CORRESPONDENCE.

Division Courts—Abandonment of excess beyond $100—Effect thereof when less than $100.

To the Editors of the Law Journal.

Gentlemen,—I would ask your opinion on the following point of Division Court practice:

A person has a claim against another, amounting to, say, $110, and he sues in the Division Court, abandoning the excess of $10 above the jurisdiction of the court. In his particulars of claim he charges the defendant with all the items of account, and states that the excess of $10 is abandoned. Supposing that the plaintiff succeeds in proving only such items as amount in the whole to $80, would the judge act correctly in deducting from that sum the excess of $10 abandoned, and giving judgment for $70 only, on the ground that the abandonment of the $10 was equivalent to the crediting of it, and that amount of the plaintiff's credits should be deducted from the amount of proved debits?

I ask this question, having frequently seen causes decided in this way, and being inclined to doubt the correctness of the principle.

If followed out, the ruling would in some cases lead to rather curious results. Suppose the claim were for $180, the plaintiff abandoning $80, and from want of proper evidence he was prevented from proving all but $60. The $80 must still be credited to the defendant, according to the ruling; and the plaintiff, instead of getting a judgment for $60, would have a verdict against him for $20!

Yours, very truly,

Prescott, Oct. 6, 1863. L. E.

[The question is one which will admit of some argument, and the statute might with advantage be more explicit. It is worthy of notice that the only clause in the act which gives an express right to abandon the excess over $100, would appear to apply only to suits against absconding debtors (Con. Stat. U. C. cap. 19, sec. 205). Section 59 of the same act gives the right only by implication, but, taken in connection with the Division Court rule, which may be considered as part and parcel of the act, we suppose the right cannot be questioned.

It may be said that a sum once abandoned cannot be recalled or claimed, and that therefore a plaintiff or defendant, having proved a certain portion of his account, should properly suffer a reduction of the sum abandoned from the amount so proved, as otherwise he would be giving up that which he really never had a right to claim, so far as his evidence went to show. We cannot think, however, that the Legislature intended that this abandonment should be taken in its literal sense, and doing so would clearly in some cases work injustice. We believe that the spirit and true meaning of the enactment is, that a suitor may claim *all he can prove*, not exceeding $100, and that any decision to the contrary is at all events not in accordance with equity and good conscience.—Eds. L. J.]

UPPER CANADA REPORTS.

COMMON PLEAS.

(*Reported by* E. C. Jones, Esq., *Barrister-at-Law, Reporter to the Court.*)

Merrall v. Ellis et al.

Con. Stat. U. C. cap. 24 sec. 30—Effect thereof—Repleader.

Where plaintiff declared upon a recognizance of bail, dated 6th December, 1854, alleging as a breach that the principal departed from the limits, without being released therefrom by due course of law, and defendant pleaded—1. That the recognizance was entered into before 5th May, 1859, and that afterwards the principal surrendered himself into the custody of the sheriff of the county of Brant, and while in such custody gave and substituted for the recognizance a bond, in conformity with Con. Stat. U. C. cap. 24 sec. 30, which was allowed by the county judge, and so that the recognizance was released and discharged. 2. A similar plea, with the exception that it was stated the allowance was endorsed after the commencement of the action; and plaintiff took issue on the pleas, and stated that he sued not for the cause of action in the pleas admitted, but for the non-performance and breach of the condition of the recognizance prior to the substitution of the bon; to which the defendants rejoined that the alleged non-performance and breach in the replication mentioned are the identical breach and non performance set out in the declaration; on which the plaintiff joined issue; and the jury found a verdict for plaintiff on the first issue, with damages assessed at $1,651 59, and for defendant on the second and third issues; the court made absolute a rule to set aside the verdict, and awarded a repleader, on payment of costs by plaintiff.

Semble, Con. Stat. U. C. cap. 24 sec. 30, which enacts that persons who, before 4th May, 1859, had given bail or security under a writ of *ne exeat* or *ca. sa.*, may surrender themselves into custody, and substitute for their bonds or other security theretofore given, a bond or other security to the effect and amount mentioned in the act, and thereupon the existing bail or security shall be discharged or released, does not destroy a cause of action which had accrued for breach of the condition of the original security before the giving of the substituted security.

This was an action of debt on a recognizance of bail, dated 6th December, 1854. The writ of summons issued on 11th August, 1862.

The declaration alleged that defendants, by recognizance, became bail for one Thomas T. Transom that he should remain at the suit of the plaintiff, within the limits of the gaol of the county of Brant until released therefrom by due course of law, and, in the event of his failing, that they would pay such sum of money, costs, sheriff's fees and poundage as the said Transom was liable to pay on the writ *of ca. sa., on which he had been arrested; that the defendants* justified in due form of law; that the recognizance was duly filed in the office of the Deputy Clerk of the Crown and Pleas in the county of Brant, and notice given to the plaintiff; that the recognizance was enrolled of record; and that Transom was duly admitted to the limits of the said gaol, in pursuance of the recognizance and of the statute. Yet Transom departed from the limits without having been released therefrom by due course of law, and that neither he nor defendants have paid the said sums of money.

The defendants pleaded—1st. That the recognizance was entered into before the 5th May, 1859; that afterwards, and after the passing of the act (Con. Stat. U. C. cap. 24 sec. 30) and before the commencement of this suit, Transom surrendered himself into the custody of the sheriff of Brant, and, while in such custody, gave and substituted for the said recognizance a bond, in conformity with that statute; and, within thirty days from the execution of the bond, procured it to be allowed by the judge of the county court of the county of Brant, and the allowance to be endorsed thereon, which bond is filed in the office of the sheriff of the county of Brant, of all which premises the plaintiff had notice, and so defendants say the recognizance was released and discharged. 2nd. A similar plea, only stating that the allowance of the bond was endorsed after the commencement of this suit.

Replication—The plaintiff takes issue on the pleas and says that he sues not for the cause of action therein admitted, but for the *non-performance and breach of a condition* of the said recognizance made by Transom, prior to the giving and substitution of the bond and the allowance thereof.

Rejoinder—As to so much of the replication as states that the plaintiff "sues not for the cause of action (in the pleas mentioned, was apparently meant, as the replication contained the words "therein mentioned") but for the non-performance and breach of a certain condition of the said recognizance, in the said declaration mentioned, made by the said Transom, prior to the giving and substitution, &c.," that the alleged non-performance and breach, in the replication mentioned, are the identical breach and non-performance