

consent of Osborne to have him added as a co-defendant, with leave to Osborne to set-off or counter-claim against plaintiff for (1) arrears of rent; (2) conversion of goods; (3) rescission of an agreement for sale of goods.

Held, that the matters in respect of which Osborne desired to counter-claim do not arise out of the subject matter of the action, and are not involved in the cause or matter in respect of which the action is brought.

Montgomery v. Foy, 14 R. Sept. (1895), distinguished.

Application refused with costs in the cause to plaintiff in any event.

McCarler, for application.

Harvey, for plaintiff, contra.

SCOTT, J.
In Chambers. }

[March 5.]

MCCARTHY v. BRENER.

Practice—Service out of jurisdiction—Small debt procedure.

This was an application to set aside the service of a summons issued out of this Court under the provisions of the Judicature Ordinance for small debt procedure (Ord. 5, 1894), and served on the defendants at London, Ontario, where they resided, without any order having been obtained, on the following grounds: (1) That defendants are resident and domiciled out of the jurisdiction of the Court, which has no inherent jurisdiction over them. (2) That the Legislature has no power to subject such persons to the jurisdiction of the Courts. (3) That there is no Ordinance authorizing service out of the jurisdiction of a summons such as this. (4) That the summons was not issued for service out of the jurisdiction, and no leave has been obtained. (5) That the service has not been allowed by a Judge, nor was leave obtained for such service. (6) That it does not appear by the pleadings and proceedings that this is a proper case for service out of the jurisdiction. (7) That sec. 32 (e) of Ord. No. 5, of 1894, has not altered the law respecting service out of the jurisdiction.

Held, (1) that as the principle of assuming jurisdiction over absent defendants in certain cases is part of the universal practice of nations and the colonies (Piggott, pp. XLVIII., and 201), and the Dominion Parliament has conferred on the Territorial Legislature the right to provide for the administration of justice in civil cases in the territories and procedure in the territorial Courts. The Territorial Legislature has the right to assume jurisdiction over absent defendants, and has power to make provisions for service on them out of the jurisdiction as a part of the procedure of the Courts.

Held, (2) that the ordinance does authorize the service out of the jurisdiction of the small debt summons, and that no order is necessary either for the issuing or serving of the summons.

Held, (3) That it is not necessary to show by the statement of claim that the cause of action is one falling within the cases mentioned in sec. 32 of the Judicature Ordinance, but if the defendant can show affirmatively that it is not a case where service out of the jurisdiction would be allowed under the said section, the service of the summons will be set aside.

Application dismissed, with costs in the cause to the plaintiff in any event.

Muir, Q.C., for application.

P. McCarthy, Q.C., plaintiff in person, contra.