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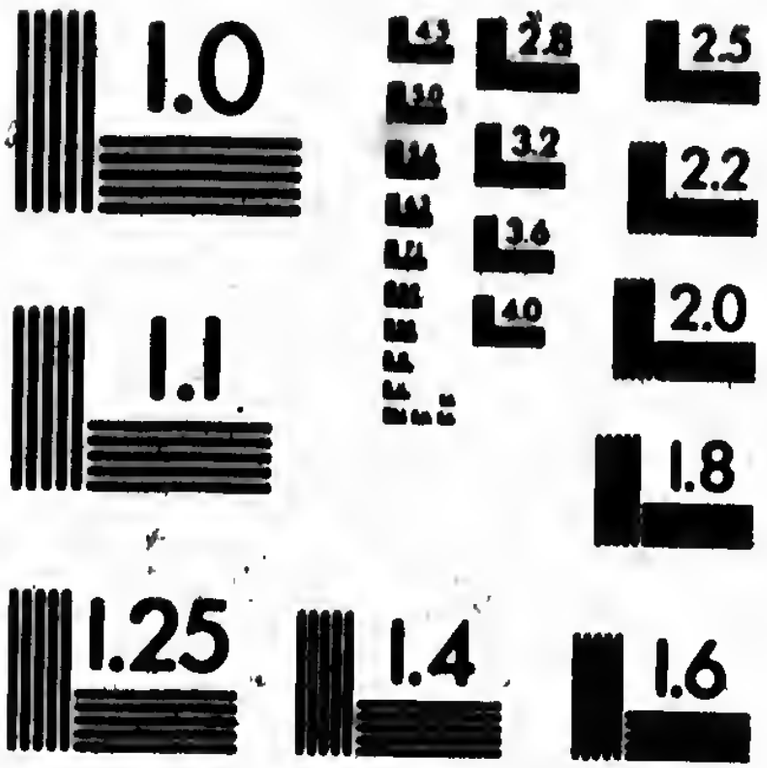

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CASES

ARGUED AND DETERMINED

IN THE COURT OF KING'S BENCH

AT

YORK, UPPER CANADA,

IN

HILARY TERM,

IN THE FOURTH AND FIFTH YEARS OF THE REIGN OF GEO. IV

No III.

JUDGES.

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

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

BY THOMAS TAYLOR, Esq.

Printed by JOHN CAREY,
YORK.

1824

CASES

ARGUED AND DETERMINED IN THE

COURT OF KING'S BENCH,

YORK, &c.

THE KING *against* M'KENZIE AND M'INTYRE, Esquires. 1824

January 21st.

Where defendants had been brought into court upon an attachment although they cleared themselves upon interrogatories, if the imputed contempt, the court refused to allow costs against the prosecutor, although he had omitted a fact in his affidavit which might have effected their decision upon the granting the attachment and although one of the affidavits upon which the attachment was moved for, was not filed early enough for them to answer it by a counter affidavit.

ROBINSON, Attorney General, stated, that these Magistrates were in court in the custody of the Sheriff of the District under an attachment issued against them in Trinity term last for a supposed contemp committed by them, as Commissioners of the Court of requests. That one of the affidavits upon which the attachment was grounded was only sworn in July, and was produced in court for the first time, on the day upon which the attachment was awarded, by which means they had no opportunity of procuring a counter affidavit, that the court had probably proceeded, in a great measure, upon this affidavit, and that if the defendants had had an opportunity of answering it, the court would not have granted the attachment. That if any objection should be made by the counsel for the prosecution,

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The King against M'Kenzie and M'Intyre

that the application which he was about to make for the discharge of the attachment, was too late, he contended that if the court should consider that it ought not to have issued, they would not permit such an objection to militate against justice.

That the court upon being more fully acquainted with the circumstances of this case, would discharge the attachment, (and that with costs) as having issued upon an affidavit, which the parties accused had no opportunity of answering.

Boulton, Solicitor General. The Counsel seems to think, that M'K's was the sole affidavit upon which the attachment was granted; in that supposition he is mistaken; the matter was argued for two or three terms, and there is no pretence for surprise: All the affidavits were read, and now, a second term after the attachment has issued, it is moved to discharge it with costs, the application is too late, and, at any rate, it should be made for a supersedeas.

Mackenzie, the Magistrate, who kept the records refused the prosecutor a copy of the judgment which had been pronounced against him, which is a strong fact his name was signed to the copy after he gave it, & it

appeared upon affidavit that he was interested in the cause[CHIEF JUSTICE,the impression of the court was, that if there had not been actual corruption, there had been a gross misprison] they have had every opportunity of answering the matters alledged against them, but in this stage of the proceedings, affidavits will not do the proper course is for them to answer to interrogatories. The conduct of these Magistrates has been incorrect, and if the prosecutor has been injured by their proceedings, whether arising from their ignorance or error, there can be no pretence to saddle him with costs as to the contempt, they must purge themselves of it(if they can)by interrogatories before the master.

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Attorney General. these magistrates would give the public a very unfavorable opinion of their conduct, if they should consent to pay cost; if this attachment has been issued erroneously can they be decently called upon so to do? To pay them without a struggle would admit every imputation which has been cast upon them. [*Chief Justice* it appeared that one of the gentlemen felt an impropriety in presiding at the cause, which has been the origin of these proceedings, and withdrew from the bench, and had not Mackenzie and the others bound

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The King against M'Kenzie and M'Intyre

themselves to pay a certain annual sum?] They were not bound to stand between the Clergyman and the subscribers. [*Chief Justice*, it appears to me that a wild party spirit is the origin of this affair.]

Per Curiam.—*Let the ordinary rule issue to administer interrogatories in four days, and let the defendants, in the mean time, enter into recognizances.*

THE KING *against* M'KENZIE AND M'INTYRE Esquires.

THE MASTER having reported to the court, that the defendants had by their answers to the interrogatories, filed by the prosecutor purged themselves of the imputed contempt, the Court were proceeding to order their discharge, when,

Boulton, Solicitor General, objected, that the answer to the interrogatories, not having been communicated to the counsel for the prosecution, the discharge would be premature, the court thereupon deferred the order until a future day *Mr. Justice Campbell* observing "the question as to contempt be

ing first decided, that as to costs will become a subsequent consideration."

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The King against M'Kenzie and M'Intyre

THE KING *against* M'KENZIE AND M'INTYRE Esqrs.

The defendants being again in court, the *Chief Justice* observed, that they having purged themselves of the imputed contempt the Court would discharge them upon the application being made, which he found upon looking into the authorities, it was usual to make in these cases.

Robinson, Attorney General, these Magistrates are not only entitled to their discharge but being fully acquitted as they have been, of the accusation upon which they were brought here, they are also entitled to be indemnified for their expenses. This evidently appears from the case in 3 Burrow of the King against Plunket.* In that case the court were induced to order costs to the party accused because the prosecutor knew that he was not guilty of the alledged con-

* 3 Burr 1329.

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tempt; these gentlemen are in the same situation, their prosecutor had not the slightest pretence for this accusation.

It originates in a trifling suit in the court of requests, wherein he chose to let judgment go by default; in his affidavit facts are stated, which are wholly false, and of the falsity of which he might easily have satisfied himself; he might have known whether they were committee men or not, and that, as elders, they had nothing to do with the management of the temporal concerns of the church: it is true, when this cause was called on, Mr. M'Intyre said, that he, as being an elder would have nothing to do with it, and desired those present, to take notice that he gave no judgment; all these facts the prosecutor might have known, and, if he did not chuse to make a defence, he acknowledged the justice of the judgment. What has happened in consequence of this wilful ignorance? These Magistrates are dragged three hundred miles without the slightest ground, and that there was no such ground, the prosecutor must have known.

