of fraud. There was a verdict for the plaintiff, and no motion for a new trial. Martindale v. Booth, is an express authority on this point of possession. Parker, J., no mean authority, there says that Edwards v. Harben has not been considered in subsequent cases as deciding that the want of delivery of possession makes a deed of sale of chattels absolutely void. He says that the want of delivery is only evidence that the transfer was colorable. He refers to Brenton v. Thornhill, and he quotes Shepherd's Touchstone that a bargain and sale of goods may be made without delivery, and adds: "it is evident this bill of sale in this case without delivery conveyed the property. It may be a question for the *jury* whether, under the circumstances, it be fraudulent."

The case of Benton v. Thornhill is also of great weight, for there the bill of sale was not conditional, but absolute; it was made also between *debtor and creditor*, and conveyed *all* the *property* of the debtor. In moving for a new trial the very ground taken by the Solicitor General was, that possession must accompany a bill of sale of chattels,—the question of fraud being left to the jury; and yet the court refused to disturb the verdict which upheld the bill of sale. Without dwelling further upon this, I would only refer to the cases of Armstrong *et al.* v. Baldeck, Lady Arundell v. Phipps *et al.*, [10 Ves., 145,] to shew that immediate and continous possession need not accompany and follow a deed transferring chattels. The case of Reed *et al.* v. Wilmot *et al.*, [5 M. and Payne,] has been cited to shew that the doctrine in Edwards v. Harben, that possession must accompany an absolute bill of sale of chattels, has never been doubted; but I do not take it to establish any thing beyond this, that if a jury find there is no fraud, possession need not, according to that case, accompany a conditional bill of sale. Parke, J., is referred to as saying that Edwards v. Harben had never been doubted; but that Judge must be taken as having reference to conditional bills, for the same Judge, in the case of Steward v. Lombe, *et al.*, [1 B. & B., 506,] will not be found to be so decided as to the extent of the doctrine in Edwards v. Harben. In the case in B. & B., Dallas, C. J., says Edwards v. Harben has *often* been dissented from; and cites, with approbation, the doctrine in Kid v. Rawlinson. Parke, J., in giving his opinion, speaks thus of Edwards v. Harben: "Supposing Edwards v. Harben to be law, (though doubts have arisen as to the extent of the doctrine there laid down.)" The possession, therefore, that must accompany and follow an unconditional bill of sale of chattels, as far as I have been able to discover, finds no support except in the case of Edwards v. Harben, which has been, in many cases, in effect expressly overruled. Then, because it has been so overruled—because I find the question of fraud or no fraud constantly submitted to the consideration of juries, —because I think that the proper tribunal to refer such a question to—because I think a jury, and not the court, the most proper deposit in cases of this kind, of the safety and fairness of trade—

I am of opinion that the rule should be discharged.

Bliss, J.—The principal questions involved in this case, relate to the validity of the bills of sale on which the whole title of the plaintiff depends. And on the part of the plaintiff it is contended: 1st, that the evidence clearly proves these bills of

sale to be fraudulent and void; and 2ndly, that it is for the court and not for the jury, to pronounce under this evidence that they were fraudulent.

The case has been most fully discussed, and every argument that could be raised, and every authority which the learning and industry of the counsel could adduce, have been presented to our notice, to establish these propositions. I confess they failed at the time in bringing conviction to my mind on these points, and the consideration which I have since been enabled to give them, has left my former opinion unaltered. It is true that decided cases and *dicta* of Judges of high authority are to be found, in which the validity of bills of sale or assignments, like the present, are treated as questions of law alone; yet, notwithstanding these, I am of opinion, both from other and later decisions of not less weight, and also from reason and principle, that the present case was properly submitted to the jury and that it was their province alone to decide upon the validity of the assignment under which the plaintiff claimed.

Undoubtedly the whole case presented a mixed question of law and fact; but a reference to the statute of 13 Eliz., Ch. 5, will at once shew in what that mixed question consisted, and how the two parts are and ought to be distinguished. The very statement of this according to its twofold character, keeping that distinction in view, goes very far, it appears to me, in settling the point before us.

The Judge, then, is to instruct the Jury, if he wishes to follow minutely and strictly the statute, that feigned covinous and fraudulent assignments are void in law,—that those assignments are so to be considered which have been devised of malice, fraud, covin, or collusion, to delay, hinder or defraud creditors of their just and lawful actions, to the hindrance of the due course of law and justice, and to the overthrow of true and plain dealing, —that no pretence or color, or feigned consideration, or expressing of use, or other such matter, will uphold them, if made with the aforesaid design; but he will add, that if indeed the assignment be made upon a good consideration, and bonâ fide, for both are essential, then they are valid. Such are the matters and the whole matters of law which he has to give the jury, under the statute. The question of fact which he then has to leave with them, for them alone to ascertain, is this: "Were these assignments of a feigned, covinous and fraudulent character, made with that purpose and intent, and with a colorable and feigned consideration; or, on the contrary, were they made bonâ fide and on a good consideration?"

But this question, like many others, depends not upon any one single fact or circumstance, but on many or a combination of facts. The motives of a party, we are told, [8 T. R., 530,] and very properly, must be looked to; for on this depends the consideration of its being fraudulent or not. But can those motives be at once ascertained from a particular part of the transaction, or would it not obviously require a due regard to every thing that took place. It would be as unjust to select one expression from many, and exclude the rest, in order to prove a fact from what was said, as to offer a single circumstance as conclusive evidence from which the character of a transaction was to be pronounced, without reference or regard to the whole *res gestæ*. Each circumstance may produce an inference more or less strong, as it may or may not be met by other facts which lead to other presumptions; but it is by weighing all, and balancing those where they are found in opposition, that the just conclusion can be obtained; and this it is the province of the jury to do; and this appears to me precisely the nature of the question before them, and of the evidence by which they had to decide it. Nor will the correctness of this general proposition be found less applicable to the case before us, by a view of the objections raised by the defendant. The first ground upon which these assignments are impeached, refers to the consideration; that it is not truly set, and is, moreover, greater than the amount of the debt due from Austin to the plaintiff. Now, these are themselves matters of fact which are to be first ascertained. But admit them to be so, do they necessarily shew that therefore the assignments were not made on a good consideration—that they were made mala fide, and are colorable and collusive; for if they do not necessarily shew this, the court cannot pronounce the assignment to be void. Are these matters, then, capable of no possible explanation? Can nothing be offered on the part of the plaintiff to account satisfactorily for all this? If the assignment is to be held fraudulent from this circumstance, it is at most but an inference; and shall the plaintiff be precluded from proving other circumstances which may weaken or destroy it? Nay, the defendant goes far beyond this; he cannot possibly ascertain these facts relative to the consideration upon which he relies, and from which he adduces the illegality of the assignment without investigating the whole transaction. That investigation discloses to the court other circumstances, which it sees, and which no reasonable man can but see, do very materially bear upon the point; and yet the defendant would have us decide, that with these circumstances the jury had nothing to do, and that

the court itself must pronounce on the main fact with regard to them. And what are these circumstances which might have such effect, but must not. In the first place it is shewn that the property, though nominally stated at a certain value, was in fact of much less. But, says the defendant, the plaintiff having agreed to take it at the sum named, is precluded from shewing this—is precluded from shewing that which is so material to the very point in issue, viz,, whether the assignment was made fairly or fraudulently. I do not see how that question could be decided without giving a proper attention to that fact. In the next place, the plaintiff shews that his own debt did not form the whole consideration—that the debt of other creditors, whom he assumed to pay, formed a part of it. Now, this again seems a very proper and legitimate subject of inquiry for the jury, as constituting a part of that by which the bonâ or malâ fide of the transaction was to be determined. That this took place without any communication with those other creditors for whom the benefit was intended, was, with other things, to be regarded in order to ascertain whether it was a mere color and pretence to cover Austin's property, or so much of it, from other creditors. But there was the positive oath of Austin that this was not the case, and other testimony to support it; and if that led the jury to a contrary presumption, as it appears to have done, can this court be called upon to say that the fact was clearly the other way—that the consideration was not good—that the assignment was colorable? Upon this point the language of Tindall, C. J., in Ansell v. Brown, [8 Bing, 91,] may be cited, though indeed it is equally applicable to every point in the case: "If in any case a doubt arises, as to the real value of the consideration or as to the real motive of the debtor in making the assignment, such question must be decided by the jury, who will determine whether it is a bonâ fide transaction or a mere collusion to evade the statute." The fact of the creditors who were to be benefitted by the assignment being ignorant of it, was also to be found in the case of Meux v. Sewell, and Ingles v. Grant, cited by defendant's counsel in the argument; but this does not appear to have been considered of any importance.—Secondly, we are next called upon to pronounce these assignments fraudulent and void, because possession did not follow them. Mr. Harris has qualified this in some measure. He insists that the possession should be immediate and exclusive, or, if the possession can be dispensed with because the transfer was notorious, such notoriety must be equally immediate. With regard to the notoriety, I confess I cannot well imagine anything more strong, and it is

certainly shewn to be very universal, although there were some things, such as the leaving the sign up, which, without the notoriety, *might* have given a different appearance to the case. The want of possession is much to be regarded as an index to the transaction, and if not explained might warrant the strongest presumption; still it cannot of itself conclusively show that the assignment was intended wholly as a cover, notwithstanding the vendor was left in possession the transaction might be most honest and bonâ fide; as on the other hand, though the property were actually handed over, the possession, as well as the transfer itself, might be colorable. As other facts would be brought forward in the latter case to show the real nature of the transaction, so with equal justice it ought to be in the plaintiff's power to do so in the former. The issue is not whether there was possession but whether the assignment was bonâ fide. Had the statute intended to have made all assignments void that were not accompanied by possession, it should have done so in express terms; and I do think it looks more like a new enactment than a construction of the old to decide that the want of possession *necessarily* vitiates the instrument; nor can I understand why, where possessson itself is not necessary to perfect the transfer of personal property, the absence of it alone should be deemed conclusive evidence of fraud, the statute itself not having noticed it. But I apprehend the question is now put at rest by the later cases on this point, which have all been referred to in the arguments. [3 B. & Ad., 490, 1 Ry. & M., 312, 1 B. & B., 511, 6 B. & C., 654, 8 Bing., 90.] They have left at least no doubt on my mind that this is but evidence, and not conclusive evidence for the jury alone to decide upon. Anything that tends to show the transfer covinous may be adduced in evidence for that purpose, and this may again be met by anything and everything that disproves it.

I come now to another objection of the defendant, which might at first seem to raise a question more proper for the decision of the court than the jury, though this, too, I am equally of opinion, belongs to the jury. It is said that the assignment is fraudulent, and we must so presume it, as it is of all Austin's property to some favored creditors to the express exclusion of Hill's estate. The right to prefer one creditor over another cannot be disputed, nor do I understand it to be; and yet it appears to me that this right necessarily extends to the whole length for which the plaintiff contends, and includes all that the defendant disputes. Where, indeed, is the limitation at which the debtor must stop in giving that preference, or where is the case to be

found that limits him at all. The authorities, as well as reason, support the proposition, that in giving this preference the debtor may part with all his property. In Munn v. Wilson, [1 T. R., 510,] Lord Kenyon says: "Putting the bankrupt laws out of the case, a debtor may assign all his effects for the benefit of a particular creditor." So in Eastwick v. Cailland, [5 T. & R., 420], Ashurst J., says there is no objection to a debtor preferring one set of creditors to another, unless in certain cases in the bankrupt laws, where a trader assigns over *all* his property to one or more of his creditors, he is thereby rendered unable to pay the rest of his debts or to carry on his business, and that is considered as an act of bankruptcy. But when the bankrupt laws do not interfere, a debtor may give a preference to particular creditors." Then as to the exclusion of Hill's estate, which is supposed to distinguish this case, every preference may and frequently must operate to the exclusion of the rest, and is frequently given for this purpose. What possible difference, then, can there be between doing a thing with an avowed object, or doing the same thing without stating the object, when it must necessarily be attended with the same result, and where the intention is just as apparent as if it had been avowed? Holbred v. Anderson [5 T. R., 235] goes the whole length which is necessary to support this case. There a warrant of attorney was given, which did and was intended to sweep away all the debtor's property from the hands of another creditor who was, at the very instant, about to take it under an execution. No avowed object could be made more plain; the preferred creditor was made acquainted with the intention, and the excluded creditor was wholly defeated by it. Can any case be more in point? or is any distinction to be drawn between a warrant of attorney and an assignment? Both, it will be recollected, are equally within the very terms of the statute of Eliz., and other cases of assignment have been decided upon the strength of this case. [3 M. & S., 371.] As the preference given in that was supported by the preference which an executor is allowed to extend to the creditors of his testator, Buller, J., asks, "whether the case of a judgment by confession against an executor which covers *all* the assets, and which is frequently given after another suit has been instituted by another creditor of the testator, did not govern this case;" as we may, I think, with the same reason ask, if that case does not govern the present. The reason that so much stress is laid in some of the cases, relative to the parting, by the debtor, with all the property, is this, that the greater suspicion of an unfair assignment is thereby excited. And in Hodgson v. Newman,

cited in the last case, Buller, J., says, that the bill of sale was not of certain goods at a stated price, but a general bill of sale of all the grantor's effects without any valuation of them. Whether such a fact would, at the present day, render the assignment absolutely void, may be questionable. But this is not like the case before us. The true question, I apprehend, in both cases would be much the same. From the assignment of all, or what is in reality all, of the debtor's property, does it appear that, after satisfying the legitimate object of the assignment, a surplus would remain for the benefit of the assignor in the hands of the assignee; in that case the jury might certainly deem the transfer covinous. But if, notwithstanding all the debtor's property was made over to one of his creditors, it appeared that it was not more than fairly sufficient to meet the debt which it was intended to secure, the colorable presumption is rebutted; and then what is left to shew the *mala fides* of the transaction.

I think, therefore, that the whole case was one of fact for the decision of the jury; and their verdict being fully supported by the evidence, we cannot disturb it. The whole case was submitted to them, as I collect, from the whole charge of the learned Judge taken together; and without saying anything on the amount of damages which rests so peculiarly with the jury to settle, I may add, that I do not see how any other verdict could well have been found than one for the plaintiff.

Rule discharged.

METZLER vs. HARVIE.

Easter Term, 1836.

This was a special case submitted for the opinion of the court. Harvie assigned to Anderson certain effects in trust to pay himself and some other creditors. Subsequent to those assignments, and previous to Anderson being summoned as an agent of Harvie by plaintiff under the absconding debtor's act, Harvie writes to him in favor of two other creditors, whose claims he wished to be paid out of the proceeds after payment of the debts under the assignment. Anderson, on receiving these letters, did not come under any written engagement to do so, but said "that without incurring any personal liability, he would, provided he had sufficient funds, pay the amounts as directed in the letters." It was decided that the proceeds of these effects in the hands of Anderson, (not being sufficient to meet the amount referred to in those letters,) could not be attached in his hands as the goods, credits or effects of Harvie.

A writ of attachment and summons was issued against John Harvie as an absent and absconding debtor, and John H. Anderson was summoned as his factor, agent or trustee, under the absconding debtor's act of this Province. A copy of the writ was served upon J. H. Anderson on the 1st April, 1834.

J. H. Anderson appeared in the term of Easter, 1834, and filed his declaration. Upon his examination, and after argument, the court adjudged that they had jurisdiction. The plaintiff, in Hiliary term last, recovered final judgment in this cause for £167 0s. 3d.

John Harvie and the firm of Harvie and Stamper, about the 20th March, 1834, assigned to J. H. Anderson all their real and personal property and effects to indemnify him for certain debts and liabilities incurred by him. After the payment of those debts and liabilities, and also of three other claims against Harvie, and after deducting the expenses of management, there was a balance in the hands of John H. Anderson of £20 4s. 7d After the assignment, and before the service of the process in this cause, J. H. Anderson received the two following orders or letters of instruction from John Harvie:

"*Mr. Anderson,*—

Under the peculiar circumstances in which Mr. Lawson is placed in reference to the £150, I do hope you will consider it as one of the first claims against my estate. As Mr. L's indulgence to me was entirely from the confidence reposed in what I had said to him, it is my distinct wish and desire that this claim be first considered.

Your's,

JOHN HARVIE.

Halifax, 22d March, 1834."

John H. Anderson did not come under any written agreement or make himself personally liable to pay the sum of £150; but considering it as an appropriation made by John Harvie, intended, if he incurred no personal liability, to comply with the direction to pay the promissory note held by Mr. Lawson, jr., after payment of his own debt and liabilities. After delivery of the note or order, and before the service of process in this cause upon J. H. Anderson about the 24th March, 1834, the following letter or document written by Harvie, and addressed to J. H. Anderson, was presented and shewn to him:

"*Sir,*—

John Leander Starr, Esq., having joined me by way of security and accommodation, and without any benefit or profit to himself,

in promissory note, for £200, and indorsed for me another note for £120, I do hereby authorize and request you to pay to him the said two amounts, making together £320, with interest thereon, out of any residue that may remain in your hands or under your control, of the various securities, stock, real estate, and debts, belonging to me or to the firm of Harvie & Stamper, held and of right claimed by you, under the assignment and judgment in your favor, or otherwise, after satisfying your own claims and personal liabilities for and against myself and the said firm. And likewise three other claims which you have promised, at my request, in the next place to discharge, so far as the aforesaid funds and securities will go, viz.: M. G. Black, Esq., £100; B. Smith, Esq., £100; W. Lawson, Esq., £150; with a small balance also due to the Tract and Temperance Societies; it being my wish that Mr. Starr should be protected from loss next after yourself and the parties above named.

I am, Sir, your obedient servant,

JOHN HARVIE.

To J. H. Anderson, Halifax."

The sums mentioned in this letter or document as due to Mr. Black, Mr. Smith, and the Tract and Temperance Societies, the said J. H. Anderson, at the request and by the direction of J. Harvie, had before assumed and paid; but the two amounts therein referred to as due to W. Lawson and Mr. Starr, formed no part of liabilities in the assignment, and had never been assumed by J. H. Anderson; nor had he become in any manner personally liable or responsible therefor before the above letters. The letters or documents in question were left with J. H. Anderson. If the amounts to Mr. Lawson and Mr. Starr were paid, no balance would remain in the hands of J. H. Anderson; but otherwise, there was a balance of £20 14s.

WILKINS, J.—I feel no difficulty in saying that Anderson should appropriate the balance in payment of the two orders. He had no funds of the debtors in his hands after the orders were drawn. The case of Crawford v. Gurney [9 Bing., 372,] is decisive on this point.

HILL, J.—The courts of law in England have gone great lengths in supporting transfers of choses in action both upon legal and equitable grounds, even in cases of bankruptcy, which are much stronger than any case that can arise under our statute relative to insolvent debtors; and wherever a legal or equitable

transfer has been made, the common law courts have endeavored, and particularly of late, to give effect to them without compelling the assignee to go into chancery. The case of Crawford and others, assignees of Streather v. Gurney [9 Bing., 372,] is decisive upon this point. The court there held that an equitable assignment of a debt was good in a court of law, and so clear were they as not to require to hear the counsel who were to have argued in support of the assignment. The language of Bosanquet, J., is this: "If Jolly, (the party to whom the order was given,) had any right in law or equity against Streather, (the party giving the order,) upon the order, the assignees cannot recover, I am of opinion that he had a right in equity to claim a formal assignment. The cases of Bailey v. Culverwell [8 B. & C., 448,] and Carvalho v. Burns, [4 B. & Ad., 382,] recognize the same doctrine that effect will be given to equitable transfers. Now, if in the case of bankrupts, where the assignees take under a statute, and hold as trustees for the benefit of all the bankrupt's creditors, the courts thus decide, much more will we decide so in this case, where the plaintiff has no property vested in him by the operation of a statute, and where he comes to take the whole in exclusion of the other creditors.

Then the question here is, has an equitable assignment been made of these funds by Harvie to Lawson, and could the latter, according to the language of Bosanquet, J., in Crawford v. Gurney, compel Harvie in a court of equity to give him a formal assignment if any more formal one were necessary. There can be no doubt that a court of chancery would so order. The language of the case is, that Anderson considered the funds that were to come into his hands, if any did come, as appropriated to the payment of the order given by Harvie in favor of Lawson. It is true that he says he declines becoming personally liable; but if the funds were so, that is sufficient,—if they came into his hands, whatever he might have considered, a court of equity certainly, and perhaps even a court of law, would have compelled him to have paid them to Lawson. Here no dissent was given—there was no rejection and repudiation of the order. In the case of *ex parte* Alderson, [1 Mad. 53,] there was no actual acceptance of the order, but it was retained to meet funds when they should come in. So here the order was not returned, but retained by Lawson until Anderson should be in funds to pay it; and it is clear that Anderson, Harvie and Lawson looked to these as the funds out of which Lawson was to be paid. The case of Williams v. Everett, [14 East., 581,] proceeded entirely upon the ground that the defendants *refused*

to act upon the letter of Kelly, although they admitted its receipt; but here Anderson, far from refusing, expressly assents to act upon the order, and would, as he says, have paid the money over to Lawson, had not Metzler's attachment intervened. Under our act, the funds attachable must be absolutely, not conditionally, those of the absconding debtor. These funds were neither absolutely nor conditionally the funds of Harvie. They were appropriated—they had passed out of him, and he was irrevocably bound in equity to throw no impediment in the way of Lawson's receiving them, and a court of equity would have prevented any attempt on his part to lay hold of them. The attacher has no right to step in and abrogate equitable rights existing between the absconding debtor and others of his creditors, having, to say the least of it, as much equity as the attacher. Without the statutes compel us, why should we afford facilities to the plaintiff to secure his whole debt in exclusion of others? That part of Anderson's declaration as to his refusing to become personally liable, appears to me nothing more than a refusal to accept the order in writing under an impression perhaps that he might thereby be held liable, though funds might not come to his hands, but what passed bound him undoubtedly in equity to pay when in funds. This cannot be disputed, for all the authorities are that way. Then, if in equity, Harvie would be bound to give a more formal assignment if necessary,—if Anderson would, when in funds be bound to pay Lawson, supposing this claim had not been made its appearance—that is quite sufficient under the authority of Crawford v. Gurney for this court to hold the plaintiff not entitled to recover. The payment of this order was not to depend upon any contingency except that of their being funds, as was the case in Carvalho v. Burns. It was not to be paid, provided other sources of payment should prove unavailing, but it was absolute—unconditional. In *ex parte* Alderson, the order rested upon the same contingency as this, that is to say, the receipt of funds. Then, from this case, it appears that the funds were equitably appropriated before the issuing of the attachment, and upon that ground alone I found my opinion, that this plaintiff cannot disturb the equitable rights under which all the parties acted, and that there must be judgment for the defendant.

BLISS, J.—My mind has fluctuated a good deal since this case was first mentioned. At the former argument, I confess that I was disposed to consider that the process against Anderson, the agent, would take effect upon the funds in his hands, so as to make them available to respond the plaintiff's judgment against the absconding debtor, his principal. A more attentive con-

sideration of the case itself very much weakened that impression; and the authorities which have now been referred to, but which were unnoticed in a great measure in the first argument, have led me, after the fullest enquiry, to an opposite conclusion.

If the letters which were addressed by Harvie to Anderson, were merely those of instruction, and were, up to the time of the process under the absconding debtor act, still revocable by the former; then, as in the case of bankruptcy, the process against the agent may be considered a revocation by operation of law, [3 Mer., 664,] and the property in his hands must be held bound by that process to respond the plaintiff's judgment against Harvie; because in such case it was clearly the property of Harvie in the hands of his agent, Anderson. But, on the other hand, if these letters are not to be considered as merely directory, but amount to an appropriation, by Harvie, of the expected proceeds of his property in his agent's hands, and were no longer, when the process issued, countermandable by Harvie, then they were not subject to the process of the plaintiff, because they could not then be the goods, effects or credits of Harvie, in the hands of Anderson,—who, *quoad* these, was no longer the factor, agent, or trustee of Harvie, but who, thenceforward, must be deemed the agent or trustee of the party in whose favor such irrevocable appropriation had been made. The Counsel for Mr. Lawson, both in the former and at the last argument, contended that the plaintiff could not, by his process, bind these effects, if there even were an equitable assignment of them to Lawson, or such a right acquired by him as would be supported by a court of equity. Mr. Wilkins appeared to admit that, still the assent of the agent would be necessary to perfect the appropriation made by his principal; but the Solicitor General argued that the assent was unnecessary. If we were called upon to decide this case upon this point, and were obliged to exclude from it the fact of any assent on the part of Anderson to the directions contained in the letters of Harvie, I should have thought it a case of more difficulty, and should pause before I pronounced such an opinion which seems to me contrary to the current of cases which have been decided in the courts of law. But the case upon which our judgment is to be given, furnishes, I conceive, quite enough to meet the doctrine contained in the authorities and established under the facts set forth, such an interest in Lawson as must be held irrevocable by Harvie, and consequently by the process of law. I shall now turn to some of the authorities in support of this position. In Crawford, assignee of Streather v. Gurney, [9 Bing, 372,] Streather, to whom

the defendant was indebted in a balance not ascertained, and who was himself indebted to Jolly & Sons, gave the latter the following letter addressed to the defendant: "I shall feel obliged by your paying to Messrs. J. Jolly & Sons, the balance due to me for building the Baptist College Chapel, &c., and their receipt shall be a sufficient discharge to you." Jolly & Sons inclosed this letter to the defendants, requesting to know when such balance would be in course of payment; to which the defendant replied, that he should be happy to make the payment to them instead of Streather, as requested, but was ignorant then of the amount and of the time it would be payable. Streather, after this, became a bankrupt, and assignees brought an action against the defendant to recover the balance due him. The court held that the assignee could not recover. Tindal, C. J., remarked: "*that the defendant had given his assent to the assignment—an assent which, it may be observed, was wanting in many of the cases referred to,*—that these circumstances amount to an equitable transfer of the debt due from Gurney to Streather; for Jolly might have gone into a court of equity to compel a formal assignment, and no answer could have been given to such an application; and that being an equitable assignment, the assignee must stand in the same situation as the bankrupt." The language of Bosanquet, J., is still more express: "If Jolly had any right in law or equity against Streather, upon the order, the plaintiff cannot recover." Alderson, J., referred to the case of Hodgson v. Anderson [3 B. & C., 842,] the decision in which is thus expressly stated by him, and is conclusive upon the point of revocation: "Although a creditor had a right to insist on payment of his debt due to a third person, he had no right to revoke that order, *provided there was a pledge by the person to whom the authority was given, that he would pay the debt according to the authority.*" The case of Williams v. Everitt [14 East., 582,] is, in some respects, like the present in one particular, which, however, did not enter into the judgment. The analogy was striking, but upon the main point now under consideration, it falls far short of the case before cited. Kelly remitted bills to the defendant, with directions to apply the proceeds in payment of certain of his creditors, (among others, £300 to the plaintiff,) who should produce letters of advice from him on the subject. Before the money was received on these bills, the proceeds were attached in the hands of the defendant, under the process of foreign attachment, but the decision of the case did not turn at all upon that point. The plaintiff brought his action for money had and received. It appears in evidence that when the plaintiff

applied to the defendants before the bill became due, representing that he had received a letter from Kelly, directing £300 to be paid him out of the bills remitted, and proposed to them an indemnity if they would endorse or hand over one of the bills to that amount, the defendants refused to do so or to act upon the letter, although they admitted the receipt of it, and that the plaintiff was the person to whom the sum in question was directed to be appropriated. The court held that the plaintiff could not recover, because there was no assent on the part of the defendant to hold the money for the purposes mentioned in the letter, but, on the contrary, an express *refusal* to the creditor to do so,—that no *agency for the plaintiff ever commenced*, but such agency was repudiated by the defendant in the first instance; and therefore that upon no principle of law could the defendant be said to stand in such privity in respect of the plaintiff that the sum claimed could be said to be money had and received to the plaintiff's use. The decision turned therefore expressly upon the form of action; and the case of Wharton v. Walker, [4 B. & C., 163,] cited at the first argument, was decided upon the same grounds. But in this case of Williams v. Everett, Lord Ellenborough lays down, in very distinct terms, the rule of law which I think applies to the present case, and governs it. He says: "It lies with the remitter to give and countermand his own directions respecting the bill as often as he pleases, and the person to whom the bill is remitted may still hold the bill till received, and the amount when received for the use of the remitter himself, *until, by some engagement entered into by themselves with the person who is the object of the remitter, they have precluded themselves from so doing, and have appropriated the remittance to the use of such person; after such a circumstance, they cannot retract the assent they have once given, but are bound to hold it for the use of the appointee.*" This doctrine is precisely similar to that of Hodgson v. Anderson, as stated by Alderson, J., in Crawford v. Gurney. The case before us differs from each of those in that very important circumstance, which relates to the conduct of the agent upon the order of his principal being produced to him. He has not simply agreed with the appointee to follow them as in Crawford v. Gurney, nor has he refused to do so as in Williams v. Everett. He has taken, as it were, a middle course, between both, certainly much more inclining to the former, for the case states that when the first letter from Harvie was delivered by Lawson to Anderson, the latter did not come under any written agreement or make himself personally liable to pay the said sum of £150; but "*he*

considered it as an appropriation made by Harvie, and intended, if he incurred no personal liability, to comply with the directions contained in the said J. Harvie's note, and to pay the promissory note held by Lawson after payment of his own debt and liabilities in case there were funds for that purpose." And it is further stated, after the second letter was shown to Anderson, written in favor of Starr but repeating his former directions respecting the debt to Lawson, he was requested to accept the same, but refused so to do, stating "that he would accept no order to pay any further sum than he had already accepted, and become liable to pay, but that, *without incurring any personal liability, he would, provided he had sufficient funds, pay the amounts as directed in the said letters.* This conditional undertaking the plaintiff maintains is sufficient to vest an irrevocable interest in Lawson. That Anderson did not thereby become personally liable, and that it could not be enforced at law. Can there be no valid and binding assent given by an agent to the orders of his principal, except a perfectly unconditional one? Must it be one that cannot fall short of a personal liability, or be none at all? Looking at what did take place, it certainly appears that, excepting only his being made personally liable, which an agent might naturally be most anxious to guard against, a full and unqualified assent was given by Anderson to the parties in whose favor these orders were made, that he would comply with them. Does, then, this stipulation respecting his personal irresponsibility so neutralize or destroy this assent, that, coupled as it is with this condition, it could not be enforced against him in favor of Lawson? The intention of Anderson may easily be understood. It was at least indifferent to him who obtained the preference among Harvie's remaining creditors, and he was willing, indeed he could not with propriety refuse to pay those to whom Harvie gave a preference, provided he himself was involved in no difficulties by it. Perhaps he may have anticipated what from Harvie's conduct was probable, the very circumstances which have occurred, and may have feared that if he promised unconditionally to pay these orders, in case he had funds, that this would not protect him from legal liabilities at the suit of others, and with proper caution he stipulated for an exemption from all personal liability. He does not refuse to pay, if he shall have funds hereafter, out of which it may be done; on the contrary he does promise, in that event, to pay, provided he could do it with safety to himself. His answer, in fact, amounts to this: I will not bind myself, but I will bind the property of Harvie as far as I can do so without

binding myself, and this was all that Harvie's orders did or could require, and the assent is therefore given as fully as the appointee could urge. It meets then the language of Alderson, J., before cited: "It is a pledge by the person to whom the authority is given, that he would pay the debt according to the authority," and the authority, then, was no longer revocable Anderson being in a situation which prevented him from altering it, because, as the case states, he considered it an *appropriation by Harvie, and intended out of the funds to pay the orders*, thus agreeing, even in the letter, with the rule stated by Lord Ellenborough, in Williams v. Everett. It cannot, I think, admit of a question, that such a conditional undertaking might be inferred, provided the parties sought only to make the funds in the hands of the agent available for that purpose, and could shew that there were such funds which could be paid to him with perfect safety by the agent, without the risk of personal liability. The responsibility which the agent would incur, by refusing to fulfil the contract, according to his own terms and stipulation, when it might be done safely, is not the exemption from liability against which he could have meant to guard himself; for then he might retain these funds, though he incurred no possible hazard, and put the party entitled to them at defiance. It would be enough, under the case of Crawford v. Gurney, to say, that his undertaking might be enforced in equity; but I should not suppose it necessary to resort thither, as I think a special action on the case might be sustained at law upon this undertaking, if the agent refused to pay the money when no personal liability interfered to prevent his doing so; though it is not necessary to decide this point. *Ex parte* South shews [2 Mad. 53, 3 Swanst, 392,] that courts of equity carry the doctrine further than the courts of common law, and that if a creditor gave an order on his debtor, *and that order is shewn* to the debtor, it binds him. As we are now in a court of law, I prefer resting my opinion on authorities from those courts which I think support it. At the same time I must add, that Lord Eldon appeared to think that the mere holding of an order by an executor until the assets should enable him to make payment, would, even in the courts of law, amount to such an assent as would bind him. Carvalho v. Burns was referred to by the plaintiff's counsel, as an authority in his favor. The decision in that case went quite beside the present question. Littledale, J., in pronouncing it, puts the assignee's right to recover upon this ground, that they take all the personal estate of the bankrupt in which he was beneficially interested, and that the contract under

which the defendant claimed, did not operate as an equitable assignment of the whole or any specific part of the bankrupt's property *at that time or before the act of bankruptcy;* it depended on certain contingencies before it could be ascertained; and till then the legal and equitable interest remained in the bankrupt, and therefore passed to his assignees. And the decision pronounced by Lord Lyndhurst, [1 Ad. & Ell., 803,] in the same case, in the Exchequer Chamber in Error, was on the same grounds. This distinction between the plaintiff and the assignees of the bankrupt was properly made at the argument,—the latter take all the effects of the bankrupt in which he was beneficially interested, but they take it, too, subject to all the beneficial interest of others, though the mode of enforcing these rights belong to a court of equity; and in this case, therefore, it was not necessary to decide whether the assignees would not take as trustees for the defendant under the alleged assignment. But in this case, under the absconding act, it appears to me, we must decide the question; for the plaintiff claims, under his process, to bind the property for his own particular benefit—to respond his own judgment—and to exclude any beneficial rights which others may have acquired. The agent in whose hands the property is placed, submits himself to the decision of the court. It seems to me, with respect to the question, we are exactly in the situation of a court of equity who would be called upon to decide between the assignee of a bankrupt and a creditor under such an assignment. The attaching creditor takes the property of the debtor in the hands of his agent, he must take it *just as it is in his hands;* and, therefore, subject to all the liabilities and rights which others had acquired in it, I cannot see how he can acquire rights beyond those of his debtor by this process of law, or divest the rights of others in that property. We are therefore bound to inquire into the situation of all the parties as they are disclosed by the agent. This informs us that Lawson had acquired, as I think I have already stated, a right to the proceeds in the agent's hands, to the extent of £150, which Harvie himself could not recall, and which therefore the process of law did not revoke or put an end to; and, consequently, Anderson cannot hold the proceeds in his hands to respond the plaintiff's judgment until the claim of Lawson is first satisfied out of them.

RALSTON vs. BARSS, ET AL.

Where a Seaman who has shipped for a whole voyage is injured in the service of the ship, and is left at an intermediate port, he is entitled to wages for the whole voyage.

Where the master furnished such seaman at the intermediate port with surgical aid and with maintenance, he cannot set off the sums expended therein as against those wages.

Quære.—Whether the master is bound to furnish such assistance?

This was a special case. The plaintiff was a seaman on board of a ship belonging to the defendants, on a voyage from New York to Port Medway, N. S., thence to Liverpool, England. While the ship was at Port Medway, and the plaintiff was engaged in loading her, he received an injury by which his leg was broken, and he entirely disabled from further duty; and his health rendering it necessary, he was put on shore, and before he could with safety be removed again on board, the ship sailed on her voyage to Liverpool, where she subsequently arrived. The plaintiff was taken care of on shore by the defendants, who furnished him with board and surgical attendance, and when able to be removed he was sent by them, with his own consent, to the poor house at Halifax, where he has since continued. The plaintiff now claims his wages for the whole voyage. The defendants dispute this claim beyond the amount of the expenses incurred in the plaintiff's cure, which are stated to exceed the wages of the whole voyage.

HILL, J.—This case, though the sum in dispute is small, involves a question of great importance and considerable difficulty. After the best consideration that I have been enabled to give it, I cannot say the opinion I have formed is entirely satisfactory to my own mind.

The first point for disposal is, whether the plaintiff, under the circumstances of this case, is entitled to the full amount of his wages from the time of his shipping (15th April, 1835), until the voyage on which he shipped terminated, 2nd July, notwithstanding he performed no duty on board the ship after the 8th of May; and I am of opinion that the defendants ought to pay him the full amount of the wages.

Merchant seamen have always been considered as a meritorious and useful body of men, on whose labor and exertions the prosperity of every mercantile state rests, and all contracts touching them have been construed favorably towards them.

The contract between the master and seaman is a peculiar one, referable to, and to be construed by, the law and custom maritime. These impose severe duties upon the sailor, compelling him even to peril his life for the benefit and safety of the ship, but they also look with favor on him if he has faithfnlly performed or endeavored to perform his duty. To ascertain, then, the right of the plaintiff to recover the full amount of his wages, we must look to the contract, and construe it according to the law merchant and the custom of Maritime States. The case states that the plaintiff received the injury which deprived him of the power of continuing his labor in the service of the ship, and while he was employed in loading her. Now, in Miege's Laws of Wisbuy, 16 and 19, it is stated: "In case a mariner falls sick, and that it is thought convenient to carry him to shore, the law is that the said mariner shall be there kept and maintained as if he were on board, and attended by a ship boy. If he recover, his wages shall be paid to him *to the full due*, and if he dies his wages shall be paid to his widow or to his next kin." It is not certainly said here that wages shall be paid up to the termination of the voyage for which the mariner shipped; but it does appear to me that the words "shall be paid him to the full" can mean nothing else than his wages for the whole voyage. If it was intended that his wages up to his leaving the ship should be paid, then the passage would have so expressed it; but the expression is general and strong—his wages shall be paid "to the full." Here we see also how careful these laws were to protect and guard the seaman. He was not to be left on shore in a sickly and helpless state, unprotected; but he was to be maintained and attended on in his sickness. Malynes, who himself was a merchant, in his Lex Mercatoria, treating of the duties of masters and merchant ships, and quoting the Laws of Oleron, has these words: "And if a mariner falls sick, the master shall cause him to be laid in a house, with sustentation necessary and usual in the ship, but shall not stay in the ship until he be healed; and when he recovers health shall give him his hire; or if he die, shall give it to the wife or nearest friends. But if the mariner be not hurt in the ship's service, the master shall hire another in his place. So far back, then, as 1686, the opinion was, that if a mariner fell sick, or was hurt in the service of the ship, which prevented him from doing his duty on board, he was entitled to maintenance on shore, and his wages. The extract of Malynes from the Laws of Oleron does not, it is true, fix the time to which the seamen would be so entitled, but it does shew that he was entitled to wages for some time while

he was maintained on shore, and it does not shew at what period the right to transfer ceased. In Cutten v. Powell, [6 T. R., 320,] which was an action for seamen's wages, Grose J., in giving his opinion, says: "The Laws of Oleron are extremely favorable to seamen, so much so that if a sailor who is agreed for a voyage be taken ill and put on shore before the voyage is completed, he is nevertheless entitled to his whole wages after deducting what has been laid out for him." Mr. Justice Grose here quotes the laws of Oleron, with approbation, as favorable to seamen, and I feel disposed to the same favorable consideration and construction of these laws. The case of Chandler v. Grieves, [2 H. Black, 606,] cited in the note to Greener v. Meyer, appears to me an authority directly in point. The voyage in that case was from London to Honduras—thence to Philadelphia, and thence back to England. At the Bay of Honduras the plaintiff, from a blow received on board, was entirely disabled, and was put ashore at Philadelphia, and the wages were paid him to the time he was put ashore. Lord Loughborough, who tried the case, was of opinion at the trial, that as the plaintiff had not performed the whole voyage, though without any default on his part, he was not entitled to wages for the whole. The jury gave wages up to the time the ship *left* Philadelphia. Bond, Serjt., on shewing cause against a rule to set aside this verdict and grant a new trial, contended that the plaintiff was entitled to wages for the whole voyage—first, because by the common law no contract for wages was apportionable; secondly, because, in particular, by the law marine and usage of the sea contracts for seamen's wages, such wages could not be apportioned; and he quoted, among other authorities, Malynes's Lex Merc., and Meige's Laws of Oleron, observing that these were received by all the nations of Europe. The court said that clearly the law marine ought to be followed in the construction of the contract, and before coming to any decision, they directed an enquiry to be made in the court of admiralty whether, according to the usage there adopted, a disabled seaman in similar circumstances would be entitled to wages for the whole voyage, or only up to the time when he was so disabled. On a subsequent day the counsel for the defendants stated that he had made the enquiry, and that in every instance there to be found, a seaman disabled in the course of his duty was holden to be entitled to wages for the whole voyage, though he had not performed the whole. The rule obtained by the defendant to set aside the verdict was then discharged. The court, in this case, adopted, recognized and acted upon the practice of the admiralty, or the law maritime,

or they must have made the rule absolute. The jury had found contrary to the charge of the court, and there can be no doubt that if the jury had found for the whole wages, instead of taking the middle course, the verdict would have been sustained. Indeed the same principle that would have sustained the one, would have sustained the other, viz., the right of the seaman to wages beyond the period when he was disabled from performing his duty. 2 Danes Abr., 480, was cited at the bar in support of the right of the seaman to his full wages; the words are: "A seaman is sent out of a ship on special service—is taken and made a slave—falls sick, &c., his ransom, care, and expenses, are to be paid by the master or owner, as also his full wages for the voyage." And Kent, in his Commentaries, [3 Kent's Com., 186,] not only quotes it as the practice of the English Admiralty, but as obtaining generally to allow full wages though the whole voyage may not have been performed. "A seaman" he says "is entitled to the whole wages for the voyage, even though he be unable to render his services by sickness or bodily injury happening in the course of the voyage and while he was in the performance of his duty. This is not only the invariable usage of the English Admiralty, but a provision of manifest justice pervading all the commercial ordinances." Chancellor Kent, no doubt, in referring to the practice of the English Admiralty, had in view the case of Chandler v. Grieves, and intended to apply his observations as well to cases of sailors leaving the ship and being put on shore, as to their remaining in the ship. If the plaintiff in the case before us had remained in the ship during the whole voyage, his right to full wages is hardly doubted; and I can find no authority or reason for holding him disentitled to them in consequence of his being put and left on shore, but rather the reverse,—for in the one case the presence on board of a sick seaman might, and doubtless would, be very inconvenient to the master and mariners, and in the other case they would be free from such inconvenience. In upholding and protecting the interest of seamen, we best subserve the interest of the mercantile world who employ them; for what can be a greater inducement to a sailor to enter the merchant service, and faithfully to perform his duty therein, than the knowledge that if he should be disabled in the performance of his duty in the course of a voyage, he is still entitled to his full wages. This unfortunate plaintiff, while occupied in a service calculated to induce injuries of the description he received, has his leg broken. Is it good policy? is it for the maritime interest that he shall be turned on shore in a foreign country, and lose his wages for the rest of the

voyage? On the whole, therefore, upon this part of the case I think the plaintiff is entitled to recover the whole of his wages, amounting to £9 7s 6d.

