REPORTS OF CASES

ADJUDGED IN THE SUPREME COURT OF THE PROVINCE OF

NEW BRUNSWICK.

Hilary Term, 1835.—*5th William 4th.*

THE KING, v. *John Wilson and others.* } THIS was an Information for Intrusion on Crown Lands, in Charlotte County, tried at Bar in last Hilary Term —Verdict for Defendant. The Attorney General moved, in the same Term, to set aside the Verdict; the grounds were—1st. That a Plan, purporting to be a Grant plan, was improperly received in Evidence, not being annexed to the Letters Patent. 2d. That the Grant, called the "Chamcook Grant," did not include the *locus in quo*, and was not intended so to do. The cause having been argued at the present Term by the Attorney General for the Prosecution, and by Mr. Street (the Solicitor General,) for the Defendant—The Chief Justice now delivered the opinion of the Court:

Upon the first point, it appeared in Evidence that Colin Campbell had found the Plan and the Grant together in the same bundle of papers left by his Father, that they had been in his possession 25 years, and his Father had held them for a longer period before that: The proper place for a Plan is in company with the Grant which refers to it. It is said this Plan was never annexed to the Grant, but it is material that the Grant refers to a Plan, and in the habendum, the lots are designated only by numbers, referring to the Plan; and there is an exception out of the Grant of a particular Lot, No. 70, and of certain tracts "*marked on the Plan,*" it is obvious that effect can be given to the Grant only by the Plan. It cannot be supposed the Grant issued without a Plan; the maxim of Law is, that a Public Officer shall be supposed to have properly discharged his duty. The Plan is signed by the Surveyor General, whose duty it was so to authenticate it: an objection was taken that this was not the best evidence—that a copy of the Plan might have been procured from the Records; but if there is Evidence to authenticate this as the original, it is the best evidence. The Court are of opinion that the Plan was sufficiently authenticated, and was properly received in Evidence.

The second point was fairly put by the Attorney General, what did the King intend to grant, what did the Subject expect to receive? The Premises are a tract of Land comprehended by metes and bounds, containing 500 acres with allowance for Roads. The statement of quantity never can be held to circumscribe or diminish the Land actually contained within the limits of the Grant—the question depends on the statement of the boundaries: One line is to extend 32 chains, or until it meets certain Farm Lots, (being the rear of another Grant.) Shall the line then terminate at the 32 chains, or extend to the Farm Lots? On inspection of the Plans and Grants, all shew that the intention of the Crown was to grant the whole Land, and that one Grant should be bounded by the rear of another—the second words "or until it meets," &c. must be held the controlling words. The person who prepared the Grant, evidently supposed the 32 chains would comprehend the whole ground:—The Verdict for Defendant must stand:—His Honor expressed the satisfaction of the Court that this decision would not interfere with the rights or possessions of those who had so long been quietly in possession of the Land.—*See Com. Dig. Tit Fail, D. 4, as to construction of Grants.*

NOTE.—The Chief Justice stated, that this was distinctly and properly the opinion of Botsford J. and himself, the two surviving Judges who heard the argument; the Judgment had been submitted to Carter J. who concurred therein; Parker J. having been, while at the Bar, retained as Counsel in the matter, declined giving any opinion.

Wiggins, v. *White, Garrison, and Woods.* } *Trespass for taking and carrying away Timber.* Plea 1st. Not Guilty.

2d. As to the taking and carrying away, &c. White and Garrison pleaded that it was seized by Garrison, as the Deputy of the Sheriff, White, under a Writ of Replevin, at the suit of Woods against one William Turner; and that the same, just before the taking, &c. had been taken possession of by the Plaintiff under a sale from one Dibblee, but there was no allegation of fraud or collusion. To the second Plea, Plaintiff demurred.

The Demurrer was argued in Michaelmas, by the Solicitor General for Plaintiff, and N. Parker for Defendant.

Chipman, Chief Justice:

This question depends on the exigency of the Writ of Replevin. The argument for Defendants is, that the exigency of the Writ is to replevy the Goods specified therein, and that the identity thereof is the only thing material. The Counsel for the Plaintiff urges that it is further requisite that the Goods be found in the possession of the Defendant against whom the Writ issued;

I am clearly of opinion that the last is the correct construction. Replevin is an action of a peculiar nature in which the Plaintiff is in the first instance put in possession of the Goods in dispute, and the Defendant may claim and have a return of the Goods; and from the principle in Replevin that the Defendant, and the Defendant alone, can claim and have a return, it is evident that the Goods can only be replevied from the person against whom the Writ issued. The English Practice (see Sellon's Practice,) our Rules of Court. The Writ itself, the Capias to bring the Defendant into Court, the Replevin Bond, all shew and confirm the same doctrine. There must be Judgment for the Plaintiff on the Demurrer.