It is the duty of this court, to protect Magistrates, even had they (which I do not admit) committed an error in judgment,

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and particularly so in this so penal a mode of procedure. Where an information is filed against them they are tried by a jury of the country, and are much protected by the laws. Supposing even what has been stated against these magistrates to be true, and that they have been mistaken from beginning to end, shall a prosecutor be allowed with impunity to drag them three hundred miles for giving judgment by default in a one pound cause, which he as defendant did not think proper to attend? There are two substantial reasons for giving costs, namely, to protect magistrates where there is no proof of intentional misconduct, and to discourage vexatious attacks upon them, and upon this principle in the case of the King against Young and Pitts,* and the King against Cox † in Burrow, informations were discharged with costs. If the country supposed that magistrates could be harrassed in this manner by payment of heavy costs, it would be impossible to find persons of respectability to undertake their duties.

Boulton, Solicitor General, contra.—No person can feel more strongly than I do the propriety of protecting magistrates, but when you look at this case, it is impossible to con-

* 1 Burr, 556. † 2 Burr, 787.

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sider that these gentlemen have acted properly, nor does it at all appear that the prosecutor has been actuated by malice. If magistrates will go beyond their duty, and proceed in cases where they have no jurisdiction, an attachment lies against them as laid down in Hawkins, and, though looking at the situation of this country, if magistrates are not fairly protected, respectable persons could not be procured to fill the office; yet, on the other hand, how many poor persons may be day after day harrassed by their oppression if they are so ignorant as to exercise jurisdiction in cases where they have no pretence to do it as too often happens? In the case before the court there is great doubt whether they were not interested, a clergyman was called from Scotland at a stipend of £200, and the names of both these magistrates were appended to the instrument, and although their names are signed as elders only, as approving it, yet any common person reading it would suppose they were much more bound to see the promises contained in it complied with, than Wood a common subscriber was. I do not say that they considered themselves as so bound, nor that they were actually so, but I do think that it might be a fair ground of litigation, the words are "We concur and approve of

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The King against M'Kenzie and M'Intyre

the above," and if persons of information can hesitate as to the effect of this subscription, how natural is it for ignorant persons such as the prosecutor, to consider that they were actually bound? The subscription paper which is dated in 1815, is bottomed upon matter which could only be the ground of a special action, even if it had been brought a week after it had been signed, and more especially at this distance of time, only one action could be brought upon this instrument the parties could not be harrassed by several actions.

[*Chief Justice.*—We are not trying ignorance in law.] These magistrates have acted very erroneously and that knowingly. By the process of attachment alone, Wood could have restitution (the Court being competent to make that the condition of discharging it, that is upon restoring to the prosecutor what he has lost by the execution being so improperly issued against him and paying his costs,) an indictment or information would have been of no use to him, if he has been ill treated, he is not to be saddled with costs. No person can say he has commenced this prosecution without grounds. These magistrates have subscribed a paper promising a minister a salary of £200 a year,

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which sum was to be made up by the subscriptions of Wood and others. It was very reasonable to suppose they had guaranteed this subscription, and if they had produced it as they ought to have done upon the several motions which have taken place, the court might have formed that opinion as to the defendants' being bound as guarantees or otherwise, which might have affected their decision; as to issuing the attachment, their not having done so is their own fault and they must take the consequences: however, at all events, the essence of the accusation against them is made out, namely, sitting in a case where they were implicated, one of them, M'Intyre, has sworn that he gave no judgment in the cause, but how was Wood to know that? he could only form his opinion by the copy of the judgment, and can Mr. M'Intyre after it has been certified, and after all these proceedings had upon it, come in and say that he was no party to it? and shall these magistrates call upon the prosecutor to pay cost in consequence of their own errors? The learned Counsel says that Wood's conduct has been wilful against these gentlemen; but it clearly appears from the whole proceedings that he had good reason to suppose he was acting rightly.

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The King against M'Kenzie and M'Intyre.

[*Chief Justice.* In the case of the King against Plunket, which is, I believe, the only case where costs have been given against a prosecutor after an attachment has issued, the truth was, that in taking the answers to the interrogatories it was found that nothing had been sworn by the prosecutor in his affidavit, which was not true, although the accusation against the defendant, was unfair and unwarranted, and the court dismissed the attachment with costs against the prosecutor, because he could not be punished in any other way; but in the case before us, if costs should be given against the prosecutor, what is to prevent his being punished a second time by indictment?]

Attorney General in reply. Wood had not a shadow of ground to make this complaint, as appears by the answers to the interrogatories. As to the copy of the judgment about which so much has been said, Mr. Mc. Kenzie gave him a copy of it upon his first application, although he refused to give him a second after he had moved for an attachment against him, until he took advice from his Attorney. The omission of this fact (so very important a feature in the case) in Wood's affidavit, was an imposition upon the

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The King against M'Kenzie and M'Intyre

court, and was a matter which if it had been fairly disclosed, would no doubt have influenced them materially.

Mr. M'Intyre as an officer of the church refused to give judgment against Wood, but this was no admission of interest, in fact neither of the Magistrates were at all liable, except as individual subscribers, a fact which Wood might have well known if he had read the call; as to the illegality of this transaction I will not say that in a court of law, their proceedings and judgment would be considered regular, probably the minister should have sued upon this paper, but according to the statute* which gives them jurisdiction, courts of request are to proceed according to equity and good conscience, in which particulars I cannot think these Magistrates have failed. Were I a Magistrate to-morrow it is probable I might in a similar case, do as they have done, substituting [illegible] layman perhaps as plaintiff. Wood at any rate, can have no pretence to consider himself as injured after putting his name to the subscription paper. As to the distinction which has been attempted to be made between the two churches of Williamstown and Lancaster, it

* Provincial 56 G 3. C. 5. S. 2.

that they composed but one congregation. And whatever difference their being committee-men for managing the temporalities of the congregation would have made, is of no consequence, for neither of these Magistrates held that situation, and even supposing that an elder was more interested than others in the payment of this subscription, yet M'Intyre can not be criminated as having sat in judgment in Wood's case, merely from the circumstance of his name being set to the judgment paper, he gave no opinion, and called the persons present to take notice, that he had nothing to do with giving the judgment; if there had been an hundred causes tried at the court of requests that day, it is most probable that the names of all the Magistrates would have been mentioned, though some of them might not have been present at the hearing or decision of half of them; therefore to criminate M'Intyre by M'Kenzie's copy of the judgment, would be the height of injustice: M'Kays affidavits which state the facts of these Magistrates having signed the subscription paper, and the refusal by one of them of a copy of the judgment (facts which no doubt weighed much with the court,) were not filed until the 13th day of July, only five days before the

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The King against M'Kenzie and M'Intyre.

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pronouncing the judgment for the attachment, a space of time within which it was impossible to procure counter affidavits. The prosecutor has not the least pretence to say he has been unjustly dealt with, in a cause which he did not think it worth while to attend.—*Chief Justice.*—The only question with me is as to punishing the supposed perjured person. If we should award costs to the magistrates we should be in fact prejudging the prosecutor. If, indeed, it clearly appeared that there were no other means of punishing him (supposing him to have behaved ill) I should think it fair to consider the propriety of giving costs to the Magistrates.

The Court deferred pronouncing judgment until to-morrow.

THE KING *against* M'KENZIE AND M'INTYRE, Esqrs.

The Court proceed to give Judgment in this case.

Campbell J.—Upon the return of the rule nisi obtained against these magistrates, the

court were of opinion that the affidavits filed on their part, did not sufficiently answer those that were filed against them, and therefore granted the attachment, upon which they are brought up from the extremity of the province, a distance of several hundred miles.

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The King against M'Kenzie and M'Intyre

They have now upon interrogatories fully purged themselves of the alledged contempt, and are therefore ordered to be discharged; and the question now under consideration is, whether or not they are to be allowed their costs.

Upon hearing Counsel, and full consideration of all the affidavits, we are all of opinion, that there was some probable ground for the complaint exhibited against them, in as much, as it appears they interfered in some degree as magistrates in a matter strictly considered, in which they should have refrained from acting at all; but we also seem to be all of opinion, that in so far as they did act, it was in pursuance of what they considered their public duty, and for a good and beneficial purpose to the community, and that their conduct therein, was honest, conscientious and candid, and without malice, oppression, revenge, or any ill inten-

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THE KING against PHILLIPS and PHILLIPS

tion whatever, such, at least, is my own opinion of their conduct, and therefore upon the authority of several cases, particularly that of Palmer and Paine, and others * I should be disposed to allow them costs; but when it is farther considered as now appears, that the complainant has practised a deception on the court, by withholding the disclosure of a material fact within his knowledge, at the time of making his affidavit, and also that another material affidavit had not been communicated to the magistrates in sufficient time to be answered by them, at the time of shewing cause, I have no doubt of their being entitled to their costs.

