

C. L. Cham.]

CASEY V. McGRATH.

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at the end of the sawing season if the patent was satisfactory; that as no objection was at that time made to the patent, the \$300 then became due and payable by the defendant; also, that the defendant had purchased the log turner at the price of \$175, and that the plaintiff had also agreed to an abatement of \$25 for the putting up of the same. The learned judge entered a verdict for the plaintiff, and damages at \$246 with interest.

Bethune, for plaintiff, moved for a certificate for Superior Court costs.

Christie, for defendant, opposed the application, on the ground that the claim was for liquidated damages ascertained by the act of the parties, and reduced by payment to a sum below \$400.

PATTERSON, J., granted the certificate applied for on the ground that although the price was ascertained by the agreement of the parties, yet the amount did not become due and payable until the fulfilment of a condition which the plaintiff had to prove, and about which there was a conflict of evidence, and he was therefore entitled to a certificate for full costs.

Certificate granted.

COMMON LAW CHAMBERS.

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Ejectment—Notice limiting defence.

When a defendant files his appearance, the cause is at issue, and the plaintiff may serve issue book and notice of trial. Defendant may, however, within four days, give notice limiting his defence; and, if he do, may, under the powers of amendment in the Administration of Justice Act, have the issue book amended in accordance with the limitation, but he is not entitled to have the notice of trial set aside.

[Chambers, Nov. 2, 1875.—MR. DALTON.]

The defendant having filed his appearance and notice denying plaintiff's title, and claiming title in himself in ordinary form, the plaintiff made up the issue book and served it together with notice of trial. Subsequently to the service of the issue book and notice of trial, but within the four days allowed by the C. L. P. Act, sec. 12, defendant filed notice limiting his defence; and immediately obtained a summons calling upon the plaintiff to shew cause why the issue book and notice of trial herein should not be set aside for irregularity, on the ground that the issue book did not contain defendant's notice limiting defence.

Osler shewed cause. As soon as a defendant in ejectment files his appearance, the cause is at issue, and plaintiff is at liberty to serve the issue book and notice of trial forthwith. According to section 12 of the C. L. P. Act, "an appearance without such notice confining the defence to a part, shall be deemed an appearance to defend for the whole." If defendant wish to limit his defence, the proper practice is to file and serve notice to that effect with the appearance; and if this is not done, plaintiff may proceed on the understanding that the cause is at issue. The notice which defendant files, limiting his defence, is on its face embarrassing; so that the proceeding looks very like a trick to throw the plaintiff over the Assizes, and, on the authority of *Vrooman v. Vrooman*, 17 U. C. C. P. 523, should be struck out. Under the powers of amendment in the Administration of Justice Act, the defendant should not be allowed to defeat the plaintiff's notice of trial.

Davidson contra. Under section 12 of C. L. P. Act, defendant's notice limiting his defence is perfectly good if filed within four days after the filing of his appearance. This is a right given by the Act, which cannot be overridden by plaintiff's voluntary expedition in making up and serving his issue book before the expiration of the four days. The notice of trial should be set aside, and the issue book amended by inserting defendant's notice limiting his defence. See *Grimshawe v. White*, 12 U. C. C. P. 521, and *Phillips v. Winter*, 3 Prac. R. 312.

MR. DALTON.—It is quite true that under the Act defendant has four days after appearance within which to file his notice limiting defence. It is also true that when a defendant wishes to defend for a portion merely of the land claimed by plaintiff, the practice is to file a notice limiting his defence to the particular portion which he claims at the same time that he files his appearance. If, then, as in the present instance, the defendant choose to take advantage of the four days allowed him by section 12, and file his appearance without such notice, the plaintiff is also justified in considering that the defendant intends to defend for the whole. This being the case, the plaintiff, when he finds a simple appearance filed, may properly treat the cause as at issue, and proceed accordingly. The clause of the Administration of Justice Act as to amendments obviates, in my opinion, the difficulties under the former practice. The defendant has, of course, a right to have the issue book amended so as to include his notice limiting defence; but I cannot set aside plaintiff's notice of trial.