The defendant has sworn that he is able to pay whatever can be recovered against him in the action, and therefore there is no reason to suppose that he will have any difficulty in complying with these conditions.

I appoint this to be done within three weeks.

WESTLAKE v. ABBOTT.

Special Endorsement—Liquidated Demand—Final Judgment by Default.

The Court will set aside a final Judgment by default regularly signed on payment of costs if the Defendant shew merits.

A *final* Judgment by default signed *generally* in a cause in which part of the claim is liquidated and part is not, is irregular and will be set aside with costs though the amount of the Judgment be confined to the liquidated demand.

Judgment by default may be signed for want of a plea, if inconsistent pleas are pleaded without a Judge's order.

(7th November, 1857.)

This was a summons on plaintiff to shew cause why the final judgment signed 30th October last, and all subsequent proceedings should not be set aside with costs for irregularity.

1st. Because defendant had filed and served his pleas before judgment signed, and

2nd. Because the declaration contained a count for unliquidated damages, for breach of an agreement to submit a certain cause to arbitration.

3rd. Because plaintiff signed final judgment upon the arbitration generally for want of a plea, without any order to compute or an assessment of damages, and without entering a nolle prosequi, as to such count.

4th. Because the writ of summons was not specially endorsed, nor any particulars served with the declaration.

5th. And because as the declaration contained a count for unliquidated damages plaintiff was not entitled to sign final judgment without an assessment of damages.

Or why judgment and all subsequent proceedings should not be set aside on the merits, and the defendant admitted to plea.

Or why the interlocutory judgment signed in this cause on 28th October last, should not be set aside on all or any of the grounds mentioned.

Judgment was entered on 30th October, 1857, on the whole cause of action—that plaintiff do recover against defendant the sum of £74 5s. 4d. damages, and £7 3s. 8d. for costs of suit, which amount in all to £81 9s. 0d."

Plaintiff sued defendant in the County Court of Middlesex for goods sold and delivered. The cause was tried and a verdict given for defendant.

Then on plaintiff's application a new trial was granted to him on payment of costs. Plaintiff without paying the costs took his cause down a second time to trial. It was then mutually agreed to refer it to arbitration. The 29th July was appointed for the arbitrators to hear the cause. Plaintiff and his witnesses attended and were heard. The defendant was, as he swears, unavoidably absent in Montreal.

The arbitrators made an award that defendant should pay plaintiff £45 5s. 0d. besides costs of the cause, and of the reference.

The defendant before the arbitrators made their award, revoked the submission, because as he says he found the arbitrators were resolved to proceed ex parte in the absence of himself and his witnesses, and because they would not let him see the evidence which the plaintiff had given.

The defendant in the Term following, moved the Court of Queen's Bench to set aside the award, and obtained a rule *nisi* returnable next Term (Michaelmas).

In the meantime plaintiff sued defendant upon the award in the Queen's Bench. His declaration contained two counts, the first upon the award, and the second *a count in case for revoking* the submission, in which he claimed £80 damages.

Before the plaintiff filed his declaration, the defendant had obtained the rule *nisi* in the Queen's Bench, for setting aside the award.

The declaration was filed on 10th October, 1857. On 19th October, 1857, a Judge's order was made, giving defendant four days' time to plead and leave to plead in bar the application made by him to set aside the award, defendant to take short notice of trial.

On 22nd Oct., 1857, defendant filed pleas to first count—1. That the submission was revoked by him. 2nd. That the arbitrators proceeded illegally to make an award without hearing him. 3rd. That he had moved against the award, and obtained a rule to set it aside. 4th to 2nd count, denying the alleged consideration for submitting. 5th to same count, justifying the revocation on account of the illegal proceedings of the arbitrators.

On 28th October plaintiff signed interlocutory judgment for want of a plea, and on 30th October entered final judgment for £81 9s. 0d. and issued execution thereon, which was in the sheriff's hands.

ROMILSON, C J.—The summons by which this action was commenced was not specially indorsed. The plaintiff signed judgment on the ground that the defendant had pleaded all the pleas, which he did without leave of the Court, other than the leave to plead the single plea mentioned in the Judge's order of 17th October.

Under the 61st sec. of C.L.P.A the plaintiff assuming that he was at liberty to proceed after judgment by default for want of a plea to his declaration, *as* if he had entered judgment *for* want of appearance to a specially endorsed writ, entered final judgment and took out execution. He treated the cause of action mentioned in his declaration, as being *claims* which might have been stated in a specially endorsed summons under the 41st section.

The defendant filed an affidavit of merits.

The defendant having pleaded without leave several pleas, such as he could not *together* without leave, according to the Statute the judgment signed against him by default was regular. But the Court would relieve him almost as a matter of course, on payment of costs; and in such a case as this, I would be disposed to set aside the judgment without costs, for it is inconsistent in the plaintiff to be going on with his action upon the award while the defendant has a rule *nisi* pending for setting it aside, and on grounds which if substantiated, are the plainest and strongest that can be.

But the first question is whether the final judgment and execution are regular. I think they are not. The plaintiff instead of bringing an action upon a plain money demand, such as is contemplated in the 41st and 61st sections of the C.L.P. Act declares on two causes of action quite repugnant to each other; for if the award is valid then the submission could not have been in law revoked. And on the other hand, if he is entitled to damages against defendant for revoking his submission, it is impossible that he can be at the same time entitled to recover upon the award, and yet he has signed final judgment upon the whole declaration.

It is quite clear that the cause of action stated in the second count, is not one which could have been specially endorsed on a summons under the 41st clause, and that being so, final judgment could not be taken on that count under the 61st clause.

It is true that though plaintiff has entered final judgment in his favour on the whole cause of action, yet he may have confined his damages to the sums awarded and interest. And I suppose he has: but yet he has an inconsistent judgment in his favor on two causes of action which could not subsist together; and he has by his judgment entitled himself to the costs of both counts, as if he had a right to final judgment on both, while it is clear he is not; no final judgment on the second count without some other proceedings being taken is allowed under either the 41st or 61st clauses.

I take it that when a plaintiff signs judgment under either of these clauses in a case where the claim put forward by him, is not *wholly* of such a character as brings it within either of these clauses, his judgment must be set aside. Looking at the plaintiff's cause of action as set forth in his declaration, it cannot be said that he has sued upon a liquidated demand, that is, that all his alleged cause of action are of that character, which I consider the 41st clause to mean, and, that being so, I am of opinion that this final judgment and execution must be set aside with costs for irregularity, and the defendant be allowed to plead issuably within one month. This will give time for the application against the award to be disposed of. Nothing could be more absurd than that the plaintiff should go on and recover upon an award while a rule is pending on which the Court may find it necessary to set aside the award.

It may be that the plaintiff will ultimately be found entitled to recover; but there is nothing gained by attempting to proceed in an unreasonable or irregular course with a view to shutting out a defence.