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*Feb'y. 11.

*April 16.

GEORGE GUNN.....APPELLANT;

AND

WILLIAM COX.....RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Action—Evidence—Judgment, parol evidence of determination of suit by, inadmissible.

In an action of damages for malicious arrest and imprisonment of plaintiff, under a *capias*, issued by a stipendiary magistrate in *Nova Scotia*, whose judgment, it was alleged, was reversed in appeal by the Supreme Court of *Nova Scotia*, oral evidence—"that the decision of the magistrate was reversed,"—was deemed sufficient evidence by the Judge at the trial of the determination of the suit below.

*PRESENT—Ritchie, C. J., and Fournier, Henry, Taschereau and Gwynne, J.J.

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Held (reversing the judgment of the Supreme Court of *Nova Scotia*), that such evidence was inadmissible, and was not proper evidence of a final judgment of the Supreme Court of *Nova Scotia*.

APPEAL from a judgment of the Supreme Court of *Nova Scotia*, rendered on the 2nd April, 1877.

This was an action brought by respondent (plaintiff) against appellant (defendant) to recover damages for alleged malicious prosecution.

The writ was issued on the 21st October, A. D. 1873, and the cause was tried before Mr. Justice *DesBarres* on the 28th March, A.D. 1876, when a verdict was found for the plaintiff for $150 damages.

A rule *nisi* was taken under sec. 212, c. 94 of Revised Statutes of *Nova Scotia*, 4th series, to set this verdict aside, the Judge having refused a rule, and was argued before the Supreme Court of *Nova Scotia* on the 12th day of April, A.D. 1876.

The rule *nisi* was discharged on the 2nd April, A.D. 1877.

The facts and pleadings sufficiently appear in the judgments on this appeal.

Mr. *Cockburn*, Q.C., for appellant:

There was no sufficient proof of the termination of the suit below. *R. L. Weatherbe's* evidence is the only evidence that the suit below was terminated. Mr. *Weatherbe* admits that the Judges on appeals of summary causes keep or use a docket and make minutes of their proceedings. This book should have been produced. There was, therefore, mis-direction on the part of the learned judge who tried the cause, who ought to have told the jury that there was not sufficient evidence to prove the termination of the proceedings under which the arrest was made. See *Panton* v. *Williams* (1); Rev. Stat. *Nova Scotia*, 4th series, c. 91, sec. 266.

(1) 2 Q. B. 169; L. R. 4 H. L. 521.

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Mr. *A. F. McIntyre*, for respondent:—

No objection was made to the charge by counsel on either side. The evidence of Mr. *Weatherbe*, which was offered and received to prove the termination of the proceedings had under the *capias*, was in all respects sufficient to establish the termination of those proceedings. The question whether judgment was given in favor of the respondent in the proceedings on the *capias* being a matter of fact was held to be properly provable as such by any competent witness present when the judgment was delivered and who knew the fact.

Dyson v. *Wood* (1); also *Sinclair* v. *Haynes* (2); *Pierce* v. *Street* (3); *Arundell* v. *White* (4).

There was no necessity under the practice of the Court to prove by record or memorandum the determination of the suit, for no record is filed in appeal cases, and execution issues in such causes upon the bill of costs filed without any record.

Rev. Stat. *Nova Scotia*, c. 91, secs. 1, 2, 3, 4, 19, 20, 31, 32, 33, 34; c. 94, sec. 77, 78 and 266.

The learned counsel also referred to *Broad* v. *Ham* (5).

THE CHIEF JUSTICE:—

This was an action for maliciously, and without reasonable or probable cause, procuring a party to be arrested and imprisoned on a writ issued against him at suit of defendant, and the declaration alleges, that "such proceedings were thereupon had in the said action that the now plaintiff obtained final judgment of *nil capiat* thereon against the now defendant, whereby the said action was determined;" and, in an added count, he

(1) 3 B. & C. 449.
(2) 16 U. C. Q. B. 247, 250, 251.
(3) 3 B. & Ad. 397.
(4) 14 East 216.
(5) 5 Bing., N. C., 722.

alleges that the magistrate who issued the writ gave judgment for plaintiff, the now defendant; that the now plaintiff, the then defendant, applied for, and perfected, an appeal from the said judgment to the Supreme Court according to the Statute, and the now plaintiff caused his appeal to be entered upon the docket of the Supreme Court, and did duly prosecute his said appeal in said Supreme Court, and such proceedings were thereupon had in said suit that the said judgment was reversed, and the now plaintiff obtained final judgment in said suit of *nil capiat* therein, against the now defendant, whereby said action was determined.