Boulton J.—There is not an instance of allowing costs after an attachment has issued except the solitary one of the King against Plunket, mentioned by the Counsel for the defendants and the Chief Justice.

In the case before the court it appears to me that the prosecutor has made his charge upon probable grounds, and that it is not for the court in this stage of the proceedings, to conclude that he has sworn falsely. To make it reasonable that he should be

* 2 Burr, 1128. See also, Rex v. Cox Esq. 2 Barnes.

charged with costs, it should appear that he knew he was acting wrong, but it appears that he proceeded upon an opinion which he had formed, as to the effect of the subscription paper or call produced in court; and if he acted fairly, according to the best of his opinion, that discharges him from corrupt motives. 1824

The King against Kinnaird and Another.

My learned brother has perhaps in some measure, relied upon the cases cited by counsel where costs have been given to magistrates in cases of informations, but these differ both in law and practice from that of a party being brought up upon attachment. Probably there is no blame to be attached to Wood.

Whether he has sworn the truth or not in his affidavit, is not for us to determine, it would be to say whether he was foresworn or not.

Many persons looking at these papers, would form the same opinion upon them which he appears to have done. If, indeed, he had stated in his affidavit some facts which he has omitted, it might have had some effect upon the opinion of the court when the attachment was granted, but these affidavits

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The King against M'Kenzie and M'Intyre

are commonly drawn up by the attorney who does not usually insert any thing which may make against his client; I however think that there was a sufficient proportion of facts set forth to lead the court to their decision, and, as it is altogether without precedent, I am of opinion that costs should not be given to the defendants.

Chief Justice.—The decision of the court in awarding the attachment, was founded upon the affidavits of the prosecutor, and the facts stated in those affidavits, have now been answered by the oaths of the adverse party, the court contents itself by the prosecutor's affidavits being contradicted by positive testimony to the contrary, by the parties accused swearing that they are not guilty. Where there is oath against oath, there must be perjury some where, but it is not the practice of the court by its determinaton, to say where it lies, which it would in effect do, if it gave costs to the defendant.

In the singular instance before referred to* of costs being allowed to a defendant brought in upon attachment, the affidavit of the prosecutor was not controverted; the accused was unable to swear that the facts were not

* King v. Plunket.

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true, but it appeared by the answer to the interrogatories that there had been a practice upon the court of a concealment, which, if disclosed, must necessarily have altered their decision upon the motion for the attachment; upon this ground and from the great injustice evinced by the prosecutor in that case, the court gave costs to the defendant, but in the case before this court there is oath against oath. I cannot undertake to determine the question of perjury between the parties, nor do I consider it my duty to prejudge it. I am therefore of opinion that the court should not give costs to these defendants.

Per Curiam.

Let the defendants be discharged.

LOSSING *against* HORNED.

January 23d.

This was an action upon bond conditioned for the performance of an award. *Baldwin*—moved for a rule to shew cause why the venue should not be changed from the Home District to the District of London, upon an affidavit stating, "that the plaintiff's cause of

1824

Lossing against Harvey.

action (if any) arose in the said District of London, and not in the Home District or elsewhere, and that all the material witnesses of the defendant were resident in said District of London."

Macaulay, contra.—This venue cannot be changed without special grounds, it is laid down in Tidd & all the authorities, that in actions of debt upon bond or other specialty, the court will not without such special grounds, change the venue. In this case the only issue must be non est factum or performance.

Per Curiam

Application refused

CRAWFORD *against* RITCHIE.

January 23d.

Macauly moved to set aside the proceedings in this case for irregularity, the writ having been issued in the deputy Clerk of the Crown's office, in the District of Gore, and the venue being laid in the Home District. He contended that the statute allowing proceedings to be instituted and carried

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Crawford against Mathie.

on in the outer districts, was always understood to be confined to cases where the venue was laid in those districts. That a judge of assize of the Home District, would not recognize the signature of the deputy Clerk of the Crown of an outer district, to the nisi prius record.

Per Curiam.

The plaintiff may have leave to amend upon payment of costs.

HASLETON *against* BRUNDIGE.

January 23d.

Where the defendant, one of the Sheriff's bail, had from misapprehension given the plaintiff in the original action a cognovit and had moved for and obtained an order to stay proceedings upon it until the action against the principal could be tried, which order was conditional upon payment of "all costs incurred by proceedings against the Sheriff's bail," the court determined that the costs of the proceedings upon the cognovit should be considered as such costs.

An application had been made in a former term in the case of Hasleton against Roberts, to stay proceedings upon a cognovit given by Brundige, the present defendant, who had become Robert's bail to the Sheriff. It had been given under an apprehension, that Roberts who had left the province, would not return to defend the action: It was given in the name of Brundige, the defendant, without any reference in it, to his

1824

Hewleton against Brundige.

situation as bail; an execution had been issued against the present defendant, according to the terms of the cognovit, but the court upon an affidavit that there were merits in the suit against Roberts, had stayed the execution until a trial might be had in the original action. The terms of the rule were "that all costs incurred by proceedings against the Sheriff's bail should be paid, leaving the judgment by confession as a security."

The costs of entering up judgment and issuing execution upon the cognovit, not having been paid, *Macaulay* had last Michaelmas term, obtained a rule to shew cause why the plaintiff should not issue execution against Brundige, the present defendant, for the amount of the sum secured by the cognovit and costs, and now,

Washburn shewed cause: he contended, that as the rule only required the costs to be paid upon any proceedings that had taken place upon the bail bond (but which remained still in the sheriff's office unassigned,) the defendant was not by the terms of the rule, called upon to pay any costs, as none had been incurred. That although it might have been the intention of the court, that the costs upon the cognovit, should have been

paid, yet, that as the defendant had omitted to do so under a misapprehension, the court would again stay the execution against Brundige, the defendant, upon these costs of the cognovit being now paid.

1824

Hankinson against Brundige.

Macaulay, contra.—Contended that the defendant in this action by the former application to stay the proceedings upon this cognovit, had himself considered the proceedings upon it, as proceedings against bail, and that it was upon that principle that he obtained the relief granted by the court, and that he could not after his own neglect by nonpayment of these costs, come forward and say, that they were not proceedings against the bail; that it was his duty to have got these costs taxed and paid them, that it was a condition precedent to going to trial in the original action, and that it was now too late for this application.

Chief Justice.—The former application made to this court for staying the proceedings and allowing the merits to be tried, was made in favour of Brundige quoad a bail, and as such entitled to the equitable relief which the court is empowered to give under the statute, the plain intention of the rule was, that he should pay the costs of

1824

Hesleton against Brundige

the proceedings upon the cognovit, which security was contended by his counsel to be within the equity of the statute.

Per Curiam—*Rule made absolute*

M'DOUGAL *against* CAMP.

January 23d.

Where the plaintiff's attorney had attended a meeting of Arbitrators and they had made their award the court refused to set aside the same upon the ground that the plaintiff had not attended to give his evidence agreeable to the provision in the rule of reference, from the miscarriage of a notice sent to him by his Attorney for that purpose, and although the decision of the arbitrators proceeded principally upon the evidence of the defendant.

Macaulay moved for a rule nisi to set aside the award on the ground, that the arbitrators who had been appointed by a rule of reference made at nisi prius, had not full evidence upon the subject matter submitted to them, the plaintiff not knowing of or being able to attend the said arbitration.

The rule of reference upon which the award was made, ordered "that *the parties* and their respective witnesses might be examined before the arbitrators."

The affidavit upon which the motion was grounded, stated the plaintiff's residence at York—the arbitration taking place at Niagara—the non-receipt of a letter which had been sent to apprise him of the time and place of meeting, and that the award principally proceeded upon the affidavit of

the defendant, which the plaintiff, if present, could have rebutted. 1824

M'Dougal against Camp.