But another question of more importance and difficulty presents itself. Supposing the plaintiff entitled to full wages for the voyage, can the defendants set off as against these, the expenses incurred by them in the maintenance and care of the plaintiff after he left the ship and was put ashore; or, in other words, is the master bound to provide sustenance and aid on shore to a seaman situated as the plaintiff? Were it necessary to come to a decision upon this point, I confess I entertain a strong leaning and inclination in favor of the right of the seaman to such maintenance and medical aid. We shall, however, be able to dispose of this case without deciding on this right, and leave ourselves unfettered upon a seemingly unsettled point. I would throw out, however, that the laws of Oleron and Wisbuy to which I have already referred, would, I think, sustain the view I at present take of the question. The Laws of Wisbuy, as quoted by Viner, [Viner's Abrid., Mariner's Wages, F.] say: "If a mariner being ashore about the master's or ship's business, happen to be wounded, the ship shall be at the charge of his cure; but if he went ashore for his pleasure, he shall not be cured at the expense of the master." Again: "In case a mariner falls sick, and that it be thought convenient, (as in the case before us,) to carry him to shore, the law is that the said mariner shall be there kept maintained as if he were on board and attended by a ship boy. If he recover, his wages shall be paid him to the full." The mariner, then, is to be kept and maintained on shore, and is to be attended by a ship boy. He shall not be left without support or attendance in his sickness. In the margin, Viner adds this note from Meige's Laws of Oleron: "Or else, (referring to the attendance of the ship boy,) hire a woman to attend him. He shall likewise give him such diet as is used in ship, and the same quantity that was allowed him when he was in health, unless it please the master to allow him more." Molloy, book 2, c. 3, § 5, cites this passage from the laws of Oleron: "If mariners get drunk and wound one another, they are not to be cured at the charge of the master or ship, for such accidents are not done in the service of the ship; but if any of the mariners be any ways wounded, or do become ill in the service of the ship, he is to be provided for at the charges of the ship; and if he be so ill as not to be fit for travel, he is to be left ashore, and care to be taken that he hath all accommodations of humanity administered to him; and if

the ship be ready for a departure, she is not to stay for him." The spirit—the letter of these quotations, in my mind, appear to be in support of the position that the master is bound to afford sustenance and medical aid to a seaman who has received, in the service and duty of the ship, any injury or wound that prevents his helping himself. The laws of humanity themselves would seem to revolt at the idea of this unfortunate seaman, with a broken leg, being thrust on shore amongst strangers, in a strange land, without aid and without comfort; and the law of England in no department of it upholds any principle directly at variance with the laws of humanity. It may be asked, until what period is the support and medical aid to be offered. I answer at all events until the termination of the contract between the parties. Then the hardship of imposing such a burden upon the master may be urged, but this is incident to the peculiar situation of the contracting parties. The seaman undergoes all hardships and dangers by sea and night—at home and in foreign climes, for the benefit of the owner. He looks naturally to the ship and his commander as his refuge and home in the hour of peril and sickness; and how much harder would it be on the sailor to permit his being turned adrift without aid, than upon the owner being compelled to afford it during the continuance of the contract. The 20 Geo. 2, Cap. 38, has been thought to militate against the right of seamen, but it does not, in my mind, bear upon the question, or at least affect the right. It is "an act for the relief and support of maimed and disabled seamen, and widows and children, of such as shall be killed, slain or drowned in the merchant service." The object of this statute was to provide a fund for the permanent relief of the person named in the title; but as I apprehend it left the right of the sailor to support and medical aid abroad, while the voyage was not terminated, untouched. The sailor was bound to pay so much per month towards the fund contemplated by the statute, and in consideration of such payment he was entitled to certain advantages and relief under it. But there was no intention of enacting any matter interfering with the then existing rights between master and mariner.

Our decision, however, may be safely rested on the ground that as the defendants have voluntarily provided the medical aid and attendance on shore, they shall not now be permitted to deduct the expenses thereof from the wages due to the plaintiff. The case does not state any request made by the plaintiff to the defendants for the board and surgical aid; they appear to have been provided voluntarily. There was, I think, a moral obliga-

tion upon the defendants to make this provision; the dictates of humanity itself would seem to declare against this seaman, injured severely in the ship's service, being put on shore without any obligation on the part of the master to look after him in his illness. The defendants felt the force of this obligation, and obeyed its dictates; and even admitting there was no legal liability, yet if there was a moral one, and the money has been paid, it cannot be recovered back. In Bize v. Dickson, [1 T. R., 285,] Lord Mansfield says: "The rule has always been, that if a man has actually paid what the law would not have compelled him to pay, but what in equity and conscience he ought, he cannot recover it back." I think the defendants were bound in equity and conscience to furnish the aid mentioned in the case, to the plaintiff; and having done so, they shall not be permitted to open the transaction and recover back the money paid. There does not appear in the case to have been any intimation given at the time to the plaintiff that he was to be held responsible to repay the defendants the sum laid out, or that they were to be deducted from his wages. Upon the statement annexed to the case, it appears that the whole amount of the wages due the plaintiff would not cover the sums claimed by the defendants for the expenses incurred in board and surgical aid, the amount of the former being £9 7s. 6d., and the latter £13 1s. 6d., leaving a balance in favor of defendants of £3 13s., which sum the defendants would now, as plaintiffs, be entitled to recover back from the present plaintiff, unless this payment shall be held as one made voluntarily and upon a good moral consideration. Indeed the defendants stood in no other light than as plaintiffs seeking to recover against the sailor a sum of money paid without his request or desire—paid by a master for his servant under peculiar circumstances, and without even a hint that the seaman was to be ultimately held responsible to refund. The surgeon was called in by the defendants themselves, and was probably their family surgeon; and the nurse was employed by them. A master is held not to be liable to furnish medical aid for his servant, but if the master voluntarily calls in his own physician, and directs one of his own servants to administer to and attend on another servant in sickness, no case can be found authorizing the master to deduct from the wages of the sick servant the expenses incurred. It was a free act—generous if you will—of the master, but the law will not suffer that to be turned into a contract, which, in its origin, was not intended as such. But the Laws of Oleron, to which I have referred, adverting to the diet that a master is bound to furnish

a sick seaman ashore, say: "The seaman shall be allowed the diet of the ship, unless the master please to allow him more." The master, in this case, was pleased to allow the sailor beyond the ship's diet, and there is no authority for permitting this surplus to be made a matter of offset. According, however, to the defendants' doctrine, they should not allow even the ship's diet while the sailor was ashore, for the whole charge for board is made. On the whole, therefore, I am of opinion that the plaintiff is entitled to our judgment for £6 17s. 6d.

BLISS, J.—(after stating the case.)—The question intended to be raised by the case, is this: "Whether a seaman, who in the course of a voyage for which he has shipped, and while at an intermediate port has, in the actual service of the ship, become disabled from doing duty, and from proceeding further on his voyage, and has thus necessarily been put ashore, can recover the whole amount of the wages for the voyage for which he shipped, (that voyage having been performed by the ship;) and can also further claim to be cured of the injury thus received, at the expense of the ship.

Though the sum in dispute is inconsiderable, the principle involved in this case, is, as I view it, of some importance, for it concerns the whole shipping interests of the great commercial nation of which we are a part; and though the effect of our decision is of course restricted to ourselves, yet even thus it may well call for much consideration since it is to be viewed on the one hand in reference to the liabilities of owners of ships, and on the other to the rights of a hardy and meritorious class of persons, whom policy, humanity and justice, alike commend to our protection.

The first remark that has occurred to me in looking into the subject, arises from the insufficient aid with which we are furnished by those authorities to which we properly resort, and by which alone we can be governed. We have been referred to the work of an eminent lawyer of the United States, from which it would appear that this question had been fully settled in that country by a judge of great reputation and of abilities well qualified for the task. [3 Kent, Com. 142, cites judgment of Judge Story] We must always be happy on all occasions to avail ourselves of such guides in our researches, and to profit by their acknowledged talent and learning. But even if we could recognize the authority of that decision, we ought first to have the case submitted to us at large, (and I am not aware of its being within reach), that we may know what are the precise grounds upon which it is founded, and how far they are appli-

cable to ourselves. The English authorities are strikingly deficient on the subject, though it might be supposed that the question would have been of frequent occurrence and have long ago engaged the attention of the court, yet I do not find this to have been the case; and what is scarcely less singular, the writers on maritime law, whose observations upon it appear so immediately called for by matters closely connected with it, pass it by with little or no advertence. Such being the case, I feel no hesitation in avowing that I have not wholly succeeded in freeing my mind from the difficulties which I think attend it.

With respect to the first branch of the question—the right to the wages of the whole voyage, the case of Carvalho v. Greaves, [2 H. Black, 606, note], seems to have settled that in favor of the plaintiff, though that case did not expressly decide that a sailor is entitled to recover the wages of the voyage where he has voluntarily, though from disability, left the ship; for in that case it is stated that the seaman was put on shore at Philadelphia, and there left, his wages being paid up to that time, and this, it is evident, was not with the concurrence of the seaman. And in Beale v. Thompson, [3 B. & P., 419,] Chamber, J., speaking of this, says: "the conduct of the master was totally unjustifiable. He ought to have kept the seaman, and brought him back to the place where he first took him on board—he ought to have brought him home." The court held that the mariner was entitled to wages during the whole voyage, the ship having earned freight. The court, therefore, would seem from this to have decided that the seaman having been thus improperly put on shore, he could not be deprived of the right which he would have had if he had continued on board—that is to his whole wages. But still, when we find that it is stated to have been the invariable usage of the admiralty, to which an enquiry had been directed by the court before its decision was given, and on which it probably proceeded, that a seaman, disabled in the course of his duty, was entitled to wages for the whole voyage, *though he had not performed the whole*, we may, it appears to me, safely extend that decision to the case now before us, and thus in accordance with it, dispose of that branch of the subject.

But it is on the remaining point—the claim of the seaman to be cured at the expense of the ship, that my difficulties arise, and both text book and authorities seem deficient. Of modern writers, Holt leaves the point unnoticed. Abbott cites indeed the Laws of Oleron, of Wisbuy, and of the Hansetowns. He says: "By the ancient marine ordinances, if a mariner falls sick

during the voyage or is hurt in the performance of his duty, he is to be cured at the expense of his ship;" but he adds not a word of comment, nor can we collect his own opinion as to this forming part of the present maritime code of England. The Laws of Oleron on this point, as cited by Grose, J., in Cutler v. Powell, [6 T. R., 325.] are, however, somewhat different in their import. He says: "The Laws of Oleron are extremely favorable to seamen, so much so that if a sailor who has agreed for a voyage be taken ill and put on shore before the voyage is completed, he is nevertheless entitled to his whole wages, *after deducting what has been laid out for him.*" We are told at the argument that this was an inaccurate statement, but it comports with that given in Molloy, [1 Molloy, de Jure, Mar., B. 2, cap. 3, sec. 5.] "If mariners get drunk and wound one another, they are not to be cured at the charge of the master or ship, for such accidents are not done in the service of the ship; but if any of the mariners be any way wounded, or do become ill in the service of the ship, he is to be provided for at the charge of the ship; and if he be so ill as not fit to travel, he is to be left ashore, and care to be taken that he hath all accommodations of humanity administered to him; and if the ship is ready for a departure, she is not to stay for him. If he recover, he is to have his full wages, *deducting the master's charges, which he laid out for him.* The distinction which is here clearly made between the two cases may perhaps be founded on this—that as the ship must provide all things necessary for the mariners, they are entitled, in case of sickness, to such care and assistance as it is within its ordinary means and ability to furnish; but to anything beyond this, and which can only be obtained by leaving the ship, it may have been considered that the ship's liability did not extend. I do not mean to express an opinion that such is the rule; but taking it as I find it stated in Molloy, I only suggest a reason, perhaps an unsatisfactory one, for it; and I cannot help thinking that the legislature, in former times, have entertained an opinion not wholly dissimilar. The statute of 20 Geo. 2, (amended by 4 & 5, Will. 4, cap. 52,) for the relief and support of maimed and disabled seamen, &c., provides that sixpence a month shall be deducted from the wages of all seamen for the objects of that act, and among these there is one to meet the very case which is now before us. The 33rd section of that act is as follows: "And whereas it may happen that seamen or other persons employed on board ships or vessels may, by accident in loading or unloading the same, or otherwise in doing their duty on shore as well as on board such vessels, receive such hurt or la ge

that it may endanger their lives to send them to the port to which the ship or vessel do respectively belong: therefore, be it further enacted, that in case any seaman or other person employed on board any such ship or vessel, shall, in doing his duty on shore or on board, break an arm or a leg, or be otherwise hurt or maimed, so that immediate care is necessary to be taken of him, it shall and may be lawful for the president and governors (of the institution established by the act) at the port of London, and the respective trustees for the outports, and they are hereby required to afford proper relief for such seaman or other person so hurt or maimed, until he shall be so well recovered of such hurt as to be removed and sent with safety to the port to which such vessel belongs; and the expenses of removing such seaman or other person to such port, not exceeding 2d a mile, shall be paid by the president and directors at the port of London, or by the trustees of the respective outports to which such seaman or other person shall be so removed and sent." Now if there was already a legal obligation on the part of the ship or owner to provide for the care and relief of the seaman, there would have been no necessity for requiring others to do this—much less to make a deduction from the wages of the seaman to defray the expenses of it—if the law imposed that burthen on the ship itself. The act of parliament [6 Will. 4, ch. 19,] "for amending and consolidating the laws relating to merchant seamen," has provided for such cases as the present. The 18th section of that act is as follows: "And whereas it is necessary that due provision should be made for the preservation of the health and lives of the seamen employed in the merchant service, be it further enacted, that every ship sailing from the United Kingdom to any place out of the same, shall have and keep constantly on board the same, a sufficient supply of medicines suitable to accidents and diseases arising on sea voyages, which shall be renewed from time to time as shall be found requisite; and in case any default shall be made in providing or keeping supplied such medicines, or in case any of the seamen shall receive any hurt or injury in the service of the ship, the expenses of providing the necessary surgical and medical advice, and attendance and medicines, which the seaman shall stand in need of until he shall have been cured, or shall have been brought back to some part of the United Kingdom, shall be borne and defrayed by the master or owner of the ship, or one of them, without any deduction whatever on that account from the seaman's wages. If this clause makes it obligatory on the owner to provide the necessary medicines, &c., for the seaman, beyond what he has

provided in the ship, as directed by this clause, and extends to cases where the seaman is not brought back in his own ship, but is left abroad to be cured, it does most undoubtedly establish a very different rule from that cited from Molloy. By the 44th section it is enacted, that when the seaman is left ashore at any place abroad, from sickness, &c., his master is to pay him his wages up to that time. Taking these two clauses together it would seem that a new rule was then established deviating no less from that settled in the case of Chandler v. Greaves than it does from the ordinance as cited by Molloy. This statute does not extend to the Colonies,—it has been re-enacted in part; but though the 18th section of the English act is to be found in ours, the 44th section, I know not why, has been excluded. There are, no doubt, many considerations which entitle seamen to a more favorable regard than domestic or menial servants; yet it may not altogether be inapplicable to this subject, to see how the law stands with respect to the latter. Formerly it was held that they were entitled to that right which is now claimed for the seamen. In Dalton's Justice, (p. 129,) it is said: "If a servant retained for a year, happen, within the time of his service, to fall sick, or be hurt or lamed, or otherwise to become *non potens in corpore*, by the act of God, or in doing his master's business, yet it seemeth that the master must not therefore put such servant away, nor abate any part of his wages for such time." And in Seaman v. Castill, [1 Esp., 270,] Lord Kenyon held that a master was obliged to provide for his servant in sickness and in health, and was under a legal as well as a moral obligation to provide him with necessary medicines, and to pay for such as were administered to him. The moral obligation none may feel disposed to doubt; but, as Lord Mansfield said, in a case prior to this, Newly v. Wiltshire, [1 Esp., 739,] the question now is, what is the law? and it was decided by the whole Court of King's Bench that the master was not liable to the overseers of the parish for money expended in the cure of his servant. In Winnall v. Ackny, [3 B. & P., 247,] the same doctrine was held by the Court of C. Bench, and the opinion of Lord Kenyon—who, it was said, was misled by his humanity—was overruled. The observations of Rooke, J., in this case, may, to some extent, be applied to the owners of vessels, at least of coasters and small craft, upon whom the law must equally operate. "If," says he, "the general principle contended for by the plaintiff were to be adopted as a rule of law, many persons who are obliged, for the purposes of their trade, to keep a number of servants, would be unable to fulfil

the duty imposed upon them by the law. It must be left to the humanity of every master to decide whether he will assist his servant according to his capacity or not." It is, however, but proper to add, that in the decision of this case a reason is given for exempting the master from this liability to provide for his servant, which is less applicable to the case of the ship-owner and seaman, namely, that by holding the master not liable, the servant is not necessarily left destitute, as it is the duty of the parish to provide relief, and more for the advantage of the servant that their claim should be against these—an advantage by no means certain to those who may be unconnected not only with the parish but with the country itself. I have made these observations rather in justification of what I have said respecting my own doubts and the difficulty of finding any sufficient authority to remove them. But I think, and I feel relieved in so thinking, that I am not called upon necessarily to decide this point. With respect to the claim for the wages for the whole voyage, I have already stated my opinion that it must be allowed. As to the other point, there was at least a strong moral obligation on the part of the defendants to provide those things which the necessities of the plaintiff required from the injury received by him in their service. That obligation has been complied with, and those necessaries furnished. There was no contract between the parties that the plaintiff should pay for them, nor is there anything stated in the case from which, when there was a moral obligation on the part of the defendant to provide them, I can say that the law will raise an implied promise on the part of the plaintiff to pay for them. The money, therefore, expended by them, as it could not form the ground of an action against the seaman, cannot be allowed as matter of set-off against his claim; and in this view of the case I am supported by Sellon v. Norman, [4 C. & P., 81.] which, though a Nisi Prius case, it is true, is expressly in point. That was an action of assumpsit for wages, to which under the plea of set-off, the same defence was set up as in this case; and Gazelee, J., before whom the cause was tried, thus expresses himself: "I am not prepared to say that a master is bound to provide a menial servant with medicine,—with respect to some other servants he is clearly not so. However, though it is often done by masters for their menial servants, I do not think I should be authorized in saying they are bound so to do. But if a master, when a menial servant falls ill, calls in his own medical man, I think he cannot afterwards charge that against the servant's wages, unless there be some special contract between the master and servant that he should do so."

On this ground, then, I consider the defendants cannot make the deduction from the plaintiff's wages, and that he is entitled to judgment for the whole amount which he claims.

BILLINGS vs. RUST.

Hilary Term, 1838.

Where action founded upon notes made by defendant and another, to which defendant pleaded statute of limitation, and plaintiff proved that defendant, when applied to for payment, said, "if he must pay the notes he would, if he had time given him," held not sufficient acknowledgment to take case out of statute.

This was an action upon four joint and several promissory notes made by defendant and one Benjamin Harding, dated 17th June, 1820, for £12 10s., payable at 3, 12, 15 and 18 months respectively, after date. Plea, statute of limitations. Issue thereon.

There was a rule to set aside the verdict and enter a nonsuit.

Coffin, one of the witnesses, whose testimony was relied on to take the case out of the statute, stated, that in 1830, three years before action brought, defendant, on application to him for payment, said, "it was very hard that he should be called upon to pay these notes—that Israel Harding," (whose name was on these joint and several notes), "ought to pay them; but if he must pay the notes, he would if he had time given him." To this account of Coffin's conversation with defendant, is added a letter addressed to him by defendant, bearing date 25th March, 1830, in which the defendant declares that he has once paid those notes, and thinks the receipt he holds will clear him in law from paying them over again. He admits, however, that the man to whom the notes are justly due has not received value—states his willingness to take the notes—find security to pay a part of them in a reasonable time—give bond that they shall be prosecuted, and if collected will pay all." "More," defendant adds, "I cannot do; for were I justly owing them and felt a desire to have them paid, it would be utterly out of my power at present."

HALLIBURTON, C. J.—As it respects the letter of Israel Harding, (the joint maker of the notes with defendant,) to Mr. Grantham,

if it were properly received in evidence, it only admits that these notes were unpaid when he left Yarmouth in 1831, and that he had never paid them since. But it is unnecessary to consider whether this admission of a co-contractor that the notes were still unpaid, would, under these circumstances, take the case out the statute against the defendant, (the other joint maker of the note,) because we have sufficient proof that the defendant himself admitted three years before action brought, that the notes were unpaid; and after such admission we must presume they remain unpaid until the contrary is shewn. Without resorting to the letter therefor, the plaintiff possesses all the advantages that such admission of the co-contractor could give to him arising out of the defendant's own admission of the same fact that the notes were unpaid.

The principles upon which cases have been taken out of the statute, and the practice under these principles, have been very fluctuating.

At one time it was held that where six years had elapsed, *payment must be presumed*; and wherever it was admitted that the debt was unpaid, the statute did not apply, and the law would raise an implied promise to pay from such admission. The abstract justice which supported this construction led the courts to adhere to it until they had almost deprived the community of the benefit which this useful statute was well calculated to confer upon it; indeed so much uncertainty was introduced in consequence of the nice distinctions which the courts were compelled to make in applying this principle to the endless variety of circumstances which presented themselves, that it might have been questioned whether the statute was not productive of more evil than good; for before it passed every man knew that he was bound to pay his simple contract debts, however long they might have remained unpaid; but whether the statute would operate as a defence for him or not, became a matter of much uncertainty.

The courts became sensible of the difficulty, and some years ago began to limit the extent into which this desire to do justice according to the circumstances of each particular case, was leading them; and have gradually adopted a construction more consistent with the practical good the statute was intended to produce, in preference to the abstract justice, which, it cannot be denied, that the statute must sometimes violate. A short review of some of the principal cases decided under the statute, will justify these remarks.

In Heylin v. Hastings, (decided—10 Wm. 3,) [1 Lord Raym., 389, 5 Mod., 426,] where the defendant denied the receipt of goods, but said at the time of such denial, "prove it and I will pay you." was held by all the Judges of England, (except one whose opinion was not given,) to take the debt out of the statute on proof of the delivery of goods; although it was also held that a bare acknowledgment of the existence of the debt did not of itself constitute a promise, but was only evidence of a promise on which the jury might find a verdict for the plaintiff.

In Yea v. Furraker, (decided—1 Geo. 3,) [2 Burr., 1099,] it was ruled by Mr. Justice Noel, upon the circuit, and confirmed by the court without argument, that an acknowledgment of the debt after the commencement of the action, takes it out of the statute of limitations.

In Quantoch v. England, (10 Geo. 3) [5 Burr., 2630, Cowp., 548,] Lord Mansfield says: "The slightest word of acknowledgment will take it out of the statute."

In Richardson v. Farn, (12 Geo. 3,) [Loffl., 86,] evidence that, within six years, defendant said to a man whom he met at a fair, "that he came there to avoid the plaintiff, to whom he was indebted," was held sufficient to take the case out of the statute of limitations.

In Lloyd v. Maund, (29 Geo. 3,) [2 T. R., 760,] a nonsuit ordered by Lord Kenyon, where the plaintiff produced a letter of defendant containing ambiguous expressions neither admitting nor denying the debt, was set aside on the ground that it should have been left to the jury to decide whether the expressions in the letter did or did not amount to an acknowledgment of the debt.

In Stadholme v. Hodson, (28 Geo. 3,) [2 T. R., 390,] it was decided, that after the defendant had obtained time to plead on the terms of pleading issuably, he could not plead the statute of limitation. In Rucker v. Hannay, (29 Geo. 3,) [3 T. R., 124,) this last case was over-ruled, and defendant permitted to plead the statute.

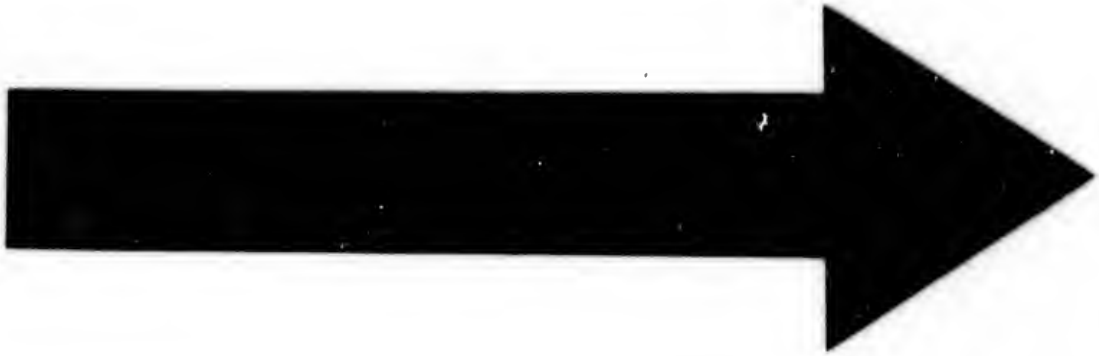
In Cutling v. Skoulding, (35 Geo. 3,) [6 T. R., 103,] Lord Kenyon says: "It is not doubted but that a promise or acknowledgment, within six years, will take the case out of the statute."

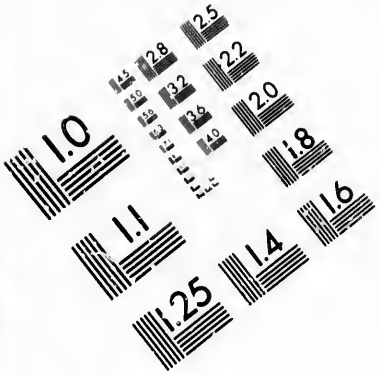
In Sarell v. Wine, (43 Geo. 3,) [3 East., 409,] the evidence was an acknowledgment by defendant, since the death of the intestate, and within 6 years of an old existing debt due to intestate more than 6 years ago, held insufficient to support a promise to the intestate. Greene v. Crane [2 Lord Ray., 1101,] was cited

by Lord Ellenborough in support of this decision; but how is this reconcilable with Richardson v. Fearn, where an acknowledgment to a stranger at a fair was held sufficient to support an averment of a promise to plaintiff.

In Bryan v. Horseman, (44 Geo. 3,) [4 East, 599,] defendant said to the Sheriff's officer on being arrested: "I do not consider myself as owing plaintiff a farthing, it being more than six years since I contracted. I have had the wheat I acknowledge, and I have paid some part of it, and £26 remains due." Lord Ellenborough, at the trial, said that, *according to the authorities*, such an acknowledgment must be deemed sufficient to take the case out of the statute, though, if the matter had been *res integra*, it might have admitted of a doubt; and in deciding upon the rule to set aside the verdict for plaintiff, his Lordship again said, the court had looked into all the authorities, and whatever *their opinion upon the statute might have been, had the question been new*, after the long train of decisions upon the subject, it was necessary to abide by the construction put upon it; from which, I think, it may be inferred, that Lord Ellenborough was not quite satisfied with the view which his predecessors had taken of these questions. He however, deemed it right to adhere to the precedents thus established; for, nine years afterwards, (53 Geo. 3,) in [Leaper v. Tatton, 16 East., 420, 1816,] an action brought upon a bill of exchange drawn in 1796, and accepted by the defendant, who pleaded the statute, a witness proved that defendant, when applied to for payment shortly before the action brought, said, "he had been liable, but was not liable then, because the bill was out of date, but acknowledged that it was his acceptance;" and when told that the plaintiff would take the money by instalments, said that "he would not pay it, it was not in his power;" Lord Ellenborough, at the trial, held the words sufficient to take the case out of the statute,—and in deciding upon a rule to set the verdict for plaintiff aside, he said: "As to the sufficiency of the evidence of the promise, it was an acknowledgment by the defendant that he had not paid the bill, and that he could not pay it; and as the limitation of the statute is only a presumptive payment, if his own acknowledgment that he has not paid be shewn, it does away the statute."

But in Rowcroft v. Lomas [4 M. & S., 457, decided in 1816,] plaintiff's demand was founded upon an accountable receipt, 29th August, 1803: "Received of Mr. T. Rowcroft, £80, to account for on demand." A witness proved that, in 1814, he called on defendant for plaintiff, shewed him the receipt, and asked him if he knew anything of it. Defendant answered, "Yes, I know





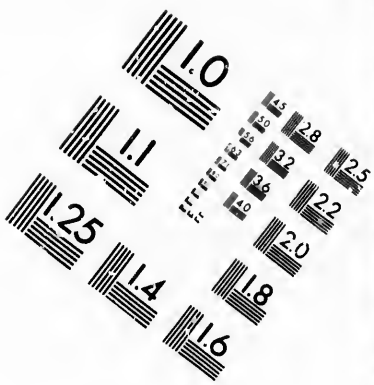
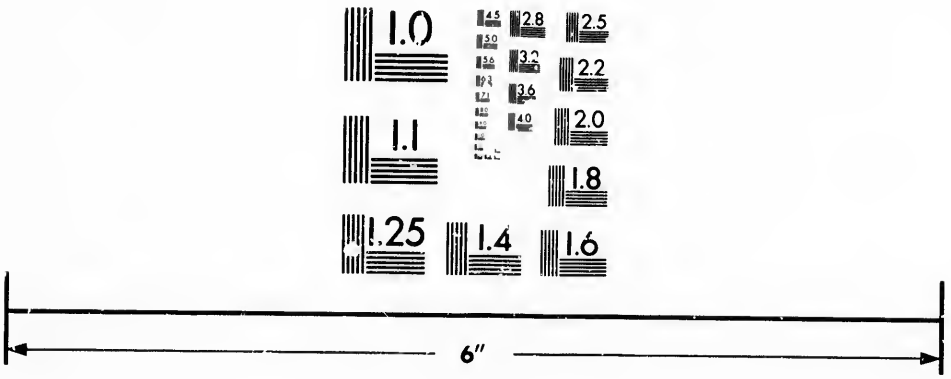
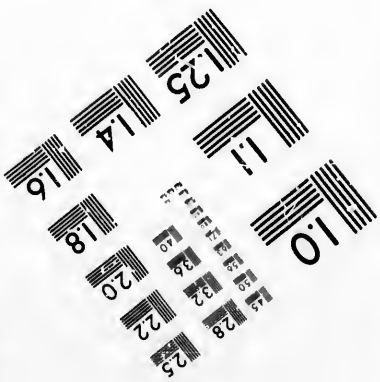


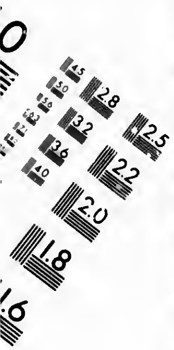
IMAGE EVALUATION TEST TARGET (MT-3)





Photographic Sciences Corporation

23 WEST MAIN STREET
WEBSTER, N.Y. 14580
(716) 872-4503


2.8
2.5
3.2
3.6
4.0
2.2
2.0
1.8
1.6


1.1
1.0

all about it." Witness then asked for the amount. Defendant answered, "it was not worth a penny, he should never pay it." he admitted his signature to the receipt. Witness said, "perhaps you have paid it." Defendant said, "no, never; he never paid, and never would;" and added besides, "it is out of date, and no law shall make me pay it." It requires some nicety, (I will not say subtlety,) to distinguish this case from Leaper v. Tatton, decided by the same three Judges, Lord Ellenborough, LeBlanc, and Bayley, in 1812; yet in this latter case the decision was in favor of the defendant. But the courts had then begun to feel the perplexity into which their equitable decisions were leading them. The Court of Common Pleas had declared the year before, (1815,) in Ward v. Hunter, [6 Taunt., 310,] *that they had gone far enough;* and from that period they commenced retracing their steps, though not without considerable fluctuations.

In the case of Brandram v. Wharton, (1818), [1 B. & Ald., 463,] the defendant also prevailed under his plea of the statute, although a dividend had been paid within six years upon the bill upon which this action was brought against a solvent partner out of the effects of one of the drawers, who had become bankrupt. In this case, Lord Ellenborough made some very forcible remarks upon the evil consequence which may flow from the principle established by Lord Mansfield, in Whitcomb v. Whiting, [Doug. 652,] viz., that a joint contractor may be deprived of the benefit of the statute by an act of his co-contractor, which amounted to an admission that the debt was unpaid,—a principle, however, that almost necessarily arose from the doctrine that the true construction of the statute was to presume payment after six years, and that whenever that presumption was rebutted, the law at once raised the implied promise to pay on the part of all who were originally liable as well as on the party making the acknowledgment.

Lord Ellenborough left the bench on the following year. Had he remained he would probably have remedied, judicially, an evil, for which his successor wisely provided a legislative remedy in 1829.

In Gibbons v. McCasland, (1818,) [1 B. & Ald., 690,] where the guarantee on which the action was brought was shown to the defendant, he said, "he remembered it perfectly well, and when he was able it should be arranged," held sufficient to take the case out of the statute. No question was then made about the necessity of proving the plaintiff's ability.

In Swan v. Lowell, (1819), [2 B. & Ald., 759,] the action was brought upon a note of hand to which the statute was pleaded. When the note was exhibited to defendant within six years

plaintiff said, "You know your own handwriting." Defendant looked at the note and replied, "You owe me a great deal more money, and I have a set-off against it." Plaintiff said, "furnish me with your account." I should be sorry to swear to a debt if I owed you anything. If you do not furnish me with your account, I shall put this into the hands of my solicitor." Defendant replied, "you may do as you please—I shall defend it. Bayley and Holroyd, J's., held this not sufficient to take the case out of the statute. Best, J., was of a different opinion. That learned Judge had not then been so fully impressed with the inconveniences of allowing a bare acknowledgment (supposing what passed between the parties in this case to amount to one,) to take cases out of the statute, as he appears to have been a few years afterwards (1825,) when A'Court v. Cross was decided.

In Mountstephen v. Brook, (1819,) [3 B. & Ald., 141] which was an action upon four bills of exchange against the acceptor, the admission to take the case out of the statute was contained in a deed between the defendants and parties who were strangers to the action. This was, then, held sufficient, and the plaintiff obtained a verdict. Abbott, C. J., then said, "The statute was passed to protect persons who were supposed to have paid the debt, but to have lost the evidence of such payment. Here, however, there is no such thing, for there is a solemn acknowledgment of the existence of the debt within six years, *the legal effect of which is to raise of itself a promise to pay the debt.*

How widely does this learned Judge's language, in Tanner, v. Smart, (1827), [6 B. & C., 603,] differ from the above used by him in Mounstephen v. Brook.

Beale v. Nind, [4 B & Ald., 568,] evinces a disposition to adhere more strictly to the statute than the courts had heretofore done; and Bailey, J., refers to the language of Lord C. J. Gibbs, in Hilleys v. Shaw, [7 Taunt., 612,] where he laments that the courts had not confined themselves to the words of the statute, and notices the cases in which those words would discharge the defendant, but in which the courts have held him liable. "I agree," says Gibbs, C. J., "that if the court could retrace their steps, and could see all the consequences that have arisen, they would have seen it better to adhere to the precise words of the statute than to attempt to relieve in particular cases;" and Bayley, J., further adds in the same case of Beale v. Nind, that the onus of taking a case out of the statute is upon the plaintiff, and that conversation is the worst description of evidence upon such a subject"—an observation to which, I think, every reflecting man will assent.

Pittam v. Forster, (1823,) [1 B. & C., 248,] also shews that the courts were still going back to the words of the statute, for had they adhered to the principle upon which Mountstephen v. Brook, and several other cases had been cited, viz., that an acknowledgment of the existence of the debt made to a stranger within six years would of itself sustain the action, they would not, I think, have resorted to the nice distinction that when the action was against the husband and wife, upon a note made by the wife, *dum sola*, the acknowledgment of the husband that the debt was still due, made after the marriage, was insufficient.

Atkins v. Tredgold, (1823.) [2 B & C., 23], manifests the same disposition. In this case, Abbott, C. J., alludes, with approbation, to Lord Ellenborough's observations upon Whitcomb v. Whiting, in Brandram v. Wharton; and the whole court agree that *if* the case of Whitcomb v. Whiting be law, the principle of it ought not to be extended.

In A'Court v. Cross, (1825) [3 Bing. 239,) the words proved were: "I know I owe the money, but the bill I gave is on a receipt stamp, and I will never pay it." It was decided that this acknowledgment did not take the case out of the statute. The observations of Best, C. J., to which I before alluded, were: "I am sorry to be obliged to admit that the courts of justice have been deservedly censured for their vaccillatory decisions on the 21 J. c. 1. He subsequently adds: "The mere acknowledgment of a debt is not a promise to pay it. A man may acknowledge a debt which he knows he is incapable of paying, and it is contrary to all sound reasoning to presume from such acknowledgment that he promised to pay it; yet, without regarding the circumstances under which an acknowledgment was made, the courts, on proof of it, have presumed a promise." "It has been supposed, he continues, "that the legislature only meant to protect persons who had paid their debts but had lost or destroyed the proof of payment. From the title of the act to its very last section, every word of it shows that it was not passed on this narrow ground?"

In the case of Scales v. Jacobs, (1826) [3 Bing. 647,] Parke, J. makes similar observations: "It has been truly observed," he says, "that the conflicting decisions to be found in our reports upon the statute of limitations, reflect no particular credit upon Westminster Hall; and I am very glad that the courts of law seem inclined to retrace their steps as far as possible, and to get back to the plain construction of the statute. Having this view myself, I was happy to concur with the Judges in A'Court v. Cross, in endeavoring to assist in so desirable an object."

