[Heard 24*th April*, 1845.]

WILLIAM CLELAND, suing *in forma pauperis*, *Appellant.*

JANE PATERSON and others, *Respondents.*

Process.—Jury Trial.—Jurisdiction. An order for the trial of a cause not at the regular Circuits under the proviso in the 11th section of 1 William IV. c. 69, does not require to be in writing.

IN this case an issue, which was adjusted and sent for trial by Jury, was tried before a Judge, who was one of the Circuit Judges, on the 21st of May, four days before the circuit commenced. The appellant appeared at the trial without taking any objection. After verdict against him, he moved the Court in arrest of judgment in respect that there had not been any trial, because the circuit did not begin until the 25th of May, and no direction *in writing* had been given to hold the trial before the circuit, and therefore the Judge, (*Lord Cockburn*,) who tried the case, had no jurisdiction.

The objection arose under the 11th section of the 1 William IV. cap. 69, which is in these terms:—"And be it enacted, "that all causes or issues appointed to be tried before any Circuit "Court, shall and may be so tried before any one or more of the "Judges of the Court of Justiciary when upon circuit; and at all "trials before any Circuit Court the jury shall be taken from the "lists prepared for the trial of criminal offences: Provided al-"ways that it shall be competent to either division of the Court "of Session, if in their judgment it shall be considered necessary, "to direct any causes or issues to be tried by any other Judge or "Judges of the Court of Session, at any circuit town, and, if "necessary for the trial of the same, to cause jurymen to be "summoned in the manner provided by the before-recited acts."

CLELAND *v.* PATERSON.—24th April, 1845.

The Court refused the motion in arrest, and applied the verdict by a final decree in the action. The appeal was against this interlocutor.

Mr. Turner and *Mr. Anderson* for the Appellant, argued that the Court being one of Record, it could only speak by Record; if therefore the direction allowed by the statute were given, it could be shewn only by the written act of the Court; without such a written order it would be impossible for the party to know whether the requirements of the statute had been complied with, which he is entitled to know, as the jurisdiction does not arise under the common law, but is derived entirely from the statute. The presumption, indeed, was, that no order had been given, except perhaps some verbal communication from the President out of Court, because the Court had risen for the holidays, before the notice of trial for the ensuing circuit had been served.

Mr. Stuart and *Mr. Grant* for the Respondent, were not called on.

LORD BROUGHAM.—My Lords, it is quite evident that there is no ground for this objection being taken in this the last resort. The objection is entirely confined to one point, ought or not, in order to give jurisdiction to a judge, other than the Circuit Judge, the direction of the division of the Court to be in writing? That is the whole question. The Judges appear from this Report, (and it is not denied that this is an act of the Court,) to have examined into the fact, to have enquired whether there was a direction, and to have been satisfied that there was a direction through the President by the Division, because it could not have been a direction to the President through himself. It imports distinctly, therefore, that there was a direction given by the Division through the President to Lord Cockburn and the Jury Clerk. Now, the Act of Parliament does not say that the

CLELAND *v.* PATERSON.—24th April, 1845.

direction shall be given to the Judge, it only says that it shall be given to proceed in the trial in that manner, other than by a Circuit Judge. There must have been some practice existing on the subject. This is referred to as having been the uniform practice for the six or seven years which had elapsed after the passing of the Act, and the Court did not feel themselves justified in disregarding that practice and setting up a new rule which has no warrant by the terms of the Act, namely, the rule that this direction of the Court must peremptorily be in writing. The Court did not find that it had been the practice ever to give such a direction in writing at all, and therefore they held that this was sufficient.

I do not mean to say, that if this had been well founded, the mere appearing of the party to it, would have given a jurisdiction which did not exist before. Upon that I am not called upon to say a word, but it does not appear that there was that defect of jurisdiction which is the whole foundation of the appellant's case. The interlocutors must, therefore, be affirmed.

LORD COTTENHAM.—My Lords, I am of the same opinion.

LORD CAMPBELL.—My Lords, in this case, if Lord Cockburn could not have had jurisdiction, the appearance before him would not have given him jurisdiction, and the party by appearing would not be prevented from objecting that he had no jurisdiction. But as Lord Cockburn, a certain form being observed, might have had jurisdiction, the party having appeared, and having taken the chance of a verdict, I am strongly inclined to think that it is not competent to that party now to object that that form has not been observed.

But, my Lords, it is not necessary that we should give any precise opinion upon that point in this case, because I have no doubt, if we were to enquire, it would be found that in this case, there was a parol direction given through the President for the

cause to be tried. It is quite sufficient, therefore, for us to come to the conclusion, that in point of fact, there was that order, and then the only question to be raised, is, whether that order must be in writing. It appears to me, that there is no pretence for saying that it must be in writing, but that the order may be given by word of mouth, in the manner in which we believe it was given in this case.

I entirely concur, therefore, in the opinions which have been expressed, that there is no foundation for this appeal, and that the interlocutors must be affirmed.

Ordered and adjudged, That the petition and appeal be dismissed this House, and that the interlocutors therein complained of be affirmed.

J. ANTON and G. and T. WEBSTERS,—Agents.