Boulton, Solicitor General, contra.—Contended, that as the Attorney for the plaintiff attended the arbitration—as the same had been postponed in consequence of the absence of a witness on the part of the plaintiff, who afterwards attended and was examined, and the arbitration gone into in the Attorney's presence, the award could not be set aside. That it was a pure case of negligence on the part of the plaintiff, or his attorney, in which the court would not interfere. That the application was analogous to that for a new trial which was never granted in consequence of a party's neglect to produce his witnesses.

Per Curiam.—Rule refused.

M'GILL *against* M'KAY.

January 23d.

Dixon moved for a rule upon the Sheriffs of several districts to suspend the sale of the lands of the defendant, taken by them in execution at the suit of the plaintiff in this

Semble—That where a plaintiff has taken a fieri facias, against lands and tenements belonging to a defendant, in several Districts, the court would interfere to prevent more of these lands being sold, than would satisfy the plaintiff's demand.

1824

M'Gill against M'Kay

action, until it could be ascertained whether the proceeds of the sale of the lands in one district, would not be sufficient to satisfy the plaintiff's debt.

The court inclined to grant a rule nisi, but Dixon withdrew his application upon the counsel for the plaintiff (Macaulay) undertaking that the sales should take place in succession.

January 26th

SCOTT *against* M'GREGOR.

There is no occasion for the seal of the court to be affixed to a record of nisi prius in an outer district where the suit has been instituted & cause tried there.

This was a case of demurrer in which judgment was given for the plaintiff. In the course of the argument the defendant's counsel had objected to the want of a seal to the nisi prius record. It was asserted by the plaintiff's counsel,

Boulton, Solicitor General, and assented to by the court, that there was no necessity for a seal to be affixed thereto in the outer districts, as there would be but one seal of the court which remained in York at the principal office, and consequently as the deputy clerk of the crown in each district, was authorised to issue the writ or record of nisi prius,

his signature alone must be sufficient. The counsel referred to a former case of Lancaster and Curtis, where this point had been determined.

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State against M'Gregor

January 29th

DAVY *against* MYERS (*executors of*)

Where the plaintiff had recovered a verdict against executors for a breach of promise of marriage made by their testator, this Court would not (on the ground that such an action could not lie against personal representatives) arrest the judgment.

This was an action brought against the defendants as executors of Myers for a breach of a promise of marriage, and upon which the plaintiff had obtained a verdict against them for five hundred pounds. The cause was tried before the Chief Justice. *Robinson*, Attorney General, had in a former part of the term, obtained a rule to shew cause why the judgment should not be arrested upon the ground, that this action did not survive against executors, and now *Boulton*, Solicitor General, shewed cause.

This is an action of assumpsit brought by the plaintiff, Miss Davy, against the executors of William Myers, for a breach of promise of marriage in the life time of the defendants' testator, and a verdict having been found for the plaintiff, a motion is made in arrest of judgment, upon the ground, that no such action can be maintained against executors.—

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Davy against Myers

The Attorney General contends that this is a personal action, and therefore dies with the person.

That it is an action of the first impression and that no precedent can be found of such a one having been maintained.

That as the personal estate of the testator gained nothing by the contract, (so far as appears by the record) the executors cannot be called upon to pay any damages for a breach of it.

That the damages being in pœnam, and therefore for a quasi tort, cannot be recovered against an executor, and finally he argues ab inconvenienti, that it would be impolitic to sustain such an action, because there must have been many circumstances in the knowledge of the testator from the nature of the cause of action, which might materially lessen damages, which the executors can know nothing of.

With regard to the first objection, the rule "actio personalis moritur cum persona," so far from being universal, is not even general, as by far the greater number of personal actions survive, and lay as well by as against

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Davy against Myers

executors. 'All actions are either real, personal or mixed, and as to personal actions it is laid down in Hambly v. Trott,* that where the cause of action is for money due or a *contract to be fulfilled*, gain or acquisition, by the labour or property of another, or a *promise by the testator, express or implied*, the action survives against the executors, secus if it be tort or arise ex delicto, supposed to be by force or against the peace. Here it is expressly decided that if the cause of action is a promise to the testator either express or implied, or a contract to be fulfilled, the action survives against the executor, which is the case here; the testator promised and contracted with plaintiff to marry her, and broke that promise and contract in his life time, as appears by the record; therefore, this action comes within the plain terms of this authority, consequently unless the defendants' counsel can shew, that the particular species of contract or promise is an exception to this rule, the plaintiff is entitled to judgment. When a general rule is applied in argument to answer an adverse proposition, we must look at the reason of the rule, because if the reason of the rule is not applicable, the rule itself

*1st Cowper.

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fails. Now the reason why some (because we have shewn the rule is not general) personal actions, viz. for torts, will not lie against executors is this, that the judgment in those cases, is guilty and quod defendens capiatur, which is in the nature of a conviction for a crime, and no man can be put to answer criminally for the fault of another. This objection arises purely from the form of the action.

The remaining personal actions which will not lie against executors, are actions of debt upon simple contract, and the reason of the rule as applied to these actions, is, that the testator, if living, could wage his law, and as the executors could not do so for him, compelling the executors to answer, would deprive them of a mode of defence which the common law gave.

These observations apply when the action is brought *against* an executor, but when the action *is by* an executor, the reason of the rule is quite different.

The reason why an action for a tort or for any other cause, in which the damages to be recovered are in pœnam and for an injury to the person, character, feelings, &c.

of the plaintiff's testator, will not lie, is, that the executor is the representative of the *personal estate* and not of the person or personal wrongs, of the testator. Williamson vs. Chamberlayne.

This latter case was for a breach of promise of marriage by the defendant to plaintiff's testator, and the reason given by Lord Ellenborough why the action could not be supported, was, "that the plaintiffs were not the representatives of those injuries, a compensation for which was sought to be recovered; that they were the representatives of the personal estate of the testatrix and not of her person or personal wrongs; from whence it appears, that the reason of the rule "actio personalis moritur cum persona," is different as applied to actions brought *by* and *against* executors, in the first case being for want of representation, and in the last on account of the judgment being guilty, or that defendants are deprived of their wager of law.

Secondly—An action being of the first impression is no objection, it is only a reason (if true) why caution should be used to see that it comes within the general principle by which it is endeavoured to be supported; but it is highly probable that the reason why the

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Attorney General can find no case of this kind reported in the books is, because it was never before questioned.

The third objection is, that the testator's personal estate gained nothing by the contract, this is the case in many actions which were never questioned, and notoriously do lie against executors, such for instance as actions of covenant, for title, and for further assurance entered into by testator†

It has also been urged that an action will not lie against an executor for the nonperformance by the testator of a personal act, which the executor cannot perform in his stead; and my learned friend tauntingly says, which of the executors would you have marry this good woman? In this remark there is more wit than argument; for there are many actions in which the contracting party (much less his representatives,) will not be permitted to perform the act contracted to have been done, when a breach has ensued. In actions of debt on bond, payment after the day named in the condition, could not, at common law, have been pleaded in bar of

† King v. Jones & al. 5 Taunt 418 Burrow 1199

an action for the penalty. And in actions on special assumpsits, performance after a breach will not bar an action for damages arising from that breach; and in the case just cited of King against Jones and others, the executors could not have performed the contract for a breach of which the action was brought. And although it has been asserted, that no action will lie *against* executors that will not lie *for* them, the proposition is incorrect, for in King vs. Jones and others, it was not objected that such an action could not be sustained *against* the executor, yet in a similar case in Maull and Selwyn, brought *by* an executor, it was decided that the action could not be supported.

Robinson, *Attorney General*, contra.—This is an action brought by the plaintiff against the defendants, executors of J. W. Myers for a breach of promise of marriage, alleged to have been made by their testator. Except the singularity of its being brought against executors, (which seems never to have been attempted before) it is in the ordinary form of such actions—there is no special averment or allegation of any kind on the record, nothing to distinguish this case from any other of breach of promise of marriage, in which one of the contracting parties has died, and

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consequently the single question for the court to determine is, whether in *every* case an action can be sustained against the personal representatives for breach of promise of marriage; if it can in this, it can in every other, because there is no particular averment on the record to support this action, no statements but those which are ordinary and indispensible in all actions of this description. The general principle is therefore alone to be considered. I contend that, on general principles, this cause of action does not survive but dies with the party; and, on that ground, I move in arrest of judgment.