In Ayton v. Bolt, (1827,) [4 Bing. 105,] the words proved were: "I would be happy to pay you if I could. If you will recover a debt due to me from Guerney, you may therewith satisfy your own debt." Here the defendant both acknowledged and evinced a desire to pay it at the time he made that acknowledgment, yet his plea of the statute protected him.

In College v. Willock, (1827,) [4 Bing. 313,] it was decided that where a debt which had been barred by the statute, but revived by paying the principal part of the debt into court, the claim for interest was not revived.

But Tanner v. Smart, (1827,) [9 Dow. & Ry., 549, 6 B. & C., 603,] which, Lord Tenterden says, was decided with much consideration, (see his declaration to this effect in Brydges v. Plumpton, 9 Dow. & Ry., 746,) has put the question arising upon a mere acknowledgment at rest. The words proved to take that case out of the statute, were: "I cannot pay the debt at present, but I will pay it as soon as I can." The jury gave a verdict for the plaintiff, and that verdict was set aside because it was held to be only a conditional promise, on which the defendant could not recover without proving the defendant's ability to pay.

But Robarts v. Robarts (1828, just before Lord Tenterden's act,) [3 Car. & P., 296,] displays the determination of the courts to adhere, I might almost say rigidly, to the statute. There the plaintiff produced the following paper, signed by defendant: "I owe you £100. Charles Robarts. 30th July, 1821. August 17th,—Received £50. Charles Robarts." The action was brought to recover both sums. The defendant pleaded the statute to the first demand for £100, six years not having elapsed since the receipt of the second; and, notwithstanding both were written on the same paper, and the acknowledgment of the first debt must have stared him in the face when he signed the receipt for the £50, Borough, J., who tried the cause, told the jury to find for the defendant upon the demand for £100. He said: "It is now decided that there must be a positive promise; I held out against it as long as I could, but it having been so decided I cannot now put the question to the jury. The jury found a verdict conformably to the learned Judge's directions. Leave, however, was given to the plaintiff to move; the motion was made in the ensuing term, but the court refused to grant a rule Nisi thereon.

Gould v. Shirley, [2 Moore & P., 581,] subsequent to Robarts v. Robarts, was decided upon the same principle; and the cases of Fearn v. Lewis, [6 Bing., 349,] and Edmonds v. Downs, [2 Cr. & Mu., 459,] decided under Lord Tenderden's act, shew that the

courts continue to exact the same certainty as to a specific unconditional promise in writing under that act, as they had latterly deemed necessary in promises made verbally.

It appears, then, that the court at Westminster, by a train of decisions commencing in 1815, and continued, with a few occasional but not recent exceptions, to the present day, have established the position that a mere acknowledgment of the existence of a debt, unless accompanied by an express promise or made under circumstances which would warrant the inference that the party making such acknowledgment intended to promise to pay it, will not take a case out of the statute of limitations. And further, that if such promise is accompanied by any condition, the plaintiff must prove that he is entitled to recover under the conditional promise. That being now the law, I am of opinion that the rule to set aside the verdict for the plaintiff in this case and enter a nonsuit, should be made absolute.

The letter proved by Coffin, which is much better evidence than the loose conversation upon such a subject, on which Bayley, J., in Beale v. Nind, casts so just a slur, shews the extent to which the defendant was disposed to go respecting the notes upon which this action was brought. The conversation which is stated to have taken place about the same time, is quite reconcilable with the letter, and there was nothing proved that could sustain the action upon that letter.

Independent, however, of the letter, to what does the verbal declaration stated by Coffin, amount? "It is very hard, (the defendant says,) to call upon me to pay these notes. Harding ought to pay them; but if I must pay them, (*i. e.* if I can be compelled to pay them,) I will if I have time given to me." Can we find in this declaration either a positive promise to pay, which Boroughs, J., said was necessary in Robarts v. Robarts, or was it made under circumstances which indicated the defendant's willingness to forego the benefit of the statute;—I think not. He declares that another ought to pay; and even his conditional promise to pay, if he has time given him, is founded upon the basis of a liability which did not then exist.

I have already said that the plaintiff can derive no additional advantage in this case from the admission of the co-contractor; indeed, under the view which the courts now take of the statute of limitations, I do not see how the position that the promise or acknowledgment of one co-contractor shall bind the others, can hereafter be sustained.

If we are to look to what the defendant upon the record *himself* said at the time that he acknowleged that the debt was

still unpaid,—and if, notwithstanding such acknowledgment, the plaintiff may fail, as Lord Tenterden said in Tanner v. Smart, then I do not see how any acknowledgment of one co-contractor can deprive another who was not privy to that acknowledgment, of the benefit of the statute.

I do not apply these latter observations to cases where payments have been made by a co-contractor. Payments are much stronger than mere verbal declarations; and although I think the observations of Lord Ellenborough upon Whitcomb v. Whiting can never be satisfactorily answered, and though there is much hardship in making co-contractors, who would otherwise be protected by the statute, liable because payments have been made without their knowledge by one for whom they might only have been sureties, yet that case is still law.

The decision in Burleigh v. Scott, (1828,) [8 B. & C. 36], distinctly recognizes it; and Manderston v. Robertson, (1829,) [4 M. & Ry., 440,] was also governed by it; indeed, in Lord Tenterden's act, while co-contractors are sheltered against each other's promises, the effect of a payment made by any person whatever is left precisely as it was before the statute.

HILL, J.—The decisions upon the statute of limitations have been anything but satisfactory, I had almost said unintelligible. They have been jarring and contradictory; different Judges have taken different views of it, and its policy; and, in fact, the same Judges have seen occasion to over-rule their own decisions. On the argument a multitude of cases have been cited on both sides, many, if not most of them, having a tendency to confuse rather than afford light. I shall, however, without examining all the cases—for I think it quite unnecessary—rest my opinion on the case of Tanner v. Smart, [6 B. & C., 603,] decided in 1827. In this, many of the former decisions are investigated and examined, and the doctrine in it is most consonant to principle, and ought to govern the present. That was assumpsit on a promissory note, dated 19th January, 1816,—payable 30th November next; plea, *non assumpsit infra sex annos.* The plaintiff proved that, in 1819, the note was produced to defendant, and payment of it demanded, and that the defendant said, "I cannot pay the debt at present, but I will pay it as soon as I can." There was no proof of any ability on the part of defendant to pay. A verdict having been found for the plaintiff, a rule to set aside the verdict and grant a new trial was allowed. In giving the judgment of the court, Lord Tenterden, says: "The question in this case was, whether an *acknowledgment* which *implied* that the debt, for which the action was brought, had not been paid, was an answer

to the statute of limitations,—whether this is such an acknowledgment as, without proof of any ability on the part of the defendant, takes the case out of the statute. There are, undoubtedly, authorities that the statute is founded on the presumption of payment,—that whatever repels the presumption of payment is an answer to the statute,—and that any acknowledgment which repels that presumption, is, in legal effect, a promise to pay the debt,—and that though such an acknowledgment is accompanied with only a conditional promise or even a refusal to pay, the law considers the condition or refusal void, and the acknowledgment of itself an unconditional answer to the statute." His Lordship then adverts to the conflicting authorities and to the statute, and says, "that though all the actions mentioned therein—trespass, detinue, trover and others—are put on the same footing, yet it is only in actions of assumpsit that an acknowledgment has been held an answer." He says, "that Lord Ellenborough, in the case of Hurst v. Parker, gave the true reason why an acknowledgment in trespass was inapplicable, but applicable in assumpsit: because in assumpsit an acknowledgment of the debt is evidence of a fresh promise, and that promise is considered as one of the promises laid in the declaration, and one of the causes of action which the declaration states." His Lordship concludes: "All these cases proceed upon the principle, that under the ordinary issue on the statute of limitations, an acknowledgment is only evidence of a promise to pay; and unless it is conformable to, and maintains the promise in, the declaration, though it may show to demonstration that the debt has never been paid and is still subsisting, it has no effect. The question then comes to this: is there any promise in this case which will support the promises in the declaration? The promises in the declaration are absolute and unconditional to pay when thereunto requested. The promise proved is, 'I'll pay as soon as I can;' and there was no evidence of ability to pay, so as to raise that which, in its terms, was a qualified promise, into one that was absolute and unconditional. Upon a general acknowledgment, where nothing is said to prevent it, a general promise to pay may and ought to be implied; but where a party guards his acknowledgment and accompanies it with an express declaration to prevent any such implication, why shall not the rule *expressum facit cessare tacitum* apply. The court made the rule for a new trial absolute.

I do not find that in any of the cases since decided, this doctrine has been questioned, certainly not to introduce one more favorable to the plaintiff, for the courts have been leaning more

and more against permitting stale demands of this kind to be set up, and thus, in some measure, annulling the statute. This very feeling was the cause of the passing of Lord Tenterden's act in 1828. Whippey v. Hillary, [5 C. & P., 209,] Edmunds v. Downs, [2 C. & M., 459,] Gould v. Shirley, [2 M. & P., 581,] and Linsel v. Bonsor, [2 Bing., N. C.,] decided in 1835, are all in accordance with Tanner & Smart. In Linsel v. Bonsor, the language was, "you know I gave up all my affairs, and therefore I consider I have nothing to do with your claim, nor shall I. I wish you would make me a bankrupt,—this is in your power. I regret your arresting me. You had the same as the rest, why should I pay you in preference to those who have executed the deed. I had rather go to jail than do so. I shall rely on my own integrity." Tindal, C. J., says: "Is there any acknowledgment? *A distinct and unqualified acknowledgment* would have had the same effect as a promise, because from such acknowledgment the law implies a promise. But why should an acknowledgment be construed as a promise when it is accompanied with a contradiction of any promise."

Taking, then, the latest and best authorities, and such as seem to have their foundation on principle and not to be decided on the particular hardship of this case or the other, I assume it to be the law, that to take a case like this out of the statute under the ordinary plea, there must be either an express promise to pay or an unconditional and unqualified acknowledgment from which a promise may or ought to be inferred. Now, first, is there in this case a promise to pay? The promises here, as in the case of Tanner v. Smart, are laid in the declaration to be absolute and unconditional. I can find no such promise in the examination of Charles J. Coffin. He says he had a conversation with defendant in 1830 relative to these notes. That defendant in that and in other conversations, (the time of which is not accurately fixed,) dwelt chiefly upon the hardship of having to pay the notes, and stated that he thought he had some document which would screen him from paying them. Again he says: "In 1830 the defendant told him if he must pay the notes he would if time were given him." Coffin then evidently does not bring home to, or fix on defendant, a promise to pay. The letter of the 25th March, 1850, addressed by the defendant to Coffin, commences with a positive declaration that he (the defendant) had once paid the notes, and that he thought he was not bound by law to pay them again. It is true he subsequently admits that the holder had not received value, and proposes to take the notes under certain conditions, and conditionally to pay

a part without stating what part; yet there is no promise to pay, none that could support those laid in the declaration. A letter, however, from Israel Harding, the joint promissor, addressed to Mr. Grantham, the plaintiff's attorney, dated 1st February, 1837, written not only since the commencement of the suit, but since the first trial in the inferior court, is urged as favorable to plaintiff. But without entering into the question as to what operation the admission of one joint maker of a note who is not sued under the present circumstances would have by way of binding his co-promissor, who is sued, it is quite clear that such admission must bind the maker of it, and render *him* liable, or it can have no effect against the one making no admission. Now, Harding, in this letter, certainly makes no promise to pay these notes,—on the contrary he says: "I cannot now pay these notes, for I have no property." He then states that previous to his leaving Yarmouth, in 1831, the notes were not paid unless Rust had since paid them. For anything we see, then, defendant may actually have paid them since 1831; and if he had not, there is no promise in this letter on the part of Harding to pay, and if so, it can have no effect as a promise against the defendant.

But if there is no promise to pay in this case, is there not a distinct unqualified acknowledgment of the debt, from which a jury might fairly infer a promise to pay. There are certainly some passages in the deposition of Coffin that would appear like an unqualified acknowledgment on the part of the defendant, that these notes were due to the plaintiff; but we must not select isolated parts of the testimony—its general bearing must be taken altogether. If the defendant had admitted in his conversations with him that these notes were unpaid and were due to the defendant, it might perhaps have been put to the jury to say whether they would not presume, from such an admission, a promise to pay. If there is no unqualified acknowledgment in this deposition, much less is there one in the defendant's letter of 25th March, of which I have already spoken.

I think the rule for a non-suit ought to be made absolute.

GILMORE vs. DEWAR.

Easter Term, 1838.

Where action was brought for breach of promise of marriage, held the seduction of plaintiff and consequent pregnancy, may be given in evidence in aggravation of damages; held also that the statement of a party to witness that he had had previous connexion with her, was not admissible.

This was an action for breach of promise of marriage. There was a verdict for the plaintiff and £80 damages. A. Stewart, at the trial, proposed to question Kenneth McKenzie, a witness produced at the trial, whether one Oxley had not told him (witness) that he (Oxley) had had connexion with the plaintiff.

Evidence was received by the Judge to prove the seduction and pregnancy of the plaintiff, by the defendant; and the Judge, in his charge, told the jury that they might consider that fact in their verdict. There was a rule Nisi to set aside the verdict on three grounds: 1st, improper rejection of evidence; 2ndly, improper admission of evidence; 3rdly, misdirection by the Judge.

HALLIBURTON, C. J.—Foulkes v. Selway [3 Esp., 225,] has been cited in support of the right of the party to put the question proposed to the witness McKenzie. That was an action for a breach of promise of marriage, and the defence was that the plaintiff was a woman of bad character. A witness called to prove that fact, gave evidence of his having gone to the place where she lived to enquire into her character, and was proceeding to state what he had there heard, when it was objected that he should not be allowed to state what he had heard from third persons; but Lord Kenyon ruled that the evidence was admissible. "Character here," he said, "was the only point in issue; that was public opinion founded on the character of the party, and was a fair subject of inquiry. He therefore thought, that what the public thought was evidence on the issue as it then stood."

Nothing in the above case would warrant putting a question relating to a particular fact, and supporting the existence of that fact upon a third person's having told the witness that it was so. Had the question been, whether it was generally reputed and believed in the place where the plaintiff resided, that she had had connexion with this or that man, that might have come

within the rule laid down by Lord Kenyon, because that would be testimony respecting the character which the plaintiff bore in the community in which she resided—of which any competent witness might give testimony; but as it respects a particular fact that can only be proved by the parties cognizant of the fact, and by one who received his information from the party who said he was cognizant of it and a party to it, I think therefore the Judge properly refused to allow the question to be put. The second and third objections resolve themselves into one, for if it was right to receive the evidence of the plaintiff's pregnancy in aggravation of the damages, then the Judge's directions to the jury were right; if it was wrong to receive such evidence, then of course it was wrong for the Judge to tell the jury that they might consider it. Several objections have been made to the reception of this evidence in aggravation of damages: 1st, that the plaintiff is herself *particeps criminis;* 2nd, that it will have a very immoral effect if we allow damages to be increased in consequence of an act to which the plaintiff herself consented; 3rd, that the parent or master of plaintiff with whom she was living, might recover damages, for this injury, in an action *per quod servitium amisit*, and it would be unjust to allow double damages to be recovered. I suppose it will scarcely be denied, let the law be as it may, that in point of fact it is a greater injury to a woman for a man to refuse to fulfil an engagement to marry her after he had got her with child, than it would be if he had abandoned without disgracing her; and as the action itself for breach of promise of marriage is maintainable, the jury in assessing damages for the injury will in this, as in all other cases, consider all circumstances of mitigation or aggravation which may lawfully be submitted to them. Now, as in the very nature of things, a woman thus abandoned in a state of pregnancy, is in point of fact, more seriously injured than she would be if not left in that state, it rests with the defendant to shew us that in point of law, she cannot recover an increase of damages for that aggravation of the injury. No case has been cited to shew that she cannot. The case of Paul v. Frazier [3 Mass. R., 71,] only shews that a woman cannot sustain an action against a man for seducing and getting her with child, when no promise of marriage had been made. But in that very case, Parsons, C. J., says: "damages are recoverable for a breach of promise of marriage; and if seduction has been practised under color of that promise. the jury will undoubtedly consider it as an aggravation of the damages." Neither this observation nor the case itself bind us, but it has been brought under our con-

sideration by both sides at the bar, and we willingly avail ourselves of the able opinions of such a man as the late Chief Justice Parsons, of Massachusetts, upon questions decided under laws so similar to our own. It was clearly his opinion, then, that although seduction of itself, when there was no promise of marriage, could not sustain an action by the person who had consented to be seduced; yet, if it had been practised under a contract of marriage, for the breach of which an action would lie, that it was an aggravation of the damages; and the note of Mr. Christian, in 3 Black. Com., to which we have been referred, shews that he considered the law to be the same in England. In this opinion I fully concur: as respects the argument that to allow women to recover damages for the voluntary sacrifice of their own virtue, will have an immoral effect, that applies well to such a case as Paul v. Frazier, where no contract of marriage existed; and it is well commented upon by Parsons, C. J. But we must consider how great a difference such a contract makes in the situation of the parties;—they meet each other with greater confidence—their intercourse is conducted with less reserve; and a woman may, with the most innocent intentions, admit of endearing familiarities from a man to whom she is betrothed which might sometimes lead to a loss of self-command, and betray them into a breach of chastity which neither contemplated and which both may deeply deplore. Such an occurrence may be attributed rather to weakness than depravity. Let me not be understood to be an advocate for undue lenity to such transgressions. Both will deeply pay the penalty of their misconduct in their loss of mutual respect and their degradation in the eyes of the virtuous members of the community to whom their misconduct becomes known. But, as in such cases, the man must be presumed to be the instigator to the offence, it cannot afford him any excuse for not fulfilling his engagement—on the contrary, renders the performance of his promise still more imperative, and the non-performance of it a greater injury, requiring at the hands of a jury a greater compensation.

As such an unfortunate occurrence as pregnancy taking place after a promise of marriage may, in my opinion, be given in evidence in aggravation of damages, so do I think it might be given in evidence in mitigation of damages if extraordinary circumstances should enable a plaintiff to give such proof. If a man, after having promised to marry a woman he thought possessed of the usual delicacy of her sex, should discover her to be so wanton as to court his embraces, and pregnancy on her part should be the result of an intercourse which she herself had

sought, most persons would think him prudent in declining to take such a woman for the partner of his bosom; and although it might not fully justify rescinding the contract, as the proof of intercourse with another man would do, yet, I think, if such an extraordinary case were proved, a jury would think a plaintiff entitled to but little damages. I mention this in support of what I deem a just and general rule, that, wherever an action sounding in damages is sustained, everything immediately connected with the transaction, which is not of itself a distinct and substantial cause of action or a distinct and substantial matter of justification, can be given in evidence in aggravation or mitigation of damages under the general issue, unless there is some positive law prohibiting it. I know of no positive law prohibiting the proof of this fact. It is in the nature of things an aggravation of the injury attendant upon the breach of the promise of marriage. The evidence, therefore, was rightly received, and the jury were rightly instructed to consider it, unless the third objection must prevail.

Now, I cannot see how the right of this plaintiff to receive such damages as a jury think that she has sustained, can be affected by the circumstance of another person having been injured by the same occurrence. If a man by one blow should injure two persons, (which might happen,) would he not be liable to both? If A. should throw a stone at B., which should pass through C.'s carriage and break the plate-glass windows of it on its passage to B., would he not be liable to B. for the blow he received from the stone, and to C. for the injury done to his carriage? If a man beat my servant and deprive me of his services, may I not sustain an action against him for the loss of service, and the servant for the assault and battery? And if it be the case that any other person than the plaintiff has been injured by the defendant's conduct in this transaction, in such way as to enable such person to sustain an action against him, the court and jury will decide upon that case whenever such action is brought; but the right of such party cannot and ought not to affect the rights of this plaintiff. Should such action be brought by a father or relative in that form in which a jury may take injured feelings into consideration, there can be no doubt that they will also take into consideration what the defendant may have already suffered in consequence of his misconduct, so that exemplary damages will not be twice awarded against him. It is not in the power of courts to sift too nicely the motives which actuate juries in the jury room; it is our duty to see that the action can be sustained, and that nothing but legal testimony

is produced in support of it, or to aggravate or mitigate the damages. When that is done, it is their province to decide upon the question of the damages; and I think it will generally be admitted, that in 99 cases out of 100 they decide justly.

I think that the rule for a new trial should be discharged.

HILL, J.—On the argument for the rule, it was held by the court that the evidence rejected on the trial was properly rejected, and the plaintiff's counsel was relieved from any argument on that part of the case.

The defendant's counsel then insisted that the verdict for the plaintiff, in this case, ought to be set aside, and a new trial granted on two grounds. 1st. The improper admission of the testimony as to the pregnancy. 2nd. The misdirection in instructing the jury to consider that fact in estimating the damages.

These are resolvable into one, for if the proof of pregnancy was properly admitted, it would follow that the fact was also properly left to the jury.

Though this is, strictly speaking, an action of assumpsit, yet in reality, it sounds in damages, and is intended to afford a remedy in damages to a party not only whose pecuniary interests have suffered, but whose feelings have been lacerated and wounded; and no one can deny that the wounded feelings have been constantly given in evidence in these actions, and that you are not confined to the bare proof of the contract and of its breach. You may shew for instance, the peculiar circumstances under which the promise was made, as that it took place in the presence of many of the plaintiff's relatives and friends; as that the plaintiff declared, at the time, his intentions were never to fulfil the promise made—merely to wound and delude; or that a refusal to fulfil a promise, made in good faith, took place under circumstances that must of necessity deeply injure the feelings. It may undoubtedly be shewn, and it is every day's practice to shew, that after the refusal to perform the promise, the plaintiff pined away and languished. You may, in fact, shew all or any aggravating circumstances attendant on the contract and its breach; "but you must not," says the defendant's counsel, "shew pregnancy as one of these circumstances, because it is urged the damages must be the necessary result of the breach of promise." Now, I say that pregnancy is one of the circumstances of the case, and is so connected with the promise as not reasonably to be separated, and ought to be considered; unless we are so tied down by some stubborn rule of law as to be confined to the mere proof of the contract and its breach, and to be denied the oppor-

tunity of shewing the circumstances connected with them, the damages here are the necessary result of the breach of promise and its concomitants. The promise was proved to have been made not only before but after the pregnancy was discovered, and after the defendant had admitted that he had been its cause. Is not the pregnancy, then, an aggravating circumstance attending this breach of promise; and do the principles of reason and justice require it to be shut out of our view. Is there, then, any principle of law requiring us to exclude such testimony. I find none; nor has any case been produced to us that could lead us to think that such testimony had ever been rejected. In truth these are actions which we know—whatever may be the nice technical distinctions of the law—to be, in effect, actions on the case for the recovery of damages to repair, as far as the law can, the wounded feelings of the female, and to punish the author of them. And will any one say, that to gain the affections of an innocent young female under a promise of marriage, to ruin her in a too confiding moment, and then to desert her, ought not to bring punishment on its author; and does not justice say that ample reparation ought to be made. It is said that no case has been found in which such testimony has been admitted; but the answer to that is, shew one in which it has been rejected. It has also been argued, that if such testimony be admissible, you will permit the plaintiff, indirectly, to recover damages for a cause of action which the law would not permit her to recover directly; that an action of seduction will not lie at the suit of this plaintiff. "The fact of pregnancy could not," says the defendant's counsel, "have been expanded on this record; it would have been ill." Now, first, I am not quite prepared to say that this fact might not have been put on this record properly; for, whatever propriety there may be in refusing an action to a female against the seducer where there has been no promise of marriage, I cannot just see such propriety where there has been. But secondly, does it follow, necessarily, because you could not have alleged the pregnancy in pleading, that fact may not be given in evidence; or is it an inflexible rule that damages can be recovered for that only which strictly falls in with the *allegata*. Take the action on the case brought by the parent, or one standing *in loco parentis* for seduction *per quod servitium amisit*. That action, strictly speaking, goes for the loss of service; and you must, to sustain it, give proof of service. But who ever dreamed of confining the damages to the strict letter of the declaration. The language of Lord Eldon, in Bedford v. McKowl, [3 Esp.,

119,] is explicit that you are not confined to the *allegata*. That was an action on the case for seducing the daughter of the plaintiff. The plaintiff's counsel were proceeding to examine witnesses as to the general good conduct of the plaintiff's family —what other children she had, and how she was affected by the injury complained of. Shepherd, Serjt., for defendant, objected to evidence of this nature. He said it was an action for loss of service, and that the evidence should be confined to shewing how far the plaintiff was damnified by *loss of service*. Lord Eldon—"In point of form, the action only purports to give a recompense for loss of service; but we cannot shut our eyes to the fact that this is an action brought by a parent for an injury to her child. In such a case, I am of opinion that the jury may take into their consideration all that she can feel from the nature of the loss. They may look upon her as a parent losing the comfort as well as the service of her daughter, in whose virtue she can feel no consolation, and as the parent of other children whose morals may be corrupted by the example." His Lorship summed up to the jury accordingly, and a verdict passed for £400. Here, then the eminent judge refused to confine the plaintiff strictly to the nature of the case, or to what was expanded on the record. It will not be said that any pleader, in such a case, alleged in his declaration that the defendant got his daughter with child, whereby the morals of his other children were corrupted, and he lost and was deprived of the society of a virtuous daughter. The action professes to recover damages upon no such ground, yet damages are constantly given upon those very grounds. The same doctrine was held in Irwin v. Dearman, [11 East., 23,] wherein £100 was given for five weeks' loss of service of an adopted daughter and servant. Lord Ellenborough says, "the loss of service is the legal foundation of the action; and though it may be difficult to reconcile to principle the giving greater damages on the ground of the servant being the plaintiff's adopted daughter, yet the practice is become inveterate and cannot now be shaken."

To confine the proof, then, strictly to that which is alleged in the declaration, is not the rule in all actions; it is not so in case for the seduction of a daughter. Then, why make a rule in the present case. "We shall inflict a wound upon public morals," urges the defendant's counsel, "if we suffer the plaintiff thus virtually to recover damages in a case where she shews herself to have been guilty of a breach of the laws of morality." The inadequacy of the law to afford proper security to females in such cases, has been a subject of regret, as remarked by Mr.

Christian and others; a circumstance that ought not to induce us to narrow the grounds of relief and protection. An action for seduction, unaccompanied by a promise of marriage, will not certainly lie at the suit of the female; the law has so settled it, and perhaps wisely, and I am content to take the law as I find it. Perhaps it is proper to refuse to entertain an action for seduction merely. It might be a want of that strict care we are bound to have over the public morals, if we were to allow a female to come into court, and without setting forth any extenuating circumstances, shew she had permitted herself to be seduced, and claim damages against her seducer. But the present action, I presume, stands on different grounds; and the plaintiff, though not justified, yet shews a case that all must, I think, admit, is extenuated. Surely the unfortunate female who has been betrothed, and has yielded to the improper solicitations of the man under a sacred reliance that he would make her his wife, stands on different grounds from one to whom no such promise has been given, and who had no such expectations. I can see no danger to morality in our letting in the testimony given in this case—no fear that temptation may thereby be held out to incontinence. Every case must be decided on the facts proved in it, and the jury weigh the testimony, and award damages commensurate with the injury. I find, then, neither case nor principle against the plaintiff, and on that ground I should be content to decide. But we are not left without both case and principle in favor of the admission of the testimony; Mr. Christian, in his Notes on Black. Com., (3 vol., 143,) has this strong language: "It appears to be a remarkable omission in the Law of England, which, with such scrupulous solicitude, guards the rights of individuals, secures the morals and good order of the community, that it should have afforded so little protection to female chastity. It is true that it has defended it by punishment of death from force and violence, but has left it exposed to perhaps greater danger from the artifices and solicitations of seduction. In no case whatever, unless she has had a promise of marriage, can a woman obtain any reparation for the injury she has sustained from the seducer of her virtue." Here, then, we have the authority of Mr. Christian, and no mean one surely, that a female who has had the promise of marriage, may obtain, in an action like the present—and in that only, reparation for any injury done by her seducer. But, we are asked, still further to leave the sex unprotected, and to deprive them of their only refuge against the wiles of base seducers who are to be permitted to do the last injury to female

character, and to go unscathed. But further, the case of Paul v. Frazier, [3 Mass., R., 71,] (which, in the absence of any conflicting English case, and taken in connexion with the opinion of Mr. Christian, may, I think, be fairly considered an authority,) expressly recognizes the propriety of the reception of such testimony. The declaration, in that case, set out that the defendant began to court plaintiff under pretence of marriage; having gained her affections, got her with child, and forsook her; whereby she was greatly injured in her reputation, and hurt in her peace of mind. The plaintiff obtained a verdict in the Common Pleas, which the Court arrested; and from that decision the plaintiff appealed. The court were of opinion that judgment of the Common Pleas ought to be affirmed; and the judgment was accordingly arrested, because the action was not given by statute, and there was no principle of law to support an action on the case against defendant for seducing plaintiff under a false pretence of courtship and intention of marriage. Parsons, C. J., in giving judgment, says: "As the law now stands, damages are recoverable for a breach of promise of marriage; and if seduction has been practised under color of that promise, the jury will undoubtedly consider it as an aggravation of the damages. So far the law has provided, and we do not profess to be wiser than the law." For the reasons to which I have adverted, I retain the opinion I originally held, that this testimony was properly received and put to the jury; and, therefore, that the rule should be discharged.

Rule for new trial discharged.

KEYS vs. POLLOK.

Easter Term, 1839.

Where an action was brought on a Promissory Note thirteen years old, held that the following answer to a question respecting the Note: "I have had considerable accounts with the plaintiff, and, if upon those dealings, there is anything due to him, I am willing to pay him," will not be a sufficient acknowledgment to take the case out of the statute.

Assumpsit on a Note thirteen years old. Plea, statute of limitations.

HALLIBURTON, C. J., said—I have looked in vain for a promise to pay this note in the report of the evidence given at the trial. So far from it, the defendant appears cautiously to have guarded against committing himself by any such promise. The witness mentions the note to him thirteen years old, be it remembered,

and all that he says that can bear the semblance of a promise, is, "I have had considerable accounts with plaintiff, and if, upon those dealings, there is anything due him, I am willing to pay him." This, surely, is not a promise confined to the note to which the plaintiff has confined it in the proof; for the note speaks for itself, and shews that at the time it was made the defendant admitted the amount of it was due by him to the plaintiff, which amount the plaintiff might have recovered had he brought his suit in due time. But now his whole right to recover from the defendant rests upon a promise to pay whatever shall be proved to be due upon the dealings then alluded to; which balance, it is evident from the nature of the conversation in which the promise was, was not then ascertained. Such a promise cannot sustain an action upon a note made thirteen years before. If it is asked, then, whether in such a case the plaintiff must prove the account on both sides, and establish the balance before he can recover, I answer, in the language of Tindal, C. J., in Haydon v. Williams, (1830,) [7 Bing., 163,] that "when the action is brought after six years, and the subsequent acknowledgment of the defendant is the very ground of his action, the plaintiff must take it altogether as he finds it. I cannot use the acknowledgment without annexing the qualification also."

The promise in proof, then, was a promise to pay such balance as should be ascertained to be due upon a subsequent adjustment of accounts, and not to pay a note of hand given thirteen years before.

HILL, J.—Upon the trial of this cause, I took occasion to remark to the jury that we could not select one portion of the evidence from which an inference might be drawn of something being admitted as due, and reject an immediately succeeding part negativing the inference, but that the testimony must be considered and continued as a whole, and in its entirety. Now, thus viewing it, I cannot, nor do I think, a jury ought to draw the conclusion that the defendant admitted *anything* as due the plaintiff; on the contrary, I think the fair and reasonable inference from all that passed is, that the defendant denied that anything was due. We are not to hunt after strained constructions, but to read the whole as men of common sense would.

The defendant adverts to the existence of considerable accounts between him and the plaintiff, acknowledges the receipt of a letter, but he says he did not give a written answer for fear of saying something that might be taken hold of, and adds, that he did not wish to defraud plaintiff, but that "if anything were due plaintiff he would pay." It cannot be said that here is either an

acknowledgment of a debt or an unconditional promise to pay: at all events I cannot so say, for the whole testimony has left the impression on my mind that the defendant expressly intended to guard himself against making any admission or using any expression that might be considered as such. The onus of taking a case out of the statute rests on the plaintiff, who must give the court something like certainty and precision. All the late cases since Tanner v. Smart, have repudiated that doctrine which was virtually a repeal of the statute of limitations. Courts do not now permit the inference to be drawn, that a man promised to pay a debt when he would *not pay*; and instead of permitting the seeming injustice of particular cases to induce them to resort to astute reasoning to evade the provisions of the statute, they endeavor to make the decisions conform to its import and spirit, so as to carry out the intentions of the legislature and not to frustrate them. In the argument of this case, the Solicitor General has distinctly propounded, that he rests not upon an acknowledgment of debt from which a promise to pay may be inferred, but upon a distinct promise to pay. The decision of the case, therefore, rests upon this question: has such a promise to pay been proved as will avail the plaintiff and bind the defendant, notwithstanding the statute, and compel him to pay this very stale demand? Here, certainly, it cannot be said, that there is proved any unconditional promise to pay. If there is any promise at all, it rests upon a contingency of there being anything due. There is no proof of any specific certain sum being even demanded; the whole conversation evidently refers to accounts unsettled, and any payment is put upon the contingency of anything being found due on a settlement. It has been admitted in the argument, on the part of the plaintiff, that no case precisely analagous to the present, is to be found in the books. The Solicitor General commenced by citing, and ended by declaring his chief reliance to be placed upon, Heyling v. Hastings, [Cow., 54, Lord Ray., 389–421.] But that case is entirely distinguishable from this, and seems to be rather against than for the plaintiff. It was assumpsit for goods sold. After six years, the plaintiff, executor of the person who sold goods, went to the defendant and demanded the money, naming the amount for them; but defendant denied that he had ever bought the goods of plaintiff's testator, and said further: "If you can prove your debt, I will pay it." The whole court were of opinion, that this promise, on proof of sale and delivery of goods to defendant, took the case out of the statute; though Holt, C. J., doubted whether the promise ought not to have been declared

on specially. Now the defendant did not refer to any unsettled accounts—or to any payment made—or to any offset; but wholly denies the receipt of the goods, and invites the plaintiff to prove that fact if he could, and *then* he would pay. But plaintiff took upon himself the onus of proving *everything* that the defendant disputed; there was no call upon the defendant to shew anything. There was, in fact, *nothing* in dispute but what the plaintiff took upon himself to prove, and did prove. According to the statement of the defendant himself, he must have been indebted to the plaintiff. The delivery of goods being proved, it was utterly inconsistent with the defendant's own statement of facts, that he should not be so indebted. I have said the onus is on the plaintiff, and that he has no right to call upon the defendant to be an actor. Has the present plaintiff borne this onus? Has he shewn to us that there is anything due him? Surely it is impossible to say that proving the handwriting of the defendant to the note shews that upon a settlement of accounts anything is due; for it is manifest that it may be perfectly consistent with the state of facts as proved, that Keys is now, on a settlement of accounts, indebted to Pollok. Taking all the conversation of defendant with Logan, can any one say, with any show of certainty, that Pollok's account is not greater than Keys. It will not do to say the defendant might have shewn it, had such been the case, for I repeat, everything lay with the plaintiff. It would be equally inconclusive to urge that the plaintiff could not go into these accounts and shew where the balance lay, for that would place him merely in the position of other plaintiffs who are unable to prove their case. Suppose that this promise had been declared on specially as Holt at first thought ought to have been the case in Heyling v. Hastings, how could the plaintiff have stood? Would the proof here given have supported his case as the proof in Heyling v. Hastings certainly would on a special declaration. In the case of Tanner v. Smart, [6 B. & C., 603,] the promise was, "I cannot pay the debt at present, but I will pay it as soon as I can." The plaintiff gave no proof of the defendant's ability; but the court held, that without such proof the action could not be maintained. The existence of the debt was admitted, but the defendant was called on to shew nothing. The promise proved in Tanner v. Smart, "I will pay as soon as I can," as Lord Tenterden says, "was in substance saying, prove that I am able to pay and then I will pay. That would have been what the promise was taken to be in Heyling v. Hastings—a conditional promise, and when the

proof of ability should have been given, and not before, an absolute one." Now, the promise here was equivalent to saying, prove that anything is due on these accounts, and I will pay you, which is conditional; and when proof was given that anything was due, it would be absolute, and not before. If the plaintiff here, instead of producing and proving a note, had exhibited an account containing many items of charge for goods sold, and proved the sale and delivery, would it be said that such proof would shew anything due the plaintiff on a settlement of accounts between him and defendant? It might certainly shew the charges correct upon the plaintiff's side, but it would give the go-by to that of the defendant, who expressly and directly refers to both the accounts of plaintiff and defendant? In all the cases at all similar to the present, I find that where a defendant resists payment upon some affirmative or conditional excuse, the plaintiff is always held to negative, in the most positive, distinct and clear manner, the grounds upon which the defendant rests, or to shew beyond question the condition performed. Thus, if a condition or qualification is annexed by a defendant to his admission of a debt, as where he states it was discharged by particular means or in a particular way, the plaintiff must negative this most clearly, and the defendant must refer to the means so that there can exist no mistake. In Beale, surviving partner of Long v. Nind, [4 B. & A., 568,] to take the case out of the statute, it was proved that Nind went to Beale's office, when the latter said, "Mr. Nind, I believe there is a bill due from you to Long & Beale." Nind said he believed there had been a bill, but that they had received the money, and there was a balance due him from Long's executors. Long was a partner in a banking concern with which Beale had nothing to do. At a subsequent meeting, Beale said to Nind, "If you have paid this bill to Long & Beale, I have received no account of it, and I shall not be satisfied till you shew me the receipt, and I shall proceed." Nind said, Long had always a floating balance in his hands, and had paid himself. The plaintiff proved the state of accounts between Nind and Long, and that the bill of Long and Beale was never brought into the banking account; but the court held that as Nind had not referred to any particular charge or credit in the banking account, nor designated the time or mode of payment so strictly that the court must say it is impossible it can have been discharged in any other mode, the case was not taken out of the statute. The party plaintiff in this case was therefore held to shew such a state of facts as to render it, in the language of Bailey, J., impossible that any mistake should exist. Now, it

is not only not impossible that Keys may be indebted to Pollok, according to the proof in this case; but, taking the admission altogether, I think it highly probable that, at all events, the whole amount of the note is not due; for it is manifest from Logan's testimony, without referring to the admission of Pollok, that there were accounts entered in the books of plaintiff between these parties. Logan says: "I was employed by plaintiff to make up his books and accounts. But we are not at liberty to resort to conjectures or probabilities; the plaintiff was bound to give us certainty; his evidence ought to be clear and special; ambiguous admissions are not now permitted to obviate the wholesome effect of the statute. The conflicting decisions in England gave occasion to the 9 Geo. 4, cap. 14, a wholesome act, which sweeps away the effect of these loose, verbal, and most unsatisfactory admissions often made upon a sudden, and unguardedly, and without the maker being aware of the true state of the facts; and compels a written promise to take the case out of the statute, and to bind the promissor. The writing, then, speaks for itself, and is not liable to have that coloring given to it, to which hasty conversations are so subject. Time is given to a party to examine, reflect, and deliberate. If, then, in cases where the debt is actually admitted to have been due, and alleged to have been discharged in a particular way, the courts have so strictly held plaintiff to negative the mode of payment alleged, and have not called on the defendant to shew anything, how much more necessary is the call on the plaintiff for certainty in this case, where there is no admission of anything being due. If it should be urged that the conversation referred wholly to the note and not to the account, I answer, that assuming it to be so, it would make no difference in my opinion. Had the defendant said, "If there is anything due on the note, I will pay," the case would still be within the statute. Keeping in mind the language of the of the court in Beale v. Nind, it would have been incumbent on the plaintiff to have shewn that no payment had been made. Can we, with certainty, say that Pollok has not made payments on this note which the plaintiff has both omitted to indorse and to give a receipt for; or if a receipt were given, it has not been lost through accident; and shall we put the defendant in such a position, that, from this conversation, the whole laboring oar shall be thrown on him. Had the plaintiff exhibited this note to the defendant, and the latter had said, "you know I have made payments upon this note, for which I have had no credit, but if anything is due I will pay," could we let the plaintiff recover on such an admission as this, the face of the note; if *he* could not

shew the payments alleged by him in the admission, upon which alone he rests for placing his case beyond the statute, must they go for nought? But has not the defendant, in substance, set up payments; has he not referred to his considerable accounts against the plaintiff. Lechman et al. v. Fletcher, [1 Cr. & M., 623,] is in support of what I have endeavored to shew. The defendant and one Fulljames were indebted to the plaintiff in £250; the plaintiff wrote to defendant claiming that sum; and defendant wrote plaintiff a letter, in which he said, "Fulljames had managed the cash concerns out of which the transaction arose;" and added, "I will at any time pay my proportion of the debt due, on application for the same." It was objected, that no amount was specified in this letter of the defendant. The court held that it was competent for the plaintiff to shew the sum *dehors* the letter, the statute 9 Geo. 4, not requiring in terms the amount of the debt to be specified. Bayley, B., in giving judgment, says: "Suppose a debt of considerable standing, and defendant were to write, 'I do not know the amount as we have had no settlement; nothing, however has been paid, but if you ascertain what the amount is I will pay you;' I think the plaintiff might shew the sum due." Now, here Baron Bayley puts expressly, that the defendant admitted there had been no payment; and if that had been omitted, it is clear it would not have been competent for the plaintiff to shew what was the amount of his account only.