To this declaration defendant pleaded *inter alia*:

"6th. That the said action was not determined as alleged.

"9th. That the plaintiff did not appeal from the judgment of the said stipendiary magistrate as alleged.

"10th. That the said judgment was not reversed, as alleged, on appeal to the Supreme Court, whereby said action was determined as alleged."

On the trial, the judgment given by the magistrate appears to have been proved, and the only evidence given to support the allegation as to the appeal, reversal and final judgment that I can discover is as follows:—

Robert L. Weatherbe, sworn: I acted as Counsel for *Cox* on his appeal before the Supreme Court at *Truro*, at which Judge *McCully* presided. The decision of the magistrate was reversed.

Mr. *McDonald* objects.

Cross-examined: Don't know whether any judgment was entered in the Supreme Court on the appeal, or whether any execution was issued. I don't know whether Judges make entries on their dockets of the judgments which they deliver in summary and appeal causes, but I believe they make minutes.

Mr. *Thompson* objects.

And *Gunn*, defendant, says:

I was at the Supreme Court and heard the trial under the appeal.

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The only reference to this important allegation by the learned judge in his charge appears, after stating that in order to maintain suit it was incumbent on the plaintiff to give evidence of malice and want of probable cause for issuing writ and causing plaintiff to be arrested, to be comprised in these words "*and also to prove that the suit below was at an end.*"

A verdict having been found for the plaintiff, the defendant moved for a new trial on the ground, among others, of want of sufficient evidence of the termination of the suit in which the *capias* was issued. The Court discharged this rule and refused a new trial, and from this the defendant now appeals.

This is too plain a case to need any lengthened argument. There was no legal evidence of any determination of this suit, and the Judge should have directed a verdict for the defendant.

The case of *Pierce* v. *Street* (1), upon which the judgment of the Court is founded, has no application to this case whatever. In that case defendant had not declared within a year. Now we all know that formerly in *England* as well, I may say, as in *New Brunswick*, and I believe also in *Ontario*, by the general rule of law, a plaintiff must declare against a defendant within twelve months after the return of the writ; if he did not the cause was out of Court, and so most undoubtedly the cause was at an end, and there was no other way of showing it than, as was done in that case, by showing there was no declaration within the twelve months, and, therefore, Lord *Tenterden* says:

> There was quite sufficient proof that the suit was at an end at the time when this action was commenced.

And *Littledale*, J., says:

> The suit was determined by the plaintiffs not declaring within a year.

(1) 3 B. & Ad. 397.

And *Parke*, J.:

When the cause is out of Court, it must be considered determined.

And it is somewhat curious that *Arundell* v. *White* (1), referred to by *Parke*, J., though noticed by the Court below, did not serve as a guide to show that such evidence as was given by *Weatherbe* in this case was wholly insufficient, and that though there may be no extended records, some evidence from the minutes or records of the Court is requisite. There it will be seen, as noticed by *Parke*, J., when in the Sheriff's Court in *London*, the practice was, upon the abandonment of a suit by the plaintiff, to make an entry in the minute book, it was held proof of such entry was sufficient to show that the suit was at an end. This case is much stronger here, the cause was never out of Court and never abandoned. If the suit was determined at all, it must have been by a solemn judgment of the Supreme Court, reversing the judgment of an inferior tribunal. If such took place, to say that in a Court such as the Supreme Court of *Nova Scotia*, there was no entry or record of such a judgment, or no docket, minute, or memorandum book, or no document of any description fyled of record in which the decision of the Court was entered or kept, either by Judge or Clerk, nothing in the shape of a record to show how the parties' rights had been dealt with, and how the cause was disposed of, is simply incomprehensible and inconsistent with the Revised Statutes of *Nova Scotia* (4th series). If no judgment was entered on the appeal, the party who desired to take proceedings in which it was necessary to show the cause finally disposed of, should have, by proper application, obtained a final disposition on the records of the Court before bringing an action, in which the

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determination of the suit was essential to his right to recover. If it has been disposed of, then that fact should be shown by an exemplified or examined copy from the records of the Court, and not, as in this case, by a party who was present at the appeal simply swearing "the decision of the magistrate was reversed;" and this was objected to, which objection should have been sustained. Certainly, such a statement was not proper evidence of a final judgment of the Supreme Court of *Nova Scotia*.

FOURNIER, J., concurred.

