the defendant had appeared, or when an appearance was entered for him, or when he was in the actual custody of the marshal, could serve a declaration against him for any different cause of action than that he had been brought into court to answer; and the reason of it was that the defendant being actually or presumably in court, there was no necessity to take out other process against him, and that being in court for one purpose, he was present for all purposes, and for every one, and not only for the plaintiff who had brought him there. *Smith* v. *Miller*, (3 T. R., 627); *Miller* v. *Andrews*, (5 T. R., 634); *Sulyard* v. *Harris*, (4 Burr. 2180)

I here think, then,

That as a rule of law, personal service is not necessary, either of the order to attach or of the summons to shew cause why the garnishee should not pay over:—

That the service, if not personal, should at any rate be shewn to have been made upon the wife, or upon some member of the family at the dwelling-house of the party, in such a manner as would have constituted good service under the old practice of the declaration in ejectment, by which the possession was sought to be changed:—

That the service in the case of the attaching order is *primâ facie* not sufficient:—

That the acceptance of service of the summons to pay over by an attorney is *primâ facie* sufficient:—

That either of these services could have been set aside by an application for the purpose:—

That as no such application has been made, but as an attorney has appeared to shew cause against the validity of the last service, his appearance is in truth an appearance to the summons, and cures all previous defects.

But such an appearance as this must be distinguished from a substantive application, after proceedings have been taken upon the defective service, to set them aside: and from those cases where the court has held the service deficient when no cause was shewn; and also from those where service is not denied, but it is complained of as having been made on an improper day, as a Sunday, at too late an hour, at an improper place, or while the party was in attendance upon the courts, and so privileged for the time—for in all these cases the service is admitted, but the regularity of it is alone questioned, which is very different from a case where the effect and substance of the objection is that no service has been made at all, and yet there is the anomaly of the party being seen in court, and personally making an excuse for not being there.

Under all these circumstances I will make the order, which is, of course, subject to the correction and revision of the court.

Order accordingly.

COUNTY COURTS.

In the County Court of the United Counties of Huron and Bruce, before ROBERT COOPER, Esq., County Judge.

HOLMES v. McLEAN & ROSS.

Action on a joint and several promissory note. Set off by agreement of a separate demand. Demurrer. Equitable pleading.

This was an action on a joint and several promissory note, dated 1st May, 1860, made by the defendants, payable to the plaintiff on or before 15th April, 1861, for $130.

Pleas—The defendant Ross pleaded a set off of $400, balance due on a covenant dated 30th January, 1858, made between him and the plaintiff, whereby the plaintiff covenanted to pay him $800 on a day which had elapsed before the commencement of this suit. Alleging that at the time the note was made it was agreed between the plaintiff and the defendants that the plaintiff would deduct the amount of the note out of the amount due by him to the defendant Ross on the covenant, and concluding with the allegation that it was on this understanding that defendant Ross signed the note.

The defendant McLean pleaded on equitable grounds that he made the note jointly and severally with Ross, and for Ross's accommodation and as his surety only, which the plaintiff well knew. That when he made the note, there was outstanding and in full force against the plaintiff and in favor of the defendant Ross, the covenant set out in defendant Ross's plea. Averment that at the time of the making of the note it was agreed by and between the plaintiff and the defendant Ross, that the plaintiff should, at the maturity of the note, deduct the amount thereof out of the said covenant, and that in pursuance of that agreement the defendant McLean made the said note as aforesaid. This plea then proceeded as follows: "And the defendant McLean further avers that the plaintiff, at the commencement of this suit, was and still is indebted to the defendant Ross in an amount greater than the plaintiff's claim upon a deed bearing date" (Setting out the deed as in Ross's plea), concluding thus: "And the defendant McLean avers that the defendant Ross has always been ready and willing to deduct from said amount due on said covenant the amount claimed on said note by the plaintiff, and to set off the same against said covenant, of all which the plaintiff had due notice"

The plaintiff took issue upon and demurred to both these pleas, on the following grounds, among others.

Demurrer to Ross's plea—

1. That a debt due by the plaintiff to the defendant Ross cannot be set off in this action brought by the plaintiff against the defendants, McLean and Ross.

2. That the alleged subject matter of set off is not shewn in its nature and circumstances to arise out of or to be connected with the promissory note sued upon.

3. That the agreement in said plea mentioned, as stated, is a *nudum pactum*.

4. That said plea seeks to introduce parol evidence to vary, contradict and control, the operation of a written contract

5. That said plea confesses, without avoiding, the plaintiff's cause of action.

Demurrer to McLean's plea—

1. That the debt due by the plaintiff to the defendant Ross does not constitute an equity attaching to the note sued upon by the plaintiff.

2. Same as 2nd ground of demurrer to Ross's plea.

3. Same as 3rd ground of demurrer to Ross's plea.

4. Same as 4th ground of demurrer to Ross's plea.

5. That said plea discloses no matter entitling the defendant McLean to an absolute and unconditional injunction in a court of equity.

6 That said plea, if admitted as a defence in this action, would render necessary the taking of accounts before relief could be granted, and so is not such a plea as can be pleaded as an equitable defence in a court of law.

Joinder in demurrer.

The issues in law were first disposed of.

Saunders for demurrer.

Malcolm C. Cameron contra.

COOPER, Co. J.—The defendant Ross pleads set off. He sets up an outstanding specialty debt. It is not necessary to consider whether this could be set off without any agreement that it should be; for the plea goes further, and sets up an agreement—good—taking the statements to be true—that the two claims should be set off.

The plea is clearly good. It sets up that which if proven would be a good answer to the action.

Lest this should not be sufficient, the defendant has put nearly the same defence in substance in the shape of an equitable plea.

I do not understand the doctrine that an equitable plea must set up a state of facts, enabling this court to give complete relief. In a County Court there can be no injunction. If therefore every equitable defence on which the courts of common law cannot grant final relief is shut out, then the system of equitable defences at common law ceases in effect to exist. The language, "absolute and unconditional injunction," is not easily understood in relation to this argument. If it means that the plea is such, that if it were framed as a bill in equity it would not state sufficient facts to entitle the pleader to relief in equity, then the demurrer does not hold, for the plea does state such a case. It sets up a sufficient equitable defence. Both pleas might possibly have been more concise, but any surplusage does not render them bad. It