I found my opinion, therefore, upon the ground that the plaintiff has not proved that anything is due, which he was bound to do under all the cases similar to this; and which he must have *alleged* in his declaration, and proved, had he declared specially. The rule, therefore, ought to be made absolute.

MOORE vs. POWLEY.

Hilary Term, 1840.

Where arbitrators chosen by the parties, after having examined the witnesses on both sides, selected an umpire, refused to have plaintiff's witnesses re-examined before the umpire, but re-examined the defendant's witnesses, and gave an award for the defendant, the court would not support the award.

This was a motion to set aside an award on the ground of improper conduct on the part of the arbitrators. *First*,—Because plaintiff was not allowed to be present at the examination of his

own or of the defendant's witnesses. *Secondly*,—Because the arbitrators called in a third person as umpire; after which, plaintiff requested this umpire to allow certain of his witnesses to be examined, but he was not allowed to bring them before the arbitrators; and because, after the umpire was selected, two of the defendant's witnesses were examined before the arbitrators.

BLISS, J.—There is nothing in the first objection. It is completely answered by the defendant's affidavit, which states that the arbitrators heard the statement of both parties, and then requested them to withdraw during the examination of the witnesses, deeming that the most advisable course; to which neither party made any objection. The arbitrators had a full right to proceed according to their own discretion, provided they acted fairly to both. Though I see nothing so improper in their examining the witnesses themselves, I cannot say that I approve of the exclusion of the parties during the examination; but most certainly, where no objection was made to the course at the time, it cannot be raised afterwards. [2 C. & P., 576.] The party takes his chance of having an award in his favor, but being disappointed, he complains of that to which he before tacitly assented. He cannot do so. [1 B. & P., 91. 5 B. & Ad., 488.]

I am disposed to give more weight to the other objection. It is true that the plaintiff's affidavit does not disclose the fact relied upon with as much distinctness as might have been done, but it conveys to my mind sufficient certainty. I collect from it and the defendant's affidavit, that the two arbitrators first heard the case and examined the witnesses, when they called in a third arbitrator to join them; that the plaintiff required certain of the witnesses to be examined before the three arbitrators, which was refused, notwithstanding which, they did examine some of the defendant's witnesses. Is this allowable on the part of the arbitrators? It is not like the re-examination of a witness by the same arbitrators, as in Atkinson v. Abraham. [1 B. & P., 175.] The tribunal had been reconstructed—another had been added to it whose opinion was likely to have influenced the others; for the two having called him in after they had themselves investigated the case, shews that they had some difficulty which required his assistance to remove. It might have been sufficient if the evidence which had been given had been stated to the third arbitrator by the other two without a new examination of the witnesses, as in Hall v. Lawrence, [4 T. R., 580,]; but even then, if either party had requested him to hear the evidence anew, it may be doubted whether his refusal to do

so would not have been a good ground of objection. [5 B. & Ad., 495.] But here the arbitrators, after they had been joined by the third, must have felt the necessity of a further examination, for they did examine some of the defendant's witnesses; and to refuse the plaintiff's application to have his witnesses examined under these circumstances, appears to me perfectly unjustifiable. It was not fair dealing. If the same course had been pursued before the two arbitrators, and they had refused to examine any witnesses tendered to them, there can be no doubt it would vitiate their award. [3 Dowl., P. C., 669.] The case appears to me to be the same where witnesses are rejected after the third arbitrator was called in. Who can say that his mind would not have been differently influenced if he had heard the witnesses on both sides, and that through him the two others also might not have decided differently? The hearing on which the award was made, has been *ex parte*. The trial was not conducted fairly and impartially. I cannot, upon the statement of the plaintiff, unexplained and uncontradicted by the defendant, support the award.

ALMON vs. TREMLET.

Easter Term, 1840.

Where defendant's servant purchased a quantity of copper from the plaintiff, for cash; and having received the money to pay for it, fraudulently retained it to his own use: held that plaintiff could not recover the price of the copper, it having come into defendant's possession without his being aware of the fraudulent conduct of his servant.

This was an action brought by plaintiff against defendant, a merchant in Boston, to recover from him the price of a quantity of copper sold and delivered in Halifax, to one Lane, who commanded a vessel called the "Acadian," belonging to defendant, and engaged in trade between this port and Boston.

It appeared in evidence, that Lane was in the habit of purchasing copper to realize freight; and that in June, 1838, plaintiff's managing clerk met Lane in the street, and asked him if he wanted a lot of copper. Lane said he would purchase it, if the price would admit of its paying freight. Plaintiff's clerk named 10d. Lane said that would not do for the owners. On the afternoon of the same day the clerk again met Lane, and

offered it for 9d.; which Lane agreed to. The copper was sold for cash. The bill of parcels was made out on the 14th of June. There was some uncertainty respecting the time of delivery of the copper. The witness at first said that the copper was delivered on the following day. Lane's certificate at the Consulate office, however, was dated the 14th. On the same day, the 14th June, Lane applied to Messrs. Starr, the general agents of the defendant here, for money to pay the plaintiff for copper purchased from plaintiff; and on that day, near 3 o'clock and before the bank closed, the Messrs. Starr gave Lane a check for £100 on the bank, to pay for the copper. The Messrs. Starr had been requested by Capt. Jones, whose authority to make the request is not stated, but who appears by the evidence to be in defendant's service, as a master of a vessel to advance money to Lane to purchase copper on account of defendant. Lane promised the plaintiff to pay for the copper before the "Acadian" sailed; and said, after it was delivered that he was to get the money from Starr. He sailed in the "Acadian" between seven and eight o'clock in the morning of the 16th, without paying for it. Just after she had got out of the harbor, plaintiff's clerk came to the Messrs. Starr and asked if Lane had left any money with them to pay for the copper. They replied that they had given the money to Lane to pay for it two days before. The copper was cleared out by Lane as the property of defendant. The "Acadian" arrived at Boston on the 20th June; the copper was entered that day, by the defendant, at the custom house there, as his own property; and received by him. By the first mail after the "Acadian" sailed, plaintiff sent a bill of parcels for the copper to the defendant, and drew upon him for the amount, which he refused to pay; and by the same opportunity the Messrs. Starr informed him that they had advanced the money to Lane, who had not paid it to Almon; and defendant, in reply, told them they had no authority to make such advance. He, however, subsequently allowed the charge, on a settlement of the general account at the end of the year. There was no debit of copper against the defendant in the plaintiff's books, because, as plaintiff's clerk said, "it was one of those transactions

for which we expected to get immediately paid." Nor was there any proof of any general ageney established in Lane; although it did appear that Lane received passage money for the defendant here, and was in the habit of purchasing cordwood and other small articles for him with cash.

In supporting the plaintiff's claim, the Solicitor General, his counsel, did not contend for any general authority on the part of Lane to make purchases on the credit of defendant. There was not a shadow of proof to support such a claim; but he contended; 1st, that where there is no such general authority, if a party is sent to make purchases for another, and after the purchase is made, and the goods received, he who sent him gives the money to him he sent to pay the party from whom he received the goods, and if he does not pay him, the loss falls upon the purchaser who employed the party, and not upon the vendor of the goods. And he contends, that as Lane received the money from Starrs, (defendant's agents,) to pay Almon for the copper, which had been then delivered, and Lane did not pay it, that the loss must fall upon defendant, and not upon Almon.

HALLIBURTON, C. J.—I think there are two objections to plaintiff's succeeding upon this ground. First,—Neither the defendant nor the Starrs sent Lane to make any purchase for them. The transaction commenced on the part of the plaintiff, whose clerk met Lane accidentally in the street, and offered the copper to him for sale. This is not an unimportant distinction. If I want an article and send my servant for it without the money, and he brings it to me, it is unquestionably my duty, after receiving it, to see that it is paid for; and if I then give the money to the servant to pay for it, and he misuses it, I must bear the loss; it is my confidence he has abused. But if, without sending him on any such errand, he is accosted on the street with the offer of any article I am known to use, and on his communicating this to me I give him the money to pay for it, and the article is delivered to him without insisting on payment, whether that delivery was made before or after I had given him the money, provided such delivery was made unpaid for without my knowledge, I am not bound to sustain the loss; the confidence was reposed in the servant by him who delivered the goods, as I had not sent him abroad to procure goods on *my credit*. Now, all that the Starrs (defendant's general agents)

did, was to give money to Lane to purchase copper for cash. Starr expressly negatives Lane's having any authority to make purchases of any kind on defendant's credit. The plaintiff's own witness proves that no credit, (in the mercantile sense of the word,) was given to any body in this transaction. It was a sale for cash; but, unfortunately, the plaintiff reposed confidence in Lane that he would bring the money for it, according to the agreement made with him; and the article was delivered to him without exacting the payment from him at the time. Now, it was the plaintiff who reposed that confidence in Lane; and if Lane abused it, he must take the consequences as far as this part of the case goes. Secondly.—It is by no means clear that the copper was delivered before Starr gave Lane the money to pay for it. The date of the Consul's certificate of the shipment on the 14th, is not conclusive; but admitting it to have been delivered on the 14th, the check for the money was given to Lane on the same day before the bank closed; and there is no proof as to the priority of the two facts which it was incumbent on the plaintiff to establish, to support his claim upon this ground.

It is next contended, that the defendant, by receiving the copper, has recognized the authority of Lane to make the purchase on his account; and that such recognition is equally binding upon him, as if he had originally authorized Lane to make the purchase.

In McLean v. Dunn [4 Bing., 722,] Best, C. J., says: "In my opinion, the subsequent sanction of a contract signed by an agent, takes it out of the operation of the statute more satisfactorily than an authority given beforehand. When the authority is given beforehand, the party must trust to his agent, if it be given subsequently to the contract, the party knows that all has been done according to his wishes." This reasoning is as sound as it is just; but, is it applicable to this case. Under what circumstances did defendant receive the copper?

Lane, the captain of his vessel, not authorized to make purchases on credit for him, but occasionally buying articles for him with cash, purchases this copper from Almon for defendant, and agrees to pay cash for it. He receives the money to pay for it from defendant's general agents here—ships it on defendant's account—sails (without paying for it) on the 16th of June, and delivers it to defendant on the 20th of that month at Boston. There is no proof of Lane's communicating his own roguery to him, nor does it appear that he was then made acquainted with it through any other channel. He, of course, then received it as his own property, which had been bought and paid for with his

own funds. Nor can the mere reception of the copper, under these circumstances, amount to a recognition of Lane's authority to purchase the copper on his (defendant's) credit, when, in fact, as I have before observed, it was not sold on the credit of any person, although it was unfortunately delivered under a misplaced confidence in Lane.

In the case of Horsefall v. Faunderoy, [10 B. & C., 755,] the plaintiff had advertised the sale of ivory at Liverpool, payment to be made on delivery of bills of parcel by good bills in London to the satisfaction of the sellers, not exceeding three months' date to be made equal to cash in four months from date of terms. Lloyd and Williams, brokers at Liverpool, who were frequently employed by defendants to purchase ivory for them, sent one of these catalogues, with the conditions, to defendants, who directed them to buy certain lots for defendants, which they did. At the sale, the auctioneer made the following verbal alterations as to payment: "Payment by known buyers, the usual credit of two and two months; by strangers, as in condition annexed to catalogues," The ivory was delivered to Lloyd & Williams on their own account, and charged to them. They transmitted it to defendants, as bought of plaintiffs, payment equal to four months cash, and then drew upon the defendants a bill for the amount at four months' date, adding brokerage and commission, which bill the defendants accepted and paid. L. & W. stopped payment within two months after the sale; and the plaintiffs discovering that the ivory was purchased for and received by defendants, brought this action against them for the amount. They were non-suited by Parker, J., at the trial, and on arguing a new rule *Nisi* to set aside the non-suit, Lord Tenterden said that "the plaintiffs, by circulating a catalogue with certain conditions of sale, naturally led the defendants to suppose that Lloyd & Williams could not have received the ivory without giving good bills on London for it, and that therefore they might properly accept the bill drawn by Lloyd & Williams for the amount; and if we held that the acceptance and payment of that bill did not exonerate the defendants, it would be an exceedingly hard case."

The mere reception of the goods, therefore, does not amount to a recognition unless they are received under circumstances which authorize an inference that the party receiving them wants to recognize the power of another to make purchases on his credit. Now, here a party who had never authorized Lane to purchase goods for him on credit, but was accustomed to receive goods from him out of this vessel bought for him with

cash, receives this copper from him out of that vessel in the usual manner. Can that amount to a recognition of a purchase made on his credit? where, I repeat it, that purchase was not made on the credit of any one, but was really a swindling transaction committed by Lane upon Almon.

But this case is subsequently put in a new light. Under whatever impression the defendant may have received the copper, we are told that before he had sanctioned the advance which Starr had made to Lane to pay for it, he was informed that Lane had not paid for it; and we are now to be led from the direct question between Almon and Tremlet to try a collateral one between Tremlet and Starr, and to decide whether Starr, as Tremlet's general agent here, was authorized to make this advance on Tremlet's account. Now, this is a course upon which, I think, we should enter with extreme caution. It is undoubtedly true, that if goods are sold and delivered to a factor, whose principal is unknown to the vendor at the time, that the vendor may resort to that principal for payment when he discovers that the goods were really purchased for him; but if at the time of the sale the vendor knows the principal, and elects to give credit to the agent, he cannot after that resort to the principal. This doctrine is fully established in Patterson v. Gandesequi, [15 East., 62,] where a new trial was granted expressly to try whether the plaintiff—the vendor—did not know of the principal at the time that he gave the credit, and charged the goods to the agent. If he did, the court concurred in deciding that he could not maintain the action. Now, it cannot be disputed that Almon knew that the owner of the "Acadian" (the defendant) was the principal in this transaction, and that the copper was to go to him. The bill of parcels delivered to Lane upon this sale *for cash* was brig "Acadian" and owner; and it is equally clear that any credit that was given was to Lane, who was permitted to take away the copper, upon a promise that *he* would pay for it before he sailed. The plaintiff sent to the Starrs, not to require them, as agents, to pay for it, but to inquire if Lane, whom plaintiff had trusted, had left any money with them to pay for it. If, then, upon the transaction as it stood between Almon and Lane at the time of the delivery, the defendant was not in point of law liable, because the copper was not delivered on his credit, but on the credit of Lane, can we go into the equities of the case to fix him with a subsequent liability. I do not find that such a course was pursued in the case of Patterson v. Gandesequi. No inquiry was there made as to the state of accounts between the agents and Gandesequi, in which the interest of the creditors of the

insolvent agents would have been involved as the interest of Starr would be here. The sole question there was, did the plaintiff, knowing that there was a principal, give credit to the agents.

I would not be understood to state, that if goods delivered to an agent come into the hands of the principal, without any color of payment by either, that the principal would not be compelled to pay for what he had actually received, without having made *any* payment to any body. What I object to is going into questions between the principal and other parties who, to say the least have colorable rights: for that might lead us into much intricacy. From the authority of Starr we may be led to inquire into the authority of Jones, or into the state of the accounts between Tremlet and Lane. If it is said that it is in defendant's power to show all this, the question arises, is he bound to show it. He rests his defence upon this broad position: you trusted Lane, and not me; and I received the goods from him in the ordinary course of my business with him.

But if we consider the equity of the case, how does it stand. The Solicitor General, for the plaintiff, says, that defendant denied Starr's authority to advance the money; and as he knew that plaintiff had not been paid for it, and he had actually got it, [the goods] he ought to have paid him, instead of subsequently allowing Starrs' charge for the advance. Now, if the defendant had been so situated that he could have withdrawn altogether from the transaction, without deciding in favor of either, it would have been prudent for him to have done so. But that was impossible; he had already received the copper on the 20th of June; and it appears, by the evidence of Holmes, that a large portion of it was sold before the 28th of that month. If he, of his own authority, undertook to pay Almon—whose draft, be it remembered, he refused—at the same time that he denied Starrs' authority to make the advance, then he must have determined to resist Starrs' claim, by the allowance of which he has brought this action upon himself. He was compelled, therefore, to decide between them; and I think his decision was dictated by justice, and is sustained by law. If one of two innocent persons must suffer by a fraud of the third, the loss shall fall upon him whose act or neglect enabled the party to commit the fraud. And although it may be said, that if Starrs' had not advanced the money, Lane could not have committed the fraud; (a position, however, which may be disputed, for as he sailed without paying Almon, he might have sold it on his own account at Boston, if Tremlet's funds had not been

advanced to purchase it;) yet, would it have been dealing generously, or even fairly, with his agent, (supposing his authority to make the advance could have been successfully resisted,) to refuse to recognize an act which had been done for his benefit, and at the request of one whom the agent must have supposed to possess his confidence. Putting aside the strict right, then, to make the advance, (which, I think, is a question exclusively between defendant and the Starrs',) nothing more was required from them than to pay the money over to Lane; it did not become their duty to see to its application; it was not an act of negligence on their part that Lane did not pay it to Almon. But how does Almon stand? He first makes the proposal to Lane to sell the copper to him; he negotiates the sale with him for cash; he suffers him to remain a whole day after the delivery—if it was delivered on the 14th as Almon contends; allows him to sail between 7 and 8 o'clock on the morning of the 16th, and does not send to enquire after him until he is out of the harbor. He has thus, by this act in delivering the copper without the money, and by his neglect in permitting him to sail without paying for it, enabled him to commit the fraud, and must, I think, bear the loss of it.

I am therefore of opinion that in this case, the plaintiff ought to become nonsuit; but if he will not consent to that, at all events the verdict for him must be set aside, and the rule for a new trial made absolute.

HILL, J.—The facts of this case have been already stated; and I need not, therefore, recapitulate them. Whatever might be the decision the court found itself bound to come to, it is plain that an innocent party must suffer from the fraudulent conduct of Lane, from which the present action springs. The goods in question were not sold to the defendant himself, but to Lane, the master of the packet brig "Acadian." The defendant was the owner of the brig. The defendant is sought to be made liable for these goods as sold to Lane, the agent of the defendant, and for his use. The argument for upholding the verdict was strenuously pressed upon us; and I have given the case my best consideration, but am unable to bring my mind to a conclusion different from that which it formed at the argument—that the plaintiff was not entitled to recover. The law of principal and agent, with reference to third parties, has been discussed and laid down in the cases and text books, and our attention has been called to them; but the doctrine as applicable to an express, general, or special and limited agency, does not, it seems to me, apply here, because I do not see a particle of testimony shewing

Lane to have been, before or at the time of the sale of these goods, in June, 1838, the express agent of the defendant to manage his affairs and make purchases for him and on his account generally, or his special and limited agent to make the particular one in question. In the plaintiff's case there is an absence of such proof; but in the defendant's case that fact meets with something like a negative, for Mr. John E. Starr swears that, at that very time, his house were the general agents of the defendant in Halifax, and that Lane applied to him as such, and received money to make the purchase in question; and also, that the clerk of the plaintiff (McAuliffe) made, at that time, also application to him, on the subject of money. I say, therefore, it cannot for a moment be said, that the plaintiff has made out Lane to be, at the time of this purchase, either the express, general, or particular and limited agent. If the defendant be liable at all, it must be upon another principle: that though there be no express authority given, yet such authority may be implied from the conduct of the employer, who may recognize, sanction and adopt the act of a party, when no previous express authority had been given. This branch of the law of agency rests on the same principles as the law of master and servant; and the cases applicable to the one, apply also to the other. Now, what have been the decisions on this subject? All the cases establish, that if a master permits his servant to buy goods on credit, the former is liable for what is bought by the latter, though without his authority; because the general principles of justice would point out that he who accredits another, must take the effect of that credit. The seller is not to make enquiry, in such case, whether the purchase was made with the sanction of the master, for that is fairly to be inferred from the general tenor of his actions. But if a master has not sanctioned any dealing upon credit, from which a seller might honestly infer an authority, a party trusts a servant at his own peril, and the servant alone is the responsible person, the master being liable only for what comes to his use, and not for that, if he has furnished the servant with money beforehand to pay for it: for whenever it appears that the master has beforehand furnished the money, he is liable for nothing. The cases cited from Peake, Salk., Esp., and the case of Dunn v. McLean, [1 M. & P.,] fully establish this doctrine. I have already said that no express, general or particular agency of Lane is proved; and I may also say, that the case affords no proof whatever of Lane's having, previous to June, 1838, made any purchases on credit for the defendant, and of the defendant's adopting them and paying for them. It does not appear from any part of the

case that Lane has ever purchased on credit goods for the defendant, and therefore, as far as we can see, the defendant has not, by any one act, held out Lane to the world as a person armed and clothed with the credit of the defendant, and therefore I think it cannot for one moment be said that any implied authority to make this particular purchase on credit can be assumed. But it is said and urged with great force, and put forward as the main prop of the plaintiff's case, that the defendant has actually received and used the articles, and by such reception and use has adopted the act of Lane. The answer to this seems to me conclusive. No credit, by the plaintiff's own testimony, was given either to the defendant or to Lane. The sale was a cash sale, and the cash of the defendant was actually in Lane's hands to pay for this purchase. The copper was delivered on the 14th or 15th of June, and the check of Starr was given on the 14th. At the time of the purchase, the clerk of the plaintiff was referred to Mr. Starr as the agent of defendant, by Lane; and the clerk himself applied to Starr, as such agent, to know if Lane had left the money with him for the plaintiff. The entry of the sale was never posted, and the whole testimony puts it beyond a doubt. I think that it was a cash and not credit sale, and that Lane was in cash furnished by the defendant. The receipt of the copper would, at the utmost, only shew that defendant had adopted the act of Lane, and that would be no more than recognizing that Lane had made a cash and not a credit purchase. But we have the money of defendant actually in Lane's hands to make the purchase. Then the principle established applies that the master is not liable in any case where he has beforehand given money to the servant to make the purchase. It is said that the refusal of defendant to recognize the payment made by Starr shews that the money of defendant was not in Lane's hands before the purchase. I do not see any force in that. The fact is that Lane received it as defendant's money —the agent, Starr, paid it as such, and the plaintiff himself looked and applied to Starr as the source of his payment. The money was debited by Starr against the defendant, and was paid in the usual course of accounts between them. But let us suppose that Starr had not advanced this money to Lane, and that on the arrival of the "Acadian" at Boston, Lane had received the £97 10s. from the defendant, could the plaintiff in such case recover from the defendant. I find no case that would favor such an action. In all the cases that I have looked into, where the master is held liable by reason of the receipt and use of the goods, they were sold to the servant on the credit of the master,

and the master was known and was made the debtor. Here they were sold for cash to Lane, and not on the credit of the defendant. If a party thinks proper without any authority, to give my servant goods on credit on my account, he takes the risk of my liability to pay; but if he choses to make a cash sale to my servant, and looks to and treats with him as the purchaser and principal, he must, I think, abide by his mark; and if I have paid the servant for the article, I do not see how I can again be made responsible to a man, of whom I know nothing.

BLISS, J.—This was an action for goods sold and delivered. The sale and delivery of the articles were made to Lane, the master of the American brig "Acadian," of which defendant was the owner. The goods were shipped in this vessel by Lane, and consigned to the defendant; to whose hands they subsequently came, and who appears to have dealt with them as his own. If the case rested solely upon this, and the question now were simply whether these circumstances do not amount to a recognition, by the defendant, of Lane as his agent in the purchase of these articles, so as to make him liable for the price, no doubt could be entertained for a moment. The law is plain enough, that if one purchase goods for another without proof of any express authority, and these goods are received and made use of by that other, he will be presumed to have authorised the purchase, and be liable for it.—[Peake Cases. 48.] The subsequent recognition of the act is equivalent to an express antecedent authority, constituting the party his agent; and the agency once established, the purchase by him is the same as if made by the principal. To this *prima facie* liability two answers may be given. The defendant may show that though the purchase was known to have been made for him, the credit was given, not to him, but his agent; or, that previous to the purchase he had furnished his agent or servant with the money to pay for the articles. And this defence, I take it, rests upon this principle, that what before was a *prima facie* case of unlimited authority to the agent, now appears to have been a qualified one. By accepting and using the goods, the master still admits that his servant was employed by him to purchase them; but he now shows that it was to purchase for cash—that he was not authorized to pledge the credit of his master; and consequently that the main ingredient in the transaction—that upon which the master's liability wholly depends—is wanting in such case. It may happen—as it generally does when a defence of this kind is set up to rebut such a *prima facie* case of liability on the part of the defendant, from the recognition of his

servant's purchase,—that the fact of the money having been previously given to the servant was unknown to the vendor at the time, who may therefore have been deceived by the misrepresentation of the servant, and have trusted him with the goods in the expectation of being paid by the master. But much stronger would the case be against the vendor, if he was informed, at the time, that the servant was provided with the money to pay for the goods; for he only suffers then from his own imprudence in parting with the goods before he received the price. In the former case, however, where the servant has pledged his master's credit, and the master, by accepting the articles so furnished, establishes a *prima facie* case against himself of having given authority to his servant to do this—the vendor having no reason to doubt it,—the master has the onus imposed on him of shewing that he did not give such authority; and he can do so, by shewing that he had furnished him with funds beforehand to pay for the goods. But when the defence rests not on a fact within the master's own knowledge only, but is derived from the transaction itself, it cannot be necessary to make out that the defendant had provided the servant with the means of paying for the goods, in order to shew that he had no authority to pledge his (the defendant's) credit for the purchase. If it was, at the time, disclosed to the vendor, that the servant had no such authority, or if from the nature of the transaction the vendor must have known that the servant could have had no such authority, then the whole foundation upon which the defendant's liability depends, is removed from the case; for the principle, it will be remembered is this,—that the defendant is to be implied to have authorized the agent or servant to pledge his credit. If, then, from the whole transaction, it can be collected, that the defendant did not authorize the agent to pledge his credit, the defendant cannot now be made liable; and such appears to me to be the case now before us.

It is said that it has nothing to do with this case whether this was or was not a sale for cash; and again, it is denied that the evidence shews it to have been a cash sale. According to the view which I have taken of the case, I think this a most material point in it; and I think, too, that the evidence upon it is irresistibly strong. There may be, it is true, some apparent obscurity in the testimony of McAuliffe: the exact day when the delivery of the copper took place is not perfectly clear; and the time when Lane promised to pay the money, which he said he was to get from Starr, may have been subsequent to the delivery of the copper; but the fact that the sale was made for cash, remains

untouched. This is expressly stated by the witness. He says: "the entry of this sale was never posted or carried to any other book. It was one of those transactions for which we expected to get immediately paid." And again: "the copper was sold for cash. It was the understanding at the time that the money was to be paid before the "Acadian" left the port. Captain Lane was to pay it." The terms of the sale then were cash, and so it was at the time understood by both parties. It appears, too, that Lane shewed where he was to get the money —from Starr. This was indeed stated after the sale and delivery; but if nothing of the kind had been said before, could the plaintiff have doubted that, as the defendant lived in Boston and the money was to be paid by Lane himself before the vessel sailed, that Lane either had the money in his own hands or within his reach? It was upon this understanding that the bargain was made. The sale, by the very terms of it, had no reference to any credit, and could not therefore have been made on the credit of the defendant. The plaintiff looked to a better mark than either Lane or defendant, or any other person—the money itself. He sold for cash; and if he was so improvident as to part with the goods before he secured the price, it was not and could not have been on the credit of the defendant, which Lane had never professed to pledge, and which the plaintiff had not a pretence to suppose was pledged. But it could only have been on the reliance which he placed in Lane's promises of payment—that is, the credit, if any was given, was to Lane alone. Such, then, being the nature of the transaction, what is there to raise any liability on the part of the defendant? for his acceptance and using the copper afterwards can no otherwise create liability, than as being evidence that Lane had authority to make the purchase for him, and to pledge his credit. But if Lane did not, in fact, pledge his credit, but purchased for cash, the subsequent acceptance of the copper cannot vary the previous transaction, or change a cash sale into one upon credit; it can, at most, but recognize Lane as his agent to purchase in the manner and on the terms on which he did purchase. The plaintiff, then, by his own shewing, has no right to resort now to the defendant; and, I think, he ought to be non-suited. On the defence, it appeared that Messrs. Starr, who were the general agents of defendant, had actually advanced on his behalf, money to Lane to pay for the copper. It was contended, at the argument, that the money was not in fact paid over to Lane for this purpose, until after the purchase had been made; and the case was likened to that so often referred to, of a master giving his

servant money to pay for goods previously bought, in which case the master's liability still remains. I am by no means so clear that the facts stand as the plaintiff puts them. The bargain, whatever was the day on which it was made, was only completed on the delivery of the copper; that took place on the 14th, and on that day a check was given by Messrs. Starr to Lane for the money. But I do not wish to embarrass the case with any such niceties, which, if they were important, would be a question of fact, and for the jury alone. I think, under the circumstances, it was perfectly immaterial when the money was paid to Lane. The question, to state it again, is: whether there is evidence that the defendant authorized Lane to purchase, and pledge his credit? If he sends him to purchase, and does not give him the money, he *does* authorize him to purchase on credit. If he accepts and uses the goods which have been thus purchased without the money having been given to pay for them, it is *evidence* that he authorized the purchase on credit. In either case he is liable; the fact is the same, the modes of proof only are different. If, then, it could be shewn that the servant was sent with the money to make the purchase, the authority would be completely disproved. Suppose, then, the master should shew that the servant was directed to call upon a third person—his general agent for instance—to take up the money with which to make the purchase, would he not, to all intents and purposes, have given the money beforehand, although the servant had not actually taken it up until after the purchase was made; does not the master thereby prove, at all events, that he had not authorized the servant to pledge his credit, and that therefore he is not liable? Now, in the present case, it is proved that Messrs. Starr, being the general agents of the defendant, had been applied to before the purchase to advance the money, if it should be required, on the defendant's account; to which they assented. Lane then effects the purchase, to be paid for at once; and, if not before, almost simultaneously with, the delivery of the copper, he takes up the money from Starrs which they had engaged to furnish. The plaintiff parts with his property without the precaution of claiming the price,—Lane telling him that he was to get it from Starr, when he had in fact already got it. He sails contrary to his promise, without paying the money; and just as the vessel leaves the harbor, the plaintiff, as if now first awake to the consequences of his incaution, applies to Starr to know whether Lane had left any money with him to pay for the copper. Can there be a doubt, then, that the subsequent reception of the copper by defendant, which, standing by itself, would be

prima facie evidence that the defendant had authorized its purchase on credit, is under these additional facts, proof of no such thing? Under the plaintiff's own case, it was clear enough; but it is now made still stronger. Every presumption is against the plaintiff; the implied authority from defendant to Lane to pledge his credit is completely rebutted; and not only law, but reason and justice, are with the defendant. If either party is to suffer from Lane's misconduct, surely the loss should fall on him who might, but did not, prevent it.

MURISON vs. MURISON.

Hilary Term, 1840.

Where the affidavit under which the writ issued was partly for a debt and partly for a claim against absent debtor for negligence as a bailee, and writ was endorsed for whole sum sworn to in affidavit, held that process could not be sustained.

Per Bliss, J.—Whenever the case is such that if bailable process were to be issued, a special order of a judge would be required, the writ of attachment cannot be issued.

This was a claim for the sum of £1487 16s 7d. The affidavit upon which the attachment and summons issued was for £804 5s. 1d., money had and received—£53 8s. 6d. for interest thereon, and £630 3s. for damages sustained by plaintiff's property in the hands of the defendant as his agent, through negligence. The writ was endorsed for the sum of £1487 16s. 7d., being the amount shewn in the affidavit.

There was an application to set aside the process and proceedings.

Haliburton, C. J., said—There are two question in this case: First—Did the Legislature intend to extend the acts enabling creditors to receive their debts out of the effects of absent or absconding debtors to actions for torts and breaches of contract to recover unliquidated damages? Secondly—If they did not, can we sustain these proceedings to the amount positively sworn to as a debt, when part of the affidavit for the tort is improperly mixed up with it?

Upon the first point I would observe, that although the acts authorizing proceedings against absconding debtors passed in the year 1761, this is the first attempt to extend them to cases of this description. It should ever be borne in mind that, abstractedly considered, these acts, however limited in their operation,

violate one of the first principles of justice, that no man's person or property shall be affected without first calling upon him to answer what is alleged against him. In the restricted construction, however, which has been given to these statutes, little practical injustice can be produced by them. While they are confined to claims for debt and specific sums, where proof of the origin and amount of the claim must be given to the satisfaction of a jury, and the defendant is entitled to a re-hearing at any time within three years, it is not probable that much injustice will ensue from such proceedings, although doubtless, even in such cases, a party may sometimes be injured in consequence of his absence. The legislature, however, thought, and perhaps with good reason, that where a party had absconded, it was a lesser evil to render him liable to some imposition than to leave his creditors without the means of recovering their just debts out of the property he had left behind him; but if we extend this to cases of torts and breaches of contracts where the amount of the damages (if any) are uncertain and depend frequently upon circumstances where even a cross-examination might give the transaction an entirely different color, we shall indeed violate the principle which forbids any man's being condemned unheard. If the legislature, however, have directed us so to do, it is our duty to give effect to the law; but we must be fully convinced that the express language of the statute requires such construction before we so construe it.

The title, it is true, forms no part of the act, though it does show how the legislature of the day thought their act would be most properly designated; and they entitled it "an act to enable creditors to recover their just debts out of the effects of their absent or absconding debtors." It is of more importance to notice what has been already observed, that hitherto that act has received in practice a construction strictly conformable to its title, and has been confined to cases between creditor and debtor. It is now, however, contended, that the words "any person entitled to any action for any debts, dues or demand whatsoever," will embrace action for torts; and we have been referred to the views which the courts in Massachusetts have taken of cases of this description under their law relative to proceedings against absconding debtors. Although not bound by the decisions of the tribunals in the United States as we are by those in the mother country, I always refer to the opinions of the learned judges who preside in those courts with great satisfaction, and have often derived much assistance from the judgments which they have pronounced upon cases similar to many which occur

here, and relative to which it is difficult to find any that are parallel in an old settled country like England. But we can derive little aid from them in this case, for their act is differently worded from ours. It says: "That any person, body politic, &c., entitled to any *personal action*, excepting detinue, replevin, slander, malicious prosecution, or assault and battery against any person, &c." Of course it follows that every personal action that does not come under the express exceptions in this act, is authorized by it. Now, our act has no exceptions, and if the words, "any debts, dues and demands whatsoever," used in the enacting clause, have not in themselves a limited meaning, then they must extend to all civil actions, for in all of them the plaintiff demands somethings. Mr. Murdoch, counsel for the defendant, admitted that the legislature did not intend to extend the statute to torts *vi et armis*. But there is no exception of actions of this nature in the act, and therefore that exception must arise out of the reason of the thing, which would equally exclude all actions of tort. In common parlance, a demand for compensation in damages, whether it be for a broken head or a broken heart—for a beating or for a breach of contract, would equally be a demand; but when that word is used in a statute of this description, we must give to it the legal signification which it receives in other acts. Now, in the numerous cases which have been decided in England under the acts for giving jurisdiction to courts established for the recovery of small debts, we find that expressions much stronger than those used in the statute under consideration have never been extended to actions of this description; but the jurisdiction has been restricted to debts and demands for liquidated sums, Such construction I should give to the words used in the act of 1761, did it stand alone; but when I turn to the act in amendment of it, passed in the 1 & 2 Geo. 4, I find the legislature prohibiting the issue of any process under the 2nd section of the first act, until affidavit is made that the defendant is justly indebted to the plaintiff in a sum to be specifically mentioned and set forth in the affidavit. It is objected that this is a process of attachment issued under the first section of the act; the answer is, that it was not necessary for the legislature to have extended the prohibition to the first section of the act;—because, although the act of 1761, which authorized the issuing of attachment under the first clause, made no mention of an affidavit, yet by the long established and invariable practice of the courts as well as under the acts relative to bail, no attachment could issue without an affidavit of debt to a specified amount, which must be endorsed upon the process.

The 1 & 2 Geo. 4 was not passed as a declaratory act to remove any doubts in existence as to the nature of the actions to which the 1 Geo. 3 extended, but, as the preamble states, to remedy an evil arising under the 2nd section of the 1 Geo. 3, which enabled creditors, by the mere service of a summons on an agent, to attach the goods, effects or credits of absent persons in the hands of such agents to an unlimited amount, without making any affidavit that a debt was actually due to them by such absent person. They did not extend the remedy to the first clause, because the evil did not exist under it; for, as I have before observed, no process could issue under that clause without an affidavit of a debt due. It is clear, therefore, that no proceedings can now take place against absconding debtors without an affidavit of a debt due by the absent person under either the 1st or 2nd clauses of the 1 Geo. 3. Process of attachment against persons present or absent was never issued within my recollection, which extends nearly over half a century, (commenced in 1791,) without an affidavit of a debt actually due. The person may be held to bail by a Judge's order, under the special circumstances of the case; but I know of no attempt to extend that practice to the taking of property by attachment. The first clause, therefore, of the 1 Geo. 3. which authorizes an attachment, sanctions no such proceeding as this. The 1 & 2 Geo. 4 expressly prohibits the issuing of any process under the 2nd section of the former act, without an express affidavit of a debt due.

These proceedings, therefore, as far as respects the tort, are not sanctioned by either clause, and cannot be sustained.

Upon the second question, whether these proceedings can be sustained to the amount positively sworn to as a debt, where part of the affidavit for a tort is mixed up with it, there is little difficulty

The cases are quite clear that where parties have been held to bail under similar affidavits, the bail have been discharged *in toto*. In these cases, it is true, the defendant has been compelled to enter an appearance; but that is, because he has been personally served with the process. But in cases of this nature, where no personal service has taken place, if we lose our hold of the credits and effects of the absent person—which, upon the authority of the decisions alluded to, we must do—we lose our hold of the case altogether.

I am therefore of opinion, that the process must be set aside, and a judgment of nonsuit entered.

BLISS, J.—The affidavit upon which this attachment issued, discloses two distinct causes of action. In the first place, there is a positive and certain debt sworn to in the usual form, for money had and received, and for interest, amounting to £857 13s. 7d.; and then follows a special statement, charging the defendant with negligence and misconduct as bailee, from which a loss is averred to have arisen to the plaintiff of the further sum of £630 3s.; and the endorsement on the writ is for £1487 16s 7d., that is the amount of the two sums together; and for this the writ issued. The plaintiff having thus united these two sums, and the attachment being for their joint amount, it must be good for the whole or not at all. We cannot separate it into parts, and support it for either one or the other of the above sums; and, therefore, though unquestionably the affidavit would have been perfectly sufficient to support an attachment for the debt as sworn to, and no objection could have been taken to the writ if it had been limited to that sum; yet, if the latter part of the affidavit, or the indorsement in respect of it, be insufficient or irregular, the whole process must be set aside. [5 Burr, 2690, 1 Dowl, P. C., 631.]

The question, then, is: can the attachment be supported upon this special affidavit, and for uncertain damages, as in their nature they must be?