In the first place I venture to state, that no instance can be pointed out of any attempt having been made before the present, to maintain an action for breach of promise of marriage against the executors of a contracting party,—Not a dictum can be found in any book, in any treatise on any one branch of the law, to authorise such an action. No report can be produced of any decision to support it, none in which a question or pretence of the kind has been discussed. In no book of precedents can any form be found of any declaration, pleading, or judgment, in an action of this kind. There being then no express and particular author-

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Devy against Myers.

ty or precedent to support it, it remains to be inquired, whether, according to general principles of law, it can be sustained.

The maxim every where repeated is "Actio personalis moritur cum persona." But, though in very ancient times, this maxim was construed much more strictly than was reasonable, and than the law now is, yet, I admit, it was never taken to mean that all actions that are technically called personal actions, die with the person; for that, as is remarked even in the oldest authorities, would exclude the ordinary matters of debt and contract. It rather meant that actions for personal injuries, or wrongs for causes that affect the person, rather than the property, do not survive. A distinction was early taken, that an action could not be brought against executors for breach of contract, which the executors could not perform or such rather as could only be performed by the testator in person. On this principle, the case in Levinz was decided; and though there have been contradictory decisions with respect to that particular case, of breach of covenant for not instructing an apprentice, the latest seems to overrule the contrary decision, and to decide that such an action

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Dovy against Myers.

would not lie against executors, by reason that it was covenant for a personal thing to be performed only by the testator, and the executors might not be of the trade, and therefore not capable of performing it.

The maxim may in this case, have been advanced too far, because the executors might cause the apprentice to be instructed by one who was competent; but, as it is certain the executors in this case could not be compelled to marry the plaintiff, (if indeed they had not already wives of their own) and as they could not easily find her another husband, or compel her to accept one of their offering, the principles which were applied in the case in Levinz, apply with more force in this. The old authorities state most comprehensively, what actions in their nature survive, and what die with the party; and no one can read that case or any of the early decisions in Dyer, Croke, and Levinz, without feeling satisfied from the very doubts raised as to other causes of action. That in the judgment of the learned men who decided those cases, the very idea of attempting such an action as this, against the personal representatives, would have appeared altogether absurd. In later times the case of

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Hambly and Trott was decided; and if the case, arguments and judgment of the court are read attentively, (and not in detached sentences to make them appear to give countenance to doctrines evidently not supported by them,) it will be found to militate against rather than to support the present action.

These, however, are only cases that can supply reasons from analogy, not one of them relates expressly to this cause of action, nor can any such be found, at least none in which the question is raised, whether such an action can be brought *against* the personal representatives.

Fortunately, however, there is among the decisions of very modern times, one case that appears completely to determine the general principle that it does not survive, although that case is one of an action brought by and not against the personal representatives. In Chamberlayne against Williamson,* an action was brought by administrators for a breach of promise of marriage to their intestate. It struck the Judge who tried it at nisi prius, as an extraordinary action, but he suffered a verdict to be taken, and saved the

* 2 M. & S. 408.

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point. The court of King's Bench declared that it was the first instance of such an attempt, and, though they admitted that was not conclusive, they declared it to be a strong presumption at least against the action, because it proved that the general sense of mankind was against it.

To the same extent only, is the total absence of precedent or authority urged in this case. After solemn argument and great deliberation as the case expresses, the court decided clearly and without a doubt, against the plaintiffs, and every reason on which they decided that executors cannot maintain this action, apply a fortiori to prove, that it cannot be maintained against them. Lord Ellenborough says "It is an action sounding altogether in damages, that it is for an *injury*—for a *wrong to the person*. That the damages are *vindictive* and *in pœnam*"

Now nothing is more clear than that actions for wrongs, for injuries, do not survive against executors, that they are *not* liable for damages in pœnam. And when it is once admitted, that this action is to be so regarded, the reason of "actio personalis moritur cum persona," applies beyond a question. There is no case, in which, by the common law, an action can

be brought against executors, which cannot be brought for them—and since it has now been decided in the only case that appears ever to have occurred, that such an action will not survive to the executors, and decided on grounds that must apply with equal force, and do apply with greater when the parties are reversed, it must be taken to be clearly established by that decision, that his action cannot be sustained.

There the action was against the original contracting party, who ought, undoubtedly, to perform all his promises, and has the means of making a full defence; and the only question is, can he be sued upon a cause of action so completely personal, the other contracting party being dead.

The court say—generally we think not, the action is quasi ex delicto, and does not survive; but if you could prove special damage to the estate, *perhaps* it *might*. Why? because the estate should then be made good against this injury to the benefit of creditors, and others entitled.

But reverse this—The same objection as to the personal nature of the action remains—the liability of the executors must turn upon that objection, and if they are liable,

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the estate is subject to be reduced to nothing by a vindictive verdict in an action sounding wholly, as the court say, *in panam*, for loss of personal advancement, mortified feelings, and considerations wholly personal, and out of the limits of calculation: and creditors for bona fide debts, would thus be left without assets to answer their demands. It is evident too, that in such actions, of all others, the executors could not make a proper defence; they could not know the objections which may have justified the breach, but which honor and delicacy may have induced their testator never to reveal. Indeed, it is probable were this action sanctioned, that artful persons would wait, in some cases, until the death of a party put it in their power to proceed against those who could make no defence.

The whole reasoning of the case lately decided must apply to this, but not the exception, which, it is said, might possibly, in a particular case, sustain the action.

The doubt there was—The plaintiff does not represent the original contracting party as to contracts of this nature, but he does represent the estate, and, therefore, if it were specially alleged and proved, that

the estate has been damnified by the breach, perhaps he may sustain this action against the *original contracting party*. 1824

Dowy ago. not 30 years.

Here, on the general principles recognized in that case, the defendants do not represent the contracting party in an action of a nature so purely personal: on what particular ground then could it be sustained? Not because the plaintiff, one of the original contracting parties, has been damnified, for that is the case in every trespass, in slander, and in all actions which it is not pretended can survive. Perhaps the corresponding condition might be, if the plaintiff had alleged specialty, that gain had accrued to the estate of the testator by his nonperformance, he might sustain this action; but there is no such allegation, nor can it be inferred. It might have been far otherwise; the testator might have married less advantageously and left a widow fully entitled to dower. The record, at all events, authorises no inference one way or the other, and we can intend nothing to support it.

That it has never been conceived such an action can survive, is clearly seen from the observations of the court upon the first and last experiment that has ever been made in

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England; if it had been attempted, we must have been able to find some trace or mention of it.

The statute of William, which allows plaintiffs to proceed by scire facias against executors of a defendant dying after interlocutory judgment, *in all cases in which the action could have originally been maintained against executors*, would of course apply in this cause of action, if it survives as is contended. Many instances must have happened in which plaintiff's having proceeded to that stage in such an action, have been stopped by the death of the defendant; yet, none of them ever appear to have made the attempt of reviving it by sci. fa. against the executors. No case can be found which leads us to think so; no book says it can be done; no form is given of the proceedings that would be required.

It is evident unless such an action would lie in England, it does not lie here; nothing has been or can be brought to shew, that it has been attempted in England, whatever principles and cases bear upon the subject are against it; and it appears repugnant to reason as well as experience, that it should be maintainable. The court will therefore, it is presumed, not now sanction so intire an

innovation, which would lead the way to many similar actions, unsupported as they would be by any other precedent. 1824

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The arguments employed by the learned counsel for the defendant, are ingeniously built upon cases not bearing on the question. The cases cited by him are of actions upon covenants and other specialties, (where the question was not and could not be, whether the action survived or not, but whether it survived against the executor or the heir) against the representative of the real, or the personal estate; and if the positions which have been called from them, are taken with reference only to the point in the respective cases, however generally they may be expressed, they will be found not to apply in any degree to the question here before the court.

Chief Justice—This is an action by executors for breach of contract by the testator.