HENRY, J.:—

This is an appeal from a judgment of the Supreme Court of *Nova Scotia*, in an action brought by the respondent to recover damages for malicious arrest under a writ of *capias*, issued by a justice of the peace at the suit of the appellant. To the respondent's declaration the appellant pleaded in substance, (and they are the only pleas necessary to be noticed):—

1st. A denial that he issued the writ in question without reasonable and probable cause.

2nd. That the suit commenced by the issue of the said writ of *capias* was not determined as alleged.

3rd. That he had probable cause for bringing the said action.

4th. That the respondent did not appeal from the judgment of the magistrate, as alleged.

5th. That the judgment given by the justice on the appeal whereby the said action was determined was not reversed as alleged.

On the trial of this cause an unsuccessful motion was made for a non-suit by the counsel of the appellant on the two following grounds:—

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1st. That there was no sufficient evidence to show the determination of the prior suit.

2nd. No sufficient proof of the want of reasonable and probable cause.

Under the charge of the learned Judge, before whom the suit was tried, a verdict was given for the respondent for $150 damages. A rule *nisi* to set aside the verdict and grant a new trial was subsequently granted, and the same was, after argument, ordered to be discharged with costs; and from that decision the appeal was had to this Court.

The grounds for setting aside the verdict embodied in the rule *nisi* were:—

1. Because the verdict is against law and evidence.
2. Mis-direction.
3. For the improper rejection and reception of evidence.
4. For excessive damages.
5. On the grounds taken at the trial.

Under the first and third objections the appellant can question the validity of the verdict.

The objection at the trial on the motion for non-suit was that no sufficient evidence had been given of the termination of the prior suit; and that is covered by the first ground taken in the rule *nisi*, and also in the third, which objects to the reception of the evidence received, after being objected to, of the termination of the suit given by the only witness on that point.

Entertaining the views I do as to the propriety of admitting that evidence, it will be unnecessary for me to refer to any other objection to the judgment. The only evidence adduced as to the determination of the prior suit was, as I copy it from the Judge's notes of the trial, as follows:

Robert L. Weatherbe sworn:—I acted as counsel for *Cox* on his

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appeal before the Supreme Court at *Truro*, at which Judge *McCully* presided. The decision of the magistrate was reversed.

Mr. *McDonald* objects.

The notes of trial show that Mr. *McDonald* was, on the trial, the counsel of the appellant. It is, therefore, open to the appellant still to object to that evidence, as the objection to it was over-ruled and that evidence submitted to the jury. On his cross-examination the same witness said:

Don't know whether any judgment was entered in the Supreme Court on the appeal, or whether any execution was issued. I don't know whether the Judges make entries in their dockets of the judgments which they deliver in summary and appeal causes, but I believe they make minutes.

To this evidence the counsel of the respondent objected.

We have, therefore, the evidence on cross-examination objected to also. I think that evidence was quite admissible, going, as it did, to show there was evidence in writing that should have been produced. Every lawyer knows that primary evidence is what is called for on every legal trial, and until that is shown to be incapable of production, from its having been destroyed or otherwise, secondary evidence cannot be received.

It is a distinction of law, and not of fact, referring only to the *quality* and not to the *strength* of the proof. Evidence that carries on its face no indication that better remains behind is not secondary but primary. The cases which most frequently call for the application of the rule now under consideration are those which relate to the *substitution of oral for written evidence*, and the general rule of law with respect to this subject is, that the *contents of a written instrument, which is capable of being produced, must be proved by the instrument itself and not by parol evidence.*

* * * * * *

And first, oral evidence cannot be substituted for any *instrument* which the law requires *to be in writing*, such as records, public and *judicial documents*, official examinations, deeds of conveyance of land, wills, &c. * * *. In all these cases the law having required that the evidence of the transaction should be in writing, no other proof can be substituted for that, so long as the writing

exists and is in the power of the party. Thus, for example, parol evidence is inadmissible to prove at what sittings or assizes a trial at *nisi prius* came on, or even that it took place at all; but the record, or, at least, the *postea* must be produced. So the date of a party's aprehension for a particular offence cannot be shown by parol, the warrant for apprehension or committal being superior evidence (1).

In his cross-examination, the witness before mentioned, when referring to Judges trying summary or appeal causes, says he believes "they make minutes," and certainly creates the impression that "there is better evidence beyond." He, the witness, only states that he acted for the respondent on his appeal, and that the judgment of the magistrate was reversed. He does not identify it as being the suit brought by the appellant under the *capias*, nor does he say how he came by the knowledge that the judgment was reversed. If oral evidence was at all permissible, he, if such were the case, should have stated that he was present and heard the judgment pronounced, or, in some other way, shown how he acquired the knowledge which might, for all he says, have been mere hearsay. It may be objected that he might have been cross-examined, and the source of his knowledge tested, but, I hold that the onus was on the respondent by the examination of his counsel to have got from the witness sufficient to show that he obtained his knowledge from a legitimate source. The evidence, therefore, in the bald way it is presented, does not, even if admissible, establish the fact that the particular suit referred to in the pleadings was determined.