The absconding debtor's act, [1 Geo. 3, cap. 38,] upon which this process is founded, does not appear to me to be applicable to such a case as the present. The very title of that act explains its object and intention; it is to enable creditors to *receive* their *just debts* out of the effects of their absent and absconding debtors. Its enactment is indeed apparently more extensive in its language; it authorises any person entitled to any action for any *debts*, *dues* or *demands* against any person absconding or absent out of the province, to attach his goods, &c. But I do not give any greater force or meaning to the words *dues* and *demands* than belongs to the *debts*, to which they are joined—*noscitur a socio*. And by these terms, *creditor*, *debtor* and *debt*, I understand the legislature to mean what in their ordinary and common acceptation these words import; and their intention, as I collect it from them, was to provide a means by which payment of debts might be obtained from those who had absconded leaving them unpaid. The act refers to the cases of debts, and debts only; [as to word debt, vide 5 T. R., 529, 1 Taunt., 396, 9 D. & Ry., 546;] the title of the act speaks of *just* debts, and of enabling the creditor to *receive* them: thus pointedly and plainly, as I conceive, shewing its intention to provide the remedy when the

debt was certain. If we once step beyond this line, there is no possible case of uncertain damages to which the remedy by attachment, under this act, may not apply; and it could then be resorted to in all cases of breach of contract, or torts and trespass, though I do not know that a more extreme case could be put than that now before us. It would be quite a perversion of terms to call the plaintiff a creditor, and the defendant a debtor, in respect of such a claim for damages. It was, even in the limited view to which I think it must be confined, deviating sufficiently from the law of England; but I cannot bring myself to believe, and the language of the act does not compel me to it, that the legislature could authorize the attachment of the property of every absent or absconding person, to answer the uncertain damages of any one who might have a possible claim or supposed cause of action against him, and that merely upon his own simple allegation; for at this period it does not appear that any affidavit was required previous to the issuing of an attachment. The act was passed in the fourth year after the Province possessed a legislation, and appears to have been the very earliest one in which the process of attachment is mentioned. The first act which gives the form of the writ was 6 Geo. 3. This was amended, however, by 11 Geo. 3; and it is somewhat remarkable, that it is to a temporary act, long since expired, that the writ owes its origin. The act of 8 Geo. 3, cap. 5, also a temporary one, appears to be the first which required any affidavit to support the attachment. By that the sheriff was directed to attach no more property than the *sum sworn* to and endorsed on the writ. Next followed the act of 18 Geo. 3, cap. 6. This act is conclusive, in my opinion, on the subject. Neither bailable process or attachment can be issued under it, except when the plaintiff can swear to a sum certain; the only duty of the Judge being to endorse the sum so sworn to on the writ. This act authorizes no special order—invests the Judge with no discretionary power either to hold to bail or to attach; and if he cannot endorse the writ as the act directs, he cannot endorse it all. If he can make a special order under this act, so can a Justice of the Peace in the absence of a Judge, for the same power is given to one as the other, and the latter would then be authorized equally to order a defendant to be held to bail in special cases. We can never suppose this could have been contemplated by the act. Our provincial act is substantially like the English statute of 12 Geo. 1, cap. 29, which required an affidavit before bailable process could issue, and which would have limited that process to cases where the debt or damage was certain if the judge had not a power of

holding to bail independently of the statute. [8 East., 364.] And so he may do here, for the same reason, notwithstanding the provincial act. But the process of attachment owes its origin and support altogether to our statutes, and by those alone it can therefore be regulated. He has, consequently, no authority in respect of this which the acts do not give him; and as they have instructed him with no discretionary power, but have limited his endorsement of an attachment to a debt, certainly he can exercise no other. Whenever, then, the case is such, that if bailable process were to be issued, a special order of a judge would be required, then I consider that the writ of attachment cannot be issued. This case being of that description, it cannot be upheld.

BROWN vs. BOOLE.

Easter Term, 1840.

Where the deposition of a witness had been taken but not used at the first trial, in consequence of witness being able to attend, but a new trial having been awarded, and the witness dying previous to such new trial, held that the deposition was receivable in evidence at such second trial.

Notice by tenant to quit in April next, the tenancy actually terminating on the 8th of the month, and served three months before the actual termination, held sufficient.

This was an action for use and occupation. Verdict for defendant. Rule Nisi to set aside verdict for the admission of improper testimony and insufficiency of the notice to quit. The notice to quit did not name the day on which the tenancy terminated, but was simply a notice that the tenant would quit in the following April. On the 7th of that month the tenancy actually terminated. The notice was given by the tenant three months before the 7th of April.

HALLIBURTON, C. J., said—the testimony deemed to be inadmissible was the deposition of one Haley, taken under the provincial act, authorizing the examination of aged and infirm witnesses, or of those about to depart from the Province. (14 & 15 Geo. 3, ch 4.

There was no objection to the regularity of the examination, but this cause, after Haley's examination had been taken, had been brought on for trial as a summary cause before Mr. Justice Bliss, at a preceding term, when the witness Haley, being then present, was examined *viva voce* as the statute requires. He died

between the first and second trial, which was directed to take place before a jury. Plaintiff's counsel contended that the Judge's minutes of the evidence at the first trial, or the testimony he then gave, proved by a witness who heard and would verify it on oath, was the only proof that could now be received as the testimony of Haley.

If the grounds of this objection had been reversed, I should think the objection more tenable. It is certainly true, that in case of the death of a witness who had been examined on a former trial of the same cause, between the same parties, the evidence he there gave may be introduced upon the second trial by either of the modes mentioned by the Solicitor General, as was raised in the case he cited from 3 Taunton—[Mayor of Doncaster vs. Day, 3 Taunt., 262.] But particular rules are only the exemplification of general principles; and the general principle is, that the best evidence which the circumstances of the case will admit of, must be produced. And the reasons why the evidence of a deceased witness on a former trial can be thus received, are clearly stated by Phillips: "That such evidence was not given in an extrajudicial manner, but upon oath, the parties to the suit were the same, the point in issue was the same, and an opportunity was given for cross-examination."—[11 Phil. on Evid., 230.] Now, all these reasons equally apply to the deposition admitted in evidence; and, in my opinion, testimony taken as this was would probably be more accurate than the minutes of a Judge taken during the hurry of a trial or the recollection of a witness who was present at it. The Solicitor General, indeed, admitted this at the argument; but said, that the testimony given before the court was of a higher order than that given before a Judge under the statute.

What weight this argument would have in deciding a precedency in a procession of papers, I will not determine; but, when we are to look for the best evidence, I think we must give the preference to that which is actually the best; and, therefore, I think the plaintiff cannot succeed upon the first objection.

I have looked into all the cases, which were cited at the argument, to support the second objection; but I think they have been against it. It is true Phillips says: "When the notice to quit is not on a particular day, but in a more general form, as to quit at the expiration of the term or current year; such notice, however the tenant may assent to it, affords no kind of information. Other evidence, therefore, will be requisite as to the regular time of quitting."—[2 Phil. on Evid., 273.]

That other evidence is supplied here, for the notice is, "I will quit in April next," and it is proved that the tenancy terminated on the 7th April.

In Matheson v. Wightman, [4 Esp., 5,] the notice to quit was on the 25th of March or 8th of April next, ensuing. Lord Kenyon said it was a sufficient notice to the tenant if he received it six months before the end of his tenancy. In answer to an objection that the plaintiff should have shown that the tenancy commenced on the one or the other of those days, his Lordship said he was not bound to give any such evidence. It was sufficient for him to prove his having given six months notice. But in this case the precise day was proved by the plaintiff himself.

In the defence of Bedford v. Knightly, a notice served just before Michaelmas, 1795, to quit at Lady-day, which will be in the year 1795, (an impossible day, as Lady-day, 1795, was then past,) was held to be a good notice for Lady-day, 1796, because the words "which will be" shewed that it was prospective.

Now, this notice could only have been upheld upon the ground that it conveyed sufficient information to the plaintiff of the real intention of the plaintiff; and when it so clearly appears in this case that the tenancy expired on the 7th April, does not a notice that the tenant will quit in April convey to the landlord due information that he will quit at the end of the then current year of the term?

In Lord Huntingtown v. Culliford, [4 Dow & Ry., 248,] the language of the court was very strong. The objection was, the notice might be construed as a two days' notice only. Abbott, C. J., says: "There is one rule of construction in cases of this nature, which is no less sound than ancient, namely, to give such a sense to ambiguous words as will effectuate the intention of the parties. Applying that rule to this case, it appears to me that the words 'at the end of your current year' may be construed to mean the end of the current year, ending at the ensuing Lady-day.

Now, may we not say, applying that rule to this cause, do not the words "I will quit in April next," apply to the day in April on which the tenancy expires.

Bayley, J., says in the same case: "Where general language is used, which is open to doubt, the rule is to make it sensible, not insensible;" and he added, "He intended to give an efficient notice, and it is quite sufficient if the tenant understood what he meant?

Now, if such a notice as the witness has proved and the jury have established in this case, was given, must not the plaintiff have understood what the defendant meant."

The case of Campbell v. Scott, [6 Bing.,] proceeded upon the same reasonable principle. There a weekly tenant was notified to quit on Friday, or otherwise at the end of his tenancy next after one week from the day of the notice. It was objected that the notice ought to have specified some precise time for quitting, or to have required the tenant to quit at the end of the current week; but the court thought the notice sufficient.

In Hinde v. Vince, [2 Camp., 256,] a notice to quit at Michaelmas day, given after the passing of the act, altering the style, was allowed to operate as a notice to quit at Michaelmas old style, because the tenancy had commenced then, and such must have been the understanding of the parties. McDonald, C. B., said, "That the holding being from old Michaelmas, it must be taken that in all transactions concerning the premises where Michaelmas is mentioned, old Michaelmas is meant."

Now, here the holding being from the 7th of April, must it not be taken that in a notice to quit, the 7th of April is meant?

For these reasons, and under the authority of these cases, I am already of opinion that the notice was sufficient.

As to the third objection, that the provincial statute 19 Geo. 3, cap. 10, allows landlords to terminate the tenancy upon giving three months' notice to the tenant, but does not expressly say that tenants may give a similar notice to the landlords, and therefore that they (the tenants) must still give six months' notice as common law requires them to do in England, I would only say that the uniform practice both in England and this country has proceeded upon a principle of reciprocity in this particular. The general rule in England is six months' notice by and from both landlord and tenant; but in all cases where particular customs sanction a less or require a longer notice, it is always reciprocal; and I cannot doubt that if this question had been raised shortly after the passing of the statute, an interpretation would have been given to it by the courts in perfect accordance with what I deem of equal effect. That is the uniform practice which has prevailed in this country, and which may be considered as a contemporaneous construction of the statute upon the equitable principle of reciprocity. I therefore think that the rule for a new trial should be discharged.

HILL, J.—The deposition of Haley is good, though in the meanwhile he had been examined *viva voce* at the summary trial. His deposition is the very best evidence that could be adduced of what he testified to;—it was better than the minutes of a Judge, written during the hurry of a trial The only exception to such a deposition being received would be the presence of the

witness in this province. A deposition, regularly taken, is good, though there were several trials, if the witness be absent at the trial on which his deposition is offered in evidence.

The plaintiff did not object to the notice. The statute intended that either party should give three months' notice; that has been the uniform construction given to the act since 1759, and the court ought not to disturb it. To construe it otherwise would be unjust and inequitable.

BLISS, J.—The depositions and the Judge's notes are precisely to the same effect. The act makes depositions evidence in a cause; and if once receivable in evidence, a subsequent *viva voce* examination cannot impair its validity. Had the evidence given at the trial differed from that under the deposition, it might have been shewn as where there is a difference in the statement of a witness at a former and subsequent trial. The notice is, I think, quite sufficient. It meant that he would quit on the day in April when his tenancy expired. Too great strictness should not be required in the form of a notice between landlord and tenant. The notice was first introduced for the benefit of the tenant. The earliest mention made of a notice from landlord to tenant is in the year book 13 or 14 Henry 8. The court held that they stood on equal terms, and the court here must construe the provincial act in the same way.

Rule discharged.

KENNY, ET AL., vs. HALIFAX MARINE INSURANCE COMPANY.

Trinity Term, 1840.

It is not the state of the vessel at the time the notice of abandonment is given, but its condition at the time of action brought, that determines whether the loss is a total or partial one.

The schooner "Joseph Albino" had struck on rocks, in an exposed situation, on the 11th November, 1839; and, notwithstanding exertions of crew and persons from the shore, was abandoned by the crew on the 15th. Notice of abandonment was given to the underwriters by the assured, on the 19th. On the 20th, the underwriters accepted the abandonment. On the 21st, a heavy gale lifted her off the rocks, and she was brought safely into port, whereupon the underwriters, on the 27th, gave notice that they would not accept the abandonment. It was held that, though at the time the notice of abandonment was given, and accepted by the underwriters, the abandonment was well made, yet, that subsequent events having made that a partial which was formerly a total loss, the assured were only entitled to recover as for a partial loss.

This was an action to recover the insurance of the schooner "Joseph Albino." At the trial the plaintiffs obtained a verdict for a total loss, upon the following circumstances: The schooner, freight and cargo, were insured under a policy dated 21st

October, 1839, on a voyage at and from Orwell Bay or River, in Prince Edward Island, to Three Rivers or Bedeque, to complete her loading; and at and from either to London. The policy, by the terms of it, was to commence from and immediately following the loading of the cargo on board. They commenced loading the vessel on the 26th or 27th October, at Orwell River, and proceeded on the 31st October towards Bedeque, to complete her cargo there; but night coming on, and the wind being foul, they anchored her in Orwell Bay. On the morning of the 2nd November, they were compelled, after several ineffectual attempts to raise the anchor, to cut the chain cable. They set sail for Bedeque without the anchor, and arrived there on the 4th, where her loading was completed. They sailed thence on the afternoon of the 10th, determining to replace the anchor they had lost at Charlottetown. On the morning of the 11th she struck on Indian Rocks. After every exertion had been made by the crew, assisted by persons from the shore, during that and several succeeding days, to get her off the rocks, she was finally abandoned by the master and crew on the 15th, being then, as supposed, in a hopeless condition. The crew did not leave till, from her exposed situation and the state of the weather, it was deemed dangerous to remain longer on board. She thus remained for several days, the waves breaking over her so, that no man could have lived on board. She was in this situation when a very heavy gale of wind lifted her off the rocks, and she was seen on the morning of the 21st November, floating a short distance from where she had struck. A steamer, from Pictou, which had been employed by the underwriters to go and look after the vessel, found her in this situation on the 23rd November, and towed her into the harbor of Pictou. Notice of abandonment was given to the underwriters on the 19th November. The underwriters, on the 20th, determined to accept it. On the 25th they notified plaintiff that vessel had been brought into Pictou, and of their readiness to pay all expenses for her repair. The plaintiffs, on the 26th, declined to resume charge of the vessel and relied on the abandonment. On the 27th the underwriters notified plaintiff that they would proceed to repair vessel,

and would serve him with such further notice as might be necessary. On the 17th December the underwriters again state that they had not accepted, and did not intend to accept this abandonment, and that the steps they had taken for recovering and preserving the property, could not be considered, according to their policy, as an acceptance thereof. At the expiration of the 60 days limited by the policy, the plaintiffs demanded payment. The defendants informed them that they would resist their claim, on the ground that the vessel was unseaworthy; and that, at all events, they were not liable for a total loss.

A rule was applied for to set aside verdict, which was opposed in the first instance.

HALLIBURTON, C. J., said:—Four questions arose at the trial of this cause: 1st—Was the vessel seaworthy? 2nd—Did she deviate from the voyage? 3rd—Is it a partial loss only? Or, 4th—Are the underwriters liable for a total loss?

The jury have found that the vessel was seaworthy—that she did not deviate—and that it was a total loss. They have, therefore, given their verdict for the whole sum insured upon the vessel, freight and cargo—£1950.

Upon the argument, little objection was made to the finding of the jury on the question of seaworthiness; and I am clearly of opinion that the evidence fully warranted the verdict upon that point. But it was urged that the plaintiff had been guilty of great negligence in not procuring an anchor at Bedeque—that the vessel had deviated in sailing from thence to Charlottetown to procure one—and that the verdict should be set aside upon those grounds. I cannot, however, concur in this view of that part of the case. It is admitted, or at all events, cannot be denied—that, as respects the equipment with anchors, she was seaworthy when the risk commenced. She lost an anchor by one of the casualities insured against, after she had commenced her voyage, and arrived at Bedeque (where she was permitted by the policy to touch to complete her cargo) deficient in one anchor. From the description given of that place, the owner or master might very reasonably conclude that there was no probability of procuring an anchor of the weight required, at Bedeque; and in the exercise of a sound discretion, whether it would not be better to supply this essential want at Bedeque, by remaining at Bedeque at the risk of being frozen in for the winter, until he could get one round from Charlottetown by water, or call there in the vessel for one, I think he was well

warranted in deciding, as he did, in favor of the latter. The jury were of this opinion, and I think that their verdict cannot be disturbed upon that ground. In this view of the case the underwriters are certainly liable for the loss which has been sustained, and it now becomes necessary to determine whether that liability is for a total or a partial loss.

When I first heard the statement of the dangerous and apparently hopeless state in which she was at the time that the captain and crew, and those who came to aid from the shore, deserted her for the preservation of their lives, I thought the owner was justified in abandoning, and might compel the underwriters to accept that abandonment.

But, after hearing the argument, and looking carefully into the cases cited at the bar, and into others relating to the subject, I have come to a different conclusion.

It is not my intention to detail, minutely, the bearings of all these cases upon the point now under consideration, for that would rather amount to a treatise upon this branch of the law of insurance, than a decision of this particular case; but to state, as the result of my investigation, that whenever the vessel is still in existence, and can be restored to the owner in the character of a ship, or the goods are undestroyed, that the underwriters are not liable for a total loss unless the vessel has been injured to an extent that renders her not worth repairing, or that the goods cannot be transmitted, or have been rendered not worth transmitting to their destined port; and that the underwriters are not liable for any loss occasioned by retardation of the voyage, or change of market, against which they do not undertake to indemnify the assured.

The cases of Doyle v. Dallas, and Gardner v. Salvador, [1 M. and Rob., 48, 116,] strictly adhere to the principle I have stated; and although in those cases the property had actually passed out of the hands of the assured by a sale made for a small sum when the state of it was very hopeless, so that if they did not recover against the underwriters they must sustain a serious loss, yet, as was properly observed, the law of insurance did not recognize a loss by sale. The jury decided in favor of the underwriters, and their decision was upheld by the court.

It is true that in the case of Till v. The Royal Exchange Assurance, the assured recovered the insurance upon freight, although the vessel upon which it was insured was in existence, and was capable of earning freight at the time the action was brought; yet we must recollect the very peculiar circumstances of the case upon which Dallas, C. J., lays so much stress in giving

the opinion of the court, and intimates that he considers it rather as a determination upon that particular case than as coming under a general principle. The vessel and freight were insured upon a voyage from Quebec to England. She sailed in the fall of the year—was driven upon the rocks near Kamaraska, where she lay for some time in an utterly hopeless state. One of the owners proceeded from Quebec to Kamaraska; surveys were held upon her; all hope of recovering her was gone, and it was considered inevitable that she must be swept away and destroyed by the ice and storms of the approaching winter, unless she was sold as a wreck where she lay, in which case the people residing in the neighborhood might become the purchasers and make some use of her materials. Under these circumstances she was sold. To the surprise of everybody she survived the winter storms, and in the following spring was floated and carried up to Quebec at a great expense. She was repaired at an expense of about £546, and carried a full cargo to England in the summer of that year. Now, although it is most rightly held that insurers do not insure against a loss by sale, yet where a sale had actually taken place under circumstances which the interest of all concerned in the property so clearly demanded at the time of sale, and where the preservation and restoration of that property long after the sale was almost miraculous, the fact of the sale which prevented the restoration of the vessel to the owner might be considered in conjunction with, and as an almost inevitable consequence of, the occurrence of the accidents insured against. But even under these strong circumstances, it was not until after a second argument that the court decided in favor of the assured. This case, therefore, may rather be considered as excepted by its own peculiar circumstances from the general rule, than as establishing a contrary doctrine.

It is, however, objected that as in the cases in Moody & Robinson, it was left to the jury to decide the question of total or partial loss, so here the jury have decided that question against the defendants, which should be conclusive,—in answer to which I would only observe, that however conclusive the verdict of a jury may be in deciding a disputed fact, or where there is contradictory evidence a verdict cannot alter the nature of things; and as it cannot be denied that at the time when this action was brought, the vessel, although injured, was in Pictou harbor with her cargo of timber uninjured, it is now incumbent upon the court to decide what the verdict should have been under such circumstances, and not to rest merely upon a finding contrary to the fact.

Now, we must recollect that insurers do not engage that the assured shall not meet with any of the accidents insured against so as to become liable for the whole loss if such accidents do occur, for that would be mere gambling. They only contract to indemnify the assured for the damages they may sustain by the occurrence of such accidents. Should any of them occasion a total loss of the vessel or the voyage, the insurers must pay the whole amount covered by the policy; but if a partial loss or retardation of the voyage only has been sustained, then they must indemnify the assured to the amount of the damage done to the vessel or cargo, but not for any loss occasioned by the delay or the loss of market; and as Lord Ellenborough says, in Brotherton v. Barber, [5 M. & S., 423,] whether it be a total or partial loss, must depend upon the state of events at the time when the action is brought, and not by selecting any particular period when the preservation or recovery of the property insured may have *appeared* hopeless. Since the decision of Bambridge v. Neilson, (1808,) [10 East., 329,] this principle has prevailed notwithstanding the doubt which Lord Eldon expressed as to its propriety, nor can its justice or propriety be disputed.

As far as indemnity extends, the practice of insurance is most beneficial, not only to those immediately engaged in commerce but to society at large, as it divides among many those losses which would prove ruinous to one. Carried beyond mere indemnification, it would prove as pernicious as it is now beneficial.

In all cases of this nature, therefore, the question is, what actual loss has been eventually sustained? not what loss was at one time to be apprehended, or by what means was the danger averted. In cases of capture, while the insured vessel is in the hands of the enemy the whole property is taken out of the possession of the owners; and unless it is recovered, the underwriters must pay for it; but if it be recaptured either by a ship of war, by a privateer or by the exertions of the captain and crew, the underwriters are only liable for the salvage and other inevitable expenses consequent upon the capture and recapture.

Now, applying this principle to the case before us, to what does it lead? It must be admitted that at one time the situation of the "Joseph Albino" was most perilous; that the master and crew were perfectly justifiable in leaving her, and that there was very little prospect of her preservation. But she was, however, preserved. She floated off to the surprise of those who had seen the danger to which she had been exposed, and was carried into Pictou with her cargo uninjured, and with no greater damage to the vessel than might have been repaired at an expense of £400. Can

it, then, be just to give judgment against the underwriters upon a verdict for £1950, (the whole sum insured upon vessel, cargo and freight,) upon proof of an actual injury produced by the accidents insured against to the amount of £400 only, and that to the vessel alone. Some delay, it is true, would have been occasioned by the repair, and that might have been injurious to the owner; but against injuries arising from that source the underwriters have not engaged to indemnify him. When those repairs were completed, the vessel could have carried the cargo, which was uninjured, to the destined port, and thereby have earned her freight. Under such circumstances, ought we to compel the underwriters to pay the whole sum insured upon vessel, cargo and freight, when a partial loss only has been sustained upon the first—where nothing has occurred to injure the second, or to prevent the earning of the third?

I am therefore of opinion, that this verdict for a total loss cannot be sustained, and that a rule absolute should pass to set it aside and grant a new trial.

BLISS, J.—The rule for a new trial, which was sought for, was claimed on two grounds: First—That the vessel was not seaworthy when she sailed from Bedeque, in consequence of her not having replaced there the bower anchor, which she had lost previously on her passage from Orwell Bay. Secondly—That there was not a total loss, and so should have been put to the jury.

The *first* may shortly be disposed of. The vessel had her proper equipment of anchors at the commencement of the risk, and when she proceeded on her intermediate voyage from Orwell Bay to Bedeque, which was covered by the policy. Assuming, then, that she could have replaced the lost anchor, at Bedeque, I am of opinion that the neglect to do so could not destroy the right of the assured to recover. The implied warranty that the vessel shall be seaworthy, refers to the commencement of the voyage; and even where the loss has happened, and the negligence of the master or crew has been the remote cause of such loss, the underwriters have been still held liable.—Burk v. Royal Exchange Assurance Company, [2 B. & Ald., 73,] Walker v. Maitland, [5 B. & Ald., 171,] Bishop v. Pentland, [7 B. & C. 219,] Shore v. Bentall, [7 B. & C., 798, (note) Hollingworth v. Broduck, [7 A. & El., 40.] In the last case, Lord Denman expressed some doubt, whether, if such subsequent unseaworthiness had been brought about by *gross negligence*, that might not be a defence; but he admitted it was a new and perhaps a dangerous one. I am far from feeling convinced, looking at the evidence on this point, that there was any negligence; and am

satisfied, beyond a doubt, that no *gross* negligence could be imputed to the assured, in not having replaced the anchor at Bedeque. It appears that the place was not such as to render it probable that a suitable one could be procured there. The master and the owner might have reasonably concluded that it could not have been obtained, and might well have decided that they must seek to supply their loss at Charlottetown, as it appears was their intention; nor can I say—having now the fullest means of forming an opinion on this subject, supplied by the evidence which they at the time had not—that they adopted an imprudent course; for it is even now by no means made clear, that an anchor of the proper size, suitable for such a vessel, could have been procured at Bedeque. Supposing, however, that the master or owner did not use "reasonable care" to ascertain the fact, and that with "reasonable care" such an anchor could have been procured there—a fact which, if relied on, to produce such consequences, ought to be established beyond doubt—still this, as Lord Denman remarked in the case last cited, would not shew that there was gross negligence in not doing it. And, therefore, however the law might warrant this kind of defence—of which it is unnecessary for me to express any further opinion—the facts do not entitle the underwriters in this case to set it up.

The second ground upon which the rule was moved for, viz., whether the assured were entitled to recover for a total loss, is that upon which the chief difficulty has arisen; and the main legal question which it involves, is this: "whether an abandonment justified by circumstances which existed at the time, having been made by the assured his right thereupon to recover for a total loss, can be affected by circumstances which took place subsequent to such abandonment." There are besides this, however, some other points which it will be necessary to consider under this motion for a new trial; and which I shall take occasion also to notice.

I assume, as a matter I think too plain to be disputed, that the situation of extreme peril and expected destruction of this vessel, fully justified the offer of abandonment of her to the underwriters. Deserted by her master and crew after every exertion had been made, but ineffectually, to rescue her from the rocks where she lay, and when their longer continuance on board seemed but a useless risk of their own lives: water-logged, and beaten by the waves, which swept over half-mast high, her destruction seemed inevitable, and probably no human means could have saved her. She owed, in fact, her subsequent preservation to a more powerful agency; and that from which her complete destruction might have been expected: the violence

of the storm seemed to be the singular cause of her escape. To all appearance, then, though she existed as a ship, she was at the time when notice of abandonment was given, a total loss; and the assured were well entitled to consider her so, and to give that notice. But though thus apparently beyond aid and hope, contrary to all expectation she did, driven by the gale, float off the rocks, and then by the means and assistance used by the underwriters was brought into the harbor of Pictou; and we are now called upon to enquire, whether the loss being in point of fact no longer a total but a partial one, (a question, however, certainly for a jury to decide, but one upon which I conceive they could have no great doubt,) the assured can recover for a total loss. Every authority which the learning and research of the several counsel who so ably argued this case could supply, has been by them brought to the notice of the court, and I have looked with great attention into them all. I say this, because I shall not feel it incumbent on me to refer to the greater part of them any further; but it will be necessary for me to notice more at length a few of those authorities from which I have deduced the general principle which they appear to me clearly to establish, and which will govern my decision in this case. The principle may be stated in a few words: that the right to recover by the assured under his policy depends, not on the nature of the loss at the time of the abandonment, but on the loss as it existed at the time when the action was brought. This principle is broadly and plainly stated by Lord Mansfield in the case of Hamilton v. Mendes, [2 Burr, 1198,] a case from which all argument on this branch of the law of insurance must commence, and to which, after all other authorities have been examined, it will be found that we may return with increased confidence in the soundness of the law laid down on that occasion by this greater master of the subject. His language is: "The plaintiff's demand is for an *indemnity*. His action, then, must be founded upon the nature of his damnification as it really is *at the time the action is brought*. It is repugnant upon a contract of indemnity to recover as for a total loss where the final event has decided that the damnification in truth is an average or perhaps no loss at all." The facts in that case certainly differ in a very material point from this now before us. The ship on which the policy had been effected on a voyage to London was captured, recaptured, and brought into an English port, without any other loss than that arising from a salvage of small amount; and the notice of abandonment was given subsequent to all the events, and consequently there was not a total loss at the time

it was given. Lord Mansfield, too, expressly guards himself from too large an inference being drawn from that decision, and says: "I desire that it may be understood that the point here determined is, that the plaintiff, upon a policy, can only recover an indemnity according to the nature of the case at the time of the action brought—*or at most, at the time of his offer to abandon.* We give no opinion how it would be in case the ship or goods be restored in safety between the offer to abandon and the action brought, or between the commencement of the action and the verdict;" yet, though thus guardedly does he confine himself at the close of his remarks to the case then only calling for a decision, the whole reasoning shews the strong opinion that was prevalent in his mind throughout, conformably to the extract from the judgment which I have before given; and when he refers to the case of Goss v Withers, [2 Burr., 683,] which had been decided a short time before by himself, he qualifies the expression he had there used, "that in case of capture the insured might demand as for a total loss and abandon," with this proviso, "that the capture or the total loss occasioned thereby continued to the time of abandoning *and bringing the action.*" If, then, it should be thought that the case of Hamilton v. Mendes cannot be relied upon as a case wholly in point with the present, from the facts being different, I feel myself no hesitation in adopting the language and sentiment of Lord Mansfield as perfectly applicable to it in the fullest extent; and subsequent cases, I think, fully bear me out in this. Bambridge v. Wilson [10 East., 329,] approaches one slight degree nearer the present case. There there were separate parties on the ship and freight on a voyage to Liverpool. The ship was captured on the 21st September and recaptured on the 25th, and carried into a port in Ireland. Notice of abandonment was given on the 1st October, which was after the recapture but before knowledge of this fact had reached the plaintiff. There was therefore here also no total loss in point of fact when the notice of abandonment was given—the vessel being then in safety, subject to a trifling salvage only. But the assured, not knowing of the recapture, was under the supposition that a total loss had occurred, and it was held that he could not recover for a total loss. Here, again, though the facts fall short of the present case, the reasoning of Lord Ellenborough in particular, and that of Grose, J., in giving judgment, go to shew that if the recapture had been after the notice of abandonment was given and before action brought, the assured would have been equally precluded from recovering as for a total loss; and the former

refers to McCarthy v. Abel, [5 East., 388,] where he says, though the notice of abandonment were well made at the time, it was not only divested by subsequent circumstances but by circumstances which happened after the notice of abandonment had been given; and his lordship also cited the case of Godsall v. Boldero, [9 East., 81,] which was an action on a policy on the death of Mr. Pitt, by one of his creditors. After the death of Mr. Pitt, and before the action was brought, the debt of the plaintiff was discharged by his executors; and it was held that the policy being a contract of indemnity, the plaintiff had no subsisting cause of action in point of law in respect of it at the time of action brought, and could not therefore recover; and in that case the dictum of Lord Mansfield in Hamilton v. Mendes, which I have already noticed, was cited and relied on. The authority of Bambridge v. Wilson is the stronger, from the circumstance that at the trial of the cause before Lord Ellenborough, [1 Camp., 237,] he expressed himself as clearly of a different opinion, and it was only at the argument that he arrived at the conclusion that the right of action was defeated by subsequent events. It is true that something like a doubt was expressed with respect to this decision by Lord Eldon, in Smith v. Robertson; but if what fell from him is to be construed as a dissatisfaction on his part, with this case, it is sufficiently answered by other later cases, in which, with this doubt before them, the same doctrine is laid down in repeated instances. Passing by several cases, Falkner v. Ritchie, [2 M. & S., 290,] Anderson v. Wallis, [2 M. & S., 240,] Hunt v. Royal Exchange Assurance, [5 M. & S., 47,] Parson v. Scott, [2 Taunt., 363,] which are not essential to my present purpose to be considered; I come next to Patterson v. Ritchie, [4 M. & S., 393,] which brings us another step nearer to the present case. This was a policy on goods; the vessel was captured on the 27th September, upon which notice of abandonment was given on the 13th October; and subsequent thereto, on the 27th October, the vessel was re-captured and carried into port; so that here, as Lord Ellenborough states it, "the point made was, that at the time of abandonment there was a complete vested right of abandonment, and that this being once vested is not done away by subsequent events;" the reverse of which proposition is directly affirmed. Lord Ellenborough, referring to the dissatisfaction which Lord Eldon was reported to have expressed with respect to Bambridge v. Nelson, observed "that he was unable to see any good reason for receding from that judgment;" and the language of Bayley, J., is, that the plaintiff can only recover in

respect of that which was constituted a loss at the commencement of the action. Brotherton v. Barber [5 M. & S., 418,] is to the same effect, but the subject is discussed more at large by the court. In that case, which was a policy on a ship, notice of abandonment was given between the capture and re-capture. The cases I have mentioned were all cited at the argument, and Lord Ellenborough remarks of them, "that they all have taken root in the doctrine of Lord Mansfield in Hamilton v. Mendes; in which it is laid down that an assured can only demand an indemnity, and consequently his action must be founded upon the nature of his damnification, as it really is at the time the action is brought." I forbear citing at large the different expressions used by the several Judges in giving their judgment; but they all alike shew clearly and explicitly, that, as Abbot, J., says, "the great principle of the law of insurance is, that it is a contract for indemnity;" and the consequence resulting from it is, that there cannot be a recovery for a total loss if the loss has been partial only. It is true that all those cases arose upon an abandonment after capture: but if this principle be correct, it must equally apply, and be followed by the same result in all other cases, from whatever cause the loss may have arisen, which events have made at the time the action was brought a partial loss only. Holroyd, J., indeed, on this last case remarks, that he was not aware that *in any case* a plaintiff could recover larger damages than what he has sustained at the time of bringing the action. The case of Holdsworth v. Wise, [7 B. & C., 794,] approximates very closely to our own, and is, I consider, quite conclusive on this point. In that, as in this, the captain and crew, from the situation of the ship and for the preservation of their lives, had been compelled to desert her, and she was left derelict on the high seas. She was, however, afterwards fallen in with by another ship, and brought into a port in the United States, where she was repaired and sent to England, her place of destination; before any notice was received of the ship's safety, though, in fact, shortly subsequent to her having been carried into the American port, notice of abandonment was given. So far the facts are not very dissimilar from the present case. In that, however,—though the ship was restored in specie—she was of no value to the owner, for the expense of her repairs equalled or exceeded the worth of the ship. The plaintiff, therefore, recovered for a total loss, for there was, in fact, a total loss at the time of action brought. She was a total loss when deserted by her crew, and there were no subsequent events to reduce this to a partial loss, and upon this ground the judgment proceeded.

But it necessarily recognizes the principle which I have already so much dwelt upon, that if, under these circumstances, just as well as in case of capture, a loss total at the time is made partial by after events, the assured cannot recover for a total loss. The mere restoration of the thing insured in specie will not reduce it to a partial loss, as Bailey, J., states, and as had been before decided in McIver v. Henderson, [4 M. & S., 576,] and Cologan v. London Insurance Company, [5 M. & S., 447,] for if the restoration leave it still a total loss, the contract of indemnity which the insurance is, entitles him still to recover for a total loss; and therefore when it is said by Bailey, J., in this case, "that if at one period of time, there was a total loss and an abandonment, before news of the vessel's safety had been received, her subsequent return did not entitle the underwriters to say it was no longer a total loss; he meant to say that her return under the circumstances of the case—that is, in that valueless condition—did not so entitle them." To suppose him to lay that position down as a general one, and not with reference to the particular fact of the case, would make him not only opposed to the whole current of authorities and to his own clearly expressed opinion in many of them, but it would be inconsistent with the whole of his then argument; for he goes on to shew that a mere restoration, which is not a beneficial one to the owner, will not reduce it to a partial loss. "The ship," he says, "must be *in esse* in this kingdom under such circumstances that the asssured may, if they please, have possession, *and may reasonably be expected to take it.*" Lord Tenterden, in Parry, v. Aberdeen, [9 B. & C., 416,] referring to the case of Holdsworth v. Wise, says: "the court held the loss total on the desertion of the crew, and not turned into a partial loss by the subsequent events, *the effect of which will be of no real benefit to the assured.*" And the judgment of his lordship in the case then under his consideration, proceeded on the same grounds, that though the goods which were the subject of the insurance remained in specie after the desertion of the ship, the subsequent events produced no beneficial restoration of them to the owner, and therefore did not reduce the loss to a partial one; from which the converse of the proposition is to be collected, that if by the subsequent events a beneficial restoration had taken place, the loss then would have been no longer total. Naylor v. Taylor [9 B. & C., 718,] may be referred to as one of the latest cases upon the general principle which we have been discussing, that the ultimate state of facts must decide whether the loss is a total or partial; in which Lord Tenterden, alluding to the doubts of Lord Eldon, says:

"that notwithstanding that we consider the point to have been well settled, and the rule established, by the authorities which he mentions, and which have been already cited." I will only refer to the cases of Doyle v. Dalton, [1 M. & Ry., 48,] and Gardner v, Salvador, [1 M. & Ry., 116,] which were among those cited, that I may say there is, in my opinion, at least, nothing in them that weakens or is opposed to this position; and it is unnecessary to extend my remarks by examining how far they may strengthen it. In the course of the argument much reference was made to the law on this subject as it exists in the United States; and independently of the character of their jurists, which is deserving of great consideration, we may with great propriety, and perhaps with advantage too, inquire how such a case would probably be viewed in a great commercial country, where the law of maritime insurance is so continually, and under such varied circumstances, discussed and decided. Now, though it does not appear to be there held, [3 Kent's Com., 270,] that where there has been a total loss at the time, and an abandonment thereupon, subsequent events will change the nature of that loss, and adeem the plaintiff's right to recover for a total loss; yet, they appear in a case like the present, to arrive at a similar conclusion to that which the decisions of the English courts would lead us, though by a different way; for they look to the subsequent events and to the ultimate state of the case to see whether the loss, which appeared to be total at the time when notice of abandonment was given, was then actually a total loss; and on referring to several cases of theirs on this subject, it appears that they, too, would hold that in this case the plaintiff was not entitled to recover as for a total loss. I will refer to a few of these. In the case of Wood v. The Lincoln and the Kennebec Insurance Company, [6 Mass., R. 479,] the ship was driven on the rocks, where she was overset, so that at high water her hull was nearly covered. An offer to abandon was then made, which was not accepted. The vessel being afterwards disengaged from the rocks, wholly sunk. The defendants caused her to be weighed and brought to a wharf in her port of discharge fifteen days after the misfortune, and having considerably repaired her offered her to the plaintiff, who refused to receive her. It did not appear that the vessel was wholly repaired by the defendants, nor what degree of injury was sustained by the stranding. It was, however, presumed, that it was not such as rendered her not worth repairing, and it was held that then it was a partial and not a total loss. Parson, C. J., remarks: "If the plaintiff, when he made the offer to abandon, had

a *legal right to abandon*, the verdict must stand, notwithstanding the subsequent recovery and arrival of the vessel; the right to abandon is a vested right, and when legally exercised, the assured is entitled to recover as for a total loss, which subsequent events cannot prevent unless with his consent." But he afterwards remarks, that "where a ship is stranded, the assured cannot for that cause merely abandon immediately, for, *by some fortunate accident*—by the exertion of the crew, or by extraneous assistance, the ship may be again floated and rendered capable of pursuing her voyage;" so that, in truth, it is after *events* that must decide whether the abandonment were properly made. In Poole v. Suffolk Insurance Company, [7 Pick., 254,] this is expressly stated. The ship in question was driven on the rocks, and received great damage. While she lay there, an offer to abandon was made. The defendants caused her to be taken from the rocks, and having made certain repairs upon her offered to restore her to the plaintiff, who declined to accept her. Parker, C. J., in giving judgment, says: "That the ship at the time of the offer to abandon was in a state of peril *to justify that offer*, cannot be doubted. She was upon the rocks, and whether she could be got off or not was altogether uncertain. *Subsequent events must determine whether the loss was then total or not.* The mere stranding, however perilous, is not of itself a total loss, for the vessel may be relieved and the damage may be small." In Sewell v. U. S. Insurance Company, [11 Pick., 90,] the ship struck a rock on 22nd April, and beat heavily on it for forty-eight hours, when the wind forced her on a shoal, and she sunk in seven fathoms water, eight miles from shore, and remained under water six weeks. She was abandoned to the underwriters 30th April, who raised and repaired her, and tendered her to the plaintiffs, offering to defray the expenses, which offer was refused. After verdict for total loss, a new trial was ordered, on the ground that these facts did not constitute a total loss. In Hall v. Franklin Insurance Company, [9 Pick., 466,] Putnam, J., says: "The real state of facts at the time of abandonment is to govern, but that is to be ascertained from subsequent examination. The information may show such damage as would render it expedient to abandon; but if it should prove incorrect and over-stated, the abandonment would not avail. The facts in all of these cases are extremely like the present, and the law thus laid down with regard to them in these courts, would be applicable most clearly to this. The French law appears to have adopted a principle similar at least in its effects, and leading to the same results. It does not, in

such a case, sanction the right to abandon. In the *Code de Commerce*, [Tit. 10, sec. 389.] it is thus expressed: "*Le delaissement a titre d'innavigabilité ne peut etre fait si le navire échoué peut etre relevé, reparé et mis en etat de continuer sa route pour le lieu de sa destination. Dans ce cas l'assuré conserve son recours sur les assureurs pour le frais occasioné par l'echouement.*" As it can only be ascertained by future events whether the ship which is stranded is capable of being repaired, the recovery as for a total or partial loss in every case of stranding must wholly depend upon subsequent circumstances; and thus the law of this great commercial nation appears in this respect to agree also with our own in arriving at the same result.