At the trial the contract by the testator to marry the plaintiff, and by the plaintiff to marry the testator, were proved and admitted.

That in conformity to the contract they did intermarry, and cohabited as man and wife in the face of the world and their fami-

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Davy against Ryan.

lies, until the death of the testator, who, in consideration of such marriage, left by will, his wife to her lawful claims on his estate.

It appeared in evidence, that they were married by a lutheran minister, whose authority was supposed by the plaintiff to be questionable, but overruled by the testator, as being legally authorised to solemnize the marriage.

It was in evidence, that subsequently, doubts as to the validity of the marriage arising in the mind of the testator; he proposed to have the ceremony renewed by Mr Stuart, the church minister; that the plaintiff declined this offer; and it did not appear, that in any other way she had required the testator to fulfil his contract, or that he had refused so to do.

The Judge was of opinion, that the action lay for damages for breach of the testator's contract, but that the breach on his part, was evidently the refusal on the part of the plaintiff, and that the verdict must be for defendant; but the jury found for plaintiff, and £500 damages.

The present motion is in arrest of judgment without reference to a new trial. It has been

fully argued, and, although a question which must have frequently occurred, it appears doubtful if the action lies at all, without an averment of special damage in the life of the testator. 1824 Davy against Myers

The cases on the survival of actions for and against executors, are still confused, and appear to be decided rather on particular circumstances, than on general principles.

Supposing in the present case, that the plaintiff had proved an express demand on her part, and refusal of the testator to fulfil their contract, and that the testator had then married another woman and died, is it contended that the action did not survive to plaintiff against the executors for the breach of the contract without the averment of special damages, which, as against *them*, would have been one third of the value of the moveables?

Then, if it would lie in such case, the proof of the facts failing, is no ground for arrest of judgment but for a new trial. A new trial is never granted after failure in arrest of judgment, (unless the case in Douglas* is to be considered as authority) and, in so just a

* Vide.

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case as this is, it is fortunate that the verdict can stand.†

Campbell, J.—This is an action on the case in assumpsit brought by the plaintiff, a single woman, against the defendants as executors, to recover damages for breach of promise of marriage by the testator, and in which she has recovered a verdict for a considerable amount, and now the defendants move in arrest of judgment on the following grounds, viz:

First—That such action is not maintainable against executors, the cause of action being in the nature of a personal tort, within the maxim "*Actio personalis moritur cum persona.*"

Secondly—That the declaration does not state any allegation of special damage, and

Thirdly—That no precedent being found for such action, affords a presumption that it cannot be maintained.

With respect to the precise application of the common law maxim, there has been some difference of opinion both before and since the statute *de bonis asportatis in vita*

† Doug. 745.

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testatoris,[a] but a variety of modern decisions seem to have removed all difficulty on that point, and the distinction as now I think clearly established, is, that where the cause of action is a mere personal tort, or is founded upon any *malfeasance* or *nusfeasance*, or arises *ex delicto*, and generally where the declaration states the injury in such manner, that defendant must necessarily plead *not guilty*, the rule "Actio personalis moritur cum persona," will apply; that rule, however, has never been extended to actions founded on *nonfeasance* or arising *ex contractu* whether special or simple, as debt, covenant, promise, &c. In such cases the action generally survives, and assumpsit or other appropriate action will lie against executors or administrators. This doctrine is, I think, sufficiently established in a variety of cases, of which I need only mention those of Hambly and Trott—Kingdon and Nottle—Chamberlayne and Williamson, and the note on Wheatly and Lane in Saunders—if therefore the decision of the present question, depended on the general principle stated as the first ground of this motion, I should have no hesitation in saying, that the rule nisi ought to be discharged; but the same

[a] 4 Ed. 3. c. 7.

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Davy against Eyre

authorities and several others recognize, I think, with equal certainty a distinction, which I apprehend must have an important bearing on the second ground of the motion, viz: the want of any allegation of special damage on the record. In the case of Hambly and Trott already cited, Mr. Buller in shewing cause against a motion similar to the present, observes, that actions to recover specific property, or the value thereof, will lie against executors or administrators; but where the damages are in their nature vindictive, or *in panam*, or uncertain, no action will lie against such representatives. I would not cite the opinion of counsel however eminent, were it not recognized and confirmed by judicial authority. Lord Mansfield in delivering the unanimous opinion of the court in that case, cites and adopts the doctrine laid down by Mr. Justice Manwood in Sir Henry Sherrington's case, as reported by Sir T. Raymond, "That in eve-"ry case where any price or value is set "upon the thing in which the offence is "committed, if the offender dies, his execu-"tor shall be chargeable; but where the "action is for damages only in satisfaction "for the injury done, the executor shall not "be liable." This, his Lordship calls a

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fundamental distinction, and is, I imagine, the same distinction, to which Mr. Justice Bayley alludes by what he terms a pre-existing proveable debt, in contradistinction to vindictive or uncertain demands of damages, for injury to the person, or personal feelings, or at most to the personal comfort unaccompanied by any specific pecuniary loss, and therefore inadmissible against the representatives of a person deceased, or against the assignees of a bankrupt, as being incapable of any other mode or means of estimation than the capricious or accidental feelings and discretion of a jury. But a special damage alleged on the record, such as loss of marriage to another person—the relinquishment or loss of certain pecuniary advantages, or the giving up a profitable trade or employment in consequence of the promise of marriage, are in the nature of pre-existing proveable debts, as being as capable of specific proof, and precise estimation, as any other debt, and in which the jury in estimating the amount of damage, must be governed entirely by the evidence in support of such special allegation of loss.

In the case of Chamberlayne and Williamson it was expressly decided, that administrators cannot have actions for breach of

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promise of marriage made to intestate, without an allegation of special damage. But it is contended that that decision does not apply to the present case, that being an action by the personal representatives and this against such representatives—I cannot see the distinction. The doctrine there laid down, appears to me to be general.

Lord Ellenborough in giving the unanimous opinion of the court, expresses himself to this effect, The general rule of law is actio personalis moritur cum persona under which rule are included all actions merely personal. Executors and Administrators are the representatives of the personal property of the deceased, but not of his wrongs *except where those wrongs operate to the temporal injury of the personal estate*, but in that case *the special damage ought to be stated on the record*, otherwise the court will not intend it. Where damage can be stated on the record that involves a different question. Although marriage may be regarded as a temporal advantage to the party, as far as respects personal comfort, still it cannot be considered as an increase of the transmissible personal estate. Loss of marriage may under circumstances, occasion a strict pecuniary loss to a woman, but it does not necessarily do so, and unless it be expressly stated

on the record by allegation, the court cannot intend it. And his lordship concludes his remarks by saying. On the ground therefore that the present allegation, imports only a personal injury to which the administrator is not by law, nor is he in fact, shewn to be privy, the action cannot be maintained. All this perfectly agrees with the principles laid down in the other authorities. Were it otherwise the parties to a suit like the present, could not be upon equal footing with respect to the prosecution and defence of the suit, as in the present case the executors may not have had the same advantage of pleading specially to the action, as the testator would have had, if the action had been brought in his life time, such as that he was always ready and was then ready and willing, to perform his promise but was prevented by the plaintiff &c. For aught that appears on this record, it may have been the case that testator really was willing and desirous to perform his promise, but that plaintiff on her part delayed or declined performance, or relinquished her claim by consenting to cohabit with him unmarried, to the time of his death in which case her right of action would have been destroyed, not by his default, but by the act of God. I am of opinion that without an allega-

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tion of special damage this action is not maintainable against executors, and I consider the third ground of the present motion as strongly corroborative of this opinion, and therefore that judgment ought to be arrested.

Boulton, Justice—This is a motion in arrest of judgment in an action brought by the plaintiff for a breach of promise of marriage made to the plaintiff, by defendant's testator.

Mr. Attorney General has moved in arrest of judgment on the following grounds.

First—That upon the old maxim of law, which says "actio personalis moritur cum persona," the action does not lie.

Secondly—That should this maxim not apply in this case, the plaintiff could not recover on the ground, that the declaration did not contain any allegation of special damage, which it ought to do, under the authority of Chamberlayne and Williamson. †

Thirdly—That this being an action novel in its kind, and not any instance cited or suggested of its having been maintained, (although frequent occasions must have occurred for bringing such an action,) it cannot be supported.