Botsford, J.:

The Writ of Replevin is confined to the Parties named in it. The Action of Replevin should be extended wherever it can, and should be encouraged; but it might be greatly abused if the Sheriff could under the Writ take property from a stranger.

Carter, J.:

Not having heard the argument, did not give an opinion.

Parker, J.:

Concurred. The plea admits that the Goods were replevied from a stranger, against whom it is admitted that replevin would not lie, because he neither took nor commanded the taking. The Writ gives a general direction to the Sheriff, but it does not mention the numerous exceptions thereto; yet the Sheriff is bound by those. I need only mention the familiar instance of a *Fi Fa.* The Sheriff is commanded to take the Goods of Defendant, but although he may see them through a window, yet he cannot break the door to get them, and may return *nulla bona.* The Sheriff under a Writ of Replevin cannot take the Goods ont of the possession of a stranger.

Ward, v. *Dow.* } CLEARY, the Attorney for the Plaintiff, in last Hilary Vacation issued a Writ of Inquiry of Damages, returnable in Easter Term. The Jury would not give a Verdict for any thing in favor of the Plaintiff, and not being able to find for Defendant, were dismissed without giving a Verdict. The Plaintiff's Attorney, in Easter Vacation, issued another Writ, and Damages were assessed at £20. In Trinity Term last, Wilmot for Defendant, obtained a rule *nisi* to set aside the second Writ of Inquiry and Inquisition for irregularity with Costs. The irregularity complained of was, that the second Writ of Inquiry was improperly issued without the leave of the Court having been first obtained. Berton for Plaintiff, showed cause in Michaelmas

Per Curiam.

We think the Plaintiff has pursued the correct course, and that which was least expensive to the Defendant.

Rule discharged with costs.

Rex, v. *Sterling.* } *Indictment for obstructing a Highway.* Tried before Botsford, J. in Michaelmas Term.

ON the part of the Prosecution, a Record of the Road made by the Commissioners of Highways of the Parish of Saint Mary's, in York County, was put in Evidence. The Road never had been marked or laid out on the Land, and never had been opened. Several points were taken by the Solicitor General for the Defendant:

1st. That it was necessary to shew not only the Record of the Road but that the previous steps required by the Act, in altering a Road, had been taken by the Commissioners, and that the Record could not be considered even *prima facie* Evidence of the correctness of the preliminary proceedings.

2d. That the Road never had been laid out and opened, and therefore could not be considered a Highway.

3d. That before the Road could be opened, it was necessary that the compensation awarded to the Owners of the Land should be first paid.

The Points were reserved, and a Verdict entered against the Defendant.

The Solicitor General having obtained a rule *nisi* to enter a Verdict for the Defendant upon the Points above stated.

D. L. Robinson at this Term shewed cause.

The Court in giving Judgment, considered only the second point.

Chipman, Chief Justice:

This is an Indictment for obstructing a Highway. The obstruction must be shewn upon a Highway. It is not necessary to remark on the doctrine of *usor.* It is quite sufficient to refer to the Act of Assembly, 50 Geo. 3, c. 6, under which these proceedings were had. This return is not sufficient Evidence of a laying out. It is not necessary for the decision of this case to prescribe what would be sufficient, but in the present case the return or Record does not specify or particularly define through what part of the Lands the Road was intended to pass; it is so vague that the intended course cannot be ascertained,—one expression is "running from point to point, as straight as the nature of the ground will permit." The strong inclination of my opinion is, that in order to make a good laying out under this Act, there must be some marking out upon the Land—this may also be designated upon a Plan. The return is only the Record of the Road as actually laid out, and the tenth section of the Act clearly shews that the Road muat be "laid out," before it is entered in writing or recorded.

Botsford, J.:

In order to sustain this Indictment, it is necessary to establish the *locus in quo* to be a Highway. The Act of Assembly, before referred to, prescribes the course the Commissioners are to pursue; their duty is plain, and following the directions of the Act there can be no difficulty; but here, instead of doing so, from some fear of the correctness of their own acts, as appeared by the evidence of one of the Commissioners, they have neglected to open the Road, and have instituted this proceeding to test their legality. Looking to the return, can any person point out the exact course of the Road? If Evidence had been adduced of the actual laying out of the Road, I am not prepared to say the return, vague as it is, would not be sufficient Evidence. The return or Record is not to be made until the Road is actually laid out.

Carter, J.:

The *locus in quo* must be shown to be a Highway. Even granting that the return is correctly made, it must be so definite that any person may go upon the Land and point out the Road. Here two persons may go from one *terminus* to the other by different courses.

