

Ont. Rep.]

CLUXTON V. DICKSON—FITCH V. WALKER—NOTES OF CASES.

[Q.B.]

CLUXTON V. DICKSON.

Date of added plea—Jury notice filed therewith—32 Vict., cap. 6, sec. 18.

Held 1. That a plea added after issue joined refers back to the date of the original pleas, and should not be dated as of the day when it is filed.

2. That such plea is a "last pleading" within the meaning of the Law Reform Act, cap. 6, sec. 18, sub-sec. 1, and may have a jury notice filed with it.

[Sept. 30, 1876—MR. DALTON.]

Action on the case. Issue was joined on the 20th March, 1876, and notice of trial given for the Spring Chancery Sittings at Peterborough. The trial was postponed at the sittings, and on Sept. 18th the defendants obtained leave to add a plea, which was filed as of that date, a notice for jury being served along with it. On the day following the service of the added plea, the plaintiff gave notice of trial for the ensuing Chancery Sittings. Cross summonses were then taken out on behalf of the plaintiff to set aside the jury notice and added plea, and on behalf of the defendant to set aside the notice of trial, and to postpone the trial till the Fall Assizes.

Oster shewed cause to the first summons, and supported the second, contending that the added plea was properly dated as of the day when it was filed, under the 77th section of the C. L. P. Act. Even if it is irregular, the plaintiff has waived the irregularity by giving notice of trial. The jury notice is regular, being filed with the last pleading: 32 Vict., cap. 6, sec. 18. The notice of trial should be set aside, as it had been irregularly given after the defendant has filed and served a notice for jury.

W. R. Mulock, contra. If the plea is irregular the jury notice must fall with it, as no order allowing the defendant to file it has been granted. The plea should be of the same date as the original pleas: *Short v. Simpson*, L. R. 1 C. P., 250.

MR. DALTON. It has been the practice of the Courts not to date an added plea, as it is a portion of the original pleas, and relates back to their date, otherwise there would be two sets of pleadings on the record. The plea is, therefore, irregularly dated. I think, however, that it is a "last pleading" within the meaning of the Law Reform Act, and that the jury notice is good. The plaintiff has not waived the irregularity in the plea by serving notice of trial, but he had no right to give such notice for the Chancery Sittings when a jury notice was filed. I therefore discharge the plaintiff's summons, and make the defendant's summons absolute, both without costs.

Order accordingly.

FITCH V. WALKER.

Ejectment summons—Currency of—C. S. U. C., cap. 27, sec. 3.

A writ of summons in ejectment, issued on 30th June, is from effete after midnight of the 29th Sept.

[Chambers, Oct. 14—20, 1876.—MR. DALTON and MORRISON, J.]

A writ of summons in ejectment was issued on the 30th June, 1876, and was served on the 30th September, following.

C. R. W. Biggar, for the plaintiff, obtained a summons to set aside the copy and service on the ground that the writ had expired at midnight on the 29th September.

Mr. Bishop (Fitzgerald & Arnold), contra.

MR. DALTON made the order, holding that the C. S. U. C., cap. 27, sec. 3, which provides that the writ "shall be in force for three months," means three months inclusive of the date of the writ. From this order the plaintiff appealed to a judge.

Arnoldi, for the appeal, cited *Scott v. Dickson*, 1 Prac. R., 360; *Leeson v. Higgins*, 4 Prac. R., 340; *Lester v. Garland*, 15 Ves., 248; *Webb v. Fairmaner*, 3 M. & W., 473; *Young v. Higgon*, 6 M. & W., 49; *Isaacs v. Royal Insurance Co.*, L. R. 5 Ex., 296; *McRae v. Waterloo Mutual Insurance Co.*, (before Galt, J. not yet reported).

Biggar, contra, cited *Converse v. Michie*, 16 C. P., 167; *Freeman v. Read*, 4 B. & S., 184, 185; *Russell v. Ledsam*, 14 M. & W., 588; *Bank of Montreal v. Taylor*, 15 C. P., 107.

MORRISON, J. discharged the summons without costs, taking the same view of the law as Mr. Dalton, but considering the question fairly open to argument.

NOTES OF CASES.

IN THE ONTARIO COURTS, PUBLISHED IN ADVANCE, BY ORDER OF THE LAW SOCIETY.

QUEEN'S BENCH.

HILARY TERM, 1876.

LAWRIE V. RATHBURN ET AL.

Registry Law—Omission to index deed—29 Vict. c. 24—Confusion of property.

The plaintiff claimed lot 25 under a deed from the heirs at law of S., the patentee, executed in 1875. Defendants claimed under a deed from