† 2 M. & S. 408.

I have perused most of the cases cited on each side, and many others, the result of my own research.

Although I have many older authorities, (Coke—Gro—Rolle, &c.) I shall begin with the case of Hambly, vs. Trott, 16, G. 3— This was an action of trover, where the plaintiff on the principle of the maxim, failed, but in that case various rules of law on the subject are laid down. Mr. Justice Aston says, "The rule is quod oritur ex delicto, non ex contractu shall not charge an executor and cites 2 Bac 444 tit. executors.

Lord Mansfield observes, that the maxim actio personalis, &c. upon which the objection is founded, not being generally true, and much less universally so, leaves the law undefined as to the kind of actions which die with the person, or survive against the executor.

He remarks "where the cause of action is money due or a contract to be performed, or a promise of the testator, express or implied; where these are the causes of action, the action survives against the executor; but where the cause of action is a tort, or arises ex delicto, there the action dies— as battery, false imprisonment, &c.

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Davy against Myers

No action where, in form, the declaration must be quare vi et armis et contra pacem, and where the plea must be that testator was not guilty, can lie against executors.

Upon the face of this record, the cause of action does not arise ex delicto but ex contractu; the verdict therefore, I think cannot be disturbed.

It is now agreed that executors are answerable in all personal actions, which arise ex contractu, and not ex maleficio,* for every contract implies a promise to perform it, in which the testator could not wage his law, because he could not make oath that he had discharged a duty before the quantum had been ascertained by the jury.

And it hath been resolved, that there is no difference between a promise to pay a debt certain, and a promise to do a collateral act, which is uncertain and rests only in damages, as to give a fortune to his daughter, to deliver up a bond, &c. and that wherever in these cases the testator himself was liable to an action, his executor shall also be liable.†

* 5 Bac—Tit executors and administrators.
9 Coke 87—10 Co. 77 b. Croke Tac. 295 Vaughan 101.
† Cro. Tac. 505, 617. 471.—Cro. Tac. 652.
Rolle 906—5 Bac. Tit executors and administrators.

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An action lies against an executor upon every contract, debt, or covenant, made by a testator, or intestate, which appears by any record or specialty, so upon any debt or contract without specialty, where the defendant could not have waged his law, so where the cause of action is money due on a contract, or a contract to be performed, or a promise by the testator expressed or implied, the action survives against the executor, secus if it be a tort, or arise *ex delicto* supposed to be by force and against the peace.

As to the second point, that should this maxim not apply, the plaintiff could not recover, on the ground that the declaration did not contain any allegation of special damage which it ought to do, under the authority of Chamberlayne and Williamson. This leads us to a minute investigation of that case. In Michælmas term 1814, a rule nisi was obtained for arresting the judgment on the ground, that this action was not maintainable by the personal representatives, or for a new trial on the ground of misdirection.

Upon the first point the statute de bonis asportatis in vita testatoris, and 31st Edward 3d, were cited; and also com Dig. Tit. ad-

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ministrator B 13. It was said that by the equity of these statutes, an executor or administrator shall have every action for a wrong done to the personal estate of his testator; but this, it was contended, was not a wrong to the personal estate; and in Mordant and Thorold 1 salk 252, it was resolved, that the administrator was not entitled to a scl. fa. upon a judgment in dower obtained by the intestate, where she died before the damages had been ascertained on a writ of inquiry, because the writ of inquiry being in the nature of a personal action for the damages, it died with the person; and as to the misdirection it was objected, that the criterion of damages could not be the same, as if the action had been brought by the intestate herself, by reason that she would have been entitled to damages for the loss of personal comfort, and advancement in life, and also for personal feelings; whereas, the administrator could only be entitled in respect of the damage or deterioration of the personal estate. Upon this point Lord Ellenborough observes, that the declaration did not contain any allegation of special damage, and the question was, whether the action was maintainable by the personal representative.

That the general rule of law is "actio per-

sonalis moritur cum persona," under which rule are included all actions or injuries merely personal. Executors and administrators are the representatives of the personal property, that is, the debts and goods of the deceased, but not of their wrongs, except where those wrongs operate to the temporal injury of the personal estate; but in that case, the special damage ought to be stated on the record, otherwise the court cannot intend it. That where the damages done to the personal estate can be stated upon the record, that involves a different question. That although marriage may be regarded as a temporal advantage to the party, as far as respects personal comfort, still it could not be considered in that case, as an increase of the individual transmissable personal estate. That loss of marriage may, under circumstances, occasion a strict pecuniary loss to a woman, but it does not necessarily do so; and unless it be expressly stated on the record by allegation, the court cannot intend it. On the ground, therefore, that the allegation in that case imported only a personal injury, to which the administrator is not by law, nor is he in fact shewn to be privy, the court were of opinion, that in the absence of any authorities, the administrator could

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not maintain the action. Lord Ellenborough plainly shews, that in an action by an executor or administrator, special damages must be stated on the record, for the court cannot see that the personal estate is injured—consequently cannot see that the executor is qualified to bring the action.

As to the third point, "its being a case of novelty," I think it no ground for arresting the judgment, the not finding any precedent for such an action, rendered it highly proper that the court should pause in order to look at the cases.

On reason and principle, I think the action maintainable. Its being novel in its kind, is not a decisive ground of objection. I am therefore of opinion, that the rule should be discharged.

Rule discharged.

January 31st.

M'IVER *and others against* M'FARLANE.

Where a Note was made payable at a particular place although no averment of its being presented there for payment, appeared upon the record, this Court after a verdict for the plaintiff, and proof at the trial of a subsequent promise, refused a nonsuit.

This was an action upon a promissory note made payable at a house at Glasgow, in Scotland. It was tried before the Chief Jus-

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M'Iver and others against M'Farlane.

tice at the assizes for Cornwall, where the defendant's Counsel had moved for a non-suit upon the ground, that the declaration contained no averment that presentment had been made at the house appointed in the note. A subsequent promise had been made.

The Chief Justice considering the recent enactment of the British Legislature, which makes the averment necessary only where it is expressed on the note, that it is to be payable at a particular place and not elsewhere, overruled the objection and directed a verdict for the plaintiffs.

Jones had last easter term obtained a rule nisi, to set aside the verdict and enter a non-suit, or grant a new trial.

Robinson, Attorney General—now shewed cause. He contended that the want of averment, should have been taken advantage of upon special demurrer, and that, at any rate, the proof of a subsequent promise, and a verdict cured the defect. That the courts have determined in a variety of instances, that after a verdict it shall be presumed, that all has been proved which is necessary. That an express promise, in the cases upon notes and bills of exchange, will relieve

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from notices which would otherwise be required.—That this doctrine as against an acceptor, has never been disputed, and the drawer of a promissory note is in the same situation.

That the Court are fully entitled, if indeed they are not bound, to notice the new act of the British Legislature.—That there were many decisions before its passing which determined that it was not necessary to aver upon the record the presentment at a particular place. That there were indeed conflicting decisions. That even if the late act had not passed, which set the matter at rest, the court would have been fully at liberty to adopt that decision which appeared to them best founded in reason and principle. But, that now, the court could not hesitate; for that the British Statute may be fairly considered as declaratory of what class of decisions are the most correct and beneficial to the public.

Boulton, Solicitor General, contra.—Contended, that although proof of a subsequent promise would be evidence to go to a jury that the averment of presentation had been complied with, yet that such proof could not dispense with its appearing upon the

record. That the plaintiff had in fact gone down to trial without any cause of action to try. That as to the British Statute it is not in force here, and the passing it shews that the former decisions were good law. That we are guided in this country by the law as it stood in 1792. That the determination he contended for, had been the law of England ever since bills of exchange were known. That there is no cause of action stated upon the record, dehors which you can prove nothing. Other facts offered to be given in evidence, would be irrelevant; that the court can neither look at impertinent evidence, nor can they presume that this note was presented according to its exigency. That should the court determine against a nonsuit, undoubtedly the judgment must be arrested. If the cause of action is alleged faultily, the judge at nisi prius should direct a nonsuit; that for want of form you must demur specially; but for want of substance you may either demur or arrest the judgment. That if the plaintiff had meant to rely upon the subsequent promise he should have set it forth upon the record.

