The affidavit filed by the defendant stated that this was a balance claimed on an unsettled account, as appeared by the particulars of claim; that when the case came on for trial, on the 4th November, he appeared in person to defend the same, and objected that the court had not jurisdiction in the matter, as the unsettled account exceeded in amount two hundred dollars; that the judge overruled the objection, heard the cause, and gave judgment in favor of the plaintiff for $9 97c. and costs; that the plaintiff's application for a new trial is still pending; that no execution has issued on the judgment, and the defendant has not paid the amount of the judgment; that he does not owe the plaintiff anything; and that the sum of $169 07½c. credited by the plaintiff on his claim, is part of a set-off which the defendant has against the plaintiff's claim; and that no agreement or settlement had taken place between them in reference to the said claim or set-off, or any part thereof.

The plaintiff, in his affidavit, stated that the defendant paid him on account of his wages, and in liquidation of the account, at different times, in all, the sum of $155 15c. in cash: that the sum of $42 was paid by the defendant to one Gordon, on the plaintiff's written order, as he believes; that the extent of contra account of the defendant against the plaintiff was, as he believes, no more than $13 92c.: that his claim was for a balance of wages for the sum of $67 47½c., and it would only have been for $25 47½c. if he had known of the order in favor of Gordon, for $42 had been paid: that the defendant, at the trial, fully entered into his defence; and that the sum awarded to the plaintiff by the judge is justly due to him.

It was sworn on behalf of the plaintiff that an execution had been issued on the judgment, on which the deponent believed certain cattle of the defendant's had been seized.

Spencer showed cause.—*Siddall* v. *Gibson*, 17 U. C. Q. B. 98. shews that it was an irregularity to entitle the affidavits used on this application in any court as these affidavits were entitled*. On the merits he referred to *McMurtry* v. *Munro*, 14 U. C. Q. B. 166; *Wallbridge* v. *Brown*, 18 U. C. Q. B. 158; *Turner* v. *Berry*, 5 Exch. 858.

Osler supported the application. The affidavits, it is laid down expressly in Arch. Pr. 12 Edn. 1755, in a case of prohibition, "should be entitled in the court to which, or to the judge of which, the application is to be made, but not in any cause or matter." See also 11 Edn. 1727. And on the merits he referred to *Re Denton*, 32 L. J. Exch. 89; see also 1 H. & C. 654; *Furnival* v. *Saunders*, 26 U. C. Q. B. 119; *Hodgson* v. *Graham*, 26 U. C. Q. B. 127; *Higginbotham* v. *Moore*, 8 U. C. L. J. 68.

ADAM WILSON, J.—The Division Courts have jurisdiction of "all claims and demands of debt, account or breach of contract or covenant, or money demand, where the amount or balance claimed does not exceed one hundred dollars." The amount of the plaintiff's side of the account did not exceed one hundred dollars; but the question is, whether the amount or balance claimed exceeds that sum?

That depends upon the meaning to be placed upon the expression, "the amount or balance claimed." In the case of *Woodhams* v. *Newman*, 13 Jur 456, the wording of the English County Courts Act was, that those courts should have jurisdiction of "all pleas of personal actions, wkere the debt or damage claimed is not more than twenty pounds, whether on balance of account or otherwise;" and there it was held that the meaning of the words "balance of account or otherwise," was where the parties themselves had balanced the account, or where it was balanced by payments made on account; but that the plaintiff was not at liberty to reduce his claim by crediting the defendant with a set-off; for he could not compel the defendant to rely on his set-off, by giving him credit for it. *McMurtry* v. *Munro*, 14 U. C. Q. B. 166, is to the same effect, and is founded upon *Woodham* v. *Newman*, cited by Mr. Justice Burns, as in 7 C. B. 654. *Turner* v. *Berry*, 5 Exch. 858, points to the same distinction between payment and set-off; and so also does *Furnival* v. *Saunders*, 26 U. C. Q. B. 119.

The distinction between the two is quite plain. A *payment* is a sum expressly applicable in reduction of the particular demand on which it is made; that demand is therefore reduced by the extent of the payment. To constitute a payment, the transaction must have the assent of both parties, and for such payment no action is maintainable; while a *set-off* is a separate and independent demand which one party has against the other, and in respect of which he is as much a creditor of the other, as that other is to him, and for which he can as well maintain a separate action, as his creditor can for his demand.

In a case of payment, the payment must be pleaded (if the plaintiff do not credit it), when the demand is sued for in respect of which the payment was made, otherwise it is entirely lost, and can never be recovered back: *Marriott* v. *Hampton*, 7 T. R. 269; 2 Smith's Leading Cases 375; while a set-off need not be pleaded, and credit for it cannot be forced upon the party against his will.

A payment was always a deduction at the common law, while it required a statute to enable a set-off to be made to an action.

I am satisfied, therefore, that if the balance claimed here be a balance resulting from *payments* made by the defendant, and not from a set-off credited to him against his will, the judge below had jurisdiction.

It is stated in Archbold's Practice, that on a question of prohibition, the court will look, not merely at the plaint and particulars, but at the actual facts; and if it appear that the claim is in substance for damage arising out of a matter excluded from the jurisdiction of the court (as malicious prosecution), a prohibition will be granted.

Referring, then, to the summons and particulars in this case, it appears the demand sued for was a debt or account, in which *the balance claimed* did not exceed one hundred dollars.

The defendant undertakes to show that although this does so appear in the summons and particulars, yet it was not for such a claim in fact, because the *balance claimed* was an arbitrary, unwarranted balance, struck by the plaintiff himself, for the mere purpose of making it appear that his claim was within the jurisdic-

* The case referred to only decided that the "affidavit, &c., should not have been entitled in any *cause*."—EDS. L. J.