REPORTS OF CASES
IN THE SUPREME COURT OF
NEW BRUNSWICK.

Easter Term—1835.

NOTE.—In this Term there were present only His Honor the CHIEF JUSTICE and Mr. Justice CARTER.

SCOULLAR *vs.* HAZEN.

THIS was an Action on the case against the Defendant as Sheriff of Sunbury County, for the escape of a Prisoner in custody under *mesne* process.

A Debt of £60 and upwards from Prisoner to Plaintiff, the issuing of process, the arrest and escape were established. It appeared that the Prisoner was not possessed of any property except £8 in money at the time of the escape; evidence was given that some security would have been offered for the debt if the Prisoner had not escaped, but the sufficiency of the intended security was very doubtful.

The Solicitor General, for Defendant, contended that if the Jury thought no damage had been sustained by the Plaintiff they were not bound to give even nominal damages, but might find for the Defendant—5 T. R. 37, Plank *v.* Anderson.

Berton contra, cited 1 Saun. Pl. and Ev. 483, 2 Bing. Rep. 317, Barker *v.* Green.

Carter, J. directed the Jury that the escape having been proved, some damage had been established, because the Plaintiff had lost that which the Law considered one means of satisfying a debt, viz.: the body of the debtor. He left it to them to consider what pecuniary compensation would satisfy that loss, and also directed them in ascertaining the amount of damages to consider by how much the Plaintiff's chance of getting his debt was worse by reason of the escape than if there had been no escape.

Verdict for Plaintiff—Damages £10.

Cleery and Berton for Plaintiff.

Solicitor General for Defendant.

WHITE *vs.* BABCOCK.

Assumpsit by the Indorsee against the maker of the following Instrument, declared upon as a Promissory Note within the Statute.

"Ten days after date, I promise to pay Mr. Marcus Scully or order, the sum of £44 currency, (or such other balance of his account furnished,) for a Survey made for the Magistrates of the County of Charlotte of a certain piece of Land at Saint Andrews, commonly called the Commons, as per account annexed. Fredericton, first August, 1833. "WILLIAM BABCOCK.

"Account—say £64 0 0
"Paid Sheriff, £12 3 6
"By Starritt, 7 0 0
——— £19 3 6
——— £44 16 6

"*Fredericton*, 16*th Nov.* 1833.

(Indorsed.)
"Pay to Stephen White, or order, the amount of this Note of Hand.
"M. SCULLY."

The Solicitor General for Defendant contended that this Instrument could not be considered a Promissory Note within the Statute, and therefore moved for a non-suit.

Chipman, Chief Justice. Is it usual when you may demur or can move in arrest of Judgment for a defect appearing on the face of the Record to move for a non-suit? I know where it clearly appears that there is no cause of action the Court will non-suit; but I have doubts if it is usual to do so when the action is upon a written Instrument, which is clearly set out in the declaration.

The Solicitor General cited 2 Ch. on Pldg.; (5 Ed.) 700 Note; 1 Camp. 256, and 2 Star. N. P. C. 375, to shew that under any circumstances the Court would entertain the motion, and proceeded to argue that the writing declared upon and produced in evidence was not a promise for a specific sum, but for an amount to be ascertained by future investigation. In Smith, &c. *v.* Nightingale, 2 Star. 375, the promise was for a certain sum, but being also for an uncertain amount, was held not within the Statute. He cited also 4 B. & A. 679, Ferris *v.* Bond, Nealis *v.* Langen, &c. M. S Trin. 1834, Ch. on Bills, 42, 66, and 4 M. & S. 25, Hartley *v.* Wilkinson.

Wilmot, for Plaintiff, urged that the amount of the Note was rendered certain by the memorandum at the foot of it. In Hartley *v.* Wilkinson, the condition was indorsed on the Note, and the contingency affected the whole Note. In this case if there was any contingency it affected only the sum.

Chipman, Chief Justice. I entertain a clear opinion upon the point. To make an Instrument negotiable and current, the sum to be paid must be certain and fixed—it must be distinctly stated, to be for money, for what certain amount, and payable without any contingency. Looking at this paper it does not possess those requisites—it is not absolutely for £44, but for whatever balance was really due to the payee. It is said the memorandum at the foot makes it certain, but if that were true why insert the contingency, and besides the amount of the Note is £44, of the memorandum £44 16*s.* 6*d.*, shewing yet more plainly that the sum mentioned in the Note was merely nominal—the real amount, more or less, remained to be ascertained. I consider the paper as merely an agreement between Babcock and Scully to pay the amount of Scully's account.