It was insisted upon at the argument, that the Judge, in his charge, had left the question open to the jury; and that they had found it a total loss. The opinion of my learned brother was, evidently, that if the abandonment at the time was justified by the state in which the vessel was, the right to recover for a total loss remained unaffected by subsequent events. Can it be said that the question was left open to them when the Judge told them expressly, "that nothing that took place subsequent to the abandonment could vary the case." With great deference, I think that the very converse of this should have been laid down.

But another point of some moment has been also raised by the plaintiff,—that there has been, in effect, an acceptance of the offer to abandon. That an express refusal to accept was given, when the offer was made, and the same as plainly repeated at subsequent periods, is distinctly shewn. We are therefore to enquire how far, notwithstanding the language of the insurers to the contrary, their acts can be considered as amounting to an acceptance of the abandonment. Now, it appears to me, that there is no such inconsistency between what the defendants said and what they did, as to raise any question with respect to what they intended. The doubt, if there be any, as to whether they did or did not accept the abandonment, is not one therefore purely of fact which the jury have to decide; but is one depending on this: whether the insurers could do what they did without thereby fixing themselves with an acceptance of the abandonment. Upon this subject we can derive very little assistance from our own authorities, whether of text books or decisions of the court, which are singularly deficient on this point. We must, therefore, chiefly consider it on principle and sound reason, as far as we are capable of bringing them to bear upon it. The rescue of the vessel, by bringing her into Pictou,

was effected by the underwriters. Had they a right to do this, and consider the vessel still as the plaintiffs? If the plaintiff can only recover, according as it is a total loss or not, at the time he brings his action, can it be of any consequence that the loss is reduced to a partial loss only by the interference of the insurers? I confess that I cannot, after full reflection, see any room for a doubt. The insurers are bound to indemnify the plaintiffs to the full extent of the loss actually sustained. Have they not the right to do every thing which will prevent that loss becoming greater? Though the ship is deserted, apparently in a hopeless condition, must they, when they think there is a hope of saving her, abstain from doing it, and permit the destruction to be completed; or, can they save only to make the ship their own? Their contract is one of indemnity: can they not indemnify, as they effectually would do, by saving the ship, and thus saving the owner from loss? Suppose after a capture, they re-capture, and offer to restore her *in statu quo ante*, could the assured insist upon leaving her in their hands, and claim for a total loss, having her in their hands, and claim for a total loss, having in that case suffered *no* loss? The principle must be the same, from whatever danger she is rescued, and in whatever state restored, provided the loss be not still total. If another than the insurer, had, by his exertions, saved the ship from this state of peril, and the loss had thereupon ceased to be total, the plaintiff could only recover for a partial loss; may not the insurers then say, in that case: "The salvage would have fallen upon us; the salvors, therefore, act for our benefit; may we not act for ourselves, and do on principles of natural right that which another may do for us? What matters it how or by whom the ship is restored, provided that she is so; the assured is so much the less damnified." If she be wholly uninjured, upon what principle could an action have been maintained at all; and if, when restored, the loss be but partial, the action is equally gone for a total loss. In Gardner v. Salvador, [1 M. & R., 116,] Bailey, J., says: "If the means by which the ship was ultimately rescued were within the captain's reach, the underwriters have a right to say: you ought to have employed them on *our* account." Can, then, the assured say to the underwriters; I will not only not do this myself, but you also shall not do it. The question appears to me to carry with it its own answer. And if it were not sufficiently clear of itself, the language of the policy would remove all possible doubt. By that it is provided: "that the act of the assured or assurers, in recovering, saving, and preserving the property insured, in cases of disasters, shall not be considered a waiver or acceptance of

the abandonment. The act of bringing the vessel into Pictou falls, it appears to me, so clearly within the very terms of the policy —so within both the words and spirit of it, that I cannot consider this an acceptance of the offer to abandon.

The point, whether the insurers have a general right to take possession of a vessel under circumstances like the present, in order to repair her, is a question which has never, so far as I can ascertain, been raised in our courts. In those of the United States it has not unfrequently occurred, and they have decided that the insurers have this right. The cases to which I have already referred, are to this effect. In some of these, it seems that this right was considered to be founded upon the particular form of their policies, from which that in the present case appears to have been borrowed.; but in Peele v. Suffolk Insurance Company, Parker, C. J., states, "that it rests upon the very nature of the law of insurance, which is a fair and honest indemnity for loss." The principle, however, cannot be considered in that country to be fully settled, and is also a matter of doubt in other countries. In Brotherton v. Barber, [5 M. & S., 425,] Abbot, J., says, that "Emerigon puts the case of abandonment when the ship is afterwards repaired and brought home at the expense of the underwriters, in which case, he says, the underwiters cannot throw her back upon the assured;" but he adds, "that Valin is of different opinion, and that the practice of Italy is otherwise, for there it is sufficient if the *underwriters make good the damnification.*" The learned Judge does not intimate his own opinion upon this point. It may, however, be remarked, that in the United States, an abandonment when once duly made, is not adeemed by subsequent events; an opinion which, it seems, Emerigon also entertained. It comports well with this, that the insurers can have no general right to repair a damaged vessel after abandonment, and return her to the assured, and that such a right may require a special authority from the policy; while in our courts, which give no such unalterable effect to the abandonment, but on the contrary view it with regard to the ultimate state of facts, it is at least perfectly consistent with this doctrine to permit the insurers to repair. But is it necessary for us in this case to decide that point? The underwriters did indeed at one time give notice to the plaintiffs that they should repair; but thinking they could resist the claim altogether, on the ground of unseaworthiness, they have not, in fact, attempted to repair her; nor have they taken exclusive possession of her, further than having brought her into the harbor of Pictou; the plaintiffs having refused their offers to take

her, she necessarilly remains in their hands. They have not, as far as I can discover, assumed any control over the vessel, nor in any way acted at all inconsistently with their declaimer to accept the abandonment. They have not delayed the plaintiffs from repairing the vessel themselves if they had been so disposed, nor have they sustained any delay or prejudice from their conduct; but even if such a conclusion could be drawn from the facts, it should have been expressly found by the jury. It is said, indeed, that this is one of the issues in the cause, and was so put to them by the learned judge, and that they must be taken to have answered it affirmatively. But does it follow, that under the charge they could not have found their verdict without passing upon this particular question. If the jury had been of opinion that there was such a constructive loss as justified the assured in abandoning, and the abandonment once made was not defeated by subsequent events as they were instructed, their verdict must have been for the plaintiff without regard to this particular question. If, then, the acceptance of the abandonment became material, it should have been put to them in such a manner that they must *necessarily* have found it before a verdict could be supported on that ground. In that view of the case, I think, with great deference, they should have been told that if there was not a total loss at the time when the action was brought, the plaintiff could not recover for a total loss unless they were of opinion that there had been in fact an acceptance of the abandonment. I do not think the jury would have been warranted in drawing such a conclusion. In sending the case to another jury, I think they should be instructed to find for a partial loss.

LANGILLE vs. LANGILLE, ET AL.

Hilary Term, 1841.

Where after delivery of a deed the grantor remains in possession, trespass will not lie against him or his tenant for cutting trees previous to actual entry of grantee.

Alexander Langille, by deed dated December, 1833, granted certain lands to George Langille, his grandson, the plaintiff in the present action. In July, 1839, the plaintiff, for the first time, entered on the land, and claimed it as his own. Upon this entry he brought trespass against the defendants, then in possession under the grantor, for cutting wood thereon. There was a verdict for defendant.

A rule was obtained for a new trial, on these grounds: 1st—That the delivery of the deed from grantor was a valid, complete, and good delivery, as a deed. 2ndly—That if so, it transferred *ipso facto* to the plaintiff possession of the land described therein, and consequently enabled him to maintain trespass. 3rdly—That no agreement could operate as a license to enter unless pleaded.

HILL, J.—As to the first point, I think there has been sufficient evidence to show that the deed was delivered; and upon the third point, I think it clear, that under the general issue the defendants could not shelter themselves under any license, for that must be specially pleaded.

The difficulty, if any, arises on the second point—the fact of possession. Now, the principle upon this is clear. To maintain trespass, the plaintiff must not only have the freehold in law, but an exclusive possession in himself. For trespass *quare clausum fregit* is an action to recover damages for an injury done to the possession only. The freehold in law may be in one, and the lawful possession in another. The plaintiff, therefore, must undoubtedly show a possession in himself, and an exclusive one, or he has no right to maintain *this* action. It has been urged that the deed being delivered, carries with it the possession, so as to enable the plaintiff to maintain trespass; but this position must not be taken so broadly, because a deed frequently transfers the freehold without the actual possession, and without conferring upon the grantee the right to bring trespass against a party in possession. This is so in the case of there being a subsisting lease at the time of the deed given to the grantee, and many other cases. In the case of a mere trespasser and wrong-doer, the delivery of the deed may carry with it the possession, so as to enable the tenant in fee to bring trespass. That is a reasonable doctrine for it not to lie in the mouth of any person, without a shadow of claim, to commit a trespass, and then to fly to some nice technical rule to cover him from his responsibility to the undoubted and undisputed owner of the soil. But I find no case like the present where trespass has been maintained by the grantee against the grantor who remains in possession. This is not like the case of Butcher v. Butcher, [7 B. & C., 399,] cited for plaintiff at the argument. In that case the defendant had no claim whatever to the premises, nor ever had any; he was a mere wrong-doer. In January, 1827, the plaintiff was entitled in law to the premises, not claiming through the defendant; on the 10th March, 1827, he entered with his servants, and began

to plough.—the defendant then having entered, and being in possession. Now, I apprehend that if Butcher the plaintiff had derived his title through Butcher the defendant, who had never given up the possession, the decision would have been different. It may be remarked, too, that in Butcher v. Butcher, the trespass was committed subsequent to the entry on the 16th March: in the present case trespass was committed either before the actual possession, or was in progress of committal at the very time. It may have been perfectly understood between plaintiff and the old man, that possession was not to follow the delivery of the deed. Circumstanced as the parties were, I think the supposition far from unnatural.

Upon the ground, therefore, that plaintiff has not shewn himself in the actual possession of the *locus*, but that he has shewn that to have been continually in the grantor, I think that the verdict was right, and that the rule ought to be discharged.

MILLER vs. LANTY.

Easter Term, 1840.

Where party entered into possession of land under agreement to purchase from one representing himself as owner under an allotment of ancient date, held that his title was good as against a grantee holding under grant from Crown, dated four years after his entry, and setting out fact of allotment having been made to individual of same name as the person from whom defendant purchased.

Held also that defendant's attornment to the lessor of plaintiff was, under the circumstance, inoperative, defendant being under the impression that Miller had a title which, from facts *dehors* the grant, and unknown to the defendant at the time, it appeared he had not.

Held also that the returning to defendant a promissory note, given by him to lessor of plaintiff, payable upon getting a good title to the land, was not a sufficient consideration on which to found promise to relinquish the possession.

This was an action of ejectment tried at Lunenburg. There was a verdict for the defendant, and a rule Nisi was obtained to set aside that verdict.

HALLIBURTON, C. J., said:—The plaintiff founds his claim to the premises: 1st—Upon a grant dated 11th January, 1828, of 500 acres of land, in the township of Chester, being the same tract of land formerly set off to Simon Griffin. 2nd—Upon an attornment signed by defendant, acknowledging that he held the premises as tenant to plaintiff, dated after the grant. 3rd—Upon a promise made by defendant to give up the possession of the premises to plaintiff, in consideration of plaintiff's returning to

defendant a promissory note, which defendant had given to plaintiff as a security for the payment of purchase money, on a contemplated sale of the premises from plaintiff to defendant.

The defendant resists the plaintiff's claim upon the following grounds: 1st—That the premises were formerly allotted or granted to one Griffin. 2nd—That several years before the grant to the plaintiff passed, he made an agreement in writing with Griffin for the purchase of the premises; entered then under that agreement, built a house thereon, and cleared and cultivated part of the wilderness land. 3rd—That plaintiff knew that defendant had built and cleared upon the premises before he (plaintiff) obtained his grant from the crown.

That as to the attornment: 1st. He was not sober when he was prevailed upon to sign it. 2nd. That plaintiff's attorney had assured him that the plaintiff had a good title to the premises, which defendant contends was not true.

That as to the promise made in consideration of receiving back his promissory note: That the note was payable only on condition of receiving a good title from the plaintiff; that plaintiff had not a good title, and consequently could not convey one; that the note was therefore valueless to him, and could not constitute a consideration to support a promise.

On turning to the proof, it appears that the land in question had been called Griffin's land for thirty-six years past; that a person calling himself Griffin was at Chester 15 or 16 years ago, and entered into an agreement with the defendant and his brothers to sell them this tract of land, one hundred acres to each, for the price of £12 10s per hundred acres; that this agreement was reduced to writing by Caspar Eisenhaur, of Chester, and left in his possession. It cannot now be found. The last account we have of it was, that the plaintiff was seen reading it. No money was paid; but Griffin promised to return in the fall to give the title and receive payment. The purchasers were at once to enter into possession under the agreement, which they did, and built their houses, and commenced clearing the land, the whole of which was then wilderness. Griffin never returned. One of the witnesses says he understood he went a fishing voyage to Labrador that season, and he has never heard of him since. In the fall of that year, after the defendant and his brothers had entered and built, and were living upon the land, Miller came to Chester and advertised it for sale, as executor of one Stevens, who he said, had a license of occupation of it. The Lantys attended the sale, and forbade it, stating that they had bought it from Griffin. Miller said he only sold Stevens' title. The land

was put up for sale,—no one bid but Miller, and the whole was knocked down to him for 20s. The defendant and his brothers continued in possession, cultivating the land and extending their improvements. The defendant has remained on the land from the time of his first entrance, fifteen or sixteen years ago, to the present day. About three or four years after the Lantys had resided on the land, they heard that Miller had a grant of it. Four of them afterwards met him by appointment, at Crandall's. The defendant was not there. Miller showed them a grant, but it was only partly read. Crandall told them Miller owned the land, and they, after a whole day's conversation about it, agreed to give Miller £30 for 100 acres. A similar note was left at Crandall's for defendant to sign, which it appears he afterwards did. The Lantys subsequently refused to pay these notes. A witness says that the defendant's note was given up on condition that he would give up and relinquish the land, subsequent to which the defendant signed an attornment when he had been drinking, admitting himself to be tenant to the plaintiff. His brothers were in the same tavern, and refused to sign any such acknowledgment. The witness to the attornment states that he thinks the defendant would not have signed the attornment if he had understood it; and he thought he could not understand the paper, partly from his natural incapacity and partly from drink. He added, however, that the defendant understood, that he, (the witness) explained to him, that if he signed paper, and paid the plaintiff sixpence a week for the premises, he might stay there as long as he pleased, and that he (the witness) used great exertions to induce defendant to sign it. Another of the plaintiff's witnesses (his son Joseph Miller) says that the attornment was willingly signed by defendant, and fully explained to him; that he had been drinking, but witness thought he knew what he was about.

These are the main facts proved upon the trial, and by this proof the three facts upon which the plaintiff rests his claim are fully established. 1st.—That plaintiff had a grant of the premises. 2nd.—That defendant attorned to him. 3rd.—That he promised to give up the premises on his promissory notes having been returned to him.

But on the part of the defendant it is equally clear that this tract of land had been allotted to one Griffin before the grant to Miller; that a person calling himself Griffin had agreed to sell the whole of it to defendant and his brothers; that the agreement was reduced to writing; that the defendant and his brothers entered upon the land under that agreement, and had built their

houses and cleared upon their respective lots three or four years before the grant passed to Miller, and that Miller knew that they were living on the land and cultivating it at the time that he procured the grant.

Under these circumstances, I am of opinion that the grant to Miller is absolutely void. Even supposing that the man who represented himself to be Griffin was not the person to whom this land had been allotted, (a presumption which, I think, we ought not to entertain without even *prima facie* proof to raise a doubt of his identity,) yet the defendant and his brothers treated with him as owner of the land which had been called Griffin's for a long course of years. The vendor did not attempt to cajole them out of their money; but promised to return in the fall—convey to them a title, and then claim the payment. In the meantime they enter with his permission, not as mere squatters upon land without any color of title, but as bargainers for the purchase of one hundred acres each; and therefore I think that the defendant, when he entered upon this land, was, by operation of law, in possession of the whole one hundred acres he had bargained for. He built upon it—commenced clearing it, and has gradually extended his clearing in the usual and customary manner, until he has now fifty acres cleared.

It was contended by the plaintiff's counsel at the argument, that at all events the plaintiff was entitled to recover a part of the tract, for the defendant's possession could only protect what he had actually cleared at the time that the grant passed. In this opinion I cannot concur. I think that under the proof the crown was out of the possession of the whole tract at the time that the grant passed to Miller. His very grant recites the prior allotment to Griffin, by whose name this lot had been designated for many years before. The defendant and his four brothers had entered under a person representing himself to be Griffin, and were each of them in possession of their respective one hundred acres at the time the grant passed to Miller. If that possession was wrongful, and Griffin, or the person calling himself Griffin, had no right to sell to them, still the regular steps ought to have been taken to remove them before the crown would grant it to another, in which case they would have an opportunity of shewing their right and traversing that of the crown. We had occasion to go very fully into the consideration of this question in the case of Wheelock v. McKowan, a few terms ago. Indeed it has been often brought under our consideration, and the court have uniformly decided that where there is a *plena possessio* held against the crown, particularly under color of title, that the crown must

re-invest itself with the possession before it can grant; and if it grants while it is so out of possession that grant is void under the statute of 8 Henry 6, cap. 16.—[Vid. 12 East., 96, and cases there cited.]

As late as the year 1829, the Court of Common Pleas decided that a grant of Charles 1st, made in 1631, (under which there had been a long enjoyment,) was void, because the premises granted were under lease at the time, and the lease was not recited in the grant. Best, C. J., in delivering the opinion of the court, says: "We take it to be a principle of the common law of this country, that if the King makes a grant which cannot take effect in the manner in which it ought to take effect according to its terms, we must conclude that the King has been deceived in that grant, and therefore that the grant is void.—[5 Bing., 348.]

Now, a grant from the crown ought to take effect by transferring the possession at once from the crown to the grantee, because as the King never gives livery of seisin, his grant conveys the possession to the grantee as effectually, in the eye of the law, as livery conveys it to the feoffee. But the feoffee cannot give livery when there is an adverse possession against him; neither can the grant of the crown convey the possession to the grantee, when that possession is at the time actually in another. The grant to Miller, then, cannot take effect in the manner in which it ought to take effect. We must, therefore, consider that the King has been deceived in this grant, and that it is consequently void; nor can it be doubted that the crown was deceived in this grant. Can we for one moment suppose, that if the government had been aware that there were several houses then built upon this tract of land—occupied by persons who had come in under color of title from one who, if not the man to whom this land had previously been allotted, had personated him, and sold or agreed to sell it to those who, upon the faith of that agreement, had entered, built, and cleared upon it, the King's representative would have authorized the issuing of this grant to a stranger? We cannot imagine that any servant of the crown would have felt disposed so to act; and if he did, fortunately the law will not sanction such an action. I therefore hold that this grant to Miller is utterly void, and that he took nothing under it.

As it respects the attornment, even if it were free from the objections made to it, I should think it could not, of itself, create a title in Miller, or authorize him to turn a man out of his possession who did not receive the possession from him. A man in the defendant's class of life, is assured by the plaintiff's attorney

and others whom he may well suppose to be better acquainted with such matters than himself, that the plaintiff has a good title to the land of which he is possessed, and the title to which he has not himself completely gained. Under this impression, he first agrees to become a purchaser from him, and gives his note, payable upon receiving a good title. This agreement is afterwards rescinded, and he signs an attornment acknowledging himself to be his tenant, under the same impression. The fact, however, turns out to be, that Miller has no title—that the representations made to the defendant were misrepresentations; and I therefore think that he is not bound by the attornment, nor by the promise to relinquish the possession of the land to Miller in consideration of his receiving back his promissory note, which was a nullity.

But it is said, that Miller not having a title, although a fact yet resulted from the law which the defendant was bound to know, and that therefore he cannot be relieved from agreements entered into under ignorance of the law. To this, I would briefly answer: that the grant under which Miller claims a title is void, not from any defect itself, but owing to a fact *dehors* the grant, i. e., that the crown was out of possession when it passed. There is no proof that the defendant ever saw the grant, or knew its date; and therefore he is not proved to have known the fact which renders it void. Having been assured, then, that Miller had a good title, which was not a fact; and having acted under that impression, he is not bound by the promises made under that misrepresentation.

I have thought it right to express my opinion upon the invalidity both of the attornment and the promise to relinquish the possession to Miller, although I acknowledge that I do not think it very necessary to have done so; for the grant is the foundation of the plaintiff's claim; and, as that has failed him, I do not think he could sustain his action upon the circumstances that grew out of his possessing that gr nt, and which should, I think, share its fate.

I am of opinion that the rule should be discharged.

HILL, J.—I am of opinion that the grant to the plaintiff is wholly void, being made directly in the teeth of the 8 Hen. 6, cap. 16, and 18 Hen. 6, cap. 6. The cases of Hayne v. Redfern, [12 East., 96,] and Alcock v. Cooke, [5 Bing., 340,] are decisive upon this case; and the law applicable to it is clearly laid down. The stat. of 8 Hen. 6, cap. 16, recites, that the lands and tenements of the King's subjects are seized into the King's hands upon the inquest of escheators, or let to farm by the Treasurer or

Chancellor before such inquests are returned; and to remedy this, it provides that no lands or tenements seized into the King's hands, upon inquest before escheators or commissioner be in anywise let or granted to farm by the Chancellor or Treasurer until the same inquests be fully returned into the Chancery or Exchequer; but all such lands and tenements shall entirely and continually remain in the King's hands until the said inquests be returned, and by a month after the said return, unless the party aggrieved proffer to traverse the inquest in chancery, and offer to take the lands to farm; and if any letters patent be made to the contrary they shall be holden for none. The 18 Hen. 6, recites the above provisions, and states that, to evade it, divers persons had sued to obtain gifts, grants and farms, by patent; pretending such were not comprised or remedied by the former act, though within the same mischief: and therefore provides that no letters patent shall be made to any person, of any lands or tenements, before inquisition of the King's title in the same be found in Chancery, or in his Exchequer returned, if the King's title in the same be not found of record, nor within the month after the said return, if it be not to him or them which tender a traverse as before mentioned; and if any letters patent be made to the contrary, they shall be void, and holden for none. Apply this statute to the case before us. Here is the crown declaring in its very grant, that the land mentioned had been set off previously to Griffin; whether by letters patent, by lease, or otherwise, it matters not, the possession had been parted with. We have, at the time of the grant, the defendant in full possession under a purchase from a person whom we must presume the Griffin named in the grant. We have this very tract called and known as Griffin's grant, 36 years ago. We have the purchase and possession of the defendant fully known to the plaintiff. We have the very strong fact that this 500 acres was marked on the field book and plan of Chester, as Griffin's; and this fact leads me to the conclusion that these lands are included in the general grant of Chester township, for I believe all the old townships that are granted, have plans and field books of division amongst the respective proprietors. And with all this we see no inquest; nor have we any account given us as to how the crown became reinvested with the possession of this tract. The crown, under all these circumstances, if they had been laid before its officers, would never have passed this grant. It must have been deceived. The rights of the parties in possession, not as mere wrong-doers or squatters, but as purchasers from him whom they supposed to have the title, ought to have been investigated and heard before an inquest of office, the great

barrier between the crown and the subject. If such a grant as this could be upheld, the greatest confusion and injustice might flow from it. We know that very many persons in this province are now settled on lands laid off to them by the crown, by warrant of survey and leases; and surely while these parties are so in possession under these authorities, it would be far from the disposition of the crown to disturb them. We know that it would not, without a hearing at least. What right, then, have parties interested to induce the crown, by withholding the whole facts, to do that which is not consistent with its honor or dignity. No distinction can be made between Griffin and defendant; if the grant is void as to the one, so is it also as to the other.

It is said that after the sale and attornment, and other circumstances that appeared in evidence in this case, it is not competent to the defendant to object to the validity of this grant, and that even without its aid there is sufficient testimony in this case to support the plaintiff's claim. I do not think so; for if the grant is nothing more than a piece of waste paper, there can be no consideration whatever for any promise. Throughout, the declaration of the plaintiff was, that he had and sold a good title to the defendant, when in fact he had no title; besides, it was submitted to the jury whether the notes and attornment were given by the defendant, with a full knowledge of all the facts, and under a fair statement and representation of the plaintiff, and they have found against the plaintiff on that point.

I am therefore of opinion that the crown could not grant this land without inquest of office, and that the grant is void.

Bliss, J.—The lessor of the plaintiff in this case claims under a grant from the crown, dated 11th January, 1828, and the first question therefore to be considered is with respect to the validity of that grant. It appears from its own recital that the same tract of land thereby intended to be granted *had been formerly set off to one Simon Griffin.* In what manner this had been done does not appear further from the grant itself, but we learn from the evidence that the land had been always called Griffin's grant for a long period. One of the witnesses speaks as to thirty-six years, which would carry it back to 1804; and another says that the field-book and plan gave the land to Griffin, which is conformable with what the grant says as to the land having been *set off* to Griffin, and would lead one to suppose that there had been a general grant to this person and others, under which their respective proportions had been set off to them in severalty, if indeed, this allotment did not take place under the original grant of the township, where the lands are situate, as is far from being

improbable. It is enough that the allotment has been made, and having been thus recognized by the grant, it must have been mediately or immediately under the sanction of the crown. The grant admits that the crown has been divested of the possession, if not of the title to these lands; and it could only in one way regain the possession, until which it was incapable of granting the lands even if the title was still in it. But the evidence of the crown being out of possession is not derived from the statement in the grant alone. At the very time it passed, the land was actually in the full possession of the defendant and others, who had before that purchased it from a person of the name of Griffin, claiming it as the rightful owner. These purchasers had entered into possession of their several portions of one hundred acres each—had built houses thereon—had improved, cultivated and fenced part of the land. Now, if the person from whom they purchased was, as he represented himself to be, the real owner, and claiming under the crown, and in the absence of any proof whatever to the contrary, and particularly after a general verdict for the defendant, I do not know how we can possibly assume it to be otherwise, then undoubtedly the defendant and the other Lantys hold as he held, and their possession being lawful and not merely that of trespasser and wrong-doer, would cover, not only the part of the land actually occupied, but would extend over the whole tract. Even if the Lantys are not to be considered in possession of the whole tract, the crown is not the less out of possession, and the right of possession must still be in Griffin or his heir, until the crown has taken, if it can take, the proper steps for re-investing itself with that right. This is one of those cases which shew the great propriety and wisdom of the law in requiring an inquest of office for this purpose. It had its origin in a distant period, when the state and circumstances of the country more nearly resembled our own, and when, no doubt, it often happened that the title of the crown and the possession of the subject were found to clash together. In such case the right of the latter were likely to be overlooked and concealed when they stood in the way of those who were suitors for the regal bounty; and if a grant passed when another was in possession, could only be defeated by subsequent proceedings, the odds might have been fearfully against the lawful claimant, whilst those whose claims were only of an equitable nature would be wholly precluded from the opportunity of redress. "Inquest of office," says Lord C. J. Hobart, [Sheffield v. Ratcliffe, Hob. 347, Viner, office A,] "was devised by law for an authorized means to bring the King to the land by solemn matter of record suit-

able to his regality, *and for the safety of the subject*, that he should not enter or seize the lands of the subject without matter of record. "The King," says Lord C. B. Gilbert, [Gilb. Ex. 132, Vinner ib.,] "could not take but by matter of record no more than he could give without matter of record; and this was a *part of the liberty of England*, that the King's officers might not enter upon any man's possession till the jury had found the King's title. The law entitles the King where the property is in no man, but if any body else is in possession the land cannot be divested without matter of record. The statute of 8 Hen. 6, cap. 6, appears therefore to be only in furtherance of the common law. The former of these enacts: no lands or tenements seized into the King's hands, upon inquest before Escheators or Commissioners, be in anywise let or granted to farm, until the same inquest and verdict be fully returned into the Chancery or Exchequer. And the latter act, which was passed to remedy an attempted evasion of the other, enacts: that no *letters patent* shall be made to any person, of lands or tenements before inquisition of the King's title of the same be found in the Chancery or Exchequer returned, *if the King's title of the same be not found of record*, nor within the month after the same return, if it be not to him or them which tender their traverses as before mentioned; and if any letters patent be made to the contrary, they shall be void and holden for none. "The object of which," says Lord Ellenboro', [12 East., 112,] "was, according to the words of the act, that in all cases in which the King's title did not appear upon record, the possession should be open to whoever could claim against the King till the final decision of the right; and that any grant to obstruct him should be void; and the authorities correspond with this object." The doctrine of the common law is: "that wherever the crown makes a grant which it has no power to make, or which cannot take effect, as on the face of it, it purports to do, the King is said to be deceived, and the grant is void; for it is the duty of the subject to see that the King is duly informed, for the King hath the charge of the commonwealth, and therefore cannot attend his private business, and the grants which he makes he makes as King, and therefore as King he ought to be so instructed, that his purpose and intent shall take effect." This grant shews that the crown must have already parted with the possession. If it has not, therefore, lawfully regained that right which it has not been shewn to have done, the grant is inconsistent with itself, and upon the face of it void. To induce the crown, then, to do such an act, which neither comports with its honor nor its power, restrained as it is both by the common and

statute law, it is clear that it must have been deceived by a misrepresentation of the true facts of the case. These facts were well known to Miller, the grantee, and we may well believe that if when he applied for the grant he had communicated to it his own knowledge of the facts, a grant could never have been made to the prejudice of others, who, under such circumstances, were then actually dwelling upon the land. As the crown, then, "can only grant what it may *lawfully grant*," [1 Co., 52,] and that rule has been here violated, it has been deceived, and the grant to Miller is void.

The lessor of the plaintiff, then, would have no ground on which he could recover in the action, unless the defendant has precluded himself from setting up any defence to it by the facts which appear in evidence. The defendant, after Miller had obtained this grant, entered into an agreement with him for the purchase of this land, which he was already claiming to hold under Griffin, and gave his promissory note for the stipulated price, which some years afterward, being unable to pay, was given up to him by Miller, on the understanding that the latter should retain the land; and subsequent to this, Miller applied to, and obtained from, defendant, an attornment, by which he consented to become his tenant at sixpence per week. An objection was raised to this last piece of evidence, that it had been obtained from defendant when he was in a state of intoxication and incapable of executing it, which was a fact submitted to the jury, who must be taken to have decided for the defendant; and one of the grounds of the present application for a new trial is, that they were not warranted by the evidence in so finding the fact. If the case depended upon this, I confess I should have wished that matter again left to another jury, for I am by no means satisfied with the conclusion which this one has come to upon it. But it will not be necessary to do this, for, admitting that it was executed when the defendant was perfectly competent to do it. I think, under the circumstances of the case, that even this attornment, (and it is the strongest point in favor of the plaintiff,) does not preclude the defendant from shewing the absolute want of title in the lessor of the plaintiff, and, in the absence of such title, from successfully defending the action. The purchase and the attornment are of the same class of evidence. They are admissions made by him, very strong, no doubt, and, taken by themselves, would be conclusive; but far from being so if the defendant is not precluded from shewing that they were made under mistake and ignorance or misinformation.—[9 B. & C., 586.] When a party has come into possession under another, he

shall not dispute *his* right through whom he has obtained that possession; but when he had possession before, independent of that other, and subsequently by his declaration or acts admits *his* rights, he does not thereby preclude himself from shewing that the right does not in fact subsist—that it was in a third person or in himself. This is the principle of Rogers vs. Pitcher, [6 Taunt., 202,] and is concisely stated by Dallas, J.: "The rule is clear, that generally a tenant cannot dispute his landlord's title; but here it comes to this question, whether, after a person has been in possession under another lessor, if he is persuaded to attorn under circumstances which do not warrant it, it may not be open to him to prove that the rent was paid without sufficient ground, and I think it is." Gregory v. Doidge, [3 Bing., 474,] and Doe v. Burne, [7 A. & El., 447,] are to the same effect, in both of which the acknowledgment was made in ignorance of the defect of the plaintiff's title; and in the latter Lord Denman states their decision to proceed "upon the broad principle that it is always open to a party not guilty of *laches* to explain and render inconclusive, acts done under mistake or through misrepresentation." It must be admitted, I think, that the rule would be severe, indeed, and the admission must be very cogent, to be conclusive in a case like the present, where the action is brought by one without title against another in possession apparently, and as I think it must be considered conclusively and really the lawful owner, and at all events having very great equitable rights. These being their respective situations, the defendant, a man evidently not well versed in such matters, and ignorant of his own right, is induced, in order to secure his possession, to purchase from Miller what the witnesses for the defendant, one and all, state was to be *a good and lawful title.* He could give no such title. He had no title whatever in himself, and could convey none. He alleges that he had a grant, and exhibits it. He had what was so nominally, but in reality it was valueless, and as ineffectual as if it had been a blank paper. The defendant could not know this. He could not tell that an inquest of office had not been held, and that the crown had not taken the legal steps necessary to perfect its own title and to enable it to grant to another. He was therefore not ignorant of the law merely, but also of the facts which it was material to him to know. He was in this misinformed by Miller, and had therefore a full right to explain this mistake and to retract any admission made under this misrepresentation. The note which he gave was without any consideration; and the admission of Miller's title, which that implied and which was apparently still more expressly

made by the attornment, cannot for a moment countervail the clear position and certain fact that Miller had no title whatever to any part of the land, for that admission being made in ignorance cannot be binding, and the plaintiff then is without any case and cannot recover. The verdict, therefore, ought not to be disturbed.

ELLS vs. ELLS.

Easter Term, 1841.

Held that an action would be at Common Law against one of the Executors of a will containing the following bequest: I give and bequeath to my wife Elizabeth, a decent, suitable and comfortable maintenance, to be furnished and provided for her by my son, Elisha Ells, hereinafter directed." And a subsequent bequest and devise of all residue, of personal and real estate to Elisha, charged with that bequest.

Elisha and Jonathan Ells were appointed Executors. Action against Elisha.

An action for a certain legacy can be maintained in Common Law Courts, against any person, who, under a will, is made liable to pay such legacy, and receives under such will, funds sufficient to pay it.

This was an action of assumpsit against one of the executors of the will of Samuel Ells for a bequest in the will of testator to plaintiff, his wife. Plea non assumpsit.

The action was brought on the following bequests, 1st., I give and bequeath to my wife Elizabeth, a decent, suitable and comfortable maintenance, to be furnished and provided her by my son Elisha Ells, as hereinafter directed, in sickness and in health, during her life.

After several devises and bequests, the will closed thus, "And all the residue of all my estate, real and personal, (after payment of my debts, funeral expenses, and other expenses) I give and devise to my son Elisha, subject, nevertheless, and chargeable with the maintenance of his mother Elizabeth Ells, and to the payment of the legacies not provided for before to Joshua Ells and his sisters, at the several periods herein directed.

I hereby appoint my sons Elisha Ells and Jonathan Ells, Executors of this my last will and testament."

The First Count of the declaration complains of defendant Executor of this last will, &c., for that the testator made the aforesaid bequest in favor of plaintiff, and the last mentioned devise and bequest in favor of defendant, *one* of his Executors, that

testator died without altering his will, and that defendant took up on himself the burthen and execution of the will—that goods, chattels, and real estate of the testator came to the hands of defendant, more than sufficient to pay the just debts and funeral expenses and charges of proving the said will, and all the bequests, gifts and devises in the said will contained, and all the residue came to the hands of defendant pursuant to the said will and subject to the aforesaid charges, by reason of which premises the defendant became liable to furnish and provide for plaintiff a decent, suitable, and comfortable maintenance, &c., &c., and being so liable promised, &c.

The Second Count states that the testator made his will, containing the before mentioned bequests and devises, and did appoint defendant *one* of his Executors, that goods, chattels and real estate came to defendant's hands, more than sufficient, &c., by reason whereof defendant became liable, &c., and being so liable promised.

At the trial there were was a motion made for a non-suit upon the following objections, which were then reserved:—

1.—There is no sufficient contract between the parties either express or implied.

2.—The object sought to be recovered is too vague and indefinite to be the subject of assumpsit.

3.—This is not such a legacy as an action can be maintained for at Common Law, as it is not a certain legacy, nor has it ever been reduced to a certainty.

4.—That being a special action there should have been a demand and refusal proved.

5.—The witness, Jonathan Ells, should have been rejected on the ground of interest. The interest is that if plaintiff fails, he is, himself, bound to maintain her, having married her daughter.

6.—That he was a co-executor, and should have been joined in the action as a defendant.

7.—That he had sold lands to which the plaintiff would have had a right of dower, if she does not establish her right to a maintenance from defendant in this.

HALLIBURTON, C. J., said in considering the first objection which goes to the root of the action, it must at once be admitted that there was no proof of any express promise, and therefore if the law will not raise an implied promise from the circumstances of the case, the plaintiff must fail in this action at Common Law and must resort to a Court of Equity.

Since the decision of Deeks vs. Strutt, [5 T. R., 690], there can be no doubt that this action could be sustained in the Courts of Common Law in England, for it was there decided that even when an Executor had paid the annuity sought to be recovered for several years, and had assets in his hands that the law would not raise an implied promise to pay what was then due. But when we turn to the language of the Court in that case, I think we must be of opinion that no judges would have ventured to have used it in the face of an express enactment by the Legislature, that a legacy may be sued for and recovered at Common Law. Now when our Legislature has broadly enacted "that a legacy may be sued for and recovered at Common Law, any law, custom or usage to the contrary, notwithstanding," [32 Geo. 2, vide. R. S.], can the Judges of the Common Law Courts in this country come to the same decision as the Court of K. B. in Deeks v. Strutt, I think not, and I therefore consider that case as no precedent to guide us here.

The decision in the case of Deeks v. Strutt was made in 1794, and has ever since been held to overrule the cases of Atkins v. Hill, decided by Lord Mansfield in 1775, and Hawkes v. Saunders, decided by the same learned Judge, with the full concurrence of Justices Willes, Ashurst and Buller, in 1782. [Cowp. 284.] But I do not think that those cases can be considered as overruled here. Not that I conceive the right of a legatee to bring an action at law for a legacy is founded upon them. It rests upon a much firmer foundation, the statute that passed here many years before in 1758, at the first session of our first General Assembly. But it may be very useful to refer to these cases in adjudicating upon the rights which legatees may claim under our statute, although I would by no means limit that right to such cases only.

