The privilege claimed for documents is not lost merely by their being referred to in the pleadings. The penalty for non-production is that they cannot afterwards be used in evidence.

[L. R. 26 Ch. D. 724.

In this case the defendant obtained the usual order for production. In their affidavits made therein, similar affidavits being made by each plaintiff, they objected to produce certain documents on the ground that "they relate exclusively to my title and that of some of my co-plaintiffs, and do not prove or tend to prove that of the defendant." Some of these documents, production of which was refused, had been referred to in the plaintiffs' claim.

The defendants took out a summons to consider the sufficiency of the plaintiffs' objections to discovery.

KAY, J., refusing to make any order on the summons, the defendants appealed.

COTTON, L.J.,—It is said that the plaintiffs cannot avail themselves of a claim to protection, because they have referred to the deed in their pleadings, and Rule 357 (Ont. R. 229) is relied on. But that rule only says that if a party will not produce a document to which he has referred in his pleadings, he shall not afterwards be at liberty to put such document in evidence. That is the penalty. He may prefer to lose part of his claim rather than produce the document. In my opinion, that rule does not take away the privilege of the documents, but only prevents them from being put in evidence unless produced.

FRY, L.J.,—I am of the same opinion.

[NOTE.—In his judgment, KAY, J., comments at length on the extraordinary nature of the provision in Rule 357 (Ont. R. 229), which draws a distinction between the position of the plaintiff and defendant in refusing to produce documents referred to in his pleadings. He confesses he is not "at present fully able to understand" this part of the rule, but avoids passing an opinion upon its effect and meaning as unnecessary to the application before him.]

WHEELER V. THE UNITED TELEPHONE COMPANY.

Imp. O. 30, *r.* 1. (1875)—*Ont. r.* 215.

Payment into court without admitting liability.

In an action for trespass in breaking and entering the plaintiff's land, the defendants paid money into court under the above rule, and in their defence denied the plaintiffs' possession of the land, and also stated that, without admitting any kind of liability, the sum paid into court was sufficient to satisfy any damage which the plaintiff might have sustained in consequence of any acts of theirs. The plaintiff joined issue upon these defences but failed at the trial to establish any damages exceeding the sum paid into court, though he succeeded on the other issue. The Court of Appeal treated such defence of payment into court as an alternative defence, and as it went to the whole cause of action,

Held, that the defendants were entitled to judgment.

[L. R. 13 Q. B. D., 597.

BRETT, M.R.—Payment into court is allowed to be pleaded as an alternative defence; it is a defence to the action, in the sense that if it succeeds, the action is defeated. Whatever the exact form of the defence may be in words, the substance of it is that the money is paid into court, and the defence is pleaded as an alternative defence, which means, that if the defendant fails in the other defences which he has set up, this is his defence to the action. If it succeeds, the result is the same as if under the old system of pleading—the jury had found in favour of one plea which went to the whole cause of action. In that case there would be verdict and judgment for the defendant, but the plaintiff would be entitled to the costs of the issues raised by the other alternative defences which had failed, I am of opinion, therefore, that there ought to be judgment for the defendants.

NOTES OF CANADIAN CASES.

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COMMON PLEAS DIVISION.

Osler, J. A.] [October 17.

DOUGLAS V. HUTCHINSON.

Married woman—Dower—Separate estate.

A married woman, married to her present husband in 1871, was entitled to dower in land of which her former husband died seized, and was living thereon with her husband and children working it, but her dower had never been actually set apart or assigned.

Held, that this was separate estate, with reference to which she could contract debts, or which she could contract to sell or dispose of, and that it could therefore be sold under a *fi. fa.* on a judgment recovered on a promissory note made by her.

Shepley, for the plaintiff.

W. H. P. Clement, for the defendant.