Let us consider, however, the provisions for the trial of appeal cases in the Supreme Court of *Nova Scotia*. By section 77 of the *Practice Act*, Revised Statutes, 4th series, p. 456 :

In appeal causes, the appellant shall cause his appeal to be entered on the docket of summary cases, and in case he shall neglect to

(1) Taylor on Evidence (7th ed.,) pp. 358, 359 & 362.

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enter the same, the original judgment shall be affirmed at the instance of the opposite party, with costs.

Sec. 78. In all causes brought up by appeal and contested, the Court shall try the same anew.

Sec. 79 provides for a jury in summary and appeal cases at the discretion of the Court.

Sec. 80. In appeal cases, where the original judgment is affirmed, the final judgment shall include the debt and costs below, with the further costs, and execution shall issue for such debt and costs, or costs only as the case may require. Where the original judgment is reversed after the same has been enforced, the final judgment shall include the amount levied under the original judgment, together with the costs of reversal.

Sec. 81. In appeal cases the respondent may take out execution against the appellant or have recourse to the appeal bond.

Sec. 244 provides that:

The prothonotary shall examine and compare all bills of costs.

And that:

Before any such bill shall be charged against the plaintiff or defendant, it shall be allowed and signed by a Judge.

Sec. 235. Final judgment may be signed by any Judge, and the Judge shall set down the date on the docket. And the prothonotary shall mark on the record the day it was signed, but no marginal note shall be required thereon.

To carry out these enactments, it was necessary that judgment in summary and appeal causes should be signed. A docket of such causes was and is required, upon which, no doubt, minutes were made by the Judge or prothonotary. Bills of costs are to be taxed by the Judge after examination by the prothonotary; and other proceedings are to be in writing.

We must presume, without proof, that such proceedings in writing exist, and to which the rules of evidence apply. None were produced and nothing shown to dispense with their production. The evidence admitted being wholly irregular when objected to, and the termination of the previous suit being, therefore, not proved, the respondent has failed in an essential part of

his case. The appeal must be allowed and the rule *nisi* for a new trial be made absolute with costs.

TASCHEREAU, J. :—

One of the material allegations of the Plaintiff's declaration was that the original action by the present defendant against him was determined. By the 6th and 10th of his pleas, the defendant specially denied this allegation, which necessarily had to be proved at the trial. The plaintiff did attempt to prove it, but how? By parol evidence. Now, can it be seriously pretended that the judgment of a Court of Justice can be proved by parol evidence? The defendant was examined, but he does not admit that judgment was given in the first case. As far as I can see by the minutes of the evidence, no question was put to him about it. Of course, as said by the learned Judge in the Court below, as soon as a judgment is pronounced in Court, the suit is terminated, and an action, like the present one, may be immediately taken. But when it comes to prove the judgment, it has to be done according to the rule that the best attainable evidence must be adduced to prove every disputed fact. The cases of *Arundell* v. *White* (1), and *Dyson* v. *Woods* (2), cited by the respondent, only go to decide that the proceedings in Courts of inferior jurisdiction and Courts not of record may be proved by the minute books in which they are entered, or by copies of such books, or, perhaps, by the officer of the Court, or other competent person, if it is proved that no entry of them has been made in any official book. This cannot be applied to the Supreme Court of *Nova Scotia*, and, then, no minute book, no writing whatsoever has been produced here, nor has it been proved that none exist. The parol evidence pro-

(1) 14 East 216. (2) 3 B. & C. 449.

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duced, under the circumstances, seems, to me, perfectly illegal.

The case of *Pierce* v. *Street* (1), also cited by the respondent, is not in point. The question there was the determination of a suit by discontinuance. Here, the respondent alleges, in his declaration, that the first suit was determined by a judgment of the Supreme Court of *Nova Scotia*.

I am of opinion that in the judgment of the Court below discharging the rule for a new trial obtained by the defendant, there is error; that the defendant's appeal from the said judgment must be allowed, and that the said rule must be made absolute, the whole with costs against the respondent.

GWYNNE, J., concurred.

Appeal allowed with costs.

Solicitor for appellant: *R. L. Weatherbe.*

Solicitor for respondent: *Samuel G. Rigby.*

(1) 3 B. & Ad. 397.