The Victoria Plank Road Company v. Simmons.

Appeal from sessions—13 & 14 Vic., ch. 54.

Quære, whether a party, having appealed to the Quarter Sessions, under 13 & 14 Vic., ch. 54, from a conviction by a justice of the peace, has any right of appeal from the decision of that court.

If such right exists the conviction must be returned to the court above, on entering the appeal.

The appellant, having been convicted by one Robert Bird, a justice of the peace for the county of Hastings, for passing a toll-gate on defendants' road without paying the lawful toll, appealed to the Quarter Sessions, where the case was tried by a jury, and a verdict rendered for respondents, upholding the conviction. The proceedings were removed into this court, by *certiorari*, but the return to the writ set forth only the evidence, and the charge of the chairman of the sessions to the jury.

Jellett for the apellant, *Wallbridge*, Q. C., contra.

The court held that the conviction should have been returned, being the ground-work of the proceeding, and that for want of it the cause was not properly before them, and could not be entertained. They also expressed doubts whether there was any right of appeal to this court, under the circumstances, the defendant having appealed to the Quarter Sessions, under 13 & 14 Vic., ch. 54, and given the bond required by that statute, the condition of which is that the appellant shall "appear at the said sessions and try such appeal, *and abide the judgment of the court thereupon*;" but as the parties had both concurred in bringing the matter up, the appeal was dismissed without costs, and the record was ordered to be remitted to the court of Quarter Sessions.

Duffield v. Great Western Railway Company.

Demurrer—Surplusage—Practice.

An Allegation of damages on a ground in which the Plaintiff is not entitled to recover does not form ground for demurrer to a declaration.

Mere surplusage is not a good ground for demurrer.

(6th October, 1857.)

This action was brought by the plaintiff as administratrix of the late Edmund Duffield, for damages on account of his death, which was occasioned by the Desjardins Canal Bridge accident on the defendant's line of Railway, near Hamilton.

The declaration, after setting out the accident and death of said Duffield, proceeded, "and thereupon the plaintiff, as such administratrix as aforesaid, and for the benefit of the said Ellen Duffield," (plaintiff), "and also for the benefit of Mary Duffield, sister of the said Edmund Duffield, brings her suit," &c.

The defendant demurred to this declaration on the ground that the action was brought on behalf (among others) of Mary Duffield, no damages on her account being recoverable at Law.

Morphy (*H. B.*) applied to have this demurrer struck out as frivolous on the ground,—1st. That even if the claim on behalf of Mary Duffield were not good, yet it was not a cause of demurrer to the *whole* declaration. He cited on this point *Amory* v. *Brodrick*, 1 D & R, 361, 5 B & A, 712, and *Duffield* v. *Scott*, 3 T R. 374. 2d. That a non-compliance with a rule of practice not affecting the substance of the pleading cannot form ground for demurrer. He cited on this point *Vere* v. *Goldsborough*, 1 Bing. N. C. 353-4; *Tyndall* v. *Ullestone*, 3 Dowl. 2; *Darling* v. *Gurney*, 2 Dowl 235. Nor can a mere inaccuracy not affecting the substance of the plea. He cited on this point *Marshall* v. *Thomas*, 4 Moore & S. 98: *Strangham* v. *Buckle*, 1 H. & W. 519; Harrison's C. L. P. Act, p. 199, notes.

Draper, C.J. C.P.—I strongly incline to treat the demurrer as frivolous. If the allegation complained of were omitted, an entirely good cause of action would remain, and *utile per inutile non vitiatur*. It seems to me like claiming damages, on a breach of contract, on several grounds, some of which the plaintiff cannot be allowed to go into. The allegation is surplusage, as it strikes me, and may be wholly rejected and therefore is no ground for demurrer. It is no ground of demurrer to a breach that damages are claimed which plaintiff is not entitled to recover: (*Amory* v. *Brodrick*, 5 B & A 712, and see the cases collected in notes 1 to Saunders Reports, 285 & 6.)

I think the plaintiff on the whole entitled to the order to set aside the demurrer; she may, if she prefers it, take the order to amend her declaration without costs. Order granted.

Mercer v. Voght et al.

Venue—Change thereof—Practice.

In all transitory actions the venue may be changed by either plaintiff or defendant on his showing to the Court or Judge a reasonable ground therefor.

The plaintiff must *amend* his declaration in order to change his venue.

In order to expedite the trial of the cause, when plaintiff swears that otherwise he will probably lose his debt, it may be considered reasonable ground for his changing his venue.

(1st December, 1857.)

The particulars of this case appear in the judgment.

Hagarty, J.—This is an action on a note—plea "non fecit. Venue is laid in Oxford, and Plaintiff moves on affidavit for leave to amend his declaration by changing the venue from Oxford to York and Peel, on the ground that unless he can try the cause at the Winter assizes in the latter counties, he is very likely to lose his debt. He also swears that, from conversations with defendant he believes the plea was pleaded to gain time merely, and that there is no real defence. No affidavits are filed by defendant, but he objects to the proposed change.

The practice is not very explicitly stated in the books. In Chitty's Forms 1856 page 771, it is stated "In a transitory action if the plaintiff having laid the venue in one county afterwards desires to change it to another, he may obtain a Judge's order for leave to amend the declaration by altering the venue accordingly, upon satisfying the Judge that there is reasonable ground for the application.

In Chitty's Archbold, 1856, Vol. 2, 1273 "If the plaintiff from circumstances should afterwards desire to change the venue (in transitory actions) he may obtain leave to amend his declaration upon stating to the Court or Judge any reasonable ground for this application, even after plea pleaded, issue joined, or non-suit." In Bagley's Practice 322 "As the plaintiff has it in his own power to lay his venue in the County in which it is most convenient for him to try it, in the first instance, the amendment will only be allowed under peculiar circumstances, and uniformly upon payment of costs. In *Fife* v. *Bousfield*, 2 Dowl. N. S. 705 (1843) Williams, J. says, "The defendant might have had a good ground for asking the Court to change the venue. But the plaintiff who had his option when he brought his action and had a complete knowledge of all the circumstances connected with it, must shew a reasonable ground for such application. I think that the application is not a matter of course, but that the plaintiff must lay his grounds for it." Most of the older cases are cited in *Crooks* v. *House*, 3 U.C. O.S. 308, where an application by plaintiff to change the venue after his cause having been struck out of the docket at Niagara assizes, and his only reason being that by changing to the Home Assizes he could try his case earlier. The Court refused his application as inconsistent with general practice, unless some very strong grounds were laid for it; *Robertson* v. *Hayne*, 16 C.B. 560; *Turnley* v. *London*, N. W. Ry. Co., 16 C. B. 575, may be noticed.

Our own Rule of Court, 20 Victoriæ No. 19, says, "In all cases the venue may or may not be changed according as it shall appear to the Court or Judge that the cause may be more conveniently and fitly tried in the County in which the cause of action arose, or in that in which the venue has been laid."

On the whole it appears to me that it rests altogether on the case the plaintiff can make out for making the change desired. In this case I think he has shewn sufficient grounds, and I allow the plaintiff to amend the decaration as asked in the summons on payment of costs, and that the venue be changed accordingly.

CORRESPONDENCE.

To the Editors of the Law Journal.

Toronto, January 17, 1858.

Gentlemen,—It is much to be regretted that there is no gentleman in the Profession willing to undertake the task of publishing an edition of the Chancery Orders with notes of decided cases, giving at the same time the Chancery Statutes and other similar information for the use of Chancery practitioners. The monopoly of publishing the Chancery Orders,