I am not prepared to say that if the facts on which this application is grounded had not all existed and been known to the plaintiff when he took issue on the first plea, that I should not have been strongly inclined to strike out the plea and let the notice stand as prayed. But what the plaintiff did, he did with full knowledge of the state of facts, and I think I cannot properly allow him to change the position he deliberately assumed in order to entitle himself to give notice of trial in that first particular, and yet allow the notice to stand.

At the same time I think the plaintiff has made a strong and an unanswered case against the plea. It seeks to raise an issue which in conscience and good faith the defendant, after his attorney's letter, ought not to be permitted to set up; and I am willing to make an order to strike it out, and give the plaintiff leave to sign judgment, unless he prefers to take an order to add the proposed equitable replication. In either event the costs to be costs in the cause. I think I ought not to go further.

It is true that the plaintiff will most probably lose the assize. Parties very often press this consideration for or against an application, and it is under certain circumstances to be weighed; but it is only to be considered as secondary to the other matters urged and submitted.

Order to strike out the first plea.*

McNider v. Baker.

Judgment—Satisfaction—Interpleader—Setting aside proceedings—Parties.

On the 25th February, 1858, defendant gave a cognovit to plaintiff. On the 27th February, 1858, judgment was entered on the cognovit. On the 31st March, 1858, defendant made a chattel mortgage in favor of plaintiff. On the 12th January, 1859, plaintiff gave defendant a certificate of the discharge of the judgment. In 1859, defendant's brother executed a mortgage in favor of plaintiff for $2000. Defendant left Canada in 1859. On the 8th September, 1859, an *alias fi. fa.* goods was issued on the judgment of 7th June, 1852, an *alias pluries fi. fa.* goods was issued on the same judgment. A quantity of flour was seized under *alias pluries* execution. This flour was claimed by K. & S. Thereupon an interpleader issue, between K. & S. as plaintiffs, and the execution creditor as defendant, was directed. The jury found that the flour was not the property of K. & S., and so found against them. A summons was obtained, calling on plaintiffs to show cause why satisfaction should not be entered on the roll, the writs of execution and interpleader order and proceedings thereunder set aside, and to declare the interpleader bond given by K. & S. to be part and parcel of the assets of defendant.

Held, 1. That the execution debtor was not entitled to move, in the cause in which judgment was obtained against him, to set aside the interpleader order, &c., the same being between the execution creditor and strangers to the cause.

Held. 2. That the execution debtor had no right to be heard in the interpleader suit, the result of which established nothing to affect his interest.

Held. 3. That the authority to use the execution debtor's name to make the application did not either extend the execution debtor's right in the matter, or enable the persons authorized to move for their own relief in a cause to which they were no parties.

Held. 4. That under the special circumstances of the case, defendant was not entitled to have the summons made absolute, even to the extent of having satisfaction entered on the roll.

Held. 5. That the application to declare the interpleader bond assets of the execution debtor, would, if granted, be not only an extension of the equitable jurisdiction of a common law judge, but in itself utterly unwarrantable.

(Chambers, March 31, 1864.)

The defendant obtained a summons, calling on the plaintiff to show cause why a writ of *alias pluries fi. fa.* against defendant's goods, issued in this cause, and all proceedings had thereunder, should not be set aside, and satisfaction entered on the judgment roll; and to set aside an interpleader order herein granted, and dated 15th January, 1863, which directed an issue between Benj. Stedman and Thomas Kelso as plaintiffs, and John McNider as defendant; and to rescind all proceedings had, and the judgment entered thereon; and to declare the interpleader bond given by Stedman and Kelso to be part and parcel of the assets of the defendant; and that McNider should be precluded from enforcing that bond, on the grounds that the judgment in this cause was discharged by McNider before the issuing of the said *alias pluries fieri facias*; and that the judgment was fraudulently prosecuted by McNider as against defendant, and as against Stedman and Kelso.