The Legislature having conferred a right upon the legatee of a certain legacy or of any residuary or uncertain legacy reduced to a certainty by the account of any executor to sue for the same at law, it is our duty to give effect to that law without reasoning upon the policy or impolicy of it as the judges of K. B. felt themselves at liberty to do in Deeks vs. Strutt.

It has been asked, can such action be sustained without the assent of the executor to the legacy? I think it can. The assent

of an executor to a legacy is only requisite as an admission that there are effects sufficient to pay the legacy after the debts and funeral expenses of the testator have been paid. Admissions in all cases are mere substitutions for proof, and can have no greater effect than the proof of the fact itself. In England very slight circumstances or declarations amount to an assent, which, when once given, can never be revoked, and it was decided Doe dem. Lord Saye, and Sele v. Grey, [3 East., 120], that an action at law could be maintained against an executor after such assent to recover a specific legacy.

It has been suggested that the Legislature only meant to give a right to a legatee, to sue at common law when the executor had assented to the legacy. The clause of the act contains no such restriction. Language could not be more general.* [32 Geo. 2, cap. 11, § 9.] It enacts that where any certain legacy is or shall be bequeathed and given by any person in his or her last will and testament, as also when any residuary or uncertain legacy, is or shall be, by the account of any executor, reduced to a certainty, every such legacy and legacies as aforesaid may be sued for and recovered at the common law, any law &c., to the contrary notwithstanding. Now if the legislature merely meant to give the common law courts the same jurisdiction over legacies that the ecclesiastical courts exercised in England that would be sufficient to enable a legatee to maintain his action for a legacy upon proof of assets to pay it, for under such circumstances the spiritual courts will compel the executor to assent according to their own peculiar practice. [Bacon Abr., Legacy L.] And the common law courts will imply a promise to pay according to theirs, otherwise the act would be nugatory, as it would render the right to sue the executor at law to depend upon his giving his assent to be sued.

It has also been suggested that the words "certain legacy" mean specific legacy, as a horse, a piece of plate, or some specific article: I cannot so read the clause. I think it embraces every species of legacy, those certain, either in their nature, or their amount in money, or those uncertain in the latter, but which may be rendered certain by the adjustment of the Executor's accounts with the estate of the testator.

I would by no means be understood to insinuate that the Statute meant to place executors here in a worse situation than

* The law as it now stands is in still more general language. [R. S.: cap. 113, § 4. ["Every legatee may recover the amount and value of his legacy annuity or bequest at the common law from the administrator with the will annexed, or executor, either by action for money had and received or otherwise"

they are in England, by rendering them liable to an action in the Common Law Courts, nor has the Statute that effect. If the effects of the testator are sufficient, after discharging the debts and funeral expenses, the executors will be compelled to pay the legacies by the Court of Chancery or the Ecclesiastical Courts in England whether he has formally assented to the legacies or not; nor do I see any difficulty in the way, when sued at law, to pleading whatever would amount to a defence—If he has no assets he can plead that. If he has fully administered, he can plead that. If the estate is insolvent and cannot even pay the debts, he can plead that; and if he has reason to apprehend that it will prove so, he can apply to the Court for time to plead until he ascertains the fact as has been the constant practice of Executors when sued under such circumstances, for the recovery of debts since the passing of the Provincial Act, 52 Geo. 3, Cap. 3. If owing to any peculiar circumstances the estate is so situated as to render it necessary to resort to the Court of Chancery, the Executors can take that course, and upon stating a sufficient case, that Court would enjoin the Legatee from proceeding at law.

I am, therefore, of opinion that when an action is brought to recover a legacy, proof that the defendant has assets to pay it will raise an implied promise to sustain the action.

The second and third objections made at the argument, I think, resolve themselves into one, viz.: Is this a certain legacy, or is it an uncertain legacy, which can only be reduced to a certainty by the accounts of the Executor?

Now, if this is not a certain legacy, no accounts of the Executor can render it more so. It is not a bequest of a certain sum, nor any specific article, neither is it a bequest depending for the amount of the advantage to be derived from it upon a residuary balance. It is the bequest of a decent, suitable, and comfortable maintenance, to be provided for the plaintiff during her life, by the defendant, who has made himself liable to provide her with such maintenance, by receiving the property bequeathed and devised to him by the testator, subject to that charge. If the testator has charged his estate with the sum of £30, £40, or £50 to be paid annually by the defendant to the plaintiff to enable her to maintain herself, that would undoubtedly have been a certain legacy in its amount and cost. But when she is bequeathed a decent, suitable and comfortable maintenance during her life, does that cease to be certain merely because the cost of it is not expressly limited to a particular sum. I think not, and I am supported in that opinion by the decisions of the courts of Massachusetts, from which State, when it was a Colony, we borrowed our law upon this subject.

In Faulvell v. Jacobs, [4 Mass., R. 634], a bequest of this kind was sustained against the Administrator, *cum test: annexo.* Baker v. Dodge, [2 Pick., 619], is to the same effect, and in Swany v. Little, et al, [7 Pick., 296] the same doctrine is more broadly upheld. These cases shew that under a Statute similar to our own, actions generally for legacies are sustained in their Courts of Law, and that legacies of this particular nature are considered as certain legacies without any accounting or assent of the Executor. In the latter case it was ruled that the action might be maintained, not only against executors, but against devisees or against any person liable *under the circumstances of the case,* to pay the legacies.

As to the fourth objection that there should have been proof of a demand and refusal, I am not clear that such proof was necessary in this case. Here was a position duly imposed upon the defendant to maintain his father's widow in sickness and in health during her life, and by accepting the property devised to him with that condition annexed to it, he must be held to have undertaken to perform that condition. It may be said that the defendant is executor as well as legatee and devisee under the will, and that he may have taken the property in the former character for general purposes, and may require it for the payment of the testator's debts. To this I think there are two answers. In the first place, until he makes it appear as a defence to this action, that the property bequeathed to him is required to pay the testator's debts, I think he is particularly charged with the payment of this legacy, or rather with the performance of this duty, and the funds applicable to it, and therefore personally liable in damages for non-performance. Secondly, it is clearly proved that he has possessed himself of the real estate devised to him by this will, subject to this condition as well as the residue of the personal estate. Now, I think we must decide that he has taken this real estate with this condition annexed to it as a devisee rather than as executor, for I am of opinion neither an executor nor administrator can interfere with the real estate until they have taken the necessary steps to satisfy the Governor and Council that the personal assets are insufficient, and have been clothed by them with authority to sell so much of the real estate as may be necessary for the payment of the debts and legacies. Under these circumstances I am inclined to think that the action can be maintained without proving a demand and refusal. But without giving any positive opinion upon this point, I think there was proof to satisfy the jury upon this head. The evidence would fully warrant this jury in inferring that the plaintiff had

demanded, and that the defendant had refused to give her the benefit she was entitled to under the will. And I think they might draw this inference from presumptive evidence without positive and direct proof. This is not like a case in Trover, where the original taking was lawful and not tortious, and where a direct demand and refusal must be positively proved in order to render the retention of the goods a tort.

The 5th and 7th objections are both to the admissibility of Jonathan Ells as a witness.*

As it respects the 6th objection that Jonathan Ells was a co-executor, and should have been joined in the action as a defendant, it is clear that no action could have been sustained against him by this plaintiff under the will of the testator, for he expressly directs that the maintenance he bequeaths to her shall be furnished and provided for her by Elisha Ells, the other executor to whom he bequeaths property for that purpose. Nor do I consider this action to be brought against the defendant solely as the representative of the testator, but as being himself personally liable to this demand under the circumstances of the case declared upon and proved. [7 Pick., 296.] It is true that in the commencement of the first count he is called executor of the will of Samuel Ells (and executor he is) but he is not charged as executor. The facts are stated which gave the plaintiff a personal claim upon him, and he is charged with having personally made a promise in consideration of that personal liability.

The cases in Cowper, particularly that of Hawkes v. Sanders are decisive upon that point. It was contended that those cases are overruled by Deeks v. Strutt, and in England they certainly are not, however, because any objection could be made against the justice of the decisions or the soundness of the argument in support of them, but because those decisions were made in a court which had no jurisdiction over the subject matter. Now, as the Legislature have expressly conferred that jurisdiction upon this court, I conceive the reasoning of Lord Mansfield and Mr. Justice Buller in which the whole court concurred, is strictly applicable to this case under consideration.

The first case of Atkins v. Hill was upon a demurrer to a declaration, substantially, and from the brief statement of it in the report, I should think almost verbatim the same as the second count in the declaration in this case of Ells v. Ells. It is true that the demurrer was considered to admit an express promise having been made by the defendant, and the decision was founded

* I have omitted these portions of the Chief Justice's opinion, as no such question could well arise under the law of evidence in the Revised Statutes.

upon that promise, having been made upon a sufficient consideration to maintain the action.

The second case of Hawkes v. Sanders was after verdict, and an express promise had been proved on the trial. But we cannot fail to infer from the observation of the learned judges in those cases, that when the action was brought in a court which had undoubted jurisdiction over the subject that the proof of sufficient assets to pay a legacy would raise an implied promise on the part of him who was bound to pay it.

In the case of Camden v. Turner, cited in Atkins v. Hill, it was held that an acknowledgment by an executor "that he had enough to pay," was sufficient to support an assumpsit, a *fortiori* actual proof of assets would support an assumpsit.

In the next case of Hawkes v. Saunders, Lord Mansfield says, "When a man is under a legal or equitable obligation to pay, the law implies a promise, though none was ever actually made." He subsequently adds, "An executor who has received assets, is under every kind of obligation to pay a legacy. He receives the money by virtue of an office which he swears to execute duly. He receives the money as a trust or deposit to the use of the legatee," again, "He retains what belongs to the legatee, and therefore owes him to the amount." And be it remembered, that this language was used in a case where the defendant, although an executrix, was held liable personally upon her own promise, and the judgment was *de bonis propriis, and de bonis testatoris.* Lord Mansfield, upon that part of the case said, "the demand is certainly a personal demand against the defendant, in consequence of a promise (express it is true) made by her, *she being executrix.*" And in this case the same language may be used. The demand is a personal demand against the defendant in consequence of an implied promise arising out of his having received assets under the will which directed him to apply those assets to the plaintiff's maintenance.

That no express promise is necessary to sustain the action in a court that has jurisdiction over cases of this nature is evident from the language of Lord Mansfield, already cited, and still more from that of Mr. Justice Buller, "If there had been no promise, nor even an assent to the legacy, the defendant might have been compelled in a Court of Equity, or in the Ecclesiastical Court to have paid it." Whether *without assent* she could be compelled in a Court of Law to pay it or not, is a question which it is not necessary to give any opinion upon now." But this doubt merely proceeded from the authority of the Common Law Courts to take cognizance of legacies, having been questioned and can

have no influence upon this Court if jurisdiction over such cases has been expressly conferred upon it by Statute, as I firmly think, has been the case.

I am therefore of opinion, first, that an action for a certain legacy can be maintained in this Court against any person who, under a will, is made liable to pay such legacy, and receives under such will funds sufficient to pay it.

Secondly, that this legacy of a decent, suitable and comfortable maintenance, is in its nature sufficiently certain to sustain an action as has been decided in the American Courts of Law; and if withheld, I think a jury of the vicinage more competent to decide upon the compensation to be made for it than a master of a Court of Chancery.

I am therefore of opinion that the plaintiff is entitled to judgment against the defendant, upon his own personal liability, and that this rule for a new trial should be discharged.

HILL, J., the question for our consideration is whether the action can be sustained. I may at once relieve myself from considering whether an action might not be maintained against the defendant in his character as devisee under the will because he is not sued as such. The declaration charges the defendant as executor of the last will and testament of Samuel Ells, and in that capacity only, and throughout the plaintiff seeks to recover against the defendant solely in consequence of his being possessed of sufficient assets as executor to pay and discharge this legacy. The promises of the defendant are laid as springing from and arising out of the executorship and possession of assets. If the plaintiff then is liable at all, he is liable as executor of Samuel Ells. Now how does the law stand in England with regard to the sustaining of such an action as the present. The bequest of a legacy, whether general or specific, transfers but an inchoate property to the legatee. To render it complete and perfect the assent of the Executor is requisite. On the executor is devolved all the testator's personal property, to be applied in the first place to payment of debts, and therefore before he can pay legacies with safety he must see whether, independently of them, he has a sufficiency to pay creditors. If the assets prove inadequate the legacies must abate or fail altogether, according to the extent of deficiency: and if on failure of assets the executor pay legacies, he makes himself personally responsible for debts to the amount of such legacies. Hence, to protect the executor the law imposes the necessity of his assent before it can be absolutely vested. If, without such assent, the legatee take possession of the thing bequeathed, the executor may maintain trespass against him.

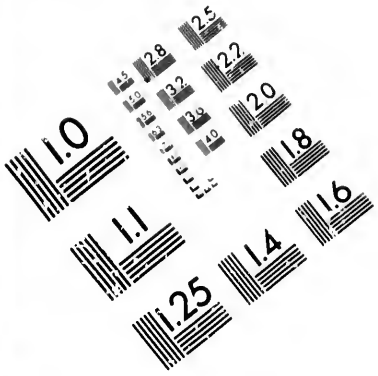
But an assent even to a legacy will not, in all cases, vest it in the legatee so as to enable him to sustain an action at law against the executor for its recovery. It is only in cases of specific, not general legacies that such an action can lie. To shew that an action for a general legacy cannot be supported, the case of Deeks vs. Strutt, [5 T., R. 690,] is decisive. In that case the testator had bequeathed £40 per annum for life to the wife of the plaintiff. out of his goods and chattels. The defendant had proved the will and taken possession of the goods and chattels which were quite sufficient to pay the annuity. The defendant had actually paid the £40 for several years, and then refusing, the plaintiff brought the action to recover the arrears. But the Court held the action not maintainable and stopped Anderson who was to have argued for the defendant. Lord Kenyon said that he knew of but one case where it was said such an action could be supported, and that happened in the time of the Commonwealth; but the reason then given was to prevent a failure of justice, the Ecclesiastical Courts being at the time abolished, and the Court of Chancery not having then entertained any jurisdiction over the question of legacies. His Lordship enters into the reason against sustaining such an action, which is indeed quite obvious. A Court of Law cannot, like a Court of Equity, impose any terms upon parties who might be entitled to recover, and consequently the greatest injustice might be done, when many parties might lay claim to rights under a will. A Court of Equity can deal effectually with all these perhaps conflicting rights, and do substantial justice between all parties, as well executors as legatees. This case has not been over-ruled nor impugned, and therefore stands directly in the way of the plaintiff, if we were dealing with this case in England, because it establishes the doctrine that even the assent of the executor to this legacy would not give the plaintiff a standing in a Court of Law to seek for the recovery of such a legacy as the present. There are authorities to show that if an executor has assented to a specific legacy, an action at law may be supported against the executor to recover it, because tho' the right to the specific chattel is but inchoate until such assent be given, yet when given by the executor the right becomes vested. The case of Lord Saye and Seele vs. Guy, [3 East, 120,] is such a case. There the lease of leasehold house and premises in Grosvenor Street was bequeathed to Lord Saye and Seele by Mary Guy, whose executor the defendant was, and the defendant had assented to the legacy, and had appointed a time to surrender the house. The Court held the action to be maintainable, and drew the distinction

between an action for a general and specific legacy. The case of Deeks v. Strutt was cited and relied on by the defendant, but the Court said that in that case the question relative to a specific legacy assented to by the executor had not been before the Court. In giving judgment Lord Ellenborough says, "General language used by the Court in giving their opinions in any case must always be understood with reference to the subject matter before them. The question of a specific legacy assented to by an executor was not before the Court in Deeks v. Strutt, but whether the law would raise an implied promise on proof of an acknowledgment of assets by the executor so as to sustain an action against him for an annuity payable out of the general funds of the testator. But it never could be doubted but that at law the interest to any specific thing bequeathed, vests in the legatee upon the assent of the executor." So it is plain that in *no* case in England can an action at law be maintained to recover any legacy, unless the executor has assented to it, and the necessary consequence is that the present action could not be then sustained, because there is neither alleged nor proved any assent of the defendant to this legacy. But it is argued that this action can be supported under the 9th Clause of our Provincial Statute, [32 Geo. 2, Cap. 11,] which enacts "That where any certain legacy is, or shall be bequeathed and given by any person in his or her last will and testament, as also where any residuary or uncertain legacy is, or shall, by the accounts of any executor, be reduced to a certainty, every such legacy and legacies, as aforesaid, may be sued for and recovered at the common law, any law custom or usage, to the contrary, notwithstanding." These are certainly strong words, and at first reading would seem to favor the position contended for by the plaintiff, but when the results that must follow our decision in favor of the plaintiff, are considered, I cannot bring myself to think that it ever could have been the intention of the Legislature to have given every legatee a right to an action against an executor for a legacy, whether he assented to the same or not. To establish the doctrine contended for, the plaintiff would enable every legatee under a will, were these twenty or more, to commence a separate action against the executor at Common Law, and without the executor being able to discover how the estate stood, or without any assent on his part, a recovery must take place. In cases where there were many legatees, all would resort to actions, and in small estates the whole would be consumed in costs. A party might, before the estate was settled, recover a legacy in a Court of Law, when, upon an adjustment of it, the

whole estate might not suffice to pay the debts due by the testator. It may be said, Chancery is open to the executor and he may resort thither to compel the legatees to do what justice and equity might require, but is an executor to be thus driven into Chancery when, perhaps, there may be no necessity for such a step, if time were given. Supposing him, however, to go there, still he will have suffered great inconvenience and incurred heavy costs in the Common Law Courts. We cannot, in our consideration, go beyond the matters directly before us, we can neither call before us other parties nor impose any terms upon the parties to the record, but must try the naked question of legacy or no legacy. Let us look at the present action? It appears that there are several legatees under this will besides the plaintiff, and for aught that appears, the estate may at this moment be insolvent, at all events we have no power to inquire into that fact, and then should it be insolvent, we shall have permitted a recovery to be had against the defendant for £39, which he must certainly lose or else he must be told to go into Chancery to recover back a sum of money which he has paid under a judgment of a Court of Law. I think he would find great difficulties in his way in that Court, and how he would reimburse himself for his expenses I cannot see. Could, therefore, the Legislature have intended to have conferred on a legatee a vested right, under all circumstances, to recover from an executor a legacy to which he never assented, and to drive an executor into a Court of Chancery to get rid of the action? If the plaintiff has a right to recover she has that right, irrespective of the final settlement of the affairs of the estate. I do not find any case in which it was ever pretended even on argument that an action could be maintained at Common Law for a legacy to which the assent of the executor had not been given. In the case of a specific legacy the assent of the executor is always shewn, and if the assent must be shewn in England, I can see no reason whatever for determining an assent unecessary here, and I should be driven to it before I should come to such a conclusion. I do not feel compelled to say such an assent is unnecessary, because I think the object of the 9th Clause of our Statute was not intended to go beyond declaring that a certain legacy, or an uncertain one reduced to a certainty by the executor might be recovered in a Court of Law, provided that the executor, as in England, had assented to the legacy, if it was specific or if uncertain, provided the executor, by his accounts shewed his assent from which the Clause would raise a promise to pay. The Legislature, as it were, said, you shall not, if the executor, by any clear and distinct act of his own, shews

that the estate is amply sufficient to pay the legacy, and assents to pay it, be driven to a Court of Chancery, but may recover it at Law. The greatest efficacy then that can be given to this Clause is, I think, to enable a legatee to recover a general legacy when the executor assents to it, which he could not in England. In short, in my opinion, the Legislature, under an impression that the Common Law Courts had no jurisdiction whatever in cases of legacy intended to give them such jurisdiction, in certain cases where it might be proper, leaving the propriety to be decided according to the practice and decisions in England. Now in cases of specific and general legacies, to which the executor has assented, it might be very just and right to give an action at law, because it might fully be presumed that such assent would indicate clearly the sufficiency of assets; but until such indication, I think it would as clearly be wrong to give common law jurisdiction. If the executor assents to the legacy, then, under this clause, a promise to pay is raised, and the action can be supported; but otherwise not. No assent has been shewn in this case, and therefore I think the action not sustainable under this clause.

But, granting that the assent of the executor were unnecessary, I am by no means clear that the present legacy falls within the words of this clause. There has been no account of the executor shewn which would make this legacy certain, and therefore it must be referred to the words in the first part of the clause "certain legacy." Can this legacy, with accuracy, be termed certain? I am inclined to think that the word certain, here used, was intended to convey the idea of a specific legacy, such as the bequest of a particular chattel; but if it can apply to a general legacy, I still cannot discover its certainty. If the bequest, for instance, had been of 40s. per annum for life, as in the case of Deeks v. Strutt, there would have been certainty, and the executor would have known with precision and certainty what he was to perform and to what he was to assent; but to bequeath to a person "a decent, suitable and comfortable maintenance," does appear to me a very uncertain bequest, and to depend upon many contingencies. The station in life of the legatee must be considered; the place where the party is to receive maintenance; whether the maintenance is to be provided at the house of defendant, or whether he is to pay plaintiff in money sufficient to provide it elsewhere; whether medical aid forms part of this maintenance, and various other contingencies which might be put. Now, I cannot say that a legacy can, with any propriety, be called certain, which involves



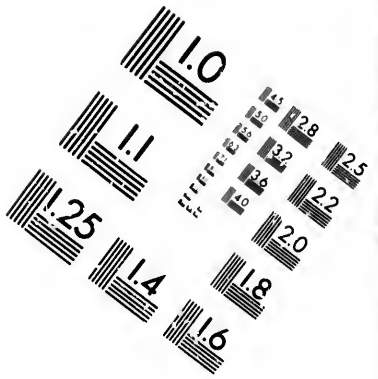
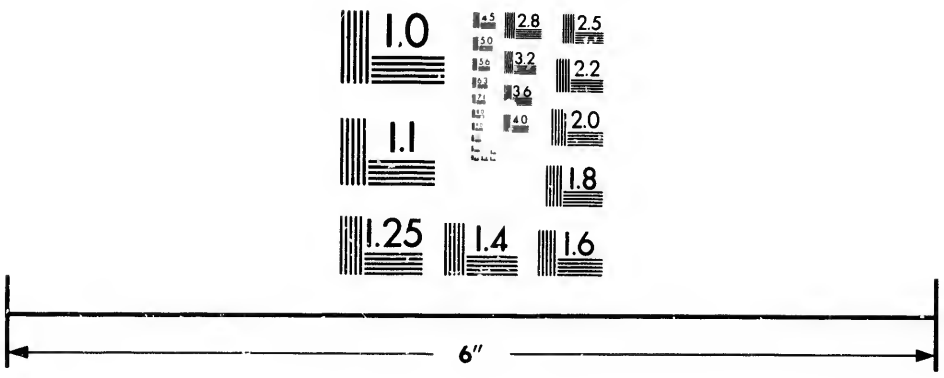
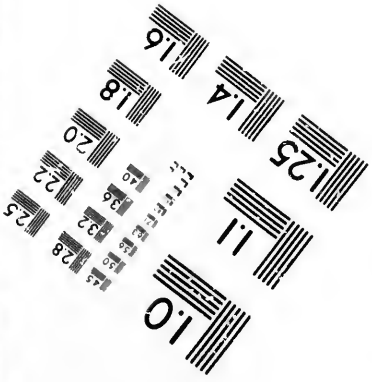
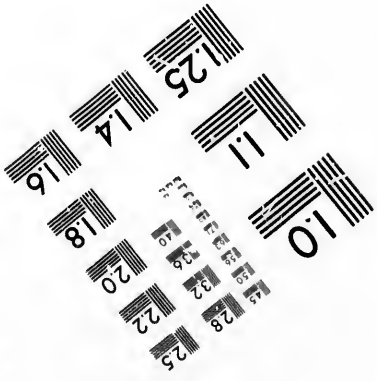


IMAGE EVALUATION TEST TARGET (MT-3)







Photographic Sciences Corporation

23 WEST MAIN STREET
WEBSTER, N.Y. 14580
(716) 872-4503

so many considerations and contingencies. But it is said *id certum est quod certum reddi potest.* That maxim, however, if applied so broadly, would supersede the necessity of using the word certain in the clause of the statute, for there could be few uncertain bequests that might not in some sense be reduced, to a certainty. The word certain, if not used in the same sense as the word specific, applies in such cases as when in general legacies, a specific certain thing is given, as, for instance, £100, or a house, or a yoke of oxen, to be taken out of the estate. I think, therefore, the action must fail.

ESSON vs. MAYBERRY.

Trinity Term, 1841.

The Grantee of a water lot, bounded on the shore, is entitled to take up to high water mark; and that line of his grant changes with the gradual encroachment or retirement of the sea.

This was an action of trespass, *quare clausum fregit*, for erecting a building on plaintiff's land, and for prostrating and removing plaintiff's buildings. The plaintiff obtained a verdict and a rule Nisi was granted to set it aside for a misdirection.

The plaintiff derived his title to the land in question through several mesne conveyances, from Mrs. Jane Donaldson. She, it appears, was, in 1818, and previously thereto, in possession of lots Nos. 4, 5 and 6, in division letter W, in the townplot of Dartmouth, derived originally by those through whom she claimed by conveyance from James Purcell, of whose right or title no evidence whatever was adduced. These lots adjoined and were bounded by the waters of the harbor of Halifax, which had actually, from year to year, encroached upon the land so, that the ordinary high water mark in 1818, and still more at the present time, was far within what was the original bounds of the lot.

In 1816 the crown granted the water lots C and D in front of the division letter W, extending 400 feet into the harbor, to William Allan, Robert Hartshorne, and two others, in severalty, from one of whom the defendant derives his title.

In 1818 Mrs. Jane Donaldson obtained a grant from the crown, of the lots numbered from one to six, in division letter

W, (including therefore the lots above mentioned, then already in possession,) together with the *water lots* number 3 and 4, in front of the same number. And by the description in this grant, and the plan annexed, we find that the water lots in the grant of 1816, are those in front of lots numbers 5 and 6 thus granted to Mrs. Donaldson.

The trespasses which are the subject of this action, are alleged to have been committed on the plaintiff's lot, No. 6. The defendant claims the *locus in quo* as being within the limits of his water lot held under the grant of 1816.

HILL, J.—This was an action of trespass tried in Hilary term last, wherein a verdict was found for the plaintiff. A rule Nisi has passed to set this verdict aside and grant a new trial. The trespass complained of is alleged to have been on lot No. 6, letter W, at Dartmouth; and the only question, as it seems to me, is as to what is the true line of this lot, on the western side, which looks into the harbor of Halifax. The defendant owns a lot adjoining westwardly the lot of the plaintiff, part of which is covered with water; and insists that the *locus* forms a part and parcel of this lot; and if so, then there ought to have been a verdict for the defendant, because he had a right, under the pleadings, to do all that he has done, supposing him to be the owner of the *locus*. Now, the plaintiff derives his title to the lot No. 6, upon which the trespass is alleged to have been committed, under a grant from the crown to Mrs. Jane Donaldson, dated 13th August, 1818. This grant makes it, beginning at high water mark, on the eastern shore of Halifax harbor; then runs from the shore several courses until it brings you to the east angle of a lot granted to the late M. Wallace; and then it directs the course to be from thence south 55 degrees west by the south boundary of Wallace's lot 100 feet to the said shore—that is, the eastern shore of the harbor as previously mentioned. The course is then easterly by the same, (that is, by the shore to the eastern angle of the water lot No. 5 granted to W. Allan and others;) thence the grant was south 55 degrees west into the harbor 400 feet; thence south 120 feet; thence north 55 degrees east 400 feet to the shore at high water mark aforesaid; thence southerly by the different courses of the shore to the place of beginning. The defendant claims the *locus* to be under a grant of water lots C and D, in front of division letter W, to W. Allan and others, dated July, 1816, extending 400 feet into the harbor. The grant of 1818 to Jane Donaldson appears to be a grant of confirmation,

for the lot had been previously possessed and occupied. It appears from the case, that previously to the date of this grant, the sea imperceptibly and gradually had encroached upon and washed away part of the shore, and of the land which originally might have been within the bounds of lot No. 6; and that at the time of its passage there was not 100 feet in measure left between the eastern angle of M. Wallace's lot and the high water mark at the shore; but that to complete this, you must run into the harbor and take in the *locus*. And the plaintiff contends that he has a right to run and complete his 100 feet; if he has not, and must be bound by the high water mark as it was in 1818, then the whole trespass complained of was within the bounds of defendant's lot, as granted to Allan and others, through whom he claims. The grant to Jane Donaldson, it must be remarked, bounds the lands therein on the lot granted to Allan and others. Now, the plaintiff can stand in no better situation than Mrs. Donaldson; the grant that he took from the crown bounds her upon high water mark, and the language is, that the line is to follow the courses of the shore at high water mark. But it is contended, that as originally the high water mark extended into what the defendant now claims as his, and as the possession was in conformity therewith, the crown would not, by its grant to Allan and others, pass anything falling within this original high water mark. But the cases cited from 3 & 5 B. & C., are conclusive upon this point. That where the sea recedes, and gradual and imperceptible accretions are made to the land adjoining the sea, these belong to the owner of the land adjoining; so where the sea makes imperceptible and gradual encroachments upon the land, these belong to the crown. We have, not long since, had this question mooted in this court, where the whole doctrine touching it was very fully gone into. I take it, therefore to be quite beyond dispute, that the crown had a right to all the water, and land covered with water, up to high water mark, on the 13th August, 1818, when it passed the grant to Mrs. Donaldson: because whatever may have been previously the precise point of high water mark, that if altered by degrees would give the crown a right. The question, then, for the consideration of the jury, was to ascertain where this high water mark was in 1818. But their attention was drawn to high water mark as it originally existed, and the verdict has evidently been founded upon the assumption that the plaintiff had the right to sustain his action for any act of force committed by the defendant within that original mark. The question as to the right of the crown, in 1818, to the encroachments made by the sea, appears to have been reserved for the consideration of the court.

The plaintiff, then, has obtained a verdict for acts of trespass committed, as appears from the evidence, below high water mark, as it was in 1818.

It has been urged that the one hundred feet given in the grant of Mrs. Donaldson from the eastern angle of Mr. Wallace's lot, are not limited and restricted by the words "to the shore," but that the plaintiff has the right to his complement of feet though they should carry you beyond the shore. But this cannot be so. Where a grant or deed gives a starting point from which you are to run so many feet to a natural fixed and determined boundary, the boundary is the *ne plus ultra*. A mistake in the measurement cannot operate against that about which there can be no mistake. Besides in this case such a construction would, independently of being against all principle, be absurd, and in reality give the plaintiff nothing; for, granting him entitled to his one hundred feet, and to run beyond the shore to complete it, still the grant directs the line to run from thence south-easterly "by the shore." Now, certainly running in the water would not be running by the shore, and we must therefore retrace our steps from the extreme west point of the one hundred feet directly to the shore, in order to enable us to run by it southerly, as the grant directs. This, in fact, would give the plaintiff no more than if he stopped at the shore, unless indeed it might be the imaginary line itself.

It has also been urged, as a technical objection, that the defendant is a tenant in common with others of the lot he claims, and therefore he is not entitled of himself to set up the defence; but no authority has been cited to show that one tenant in common cannot in any way and every way defend the position and occupation of the whole land held in common. I see no principle against it, nor do I find any case warranting such a position. If the defendant stood here in the position of plaintiff, the case might be different, for then damages recovered might belong to all the tenants in common, but I see no possible objection to one tenant in common defending his possession against the acts of trespassers.

I am of opinion that the rule should be made absolute.

BLISS, J.—It appears to be fully and clearly settled that the sea shore is that which lies between the ordinary high and low water marks. "That this originally belongs to the crown, and can only vest in the subject as the grantee of the crown."—[Per Bayley, J., Scratton v. Burne, 4 B. & C., 498.] That when this high water mark, in the course of time, becomes gradually and imperceptibly changed by the encroachment or retiring of the

sea, the land in the one case which is thus gained by the accretion belongs to the proprietor of the land—and in the other, when it is the shore which is enlarged, "it belongs to the person who has the shore at the time when the accretion takes place." —[Per Holroyd, J., ib. 402.] The rule operates alike for and against the crown, or the grantee of the crown as the owner of the shore, on the one hand, and the riparian proprietor on the other. The principles of natural justice seem to require that the rule should be reciprocal, and the case of Scratton v. Burne leaves not a doubt on this point.—[4 B. & C., 495.] This principle, being established, appears to me to be conclusive on the whole case now before us. Until the grant, in 1318, to Mrs. Donaldson, she had *a possession* only of the lot which adjoined the shore, but no sufficient title against the crown: and if her title had been ever so good, the principle which I have mentioned would have limited her right according as the sea advanced upon the land, unless she took steps to reclaim her possession against its encroachments. Mrs. Donaldson, however, not only had no sufficient title to the lots in letter W, but by her acceptance of a grant from the crown she precluded herself from all claims inconsistent therewith. The crown, then, having a clear and indisputable right to the shore—that is, to the high water mark as it then was and might be—and Mrs. Donaldson being in possession of the land above it, the crown granted, in 1816, to Allan, Hartshorne and others, the water lots C and D, in front of letter W, —that is, the water lots in front of Nos. 5 and 6, letter W, for so it is clearly and demonstrably shewn by the subsequent grant of 1818. The term water lots might possibly, if taken *per se*, be of a doubtful meaning: but here, explained as it is by the subsequent grant, I think there can be no doubt as to what was intended to be granted. They are described as water lots in front of lot letter W, but the lots in letter W were at this time, according to the principle which governs land so situated, bounded by the then high water mark. The grant, then, of 1818, must have included the sea shore, "which would convey not that which, at the time of the grant, is between high and low water mark, but that which from time to time shall be between those two termini."—[Per Bailey, J., 4 B. & C., 498.]

The description in the grant of 1818 supplies, I think, also some further evidence that the water lots in the grant of 1816 were intended to extend as far as the high water mark—or, in other words, that the grant to Mrs. Donaldson of the lots in letter W, which were immediately in the rear of these water lots, only intended to give them to her down to the high water mark. It

begins at *high water mark on the shore*, and runs up the breadth of division letter W, and then the length of the six lots to the eastern angle of No. 7, and from thence one hundred feet to the said *shore;* thence by the same (that is by the shore) to the eastern angle of water lot No. 5, (granted to Allan and others;) then by the south line of that water lot four hundred feet into the harbor; then at right angles, or nearly so, one hundred and twenty feet; thence four hundred feet again to the shore at high water mark; and lastly, thence by the *different courses of the shore* to the place of beginning. Now, in this last place, by the *courses of the shore* is meant the line of high water mark, and nothing else can be meant, for it runs from one point at high water mark to another. In this part, therefore, the lots in letter W are distinctly bounded by the shore at high water mark. Can we then suppose that when other parts of these lots are also bounded *by the shore*—the proper and correct meaning of which would extend it up to high water mark—that any other than the same correct meaning is to be affixed to that word, and that it is to bear two different significations in one and the same description of one and the same continuing line? It is true the line from the street is described as *one hundred feet to the shore*, but the shore is the substantial part of the land described; and if there be any inconsistency between the measurement as stated and that, the former must be rejected in favor of that which is fixed and certain. The Attorney General, in support of his view, would read it as if it were one hundred feet *into* the shore. But this, besides being contrary to the obvious and proper meaning of the word, and opposed to the sense in which the *shore* is spoken of in the rest of the description, would be reversing the rule by which grants from the crown are to be construed, and giving a forced construction in favor of the grantee. He also urged that the grant to Mrs. Donaldson was to be considered as a grant of confirmation, and was therefore intended to extend the whole one hundred feet to confirm her prior possession; but if the crown had previously granted in 1816 the water lots, which I consider to have included the whole shore up to the high water mark, it could have had no right to grant any part of that shore subsequently to 1818. I have, however, already pointed out how, by this shifting of the high water mark and the principle of law applicable thereto, Mrs. Donaldson could have no claim to the possession of the land lying below it, although it may have once formed part of the lot of land of which she was in possession. To suppose, then, that the crown intended to grant to her the

whole one hundred feet, which would carry it below this high water mark, would be a violent presumption to entertain as against the crown, and we should not be warranted in giving that construction to the grant even if there were no other objections to it. I think, then, that the defendant who claims under the grantee of the crown of the shore was entitled to the increase which the shore has since gained; and the question for the jury should have been, whether the supposed trespasses had been committed above or below the then high water mark. This was indeed the strong inclination of my opinion at the trial; but as I did not suppose much doubt could be entertained as to that fact, and having not much opportunity of examining fully the grant of 1818 and its plan, it appeared to me that the question which was to be decided by the court could be raised as well under the directions which I then gave. This, I am satisfied, was wrong; and the case must therefore, if the plaintiff require it, be submitted again to the jury.

There was indeed another objection taken as to the defendant's not having shewn a sufficient title to justify him in prostrating and destroying the plaintiff's building, but it does not appear to me to have any weight. The defendant, it is true, derives his title from one only of four several grantees of the water lots; but by that conveyance he became a tenant in common with the other three, and was seised of an undivided fourth part of the whole. The erection of the building by the plaintiff on any part of these lots was equally an unlawful act as regarded him, and he had the same right to remove it as if he were the sole owner of the whole. It is true that tenants in common cannot sue separately for a trespass to their land, because the damage is entire, and all must join in personal actions. But each one may, I think, separately defend his possession, and do any act which all might do conjointly in defence of that possession short of maintaining an action in respect of it.

Rule absolute for a new trial.

SEAMAN, 2ND. vs. DEWOLF.

Trinity Term, 1845.

The Provincial Statute, 34 Geo. 3, c. 15, protecting officers and others their assistants, acting under the *warrant* of a justice, extends to, and includes them, when acting under an *execution* substituted for such warrant.

This was an action of trespass for taking a Sleigh; tried before His Lordship Judge Hill, at Cumberland, in October, 1843. Besides the general issue, the defendant pleaded in justification that he was a Surveyor of Highways for Pugwash; that the plaintiff was a resident there, and liable to perform statute labour on the roads; that he had been duly warned, and neglected to attend and perform his work, whereby he forfeited 3s. for every day's neglect; that defendant had applied to a Magistrate to sue plaintiff for the forfeiture; that the Magistrate accordingly issued a summons for plaintiff to appear before him and answer the said suit; that the writ had been served upon the plaintiff, but he did not attend at the return of the writ, and the Magistrate, after examining witnesses to prove the case, had given judgment against the plaintiff for 21s. debt and costs; that on the defendant's application, the Magistrate issued an execution on such judgment directed to a constable with instructions to levy the amount on the plaintiff's goods and chattels. The defendant then alleged that under said *execution* the constable *and the defendant as his assistant* took the sleigh in question, and therefore justified the taking complained of.

To this the plaintiff replied that he had not been *duly** summoned to appear before the Magistrate in the said suit, upon which *issue* was joined. On the trial it was proved that a constable accompanied by the defendant had seized and taken away the plaintiff's sleigh, worth about £6 10—the witness also stated that the constable had at the time a writ against the plaintiff with him, and seized the property under such writ.

Upon the pleadings and proof, *Mr. James Stewart* for the defendant, submitted that the action could not be maintained

* It appeared by a demurrer in this case, that the Justice had in the summons named the plaintiff—James Seaman, 1st, instead of 2nd—which was the error relied upon by the plaintiff.

against the defendant, inasmuch as the plaintiff had not proved any demand of the perusal and copy of the *Execution* as required by the *Provincial Act 54 Geo. 3, Cap. 15, Sec. 7*, by which the constable and the defendant acting in his aid, were protected in this action. The learned Judge being of this opinion, directed a nonsuit, but the plaintiff's counsel declining to submit thereto, the jury under the charge of his Lordship, found a verdict for the defendant.

A *rule nisi* was obtained on the ground that the Statute only applied to WARRANTS granted in *criminal* matters, and not to process, for the recoveryof debts before magistrates.

