of one was a discharge of the whole, no matter if the person so discharged was primarily liable to pay the debt or not. But the legislature have unmistakably declared their intention of preserving the right to the defendants to call each other as witnesses, and to allow to each any set off that arose out of the note transaction (and as the first statute stood, any set-off whatever) which could not be done if they were to be viewed merely as joint contractors; and then as if to put the matter beyond doubt the 26th section already quoted declares that the rights of the parties to the note or bill between themselves are not to be affected

This section, in my judgment, may be fairly read as applying to the preservation of the plaintiff's rights as well as to those of any other of the parties to the bill or note. If the exception had not been introduced it might be contended that the words "several parties" to the bill or note in the way they are inserted in the statute mean parties other than the plaintiff in the action. The exception being introduced, it is then manifest the plaintiff is one of the parties referred to in the section, for it says—"Saving only the rights of the plaintiff so far as they may have been determined by the judgment." Then are there are any rights of the plaintiff undetermined by the judgment which exist and which are to remain the same as though the Act had not been passed? The wording of the section seems to imply that such rights do exist, and that only such of them as have been determined by the judgment are taken away. Were it otherwise intended the section would have simply declared that the rights of all the other parties to the bill except the plaintiff should remain the same as if the Act had not passed. The amount the plaintiff is entitled to recover from the defendant and the right to recover against each is determined by the judgment, and under the statute as between the plaintiff and the other parties to the bill or note that is so far determined that the right to bring them into discussion again does not "*remain*." But the right to release a drawer or endorser without thereby releasing the maker or acceptor, still in my judgment remains. That was a right which existed before the Act was passed, and which ought to remain. There is no justice in the ground taken by the defendant—it is purely technical—and if we can, without doing violence to any principle of law, preserve to the plaintiffs their right to recover money undoubtedly due them—we ought to do so. I do not think the legislature ever intended to place a plaintiff in any worse position than he would have been in if he had sued separately when they compelled him under the penalty of losing costs to sue all the parties to the bill in one action, and if the effect of the enactment is that the plaintiff cannot compound with an insolvent endorser on a bill without discharging the maker his rights are prejudicial, without any corresponding advantage to himself, and without any apparent reason therefor.

Why should not the plaintiffs' rights in this respect be preserved after the judgment as well as before? The proceeding authorised by the Act was certainly a novel one—practically it was found to work well, and after it had been in operation about fifteen years, the clause limiting its operation to bills under a hundred pounds was repealed. I doubt if this would have been done if it had been supposed that the construction now contended for by the defendant was the true one. The rights of all parties to a bill were to be protected so far as was consistent with the bringing of the action in this form, and as I cannot see any reason why the legislature did not intend to preserve to a plaintiff rights similar to those exercised by these plaintiffs, and as the words of the 26th section seem to me to be broad enough to cover such rights, I think they ought to recover, and are entitled to judgment on the demurrer to the replication to the second and third pleas. I think it sufficiently appears from the replication that the judgment sued on was an action under our statute against the drawers and acceptors of a bill of exchange.

HAGARTY, J.—Our legislature, for reasons satisfactory to themselves, made an innovation on long-established law by permitting, and under penalty of loss of costs practically compelling, the joinder of the various parties to a bill or note in the same action. It appears to me, after the best consideration I can give the point, that in so doing it was intended to leave the respective rights and responsibilities of the parties amongst themselves untouched. And that although in form the recovery of judgment presented the several defendants as joint debtors, that it was designed to leave the plaintiff to deal with them, and them to deal with each other, as if separate judgments had been recovered. The rule of law that the taking in execution the body of one joint debtor was in effect a discharge of all others, is at best one of a technical far more than a meritorious character.

It seems to me that to apply it to the case of a judgment recovered solely on the authority of our provincial statutes, would be to extend the technicality instead of confining it within its well established bounds An opposite view might be pushed to inconvenient lengths. *Prima facie*, any one defendant paying the whole of a joint judgment in contract, has his claim for contribution against his co-defendants. I think it certain that the co-defendant is allowed to go behind the judgment, as it were, and shew that he was a mere surety for, or joint maker with the other defendant for the latter's accommodation.

I do not see why a plaintiff who obeys the plain requirement of our statute, may not have as good a right to shew that although in form his judgment against several defendants as co-contractors, yet that in substance they must stand towards him in the same footing as if he had sued them separately. I give this opinion with some hesitation, but I see no other way by which I can carry out what appears to me to be the intention of an Act of Parliament, which, it is admitted, makes a clear alteration in the ordinary course of law. It has not been argued before us that separate judgments might have been entered under our statute, and it is possible that plaintiffs should have sought the aid of the court to amend the entry to entitle him to the full benefit of the construction we place on the statute.

Judgment for plaintiff—DRAPER, C. J., dissenting.

CHAMBERS.

Reported by ROBERT A. HARRISON, Esquire, Barrister-at-Law.

SKELSEY v. MANNING ET AL.

Issue book—Replication in denial of plea—Service of Notice of Trial.

Held. 1. That where notice of trial is irregular defendant is not bound to wait till a verdict is rendered against him, and then move against it on the ground of irregularity: his more proper course is to move to set aside the notice before trial too

Held. 2. That there can be only one issue book in a cause, which issue book must contain all the pleadings in the cause to issue. Where an issue book omitted the pleas of one of several defendants it was held to be irregular

Held. 3. Plaintiff can only serve notice of trial with his replication where that replication is in denial of defendant's pleading. Where notice of trial was served with a replication confessing and avoiding the plea of defendants, it was set aside with costs.

(Chambers, May 9, 1862.)

This was an action on contract brought against three defendants. Two of them, Manning and McDonald, appeared by one attorney, and the remaining defendant, Wright, appeared by a different attorney.

The declaration in the first count set out the contract for the doing of certain work in the County of Grey, and averred non-payment as a breach. The common counts were added.

Defendant Wright pleaded to first count that he did not agree in manner and form as alleged in the declaration. He pleaded never indebted to the common counts.

Defendants Manning and McDonald pleaded—

1st. To first count. Did not agree.

2nd. To second count. That no estimates were to be paid unless upon certain monthly certificates, and that before action defendants paid all estimates given upon monthly certificates.

3rd. To third count. That work to be done to satisfaction of County Engineer, and not so done.

4th. To so much of first and second counts as regards extra work, that none was to be paid for unless ordered in writing, &c.; and that defendants paid for all so ordered.

5th. To so much of first and second counts as regards extra haul of gravel, &c; non-performance of, a condition precedent.