The Plaintiff was non-suited.

Robinson and Wilmot for Plaintiff.

Solicitor General for Defendant.

DUNN and WIFE *vs.* MILLER.

This was an Action of Trespass for an Assault on Sophronia Dunn, one of the Plaintiffs—a feme Covert.

The Defendant pleaded—1st. The General Issue. 2d. That Defendant was lawfully possessed of a certain dwelling house, and being so possessed the said Sophronia was unlawfully in the said house, and with force, &c. making a great noise and disturbance, and thereupon Defendant requested her to cease and depart from said house, which she refused to do—whereupon Defendant in defence of his possession gently laid hands upon the said Sophronia in order to remove her out of the said House, as he lawfully might—which are the trespasses, &c.

Replication.—De injura sua propria.

The Defendant was possessed of a house in Fredericton—the Plaintiff was negotiating for a lease of it; the Defendant had sent a workman to make some repairs in the house, and while these were going on, some of the Plaintiff's goods were hurriedly moved into the house—furniture had been arranged in one room, and more was being carried in; when Defendant coming to the house, was informed of the circumstance by his workman. An altercation ensued between Defendant and Mrs. Dunn; he threatened to throw the furniture into the street; she dared him to meddle with it; and thereupon the Defendant committed the assault charged, and afterwards left the house—Mrs. D. and the furniture still remaining there. Evidence was given of the subsequent illness of Mrs. D. as ground of special damage.

After the close of the Plaintiff's case, Wilmot stated that a Witness, on the part of the Plaintiff, was anxious to return to the stand to correct a mis-statement she had made when under examination.

The Solicitor General, for Defendant, objected. The witness had retired, and had communication with the parties; while on the stand she might have corrected a mis-statement, but to allow a witness under the present circumstances to make a new statement would be striking at the root of the advantage of cross-examination. Why were witnesses excluded (if desired,) from Court but to prevent them from hearing the statements of each other, and by that means making their tales agree. Such a proceeding would be useless, if they could be permitted after conversing together to return and correct their testimony.

Chipman, Chief Justice. It must be a matter of discretion in the Court. I will allow the witness to come to the stand, but will not allow her to be questioned except by myself.

The Solicitor General, in opening the defence, contended that the only point to be determined was as to the possession of the premises. If the Defendant was justified in using any, the slightest force or violence, he was entitled to a verdict; if the violence had been excessive, the Plaintiffs should have replied specially. In support of this doctrine he cited Dale *v.* Wood, 7 B. Moore's Rep. 33, Bowel *v.* Purry, &c. 1 Car & Payne, 394.

The Defence being closed, Wilmot was about to give further testimony as to the possession, and tendered evidence of a Licence of occupation of the premises from Defendant to Plaintiff, and offered evidence also to rebut testimony given by a witness for the Defendant.

It was objected by the Solicitor General, that the Plaintiffs having in the first instance given evidence of circumstances rebutting the plea of Justification, were not now entitled to add further testimony upon that point. Rees *v.* Smith, 2 Star. Rep. 31, Roscoe's Ev. 139, Brown *v.* Murray, Ryan & Moody's Rep. 254.

Wilmot contra, contended that the Plaintiffs case had been directed professedly to the assault, and they had not attempted to answer the Justification—not one witness had been called upon that point.

Chipman, Chief Justice. said that he entertained no doubt on the point. The principle is clear and it is a reasonable principle, that when the case on the part of the Defendant is apparent on the pleadings, the Plaintiff should go into all his case at once, or else confine himself strictly to the General Issue; but if a Plaintiff goes into any part of his case rebutting a Justification, he must go into the whole, and not take it piecemeal. In this case there are two pleas—first, the General Issue;—by the second, the Defendant avers that he was in possession of the premises, and being disturbed by the Plaintiff gently laid hands upon her and put her out. The learned Counsel, for the Plaintiff, in his opening went into the whole case; he opened all the pleadings and used the expression, "we shall show the Plaintiff, Mr. Dunn, in quiet possession," &c. He undertook to rebut the affirmative plea by proving a contradictory affirmative, viz.: a possession in Dunn; and in proving his case gave evidence as to the possession on the day of the affray and also on the day previous—then if the Plaintiffs had further testimony they should have produced it at once, and not have waited to see what the Defendant could prove.

His Honor directed the Jury that it was necessary to support the Defendant's plea, that they should be satisfied that the Defendant was in possession of the house—that the Plaintiff entered therein and disturbed his possession; that he requested her to depart, and that he laid hands upon her with the intention of putting her out of the house, and only used the force complained of for that purpose. If the assault was occasioned by angry or excited feelings, the Defendant was not justified.

