CANADA REPORTS.

COMMON LAW CHAMBERS.

(Reported by Henry O'Brien, Esq., *Barrister-at-Law.)*

Donelly v. Tegart.

Con. Stat. U. C. cap. 126, secs. 3, 8—Setting aside proceedings—Laches—Jurisdiction of Clerk Q. B. in Chambers.

Where (on application to set aside proceedings, as in the case of an action against a J. P., for acts done under a conviction which has not been quashed) the facts relied upon would be a pleadable bar to the action, laches will not be imputed to the defendant because he does not apply before entering an appearance, though it might if he waited until after the expiration of the time for pleading.

The Clerk of the Queen's Bench sitting in Chambers has clearly jurisdiction to entertain such an application.

[Chambers, April 7, 1870—*Mr. Dalton.*]

This was a motion to set aside the proceedings against the defendant in this cause, under Con. Stat. U. C., cap. 126, secs. 3, 8. The action was in trespass against a magistrate, for acts done under a conviction, which conviction was quashed, but not until after the commencement of this action.

By the 3rd section of the above act it is enacted, that no action shall be brought for anything done under the conviction, until the conviction has been quashed; and the 8th section provides that in case such action shall be brought, a judge of the court shall, upon application of the defendant, and upon affidavit of the facts, set aside the proceedings.

The dates of the several proceedings did not clearly appear on the affidavits, but it did appear that the time for pleading had not expired.

Mr. Smith (Cameron & McMichael) shewed cause:

Mr. Dalton has no jurisdiction in the case, as the 8th section gives the jurisdiction to a judge of the court in which the action should be brought.

The defendant was concluded by his laches, inasmuch as he had not moved to set aside the writ of summons until after the plaintiff had declared.

John Paterson, contra.

Mr. Dalton.—As to the first point—The 4th and 5th sections of the act respecting proceedings in Judges' Chambers at Common Law, are perfectly clear as to the jurisdiction—there is jurisdiction.

As to the second point—that there was laches on the part of the defendant in not moving sooner—there is more to be said.

The case of *Moran* v. *Palmer*, 13 C. P. 450, to which Mr. J. B. Read has kindly referred me as in point here, was an action against a magistrate in which the venue was local under the same statute. Then the Common Law Procedure Act provides (sec. 8) that where the venue is local the writ of summons must be issued in the county where the venue must be laid. In that case the writ was issued in York, the cause of action being local in Wellington, and the plaintiff in his declaration properly laid the venue in Wellington. After declaration served, the defendant moved to set aside the writ of summons and all proceedings, because it had been issued in York, whereas it should have been issued in Wellington. The defendant's laches was held to conclude him; and it was held he should have moved against the writ before entering an appearance, and his application was discharged. The language of the Chief Justice is very clear:

On this point, he says, at p. 455—"I think the defendant was bound to raise the question as to the writ at the first possible opportunity. If he received a notice of action, that would be some ground on which to apply to a judge for particulars of plaintiff's demand, and having obtained the particulars, he could then have applied to stay proceedings, because the writ was issued out of the wrong county. I apprehend there is no doubt that particulars could be obtained in an action on the case, and could also be obtained before appearance. All the reasoning which applies to promptness in moving against an irregularity in ordinary cases extends to this. The statute, if applicable, requires the action to be brought within six months from the time of the act committed, * * * and if we set aside the writ the plaintiff's action is gone. * * * Whereas if the defendant had applied promptly, the writ might have been set aside in time to enable him to sue out another. It does not appear to me that in a case like this, any more than in any other case, a defendant can lie by and lull his opponent into security, and afterwards apply to set aside proceedings which he might have attacked before."

Now, the enactment which applies to the present case is, that "*no action shall be brought*" under the circumstances.

In *Moran* v. *Palmer* the objection was to practice and the mere manner of proceeding—it did not touch the cause of action—and the defendant was held precluded by the ordinary rule as to laches in cases of irregularity. But here the defect goes to the very cause of action itself—"*no action shall be brought.*"

Suppose that I discharged this summons and the cause went on—if the facts should appear upon proper pleadings at *nisi prius*, as they now appear, what could the Judge do but direct a a nonsuit? The words of the statute are so clear that the result is inevitable: there must be a nonsuit or verdict for defendant. If I could agree with Mr. Paterson that the statute affords no other remedy than this application, I should probably have discharged this summons. I should have had, at any rate, to inquire whether the plaintiff, not having moved at an earlier stage, was not precluded now, and the case would have been brought within the authority of *Moran* v. *Palmer*. But it is not so. The facts shew a defence to the action which is a pleadable bar—fatal to the plaintiff's case at the trial, and this being so, I think laches cannot be attributed to the defendant, as he has moved before pleading. Had he pleaded it might be argued that he had abandoned the right to this proceeding, and had put himself upon the jury. But at any time before that he has a right to claim that the proceedings should be set aside. It is certainly as much for the interest of the plaintiff as of the defendant that they should be.

The order is to set aside the writ of summons and all proceedings—with costs of the action and of this application to be paid by the plaintiff.

Proceedings set aside.