At the sittings after Michaelmas Term last, *Gray* for the plaintiff, argued strongly in support of the rule on the above ground; he also contended that there was no distinction between a Surveyor of Highways proceeding before a magistrate to recover forfeitures incurred under the Highway Act for the benefit of the roads, and a person sueing in the same manner for his private debt—that if the protecting statute did not apply to the latter it could not apply to the former, as the proceedings were precisely the same in both cases. He also urged that it was no part of the defendant's duty as Surveyor of Highways to point out the plaintiff's property to the constable. That by sueing the plaintiff to judgment and causing execution to be thereon issued, the defendant had fully discharged the duty imposed on him by the Highway Act, and that accompanying the constable afterwards to levy the execution was voluntary and gratuitous. And defendant could therefore claim no protection under the 54th Geo. 3:—That as the *summons* had not been duly served upon the plaintiff, the Magistrates had no jurisdiction in the matter, and the whole of the proceedings were erroneous.

For the defendants *J. Stewart* insisted that the verdict could not be disturbed in any view of the case. He contended that by the Common Law, all Judges, Officers, and Ministers of Justice, *and persons acting in their aid* are (without the assistance of any statute) protected where the *subject matter* is within their jurisdiction; whether the proceedings are erroneous or otherwise. But 2nd—That where magistrates *exceed* their jurisdiction,

whether in criminal or civil matters, if acting *bona fide*, they as well as the officers executing their process, and persons acting in their aid are entitled to the benefit of the protecting statute 54 Geo. 3, the Magistrate's *execution* authorised by the Provincial Statute, being in reality a *warrant* under the hand and seal of the Justice; the only difference being in the *name*.

That in the present case by the pleadings, the plaintiff admitted the Magistrate had jurisdiction over the subject matter of the suit before him, and as the constable was by law bound to execute the writ, he would be justified taking the plaintiff's property as directed by the execution, and if the constable was justified, the defendant acting in his aid was also justified, or if not *fully* justified at Common Law, was at all events entitled to the protection of the statute.

The opinion of the Court was in Trinity Term last delivered by Judge Bliss, viz.:—

This was action of trespass for seizing and carrying away a sleigh of the plaintiff.—The defendant pleaded 1st, the general issue, and 2nd, that he was a Surveyor of Highways, and that plaintiff being a person liable to work thereon, and refusing to do so, the defendant caused him to be summoned before George Bergman, Esq., a Justice of the Peace of the County, for the forfeiture imposed by the statute in that behalf. That the plaintiff made default, whereupon the said Justice gave judgment against him for the forfeiture and costs, and on the defendant's application issued execution for the same, directed to John Kelvine, a constable, under which the said constable and the defendant as his assistant, seized and took the said sleigh. The Replication denied that the plaintiff had been *summoned* before judgment was given, and on this issue was joined. At the trial of the cause before *Hill, J*, at Amherst, the plaintiff proved the taking of the sleigh, by the defendant and the constable, and rested; when *J. Stewart*, on behalf of defendant, moved for a nonsuit, on the ground that as the defendant was acting in aid of the constable, no action could be brought without a previous demand of the warrant according to the *Pro. Act. 54th, Geo. 3, c. 15*; the learned Judge was of that opinion, but the defendant's counsel declining to submit to it, the jury, under the directions of the Judge found a verdict for the defendant—a Rule Nisi to set this verdict aside was granted, which was argued in January last, at the sittings after term by *Gray* for plaintiff, and *J. Stewart* for

defendant. The question raised and now to be decided is whether this case falls within the statute. That is, 1st—whether the statute which protects officers and others acting under the *warrant* of a Justice, extends to and includes the officer who acts under an execution issued by the Justice in a case like the present, and 2nd—if the officer himself is entitled to the protection of the Act, whether the defendant here can claim it as acting in his aid. It is wholly unnecessary to inquire whether the statute applies to the case of an execution issued by the Justice of the Peace, upon a judgment in an ordinary suit between two parties; the present case differs widely from that. The defendant here is a public officer; a Surveyor of Highways, compellable by the *Pro. Act.* [*7 Geo. 4, cap. 2,*] to serve in that office under a penalty—sworn to the faithful discharge of its duties and liable too, to a penalty for every neglect of them. One of these duties is to notify those who are bound by law to perform labour on the roads and see that they do it, and when it is neglected to prosecute for the penalties thereby incurred, and to receive and expend them in the public services of the roads and bridges. Formerly under the old Act I, *Geo. 3, cap. 14,* the forfeitures imposed for neglect of labour on the highways, were upon the complaint of the surveyor, to be levied by *warrant of distress* and paid over immediately to the surveyor. But by the 13, 14, *Geo. 3, c. 3,* the law was in this respect altered as it stands under the Act at present in force, [*7 Geo. 4, c. 2;*] and these forfeitures are now "to be sued for and recovered by the Surveyors of Highways before Justices of the Peace in like manner as debts are sued for and recovered"—and when received to be applied to the repairs of the Highways, &c.

Had the original mode of proceeding still continued, there could not be a doubt that the officer to whom the warrant of the Justice was directed would have been within the protection of the Act 54, Geo. 3; the case of Harper vs. Carr, (7, T. R., 370,) is conclusive on the point, in which it was held that a Churchwarden who distrained for a poor rate under the warrant of a Magistrate, came within the Act of 24, Geo. 2, c. 24, of which our Provincial Act is only a transcript, and Lord Kenyon then said it had always been extended to Surveyors of Highways, whose duties it may be remarked are very similar to our own officers with respect to enforcing labor on the roads and recovering penalties for neglecting it, (See Burns' Justice, 716,) and the alterations in the manner of recovering these penalties substituting a suit for a complaint and an execution for a warrant are still essentially the same. In both the proceedings are imposed

upon the surveyor as a public duty, and in both the process by which the forfeiture is enforced, is to be issued by the Justice. The difference between a warrant and such an execution if any at all there be, is in name only, and in King vs. Bens, [6 T. R., 98,] Lord Kenyon says a "Warrant of Distress is in the nature of an Execution." If then, the party who executes such *warrant* is protected by the statute, he who levies under the *execution* which has been substituted for the *warrant*, must come within it also; for the policy of the law must be the same in both cases, when the two are identical; and if the very letter of the Act does not include such an execution, it comes within the fair meaning and spirit of it; and indeed it would be the most narrow construction which could exclude the officer to whom the execution is directed from that protection which it was the intention of the Legislature to afford him in all such cases; and the statute should receive a liberal interpretation.—Nor can we doubt that this defendant also comes within it, as one acting in aid of the constable. He was not, as was argued at the argument a mere gratuitous actor in this matter. His duty—the fair and efficient discharge of his duty is not fulfilled by the simple act of prosecuting to Judgment and causing the execution thereon to be issued; by doing all this and no more, he might very possibly exempt himself from incurring the penalty of neglect, but the highly important and public service of the roads requires the officer to see that the forfeitures which he is to receive and expend on them should be promptly levied. And he only is the efficient and faithful surveyor who attends to this ulterior duty.

He therefore who accompanies the constable to point the property of the delinquent, and assist in seizing it, is but performing a part of the duties of his office and deserves, and is entitled to the same protection as the constable himself. It would be singular indeed if the surveyor was protected by the statute when the warrant is directed immediately to himself as it is in England, and was out of its protection, when thus acting only in aid of the officer who executes it here; though a stranger would be entitled to it.—There can be no distinction in principle between the two cases. But the case of Patron vs. Williams, et al [3 B. and Ald. 330,] has decided this matter though the case turned upon another point. The question there arose upon the 8th Sect. of the English Stat. of 24 Geo. 2, c. 44, [the 10th of our Pro. Act,] which enacts that no action shall be brought, unless within six months, against any Justice of the Peace for anything done in the execution of his office or against any constable or other officer or person *acting as aforesaid.* And these last words

were held to apply to the last antecedent word *person*, and to mean acting in aid of the constable." And not that the constable must be acting in obedience to the warrant.—And therefore where under a warrant directing him to take the goods of the plaintiff, believing them to be his he was entitled to the protection of the statute. Now in that case the warrant was issued against the late Overseer for the arrears of his account, and two of the defendants were the succeeding overseers who, with the constable, seized the goods in question, and the Rule for a nonsuit was made absolute, thus shewing that the overseers were equally protected as the constable under that clause of the statute. And as the language of the clause of the Act, under which the present question arises is the same, the same decision must equally apply to it. The ruling of the learned Judge at the trial of this cause was then perfectly right, and the verdict cannot be disturbed.

The rule therefore must be discharged.

McKENZIE vs. McKENZIE.

Michaelmas Term, 1848.

One partner cannot enter on his partner's land and remove a building, though that building be merely on blocks, and has been built by partnership funds, and intended for a store to carry on the partnership business.

This was an action of trespass qu. cl. fr. The plaintiff had carried on business in Cumberland for many years. He took into partnership his nephew, the defendant, who had resided with him from boyhood. The business was carried on in a store situated upon plaintiff's land. Some time in the year 1845 or 1846 a new store was built on plaintiff's land and placed on blocks. In the Summer of 1846, the defendant entered and removed this new store (which was unfinished) and placed it on land adjoining the plaintiff's. It is for this act the plaintiff has brought this suit Verdict for plaintiff. Rule Nisi to set aside the verdict for misdirection was granted.

HALLIBURTON, C. J.—The defendant contended that this store was partnership property, and therefore he had a right to enter and remove it. The learned Judge thought that he had no such right, and directed the jury to find for plaintiff.

The proof that defendant entered the plaintiff's land and removed the store, was clear. 1st. To support the defence,

therefore, it was necessary for the defendant to establish the fact that the store was partnership property, and, 2nd. If it were that the law authorized him to enter upon the plaintiff's land and remove it.

The first question of fact was for the consideration of the jury. What the learned Judge's directions were relative to it, does not appear upon the very brief report of the charge; but had I presided at the trial, I should not have hesitated to have told the jury that I deemed the evidence insufficient to establish the fact of the store being partnership property.* * * * * * But admitting the fact to be established in favor of the defendant, does the law sanction what he has done?

In the consideration of this branch of the case, our attention has been turned to those cases between landlord and tenant, in which, for the advancement of agriculture and commerce, the old rigid rules of law, relative to fixtures, have been judiciously relaxed, and tenants who, while in possession of premises which they have rented, have been permitted to remove buildings which they had placed on the land for agricultural or commercial purposes solely. It is not necessary to enter into any of the distinctions which these cases exhibit, because I should readily admit, that if the relation of landlord and tenant had subsisted between these parties, and this building had been erected by the tenant for the purposes of trade, that it was not fixed to the freehold in such way as to prevent his removing it. That relation, however, did not subsist. But it is said that as a co-partner, he had a right to enter upon the plaintiff's land and remove the partnership property. We have been told of the unlimited power which every co-partner has over the partnership property. The power of every individual co-partner, acting ostensibly as such, is undoubtedly very great over the co-partnership property; but I do not think it would justify the defendant in entering upon the plaintiff's land for such an object, even if the pleadings would allow us to consider such a defence. There was a building in the course of erection on plaintiff's land for the purpose of carrying on the partnership business therein. The defendant, while that partnership subsisted, might have justified entering upon the plaintiff's land to carry on the business; but he enters not for the purpose of carrying on the business, but of carrying off the property of the co-partnership, and removing it from the premises of the plaintiff and placing it on the land of the stranger, so that the plaintiff, who, to say the least, had an equal

* His Lordship here commented upon some of the evidence as respects that fact. This has been omitted.

right with himself, could not enter this store without becoming a trespasser; and this he requires us to consider a defence under the general issue.

In the case of Anthony v. Haney, [8 Bing, 186,] which was as this is,—trespass qu. cl. fr.,—the defendant pleaded a justification that certain goods of his were on plaintiff's land, and that he entered for the purpose of removing the same, doing as little damage, &c. This plea, upon demurrer, was held illegal.

TINDAL, C. J. said—to allow such a statement to be a justification for entering the soil of another, would be opening too wide a door to parties to attempt righting themselves without resorting to law, and would necessarily tend to a breach of the peace.

Independent, then, of all difficulties relative to the proof, the act complained of was not within the scope of the co-partnership. The entry for such purpose was not sanctioned by the relation between the parties,—could it have been, it should have been specially pleaded. For these reasons, I think the verdict was right,—that there was no misdirection, and that the rule for a new trial should be discharged.

HECKMAN vs. ZWICKER.

Easter Term, 1849.

Where the defendant had been discharged by plaintiff's consent out of custody, and subsequently gave a note for the debt, held sufficient consideration to sustain action on note.

This was an action of assumpsit upon a promissory note. The plaintiff had recovered judgment against the defendant in a former action. Under that judgment execution had been sued out, and defendant had been taken. To procure his discharge from that and other executions, he entered into a composition deed with his creditors, and transferred his right in certain land to his creditors, which it was expected would realize sufficient to satisfy their claims. The plaintiff agreed to become one of the trustees, and paid the expense of preparing the deed. The property did not produce enough to discharge the claims of those prior to the plaintiff's. The plaintiff received nothing, and defendant having been once taken in execution for his debt

and discharged, a rule of law prevented his proceeding again. Under these circumstances, the defendant subsequently gave the defendant a promissory note for the debt.

There was a verdict for the plaintiff. Rule Nisi to set aside verdict.

MR. WHIDDEN, for defendant, argued that defendant, having been once discharged under an execution, the debt was entirely gone,—that the judgment had been satisfied, and there was an extinguishment of the debt, and cited [1 Str., 653, 3 Wils., 13, 1 T. R, 557, 6 T. R., 525, 7 T. R., 420, 1 B. & Ald., 297, 7 Dowl., 604.] That being founded on a mere moral obligation, it was *nudum pactum.*

MR. JOHNSTON, in reply, contended that the cases only shewed that where a party has been discharged on an execution, he cannot be again taken on the same judgment. That there was a distinction between the extinguishment and satisfaction of a debt. The former may be by merger, the latter must be by payment. Here there was merely an extinguishment of party's right to proceed under judgment. But there was a new promise, founded on a sufficient consideration.

HALLIBURTON, C. J., said—It can scarcely be necessary, at this day, to shew that the law considers charging a defendant in execution as a satisfaction of the debt, and that the voluntary discharge of such defendant by the plaintiff debars him from proceeding again against the defendant upon the judgment under which the execution issued. Such a discharge is not only considered as a satisfaction of the judgment against a defendant who has been taken, but it operates as a discharge of every other defendant against whom that judgment had been entered up. But the rules of law cannot alter the nature of things, and although it designates charging the defendant in execution as the highest satisfaction of the debt, it is obvious in ninety-nine cases out of one hundred that it is the least satisfactory.

When payment is made, the judgment in point of *fact* is satisfied—there is an end to the transaction—the parties are disentangled from each others claims, and the relation of plaintiff and defendant no longer subsists between them. But the satisfaction in point of *law* has none of this finality. The measure is generally resorted by the plaintiff with an ulterior object. He looks, if I may use the expression, for more satisfactory satisfaction than the mere detention of the defendant in custody, and hopes that it will terminate in the payment of his debt. The defendant, on the other side, equally knows that the claim upon

him is not finally settled by taking his body in execution, as it would have been by payment of the debt. The relation of debtor and creditor, of plaintiff and defendant still subsists; both have their rights. In the latter character the plaintiff can detain the defendant in custody, until the law of nature, the common law, or the statute law will discharge him. Death alone can relieve him under the first. Under the second he can compel the plaintiff to direct the Sheriff to discharge him, on payment of the debt and costs to the plaintiff or his attorney, as was decided in Crozer v. Pilling, *et al.*, [4 B. & C., 26.] Under the third, he may seek relief as an insolvent debtor, in which case the plaintiff is entitled to be heard in opposition to his petition, and after his discharge, any property he may acquire is still liable for the debt. With this relation thus subsisting between them, we every day hear of negotiations between parties so situated,—the one seeking his debt, the other his liberty. Should the law impose difficulties in the way of parties seeking such legitimate objects, and, by so doing, render plaintiffs more obdurate, which would be the case if contracts made between parties so situated could not be enforced? The law is neither so unjust nor so absurd. If, indeed, the plaintiff discharge the defendant from custody without guarding himself by a new contract, he can never again proceed against the defendant upon that judgment. To such an extent has this doctrine been carried, that in the case of Jaques v. Withy, [1 T. R., 557,] where a defendant had been discharged upon giving a fresh security, which was afterwards defeated on a mere informality, and subsequently brought an action for money had and received against the plaintiff who had discharged him, it was held that in a court of law that judgment must be considered so completely satisfied that it could not be set off in the latter action against the then plaintiff's demand. Had this action been brought upon the judgment, this and several other cases cited by Mr. Whidden, would have been decisive in his favor. But the action is brought upon a promissory note given by the defendant subsequent to his discharge, the consideration of which was the debt for which he had been formerly taken in execution and discharged by the plaintiff.

It is contended: 1st, That the defendant was under no legal liability to pay that debt, as payment could not be enforced. Secondly, That it was a mere moral obligation. Thirdly, That a mere moral obligation is not sufficient to sustain a promise, and consequently that it was a *nudum pactum.*

There can be no doubt that the first and second positions are correct.

The third admits of some qualification, and renders it necessary to consider the circumstances of the case. That great Judge, Lord Mansfield, in his anxiety to rid the law of the cobwebs with which the subtlety of the schoolmen had disfigured it, sometimes permitted expressions to escape from him which were not sufficiently guarded to prevent their being applicable to cases to which he probably would never have himself applied them. And it was probably owing to expressions of that nature, which fell from the lips of that learned Judge, that it was at one time contended broadly that a moral obligation formed a sufficient consideration to support a promise. The doctrine of *nudum pactum* is upheld in our courts, and will continue to be so long as sound discretion guides their decisions. The interests of society require that loose expressions and unguarded promises should not have the effect of solemn contracts, and moral obligations are of so extensive a nature, and admit of so many shades of difference, that were we broadly to allow every moral obligation to be sufficient to sustain a promise on which an action could be supported in a court of law, there would be an end to the safety which our maxim that *ex nudo pacto non oritur actio* throws over the community. Indeed the moral obligation to perform any promise might be urged in support of it, and thus the whole doctrine would be overthrown

But, although the law does not recognize every moral obligation as a sufficient consideration to support a promise, it does not discard such obligations altogether. Mr. Addison, in his recent work on contracts, [§ 30 & 31,] states, "That in cases where the remedy is taken away by a positive rule of law, and the payment of the debt remains a voluntary duty, binding only in *foro conscientiae*, an express promise revives the liability." The case of Wennall v. Adney, [3 Bos. & Pul., 249,]—the cases in which debts incurred by infants have been recovered upon promises made after they came of age and the numerous instances of the recovery of debts barred by the Statute of Limitations, upon subsequent promises, fully sustain the position, and, it appears to me, this position will sustain the plaintiff's action.

It is contended that the action cannot be sustained on this note because the consideration is insufficient. But does it not come within the letter and the spirit of the rule laid down by Mr. Addison, upon the authorities I have mentioned. That a debt was due by defendant cannot be disputed. It is equally clear that the plaintiff has never recovered payment of it. And under the circumstances of the case can it be questioned that it was a debt due in *foro conscientiae*, at the time when the defend-

ant gave his promissory note, although a rule of law prevented his enforcing it. It undoubtedly was—the promise therefore revived the liability. The plaintiff is entitled to judgment upon his verdict, and the rule to set it aside must be discharged.

DODD, J.—Concurred.

BLISS, J.—I am of opinion that there was a good consideration for the note in question. The defendant being in custody under an execution upon a judgment obtained against him by the defendant, and being liable at the same time to other creditors who had also obtained judgments against him, entered into an arrangement with them and assigned all his property to the plaintiff as trustee for the general benefit of his creditors, under which arrangement the defendant was discharged out of custody under the execution by the plaintiff. The plaintiff, under this trust deed, exhausted all the funds, in the payment of the debts due to the other creditors, receiving himself nothing out of them, but having borne the expense of preparing the trust deed, as well as the costs and trouble of the trust, without remuneration. Some time after this the defendant gave the note upon which the action was brought, the consideration of which the plaintiff admitted, according to the evidence of one of the witnesses, to have been the previous judgment and execution. Now, by this expression of the witness I understand to be meant that the note was given for the same debt for which the previous judgment had been obtained, and the execution levied on the person of the defendant, and from which he was discharged as before mentioned.

The *consideration* for the contract, the material moving cause for entering into it—that which is the subject matter of inquiry on the question whether the consideration is a legal one or not, is to be collected from the whole facts. The previous judgment and execution are obviously but a part of them. The plaintiff held the defendant under execution, and discharges him upon an assignment of his property from which, both he and defendant must have expected that the debt would have been paid, they are disappointed, no part is paid—and that which is thus recognised by both as a debt, notwithstanding the discharge from the execution, remains still a debt, but the plaintiff not only receives nothing himself in discharge of his debt, he is actually out of pocket—he has paid for the trust deed and devoted his time and trouble in collecting the funds and paying off the debts due by the defendant to his other creditors—that is, there is money paid and work and labour performed for the defendant and at his request. There is benefit to the defendant—detriment to

the plaintiff—what better or stronger legal consideration can exist. If, instead of this being inferred or implied from the whole transaction, as most clearly it is to be, suppose the consideration established by these facts had been expressed, it would have been somewhat to this effect: The plaintiff, at my request, having discharged me from execution under an assignment made to him in trust, by which I have undertaken that his own debt should be paid as well as others, having, for my benefit and at my request, paid for me the costs of the deed, employed himself in the trust and paid out of the same all other of my debts, but that due to himself, for which the funds assigned to him have, contrary to my expectations, proved insufficient, whereby the debt still remains due to him, I hereby, in consideration of these matters, promise him to pay the said debt. It appears to me to leave no room for doubt that here is a good, legal consideration, not a mere moral one. Nor need we enter into the question which has been chiefly pressed at the argument, whether the discharge from the execution is an extinguishment of the debt, so that a subsequent promise to pay it would be a mere *nudum pactum*. So far from the debt being extinguished, it is kept alive, recognized as still subsisting by the assignment under which the defendant obtained his discharge, and for the payment of which that assignment provides, though ineffectually. Nor, again, is this a mere promise to pay the debt, without other consideration, but new motives and other and different causes are combined with it. Acts done, services performed, money paid, at the request of the defendant, producing an advantage to him, and a loss and detriment to the plaintiff, which the promise, the note in question, to a certain extent, but not altogether, was intended to recompense. If such facts do not constitute a legal consideration, I know not what will, I think therefore the verdict was right, and the rule to set it aside *must be discharged.*

Verdict sustained.

HUNT, ET AL., vs. SOULE.

Easter Term, 1850.

Application to set aside process of attachment. Held that when attachment issues against a part absconding, plaintiff must furnish clear evidence of the fact to the Court to prevent the exercise of their summary jurisdiction in setting it aside. But when against party absent, defendant must prove that such absence was temporary, and its issue an abuse of the process.
Bliss, J. dissenting

This was an application to the Court to set aside a writ of attachment which issued against the defendant as an absent or absconding debtor. The writ of attachment was founded upon the usual affidavit that the defendant was beyond the jurisdiction of the Court when the process was applied for.

HALLIBURTON, C. J., said—These applications are becoming frequent, and it is necessary for the Court to lay down some safe principles for their guidance in deciding upon them. It was evidently the intention of the Legislature to restrain the issue of writs of attachment against the property of persons resident within the province, and to continue the right to issue them against absent or absconding debtors. While the right to issue these writs against residents as well as absentees existed, it was of little importance to decide under what circumstances a party was to be considered a resident or an absent debtor, as both were liable to such process, and perhaps it would be difficult to lay down any precise rule upon the subject.

It is contended, and with reason, that the temporary absence, either upon business or on pleasure of a person whose domicil is within the Province, ought not to subject his property to this incipient execution as it was formerly termed, for that might to a great extent continue the evil which it was the intention of the Legislature to terminate. And upon this principle this court has set aside such process when it was quite evident that the absence was of that nature, deeming the issue of it under such circumstances to be an abuse of the process of the court.

The court has also set aside such process where it issued against a person who was within the Province at the time it issued although he had changed his residence from Halifax to an inland county. Then it was contended that the party was *absconding* —but the court were of opinion that the plaintiff must make out a very clear strong case of *absconding* before such process could be sustained against a person who was still within the jurisdiction of the court, and upon whom with reasonable inquiry and diligence a personal service might be made.

On the other hand, the court decided in the case of Starr v. Muncey, that the mere return of the defendant into the Province would not authorize the court to set aside the process if circumstances authorized the issue of it at the time, *i. e.*, if those circumstances authorized the plaintiff to deem the defendant an absent or absconding debtor when he sued out the process.

It is contended that such process may issue either against persons absconding within the Province or absent out of it. If persons of the first description are liable to it, then it is incumbent upon the plaintiff to establish the clearest case of absconding. If the defendant is actually absent, and out of the jurisdiction of the court at the time the process issues, then I think it is equally incumbent upon him (the defendant) to establish to the entire satisfaction of the court that his absence was merely temporary, and that it was an abuse of the process of the court to sue out such a writ before they should exercise their summary jurisdiction to set it aside. If the circumstances leave any doubt upon the minds of the court that summary jurisdiction ought not to be exercised, but if the defendant thinks his property has been attached unwarrantably, he should be left to his action. These are, I think, safe principles to guide them in the decision of such applications.

The defendant in this case was absent at the time process was issued, and the perusal of the affidavits have not impressed me with the opinion that it is a case in which the court should exercise their summary jurisdiction.

I think, therefore, that the rule to set aside the process should be discharged.

LESSEES OF LAWSON, ET AL., vs. WHITMAN.

Trinity Term, 1851.

This was an action of ejectment, the lessees of plaintiff claiming under a grant from the Crown, which passed in 1773, including within the description the land in question. The defendant's title was derived under a grant which passed in 1784, describing the lands to be taken under it, as lying to the north of the former grant. In point of fact, however, the land taken possession of under the latter grant at the time of its passing was within the lines of the former grant. One of the original grantees under the later grant, conveyed by metes and bounds the lot which he had drawn at the division of the grant among the several grantees to a purchaser who had conveyed by the same metes and bounds to the grandfather of the defendant, through whom the title had descended. The original grantee had occupied and cultivated a portion of it in 1793, and so had all the subsequent possessors.

It was held that this was such an adverse possession as to bar claim by grantees under former grant, even of the portion within the metes and bounds of the conveyances of the defendant though still in a wilderness state.

This was an action of ejectment for lands situate in Sheet Harbor, tried in Michaelmas Term, 1850, in which there was a verdict for the defendant. A Rule Nisi was granted to set aside the verdict.

HALLIBURTON, C. J.,—It appeared at the trial that the land in dispute was included in a grant which was made to Jonathan Belcher in 1773, which the lessees of the plaintiff claim by several mesne conveyances.

The case therefore rests upon the defendant's claim under the statutes of Limitation.

It appears that in the year 1784 a grant passed to William Sutherland, and several other grantees bounded to the south upon the north line of the Belcher grant; but it is quite clear that instead of the south line of Sutherland's grant, having been *laid out upon the ground* on the north line of the Belcher grant, it was placed upwards of a mile to the south of it, and that possession according to that line has been held by those claiming under Sutherland's grant for more than double the number of years requisite to give a title under the statute. This was indeed so far admitted at the argument that the plaintiffs did not claim to dispossess the defendant of that part of the land which he had actually cultivated and occupied, but as he had defended for a portion of it which was still in a wilderness state, they contended that they were entitled to a verdict for that. The defendant, however, contends that as the deeds under which he claims, contain the uncultivated as well as the cultivated land, and he or those under whom he claims have held by those deeds for upwards of 50 years that he is entitled to retain both.

It has long been recognized as law that when a man without colour of title, claims to hold land under the statute against him who shows title that he shall only retain what he has actually occupied for 20 years.

But the defendant maintains that when the original entry was under colour of title and possession, and was taken by metes and bounds, 20 years actual occupation of part gives the virtual possession of the whole so as to establish a title under the statute, and reference was made to several cases decided in the United States in support of this position.

The situation of lands in this Province resembles that of those in the United States so much more than of those old and long cultivated lands in the mother country, that we may frequently consider with advantage the view which their courts have taken of questions of this nature. And on turning to their reports and elementary writers, I find that although they sustain the position of one who enters and holds for 20 years under color of title they have guarded it with so many reasonable exceptions that there is little danger of injuring the rightful owner in cases of conflicting *constructive* possession. It would occupy too much time to cite the cases at length upon this subject, they are fully detailed and ably commented upon in Angel on Limitations (Chap. 31). See also the observations of Story, J., in Prescott et al., vs. Nevers, [4 Mason, 430.]

Our natural sense of justice points out a strong distinction between a lawless intruder who enters upon the land of another without any pretence to claim it as his own, and one who deems he has a right to enter, but is not clothed with a strictly legal title. There can be little doubt that the object of the Legisture in passing the Statute of Limitations was rather to shield those who held under defective titles than to protect mere wrong-doers; although their object could not effectually be maintained without barring all investigation into the legal title where the owner had allowed an adverse possession to be held against him for 20 years, and thus sheltering both.

If ever there was a defendant who might most conscientiously claim the protection of the statute, it is the defendant in this case. The grant to Belcher passed in 1773: after his death the title vested in the Kirbys, in 1779, who took possession of the southern portion of the land by their agent, and commenced improvements upon it, but although they were in the constructive possession of the whole tract of five thousand acres or more, no act of ownership was ever exercised by them or their agents upon the northern part of the tract, although they held

the land until the year 1813, when the conveyance was made to Murphy. In 1784 long prior to this, the grant called the soldiers grant had passed to Sutherland and others, bounded southerly upon the north line of the Belcher's grant. The passing of a grant of so large a tract of land, 12,250 acres, to a numerous body of recently disbanded soldiers must have been a matter of great notoriety in the settlement, and yet there does not appear to have been any opposition given by those interested in the Belcher grant to laying out the soldiers grant by a line far to the south of that now claimed as the north line of the Belcher grant. In this state things appear to have remained until the sale to Murphy in 1813, forty years after the Belcher grant passed: and I think it well worthy of remark that the plan annexed to the conveyance to Murphy indicates an acquiescence in the south line which had been run for the soldiers grant. For in the deed to Murphy there is a reservation of town lots without any other description of their position than a reference to the plan, and on that plan we find them laid down very near the north line, while the north line now claimed is nearly two miles to the southward of them. There is no proof of any attempt having been made to run the line 480 chains north from the shore, until after the sale to Murphy, nor has anything further been done than running out the lines according to the description in the grant, although the defendant and several others claiming under the soldiers grant were then living within those lines. Watt, himself, so far recognized a line of the soldiers grant farther south than that now claimed, that subsequent to the running of this north line he expressed his surprise, "said it was not his land, that it was the soldiers grant, and he did not claim the land there."

While all this is *permitted* by the lessees of the plaintiff, and those under whom they claim, let us see what is actually done by those under whom the defendant claims. William Sutherland, one of the grantees in the soldiers grant, it appears, drew No. 4, the lot now occupied by defendant, and on the 4th Oct., 1792, he conveyed it with all the buildings and improvements thereon, by very particularly described metes and bounds, to John Peitzsh, as a lot containing 650 acres. This deed was recorded 4th July, 1798. On the 21st April, 1798, John Peitzsh conveyed the same lots by the same metes and bounds to Hugh McDonald, the grandfather of the defendant. This deed was recorded Sept. 25th, 1800. Hugh McDonald resided on the land, cultivated and improved it, and from him it has descended to the defendant. At what precise time William Sutherland, the grantee, took

possession of this lot in severalty, does not appear, but it was evidently before 1792, when he conveyed it with a dwelling house, cow house, &c., to Peitzsh. Nearly 60 years ago then the grantee sold it and it has since passed from purchaser to purchaser. It has descended from grandson to grandson, and has been held adversely to the lessors of the plaintiff and those under whom they claim, ever since Sutherland, the grantee, first took possession of it.

Although the possession was originally taken erroneously there is no reason even to surmise that the error was intentional, no one who has been long conversant with the proceedings in this court will be surprized at it: grants, particularly those conveying large tracts of land, were seldom, if ever, laid out with any approach to accuracy, and though the mistake was a great one, and that south line of the soldiers grant, if established, would deprive the claimants of the Belcher grant of 2,000 acres of land; yet it was not greater than that originally committed by the officer of the Crown, who, with the intention of granting, 5,000 acres of land, described it by metes and bounds, which according to the testimony of Kent, included upwards of 8,000; such mistakes were of frequent occurrence, sometimes operating against the grantees, but more frequently in their favor.

But without adverting to motives with which we have little to do, it is clear that in point of view, a grantee under the soldiers grant took possession upwards of 60 years ago of a lot of land as part of that grant which it now clearly appears had been granted to Belcher. That he conveyed it by metes and bounds to Peitzsh in 1792, that Peitzsh conveyed it to McDonald in 1798 by the same metes and bounds, and from McDonald it has descended to his grandson, the defendant, who has long occupied it and exercised the usual acts of ownership over property of that nature, and therefore without laying down any inflexible rule as to adverse possession taken by metes and bounds under color of title, I think that under the circumstances of this case, the defendant is well entitled to hold all that his grandfather bought; and therefore that the rule to set aside this verdict should be *discharged*.

INDEX.

ABSCONDING DEBTOR: PAGE.

Where the affidavit on which to ground an attachment contained a claim in an action sounding in damages, held that the process could not be sustained.—*Murison v. Murison*..... 131

Where a creditor to whom an absent debtor had assigned all his goods, received letter of instructions directing payment of surplus proceeds to certain creditors, with which he expressed his willingness to comply, was summoned as agent by a creditor not named in the letter, held that not having sufficient to pay the parties mentioned in the letter, there was no goods of the absent debtor in his hands that could be attached.—*Metzler v. Harvie*..... 64

Held that where attachment issues against a party absconding, plaintiff must furnish clear evidence of the fact to the court to prevent the exercise of their summary jurisdiction in setting it aside. But when against party absent, defendant must prove that such absence was temporary, and its issue an abuse of the process.—*Hunt, et al., v. Soule* 206

ACKNOWLEDGMENT:

Where a party, in answer to an application for payment of certain notes, said, "if he must pay the notes he would if he had time given him," held not to be a sufficient acknowledgment to take case out of the statute. —*Billings v. Rust*..... 88

Where, to an application for payment of a note, defendant said, "I have had considerable dealings with plaintiff, and if, upon those dealings, there is anything due him, I am willing to pay him," it was held not sufficient. —*Keys v. Pollok*..... 109

ADVERSE POSSESSION:

Possession by metes and bounds for more than twenty years under colour of title, sufficient to bar claims by grantee under a former grant, even of the portion within such metes and bounds still in a wilderness state.—*Lawson, et al., v. Whitman*..... 208

AGENT:

Where the master of a vessel, at the instance of the plaintiff's clerk, purchased for cash, and received the amount from the general agent of the owner either before or immediately after the delivery of the goods, and the master fraudulently retained the sum so received to his own use, held that the owner (who had received the goods without knowledge of the fraud of the master) was not liable.—*Almon v. Tremlet*..... 117

ARBITRATION: PAGE.

Where arbitrators, after having examined witnesses on both sides, selected an umpire and then refused to allow plaintiff's witnesses to be re-examined, but re examined defendant's, and gave an award in his favor, the court would not support the award.

The exclusion of the parties during the examination ot the witness before arbitrators, will not necessarily invalidate the award.—*Moore v. Powley.* 115

ASSIGNMENT:

Preferential to a bona fide creditor valid.

Where the consideration expressed on the face of an assignment is larger than the actual debt due by the debtor to the assignee, it is not necessarily fraudulent.

The declared intention to exclude any creditor or class of creditors will not render such an assignment invalid.

The assignor continuing in possession of the goods assigned is not a conclusive badge of fraud.—*Tarratt v. Sawyer*..... 46

ATTORNMENT:

Where A holding land under an agreement for purchase from original grantee was prevailed upon by B, claiming under a subsequent grant, to attorn, held that such attornment was not sufficient to enable B to turn A out of his possession.—*Miller v. Lanty*..... 161

AUCTIONEER:

Receiving an article, with instructions not to sell under a certain sum, is liable if he part with it for a less amount.—*Mason v. Chamberlain*..... 7

BOUNDARY:

A boundary may be settled between adjoining proprietors by parol.—*McLean v. Jacobs*..... 6

The grantee of water lot bounded on the shore is entitled to take up to high water mark, and the line of his grant changes as sea encroaches or retires.—*Esson v. Mayberry*..... 186

Land bounded on the sea shore increases and diminishes with the encroachment or retirement of the sea.—*Ibid*..... 186

CONSIDERATION:

See Promissory Note.

CONSTABLE:

Officers and others, their assistants, are protected when acting either under *warrant* of a justice or *execution* substituted for such warrant.—*Seaman 2nd v. DeWolf*..... 193

PAGE.

DAMAGES:

In an action for breach of promise of marriage, held that pregnancy might be given in evidence in aggravation of damages.—*Gilmore v. Dewar*.... 101

EVIDENCE:

In an action for breach of promise of marriage, the statement of a witness, that he had heard a person say he had had connexion with the plaintiff is not admissible.—*Gilmore v. Dewar*..... 101

Where the deposition of a witness was taken, and the witness was examined at the trial of the cause, but that trial was set aside, and witness died, held that such deposition could be used at the new trial.—*Brown v. Boole*..... 137

Vide Damages.

FRAUD:

Where question of fraud arises on a bill of sale to a creditor, it is exclusively for the consideration of the jury.—*Tarratt v. Sawyer*..... 46

GRANT:

Where a grant of land by the crown contained clause making it void unless land granted was settled on within a certain time, held that a subsequent grant was invalid, not being founded on inquest of office.—*Wheelock v. McKown*..... 41

Where a grant to A contained a recital that the land had been formerly set off to B, and where a party was in possession under agreement to purchase from B, held that the grant was void, the crown not being in possession.—*Miller v. Lanty*..... 161

INSURANCE:

Where a vessel being in a hopeless condition, notice of abandonment was given to the underwriters and accepted by them, but by fortuitous circumstance she was saved from her perilous situation, held that the underwriters were not liable for a total loss.—*Kenny v. Halifax Marine Insurance Company*..... 141

LEGACY:

An action for a certain legacy will lie in the Common Law Courts against devisee of sufficient property chargeable therewith.—*Ells v. Ells*..... 173

LIMITATIONS—STATUTE OF:

Vide Acknowledgment.

NONSUIT:

A plaintiff may become nonsuit at any time before the delivery of the verdict. —*Grant v. Protection Insurance Company*..... 12

PARTNERSHIP: PAGE.

One partner cannot enter on his partner's land, and remove a building, though that building be merely on blocks, and has been built by partnership funds.—*McKenzie v. McKenzie*..... 198

POSSESSION:

Where a boundary is a straight line terminating in a harbor, the fencing by that line to the water's edge, and possession of land so fenced, is sufficient to give possession of the land covered with water.—*McLean v. Jacobs*..... 9

PROMISSORY NOTE:

Where the defendant had been discharged by plaintiff's consent out of custody, and subsequently gave a note for the debt, held sufficient consideration to sustain action on note.—*Heckman v. Zwicker*..... 200

SEAMAN:

Where a seaman shipped for an entire voyage, and being injured while in the performance of his duty, was left at an intermediate port, held that he was entitled to wages for the entire voyage.

Where the owner furnishes a seaman, so injured, with surgical aid, and maintains him at such intermediate port, held that he cannot set off the sums so expended against such claim for wages.—*Ralston v. Barss*.... 75

SHERIFF:

No attachment can issue against sheriff in this Province for not bringing in the body of a party whom he had enlarged on bail.—*Jackson v. Campbell* 18

TENANT:

Notice to quit in April next, the tenancy expiring on the 8th of that month, served three months previous thereto, held to be sufficient.—*Brown v. Boole*..... 137

TENANT IN COMMON:

One tenant in common may prostrate, and justify prostration of, any building erected by a stranger on the land of which he is joint owner.—*Esson v. Mayberry*..... 186

TRESPASS:

Will not lie against grantor or his tenant, by grantee, before actual entry of grantee.—*Langille v. Langille*..... 159

PAGE.

a building,
ilt by part-
..... 198

fencing by
d, is suffi-
McLean v.
..... 9

on of cus-
ent consid-
..... 200

l while in
held that

l aid, and
set off the
Barss.... 75

inging in
Campbell 18

at month,
Brown v.
..... 137

building
Esson v.
..... 186

entry of
..... 159