Parker, J.:

The only question I will consider here is—Is the Road laid out? What, in the first place, is a Road? It is a piece of ground stretching from point to point and of a certain specified width. The Record is not the laying out the Road, but the Evidence of it. Then is it to be Evidence of an act or of an intention only? Who can, by the Record before the Court, point out the Road? There must be an actual laying out upon the Land.

Verdict entered for the Defendant.

Dickinson, v. *Balloch.* } *Assumpsit.* Tried before the Chief Justice, at the Carleton Circuit, in September last.

THE Declaration contained only the Common Count's Plea—the General Issue with notice of set off.

The Plaintiff's demand was for a large quantity of Timber, for work and labour in driving that Timber, and there were also sundry small items of account. By an agreement put in Evidence, by the Plaintiff, it appeared that Defendant was to make Timber in the Woods, and Plaintiff to haul it, and have one half for so doing—but the first half that was hauled was to belong to Defendant, and he was also to have the refusal of the remainder. By the same agreement it appeared that Defendant had paid Stumpage on the Timber, amounting to £25, one half of which was to be repaid to him by Plaintiff. Plaintiff alleged that Defendant had received much more than his half, and sought to recover payment for the remainder—the Evidence on this point was vague, and it evidently was not considered sufficient by the Jury. There was Evidence also of work and labour, and it was questionable if the Jury did not set off the £12 10s. tonnage money, against that—the amount, if sufficiently proved, being about that sum. Two items, amounting to 25s., were clearly proved. No evidence was offered on the part of the Defendant. The Jury found a general Verdict for the Plaintiff for 25s.

In last Michaelmas Term, Berton and Wilmot for the Defendant, obtained a rule *nisi* to enter a suggestion to deprive the Plaintiff of Costs; they urged that the 10th Section of the Provincial Act, of 50 G. 3, c. 17, was a literal copy from the London Court of Requests Act; and that by the decisions under that Statute, the Verdict must be considered the amount in demand. They cited 2 Tidd's Prac. 994, 4 Burr. 2133, 8 East. 238, 346, 1 M. & S. 393, 6 Taun. 452, 1 Taun. 397, 2 Cromp. & Jer. 505, 4 B. & C. 769, 1 Dowl. Pr. Ca. 580, 2d do. 58.

The Solicitor General at this Term shewed cause, and contended that this Action did not come within the intent of the Act of Assembly. It was for a large and important demand, and the Verdict was a general one, and it could not be said that it was upon any particular item of the account, and further that the sum of £12 10s. mentioned in the agreement must be considered in the nature of a set off; he urged that had the Verdict been for the Defendant, the learned Judge would not have certified to give double costs, and that shewed the cause was not within the Act. The Action could not have been tried in a Justice's Court.

Chipman, Chief Justice:

This action was for Goods sold—the Verdict was for 25s. The cause involved matters of a large amount; there were two small articles proved distinct therefrom, which made exactly the amount of the Verdict. It has been contended on the part of the Plaintiff that the real matter or cause of Action should be considered. The law is clearly settled that the sum recovered by the Verdict is to be considered the Debt due—4 B. & C. 769, 2 C. & J. 505, 1 Dowl. Pr. Ca. 580, 603, 704, all settle the same point—*prima facie* the Verdict is Evidence of the Debt due. In 2 Dowl. Pr. Ca. 58, the Plaintiff failed in proving part of his demand from the absence of a Witness. The Verdict being under £5, a suggestion was entered. The Law, as collected from these cases, is, that the amount of the Verdict is the sum in demand, and the onus is on the Plaintiff to shew circumstances to take the case out of the Rule. Here it is evident that but for the two items, before mentioned, the Verdict would have been for the Defendant.

Botsford, J.:

I entertained doubts upon a case in 8 E. 346, where Lord Ellenborough remarked upon the Plaintiff having a reasonable cause to bring his Action for a larger sum than £5. But the Law is clearly settled by later decisions. The present case is stronger than 1 M. & S. 394, where failing on the special counts, Plaintiff recovered a small Verdict on a balance of large accounts. 6 Taun, 452, is clear also as to the Verdict being the amount of the Debt.

Carter, J.:

Looking at the circumstances and applying the Verdict to the Evidence, little doubt can be entertained that the Verdict in this case was for the two small items; but even supposing it were otherwise—that the Verdict was upon the larger claim, the case in 2 Dowl. Pr. Ca. 58, and other cases, make it imperative to enter the suggestion. I cannot draw a distinction between this and the case I have mentioned.