It appeared that judgment in this cause was entered on the 27th February, 1858, on a cognovit dated the 25th of the same month; that on the 8th September, 1859, an *alias fieri facias* issued against goods; and on the 7th June, 1862, an *alias pluries fieri facias* was issued, under which, it would seem, fifty-two barrels of flour were seized; that Stedman and Kelso claimed them, and on the 15th January, 1863, an interpleader order was made to try their right to this flour, in which they were made plaintiffs, and the above named plaintiff was made defendant; that at the following assizes the trial was postponed by Stedman and Kelso, on the ground that the defendant Baker was a material witness for them; that the cause was tried at the then following assizes, but without defendant's testimony, and a verdict was rendered for the plaintiff in this case against Stedman and Kelso, and judgment was entered thereon on the 1st December, 1863, and execution issued for costs.

The principal foundation for this application was, that the plaintiff signed and gave to the defendant a paper in these words: "I do hereby certify that a judgment rendered in the Queen's Bench in favor of John McNider against William Baker, for the sum of £213 5s, and registered in the Registry office of the county of Hastings, has been discharged. Dated Belleville, 12th January, 1859." This was witnessed by Morgan Jellett, who made affidavit of its execution on the same day, before his brother R. P. Jellett, in whose writing the original was drawn.

The defendant also, on the 31st March, 1858, executed a chattel mortgage to the plaintiff, covering a large amount of personal property, among which was all his household furniture, to secure the full sum of £244 9s. 1d. with interest, payable on the 30th June then next, which mortgage was filed the next day in the proper office.

The defendant represented in his affidavit that he gave this mortgage, at plaintiffs' request, in satisfaction of the judgment, and not as collateral security; and that the plaintiff thereupon gave him the above discharge. The defendant swore he neglected to register this discharge, though it was sworn to for registration by the very attorney who issued the writs of execution in favor of plaintiff against him.

The defendant also swore that this chattel mortgage was afterwards fully satisfied, and that he recollected distinctly having a settlement with the plaintiff early in 1859; that he procured his brother-in-law to give plaintiff a mortgage for about $2000, which plaintiff accepted in full payment of all defendant owed him, as well as to cover certain advances which plaintiff was to make, and did make; and that he (defendant) left Canada in November, 1862, and was then largely indebted to Stedman and Kelso.

The summons was granted on two affidavits; one merely stating the proceedings in an interpleader suit; the other, made by Kelso, stating the fact of plaintiff's judgment, and that it was "fully paid and discharged," as appears by the writing already set out; that the defendant absconded from the Province about the 21st November, 1862, being then largely indebted to Stedman and Kelso, and that he is still indebted to them in the sum of $7000; that when he absconded he left behind him, among other things, about fifty-two barrels of flour, all of which were seized under the *alias pluries fi. fa.* in this cause, which was issued by Morgan Jellett while plaintiff and defendant were absent from this Province; that he and Stedman claimed the flour; and, after stating the result of the interpleader suit, he said that Robert P. Jellett, who was attorney and counsel for the present plaintiff, threatened to sue them on behalf of plaintiff, on the bond which they gave to the plaintiff under the terms of the interpleader order for the payment of the value of the flour, if the issue were decided against them. He further stated that he applied to defendant for authority to use his name in an application to set aside the *alias pluries fi fa*, and received an answer giving him authority, and stating that the judgment had been paid and satisfied.

The defendant, in his affidavit, stated he had authorized Stedman and Kelso to use his name in this application.

H. B. Morphy for plaintiff. *John Boyd* for defendant.

Draper, C. J.—I have not been able to find any authority for an execution debtor moving, in the cause in which judgment has been recovered against him, to set aside an interpleader order, the issue and judgment thereon, and the execution founded on such judgment; which order and subsequent proceedings were between his judgment creditor and certain strangers to the first cause, who

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* Plaintiff after the entry of the record struck out the plea, and had a verdict; but his proceedings in the term following (last term) were set aside for irregularity.—Eds. L. J.