

C. L. Cham.]

BARBER V. ARMSTRONG.

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giving Acre leave to sign judgment. Wallace neglected to withdraw his appearance as directed, and Acre took no steps to obtain judgment, or to take possession of the land which was offered to him. It consequently remained vacant, at least so far as concerned the fifty acres claimed by Wallace.

Many other facts appeared on affidavit and were discussed, but were not material to the point on which the case turned.

*O'Brien* shewed cause:—

1. So long as a defendant is either in possession of or claims any interest in the land, the writ against him cannot be set aside; and he does not now, as he should do to make out his case for relief on this application, disclaim title or interest: *Hall v. Yuill*, 2 Prac. R. 242; *D'Arcy v. White*, 24 U. C. Q. B. 570, and see *Kerr v. Waldie et al.*, 3 C. L. J., N. S., 292, 4 Prac. R. 138.

2. The writ may properly be directed to the person "entitled to defend the possession of the property claimed," even though he be not in actual possession: Ejectment Act, sec. 1, 2. And the writ need not now be directed, in case of a vacant possession, to the person last in possession, as was the law under 14, 15 Vic. cap. 114, sec. 1.

*J. A. Boyd*, contra:—

The writ should have been directed, this being vacant land, to the person last in actual possession: *Street v. Crooks et al.*, 6 U. C. C. P. 120; *Benson v. Connor*, *Id.*, 359; and the writ not being addressed to the tenant in possession is irregular: *Thomson v. Slade*, 25 L. J. Ex. N. S. 306.

The sole question to be determined in ejectment is, who is entitled to the possession without regard to the manner in which he has entered: *Robinson v. Smith*, 17 U. C. Q. B. 218.

RICHARDS, C. J.—I cannot hold that a person can be compelled to defend an action brought to recover possession of land of which he is not at the time in possession, even though he may claim to be the owner of it. Of course if he does not desire to litigate, he need not appear, but then he makes himself liable for costs in an action for mesne profits. Possession in this case appears to be open to either party, but neither seems to be desirous of taking it.

I think the order should go, but as the conduct of the defendant does not appear to me to be what it should have been, looking to all the facts as they appear from the affidavits, the order will go without costs.

*Order accordingly.*

BARBER V. ARMSTRONG.

*Replevin—Pleading.*

*Held*, 1. That section 18, Con. Stat. U. C. cap. 29, applies only to cases of a wrongful taking and detention within the latter part of section 1 of that act.

2. That the second count of the declaration set out below was in case and not in replevin, and could not therefore be joined with an ordinary count in replevin; but even if intended to be a count in replevin under the provisions in the latter part of section 1 it is improper, the facts being, that the action was against a pound-keeper for detaining certain horses distrained *damage feasant*, and therefore a case "in which by the law of England replevin might be made," and in either case the count must be struck out.

[Chambers, November 1, 1869]

This was an action of replevin. The declaration contained two counts; the first an ordinary

count in replevin, but omitting to state the locality in which the taking took place. The second count in its introductory part stated that the defendant was a pound-keeper, and as such received and took into his custody certain goods and chattels of the plaintiff, to wit, certain horses, &c., and that whilst the said goods and chattels were in the defendant's custody as such pound-keeper as aforesaid, and previous to the sale thereof, he, the plaintiff, considering and contending that the said goods and chattels had been and were illegally impounded in pursuance of and as required by the fourth sub-section of section 355 of 29 & 30 Vic. ch. 51, offered to give to the defendant and tendered to him good and sufficient and satisfactory security for all costs, damages and expenses that might be established against him, and did thereupon, as the owner of the said goods and chattels, demand from the said defendant the delivery up of the said goods and chattels to him, the plaintiff, as he lawfully might. Yet the defendant wrongfully refused to accept the said security or any security whatsoever, and wrongfully refused to deliver up to the said plaintiff the said goods and chattels, and unjustly detained the same from the said plaintiff against sureties and pledges, until, &c.

Upon being served with this declaration the defendant obtained a summons calling upon the plaintiff to show cause why the second count of the declaration should not be struck out, on the ground that the same is calculated to prejudice, embarrass and delay the fair trial of this action, and that the said count cannot, if in case, properly be joined with the first count of the said declaration, and if in replevin is separable; or why the defendant should not be at liberty to plead and demur to the declaration, on the ground that there is a misjoinder of counts, or why the first count should not be amended at plaintiff's expense, by stating the particulars of the place whence the chattels, &c., therein mentioned, were taken.

*D. McMichael* shewed cause, contending that although the first count was in replevin yet that supposing the second count to be in case, it might be joined under the provisions of the first section of Con. Stat. U. C. ch. 29, entitled, "An Act relating to Replevin," otherwise it would not be possible for the plaintiff to avail himself of the provisions therein contained for "the recovery of the damages sustained by reason of such unlawful caption and detention, or of such unlawful detention, in like manner as actions are brought and maintained by persons complaining of unlawful distresses." And if even nominal damages are given, and such would be the result without such a count as this, such recovery could be pleaded in bar of any subsequent action for substantial damages.

*Oster*, for the defendant, contended that the count was in case, in which event it was a misjoinder of action, under the provisions of the Common Law Procedure Act, section 73, or if it should be held to be in replevin then it was unnecessary and should be struck out, and that the provisions of the act relating to replevin respecting damages did not refer to cases like the present, but to cases where the plaintiff brought replevin in place of trespass or trover. He also contended that in this case it was necessary to