Verdict for Plaintiffs—Damages £10.

Dibblee and Wilmot for Plaintiffs.

The Solicitor General for Defendant.

WILMOT *vs.* CORNWELL and BABINO.

The Solicitor General on a former day in this Term applied on behalf of the Defendant Cornwell, a confined debtor in Westmorland, for relief under the Act of Assembly, 1 W. 4, c. 43; the affidavit of the Defendant stated his inability to support himself, and that he had no property; it was entitled "Wilmot *vs.* Cornwell."

Berton contra, produced affidavits of Plaintiff and others, which contradicted the affidavit of the applicant in several particulars, but did not show him to be possessed of property or means of support—showing also that Babino was a co. Defendant, and contended—1st. That the applicant's affidavits were improperly entitled, Babino not being named a Defendant therein. 2d. That the applicant's statements being contradicted in several instances, were unworthy of credit and could not satisfy the Court.

Chipman, Chief Justice. now delivered the opinion of the Court; We are of opinion that although the Acts of Assembly contemplate the application being made in the suit, yet upon the whole it may be considered a distinct Judicial proceeding—one which may be taken not only in the Court wherein the suit is or has been prosecuted, but before Justices of other Courts, and it would therefore perhaps be giving the Acts too strict a construction to require greater correctness in the titles of the affidavits or application. We are less inclined to dismiss the application on the first ground of objection as the second is so material that it cannot be got over. The law provides that it must appear to the Court that the person has no property or means of support. The Defendants affidavit taken alone is exceedingly loose; no schedule of property is annexed, although one is spoken of in the affidavit—nor is the property mentioned therein sufficiently accounted for; and the statements of the Defendant are so contradicted by the affidavits produced on the other side, and so contaminated, that we can give no credence to them unsupported as they are by other testimony. It is sufficient therefore to say that we are not satisfied, upon the affidavits, that the party is entitled to relief; he must satisfactorily account for all property he may appear to have possessed.

Application dismissed.

THE EXECUTORS OF ANDREWS *vs.* JOSEPH N. CLARKE.

S. G. Andrews, one of the Plaintiffs, gave notice to Defendant of an application for leave to issue a *Ca Sa* to arrest Defendant a second time, on the ground that he had been discharged from arrest under a former Execution by fraud and collusion with DeVeber, a co-Executor and Plaintiff—the notice was subscribed S. G. Andrews, acting Executor.

Wilmot moved for Rule *nisi*, which was obtained by consent of Defendant's Counsel—who stated his reason for such consent, that the Defendant had been put to expense in preparing affidavits to resist the application and shew the merits of the case, which expenses he could not recover, under the practice of the Court, unless the Rule should be granted. The cause was therefore entered in the Special Paper of the Term.

On hearing a part of the affidavits in support of the Rule, the Court determined that the Defendant having been discharged by one Plaintiff could not be again arrested at the instance of another. They allowed the Defendant's affidavits to be filed in answer to those produced on the other side, and discharged the Rule with costs, to be paid by the applicant, S. G. Andrews.

Wilmot for Plaintiff.

Berton for Defendant.

LESLIE *vs.* RAE.

Wilmot moved to discharge a peremptory undertaking to try at this Term, and for leave to discontinue without costs, on an affidavit which stated that Defendant had been seen by Deponent in the United States, where he was employed in digging a Cellar; that he told Deponent he did not intend to return to this Country; and Deponent believed at the time he went away from the Province he was not worth much property.

Berton contra, contended that the affidavit was insufficient even to enlarge the peremptory undertaking; the absence of the Defendant was a circumstance of no importance, and no evidence of insolvency had been offered.

Per Curiam:

The Plaintiff has shewn no cause to enlarge the peremptory undertaking; the Defendant may have left property in the Province, or if not a Judgment against him could follow him to the place of his abode.

Rule absolute for Judgment for Defendant.

ABBOTT *vs.* LEDDEN.

Berton moved for security for costs on an affidavit shewing that Plaintiff was out of the jurisdiction of the Court, and an affidavit of Defendant's Attorney, stating that he had put in the Post Office at Newcastle, a letter addressed to the Plaintiff's Attorney at Saint John, containing a demand of security and notice of this motion.

The Court doubted if posting a letter was a sufficient service of notice on the opposite Attorney, in order to obtain a stay of proceedings; but afterwards on the authority of Aldred *v.* Hicks, 5 Taun. 186, granted Rule *nisi*, with stay of proceedings.