Parker, J.:

I have looked at all the cases. There appears a perfect unanimity in Westminster Hall upon the subject. The Verdict is the general rule, not the exception. The Judge's notes shew there was doubtful evidence of the larger demands, and clear proof of the small—and so His Honor charged the Jury. The Court must be satisfied that the Jury found upon the large demand and not on the small, or the suggestion must be entered.

Rule made absolute.

Foulis, v. *Kinnear & another.* } *Action of Assumpsit.*—Referred by Rule of Court. Judgment to be entered on award as on the Verdict of a Jury.

THE award was made on the 8th July—the first day of Trinity Term, 1834. In Michaelmas Term, Wright for Defendant, obtained a rule *nisi* to set aside the award upon two grounds:

1st. The award was not conclusive.

2d. The improper conduct of the Plaintiff's Attorney.

Cause was shown at this Term by N. Parker for Plaintiff, and the Solicitor General was heard in reply.

Chipman, Chief Justice:

The first point depends upon the circumstance of the Arbitrators having thrown out of their consideration two articles, a Cylinder Bottom on the one side, and certain Boiler Plate on the other, which they directed to be exchanged. Now if the Arbitrators undertook to determine the Law upon this subject, it was competent for them to do so, and the Court will not interfere; but on this point, even if there were grounds for the application, the Defendants are out of time. The award was made on the 8th July—the Defendants were aware of it before the 11th, and if they did not know, had full opportunity to inform themselves of the grounds of it; they suffered the Trinity Term to pass, and on the 22d day of July gave notice of motion. The same rule as to time must prevail in this case, as in motions for new trials—the award being entered on the *postea* as the Verdict of a Jury.

As to the second point. It is stated there was misconduct on the part of the Plaintiff's Attorney. To support that, it should be clearly shown that there was a breach of faith in entering up the Judgment; but the paper to support that contains no condition precedent to, but is predicated upon the award. It expressly states the award, and merely guarantees the return of one article when the other shall be restored. There is not the slightest ground of imputation against the Attorney.

Botsford, J.:

The award is final, so far as the Arbitrators have considered the accounts. It appears that the two articles they directed to be interchanged, they considered not matters of account, and as they could determine Law as well as fact, the Court will not decide that they have not done right; but at any rate the Defendants are guilty of *laches.* On the 11th July, they expressed that the award would be paid with the costs, although they were dissatisfied. The last day of Trinity Term was the 19th, and not until the 22d, did the Defendants intimate their intention to question the award. On the 1st of August notice of Taxation of Costs was given, and Judgment was signed on the 5th August. The Defendants should not have allowed the Term to pass.

As to the second point. No imputation can be cast upon the Attorney; he has acted correctly and with diligence.

Carter, J.:

The award is final. It awards £11 10 10 to be paid to the Plaintiff, and the other articles are not considered.—As a matter of Law—the Arbitrators determined, the two articles were not included in the reference, and did not consider them in making up the amounts of the accounts; but under the circumstances merely directed an exchange.

The Attorney appears to have acted properly and honorably, and the Defendants are clearly in *laches.*

Parker, J.:

Concurred. The Action was for Goods sold and delivered. The Arbitrators were to consider what Goods were so; they determined that the two articles could not be so considered. Some discrepancies appeared in the affidavits, which however could be reconciled; but it was worthy of remark, that there were in this case two Defendants, and two Attornies jointly acting for them—all of whom acted in the matter of the reference, and yet the Affidavit of only one had been offered: the Court should have had Affidavits from all. As to the conduct of the Attorney—when the term improper was applied, there should have been something to found it upon: there was clearly nothing. The Defendants were in *laches,* in not having moved in Trinity Term.

Rule discharged with Costs.

John Heaney, v. *Richard Lynn.* } *Action for a Malicious Prosecution for Felony.* Tried before Botsford, J. at the Northumberland Circuit, in September last, when the Plaintiff was non-suited. The question arose upon the production of the Record of Acquittal of the Plaintiff.

An order of the Judge, presiding at the Court of Oyer and Terminer, having been obtained, the Clerk of that Court was sworn as a Witness, and produced the Record, signed by himself, as the Officer of the Court. J. A. Street for Defendant, inquired from whence he obtained the Record, by whom was it made up, and had it been compared with the Indictment, &c. Berton for Plaintiff, objected to any question being put, and to the admission of any parol Evidence, to affect or impugn the Record. The objection was overruled, and it was stated by the Witness that the Record was made up by Mr. Harding, the Plaintiff's Attorney, who filed it with him, and that he had not examined its contents with the original papers. Two objections were then taken:

1st. That even if the Record was correct, an order of the Supreme Court should be obtained for its production, without which it could not be received in Evidence.

☞ *See Second Page.*