

POWERS v. SHEPARD.

A deposition, in the caption of which the words "before me," preceding the name of the magistrate before whom the deposition purports to be taken, are omitted, is incompetent evidence; and if read in evidence, the verdict will be set aside.

The jurat of a deposition or affidavit, must show, by apt words, that the oath was administered by the person subscribing the jurat.

CASE, for deceit in the sale of a horse.

At the trial upon the general issue, the defendant offered in evidence several depositions, to the captions of which the plaintiff objected. The captions were in the form prescribed by the statute, except that the words "before me" preceding the name of the magistrate before whom the depositions were taken and sworn, were omitted. The objection was overruled, and the depositions read in evidence; and the jury having returned a verdict for the defendant, the plaintiff moved to set it aside, and for a new trial on account of the admission of the evidence.

Cushing, for the plaintiff.

Lovell, for the defendant.

GILCHRIST, C. J. There is nothing in the language of the statute, or of any rule of court, which in terms requires, that the words which were omitted in these captions should be inserted. But it does not therefore follow, that they are unnecessary to the sufficiency of the captions. There is no rule more important to be observed than that documents, confirmed by oath, should set forth that they are sworn before a person having proper authority. The authority is given by statute, and we cannot see that it has been duly exercised, unless the jurat shows it. The strictness to be observed in this respect, does not depend on the existence of rules of court, nor is it to be departed from because the statute is silent on the subject. It depends on the necessity of the thing itself. The objection may seem to be of but little importance; but if we are ever to use strictness, it should be in

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regard to depositions, and in all that relates to their captions. Here it is consistent with this jurat, that the oath was not administered by this magistrate at all. It may be true, that the deponent made oath as he is stated to have done in the caption, but that oath may have been administered by some incompetent person, and not even by a justice of the peace. There are two decisions to be found in the books expressly on this point, the omission of the words "before me." One is the case of the *Queen v. Bloxham*, 6 Ad. & E. (N. S.) 528. We have given the substance of the reasoning of the court in the above remarks. The other is the case of the *Queen v. Norbury*, 6 Ad. & E. (N. S.) 534, (n), in which case the court expressly approve the decision in the *Queen v. Bloxham*. Upon these authorities, and also because we approve of their reasoning, and think the decisions correct, we think the captions in the present case are defective. There must, therefore, be a new trial, as the depositions were incompetent evidence.

Verdict set aside.

STICKNEY & ux. v. STICKNEY.

Covenant is a proper form of action for the recovery of damages for the breach of a covenant, or contract under seal.

Covenant also lies upon a bond, for the recovery of damages for the breach of its conditions.

The general rule is, that a mere voluntary bond, without any consideration, is good:—*Seemle*: this rule, however, has its exceptions.

In a declaration upon a bond which is lost, and cannot be produced, it is necessary, not only to set out the substance of the whole condition of the bond, but also to prove the same, as alleged.

In covenant upon a lost bond, where *non est factum* is pleaded, and issue joined, a failure to prove a material provision of the bond alleged in the declaration, is a fatal variance.

In such a case, the plaintiff, upon motion, will be nonsuited.

If the obligees in a bond, with a condition to support them during their natural