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M'Iver and others against M'Farlane.

Per curiam.

Rule discharged.

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January [illegible]

A writ of venditioni exponas against lands and tenements, having [illegible] few days [illegible] [illegible] [illegible] although [illegible] required by the provincial statute respecting the teste, delivery, and return of the fieri facias upon which it was grounded, may have been complied with.

ARMOUR and DAVIS against JACKSON.

Boulton, Solicitor General, had on a former day in this term obtained a rule to shew cause, why the writ of venditioni exponas issued against the lands of the defendant, should not be set aside, there not being a sufficient period between the issuing, and the return of the same.

The fi: fa: against the lands and tenements of the defendant, was issued on the 23d day of August, 1821, and was returnable on the first return of Michaelmas term, 1822, comprising between its issue and return, the full period required by the provincial statute.*

The Sheriff upon this writ returned, that he had taken the defendant's lands in execution, but that they remained in his hands for want of buyers.

On the 9th of November, in Michaelmas term 1823, twelve months afterwards, the plaintiff issued the venditioni exponas, and made the same returnable on the last return of the same term, there being only a few days between teste and return.

* [illegible] C. 1. S. 2.

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Armour and Davis against Jackson.

He had contended that the period of 12 months required by the provincial statute, extended to a writ of venditioni exponas against lands as well as to the fi: fa: upon which it was grounded, the language of the statute being sufficiently general to embrace it, the words being "that the writ against the lands and tenements should not be made returnable in less than twelve months from the teste thereof.

Baldwin, now shewed cause.—He contended that the veditioni exponas was only a continuation of the fi. fa. which it recites; that the exigency of the statute had been complied with, by the period of twelve months having elapsed between the delivery and return of that writ.

That the ven: ex: was issued according to the determination of the court, in Boulton vs. Small, where eight days were laid down as a sufficient time between the teste and the return of an execution.

That the present application was made by the Sheriff, who can have no right to do so, the parties themselves being satisfied.

Boulton, Solicitor General, contra.—Contended, that the Sheriff was perfectly cor-

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Armour and Doyle against Jackson.

rect in this application to the court.

If he should sell under this writ wrongfully, he would subject himself to an action of trespass; and, on the other hand, if he should refuse to sell, and the court were against him, he would be liable to an attachment. He may always apply to the court for its decision in these cases.

That the late decision of the court respecting the period between the teste and return of an execution, related to those against goods only.

That these against lands were sui generis, and regulated by legislative provisions.

That by the last judicature act, the Sheriff is not to sell lands without advertising the sale several months before it takes place.

That the object of the statute is, that sufficient notice may be given, that purchasers may assemble; but that in the case before the court the formed advertisement is nugatory, the day appointed by it for the sale, being long since past.

That it is impossible that the Sheriff can execute this writ, he could not give any

notice that could answer the intention of the statute.

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Ammour and Davis against Jackson.

That it may be an inconvenience to wait so long, but that must be remedied by the legislature, or perhaps by some rule of court to meet the intentions of the statute.

Campbell Justice.—I cannot consider that the intentions of the Statute are complied with by the advertisements under the fieri facias, if there were not purchasers at the time appointed for the sale by those notices, it is not probable there will be any at the return of the venditioni exponas.

These returns and notices required by law are not fictitious proceedings.

If the law says nothing in precise terms respecting the time required between the delivery or teste and return of this writ, we must refer to some principle for direction, but it is clearly quite contrary to the spirit of the statutes that such a proceeding should take place instanter.

Powell, Chief Justice.—Common sense tells us that the intentions of the statute are not complied with in this case.

The lands are not sold for a year after

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Armour and Davis against Jethro.

the return of the writ under which the notices required by law were given; at the expiration of those notices, the sale was put off indefinitely, after lying by for twelve months the plaintiff issues a peremptory writ with only a few days between the teste and return.

Can it be supposed for a moment that relying upon a former notice, these lands can be sold under this proceeding?

It is the custom in the Lower Province to issue an alias, and after a certain lapse of time, a venditioni exponas, under which the same course as to notification takes place as under the former writ.

The court declared the writ to be irregular but gave leave to alter the return.

January 19th.

This court refused to set an award aside on the ground that the arbitrators had directed not to be delivered until the costs for making it were paid.

GEE *against* ATWOOD.

Rudolph had in a former term obtained a rule nisi to set aside the award in this case upon an affidavit stating that the arbitrators were to meet on the 2d day of September next ensuing the date of the arbitration bond and that the award was to be ready to be

delivered to the parties in ten days after said meeting, that the award was accordingly made on the fourth day of September, 1822, and left with a person with instructions not to deliver it until the costs of the arbitration were paid or security given for the payment, that the awards consisting of two copies remained in his hands until the 9th day of September when they were given to the plaintiff upon his giving the security required. He contended that this condition being attached to the award, rendered it void as it could not, when so conditioned, be said to be ready for delivery.

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Ogg against Atwood

Macaulay now shewed cause.—He contended that the condition did not vitiate the award, if there was no award it would be an answer to the action upon the bond, that the condition of the bond had been complied with by the award being signed and ready for delivery, there was no occasion for its being actually delivered.* That having signed the award the arbitrators were functi officio, and if they had no right to annex a condition of payment to the delivery, the party interested might recover it by action. That requiring payment of the expenses was

* Caldwell on arbitration, 168.

1824 a matter extrinsic to the award and which could not destroy it.*

Doe against Atwood

Rule discharged.

January 30th.

THE KING *against* ELROD.

A writ of exigi facias will be awarded by this court upon the application of a prosecutor, without its being applied for by the Attorney General.

Baldwin—On a former day had moved for an exigent against the defendant, against whom, an indictment for Bigamy had been found at the assizes. The Attorney General had suggested a doubt whether as the forfeiture of the goods of the party outlawed, went to the crown, the proceedings under the provincial statute ‖ should not take place under the sanction of the crown officers, who in this province conducted all prosecutions in capital cases.

On this day the court observing that there were no words in the statute restraining the proceedings under it to the superintendance of the crown officers.

Ordered the exigent to issue.

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* 6. R. R. 303. and see Grove v. Coe—1 Term 165. 3 Term 461. 4 R. R. 394.

‖ 55 G. c. 4.

TRUESDALE *against* M'DONALD.

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January 30th.

A defendant who takes upon himself to abate a nuisance, viz: a Mill dam may be called upon to pay damages for any injury done to the plaintiff's property beyond what was necessary for the purpose of removing the public inconvenience.

This was an action of trespass for pulling down the plaintiff's mill dam; and was tried, before the Chief Justice at the last assizes.

The defence set up at the trial was that the dam was a nuisance, in as much as though it did not itself stand upon the high way, yet it caused the water to overflow a neighbouring public road. It appeared in evidence satisfactory to the jury that the defendants had pulled down more of the dam than was necessary to remove the inconvenience, and they under the direction of the judge, recommending them only to consider such damages as the plaintiff had sustained beyond what were necessary to abate the nuisance found a verdict for the plaintiff for £50.

Robinson, Attorney General—had on a former day obtained a rule nisi to set aside the verdict, and grant a new trial on the grounds of excessive damages and the discovery of new evidence.

Macaulay now shewed cause.—He contended that this being a case in tort the damages were peculiarly for the consideration of the Jury. That the defendants had undertaken to abate this nuisance at their

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Trowsdale against M'Donald.

peril, and by doing more damage to the dam, than was necessary for that purpose, they had subjected themselves to an action.—That the damages given by the jury, instead of being excessive were very moderate and to obtain a new trial on the ground of excess in an action of tort it should appear that they were vindictive. That it was of much more consequence, to the public that mills should be protected than that the wetting of a person's foot should be visited by the destruction of a species of property, so valuable and useful. That, as to the discovery of new evidence which consisted merely of admeasurements taken after the verdict, they should have been taken before, as it was the plaintiffs duty, to come prepared with his evidence.

Per curiam.

Rule discharged.