and chattels of plaintiff. Plaintiff gave notice under the statute for revision of the costs, by the principal taxing officers of the court at Toronto, who on 28th March, decided in favor of the course followed by the deputy. Plaintiff on same day obtained the foregoing summons for revision.

Lauder, shewed cause, contending that the cause might have been held in the Division Court, and if so, that defendant was under Consolidated Statutes Upper Canada, cap 22, sec. 328, entitled to tax his costs as between attorney and client, and set off so much of his bill so taxed, as exceeded the taxable costs that would have been incurred in the Division Court He referred to *Cameron* v. *Campbell*, 1 U. C P. R. 170; *Ib.* 71; 12 U. C Q. B. 159; and *Dauby* v. *Lamb*, 31 L. J., C. P., 17.

Robert A. Harrison, in support of the summons, argued that at Common Law there are no costs, that the Statute of Gloucester gives costs to plaintiffs recovering damages, that the Statute of Henry the Eighth gives costs to defendants obtaining verdicts against plaintiffs, that other statutes gave costs of particular issues according to the finding, that no statute except Consolidated Statutes Upper Canada, cap 22, sec. 328, gives costs against a successful plaintiff, where there is only one issue joined between the parties and that found for the plaintiff, but that statute only applies to cases where plaintiffs are entitled to *some* costs against which the costs taxed may be set off, and here that sec. 324 of Consolidated Statutes Upper Canada, expressly declares that in such a case as the present, the plaintiff is not entitled to recover "any costs whatever." He referred to *Johnston* v. *Morley*, 9 U. C. L. J. 263, *Cameron* v *Campbell*, ubi supra.

DRAPER, C J.—I think defendant is not entitled to tax costs against plaintiff, and so must make the summons absolute.

Summons absolute.*

WINGALL v. THE ENNISKILLEN OIL COMPANY.

Several summonses to plead several matters—Practice as to costs—Sufficiency of pleas—Plea to damages—Plea setting up rescission of contract in writing, before breach, by a contract not in writing—Sufficiency.

Where defendants called upon plaintiff to show cause why defendants should not have leave to plead several pleas, and one of them was uncertain, as to it the leave was refused; and leave to amend it by severing it and making two good pleas was also refused, because the summons was merely to show cause why the plea, as it was originally proposed to be pleaded, should not be pleaded.

Defendants obtained a second summons, calling upon plaintiff to show cause why the pleas should not be pleaded in the amended form, and that summons was made absolute, and as what was asked in the second application should have been made part of the first, the second summons was made absolute only on payment of costs.

Where, to a declaration on a contract for the making and delivery of a certain number of barrels the breach alleged was that after the delivery of a certain number of barrels, defendants refused to allow plaintiff to deliver the remainder, and the damages claimed were as well for the price of those delivered as for loss of profits on those which defendants refused to be allowed to be delivered, a plea of payment as to all delivered, though objected to on the ground that it was merely a plea to damages, was allowed on the ground that it answered a substantive part of the plaintiff's cause of action, and was not a mere plea to damages.

Quære—As to the sufficiency of a plea to a written contract, that before breach it was rescinded, and a new contract substituted not alleging the rescission to have been in writing? Such a plea was allowed to be pleaded, but leave given to plaintiff to reply, take issue and demur; the demurrer, if any, to be first determined.

(Chambers, April 24, 1864.)

This was a summons calling upon the plaintiffs to show cause why defendants should not have leave to plead several pleas to the declaration in this cause.

The first count recited that before the making of the agreement between the plaintiff and the defendants hereinafter next mentioned, the defendants and one William Wiley had duly entered into a contract, whereby the defendants agreed to purchase from the said William Wiley 2 500 good barrels of eight hoops each, to be made by said Wiley of thoroughly seasoned timber, warranted not to leak, and to pay for the same on delivery at the rate of $2 20 per barrel, and to take said barrels as fast as four men could make them, until they (the defendants) had used up what barrels they then had on hand, and thereafter in larger quantities, as fast as the said William Wiley could cause the same to be made, said barrels to be delivered in the defendants' storehouse once every week, or as often as they might require them, and whereby the said William Wiley duly agreed to make and deliver the said barrels accordingly at the price aforesaid; that afterwards the said William Wiley entered upon the performance of the contract, and in part executed the same; and after the making and delivery by him to the defendants of certain (to wit, 160) of the barrels according to the provisions of the said contract, he the said William Wiley, for a good and valuable consideration in that behalf, assigned and transferred to the plaintiff all his remaining interest in said contract, and the right to make and manufacture for the defendants the residue of the said barrels, at the price and on the terms thereby stipulated and provided for; of which assignment the defendants then had notice, and assented and agreed thereto; and thereupon, in consideration that the plaintiff at the special request of the defendants, with the approbation and concurrence of the said William Wiley duly agreed to complete the said contract of the said William Wiley with the defendants, and to make and deliver the residue of the said barrels according to the said contract, and to take and receive payment therefor at the rate aforesaid, as follows, namely, a sufficient amount each week to pay the workmen, and the balance a reasonable time thereafter (during which it was to remain in the hands of the defendants), the defendants duly agreed to permit and allow the plaintiff to complete the said work, to wit, the residue of the barrels provided for by the said contract, upon the terms aforesaid, and to purchase, take and receive the same from him accordingly. And the plaintiff did thereupon make and construct a portion of the said residue of the said barrels, and delivered the same to the defendants (who accepted the same), of the quality and description in strict accordance with the terms aforesaid, and laid out large sums of money and incurred heavy liabilities in providing materials and hiring workmen fully to complete the same; and has always been ready and willing to make and complete the whole of the residue of said barrels, according to the said agreement, whereof the defendants have always had notice.—Breach: That the defendants, after having accepted and received from the plaintiff (subsequent to the said agreement with him) part of the said barrels so made and delivered as aforesaid, would not permit the plaintiff to proceed with the said contract, and manufacture and delivery of the residue of the said barrels thereby provided for, but wrongfully discharged and prevented the plaintiff from doing and completing the same, and refused to take or receive the same from the plaintiff; *per quod* the plaintiff has not only lost the price of the barrels so made and delivered by him as aforesaid, and the profits which would otherwise have accrued to him from the completion and delivery of the residue thereof, but has also lost a large sum of money laid out by him as aforesaid in providing for the completion thereof, and has sustained damage by reason of said liabilities so incurred as aforesaid.

The second count alleged, that the defendants, on the 24th October, 1862, in consideration that the plaintiff agreed with the defendants to do certain works and furnish certain materials therefor for the defendants, that is to say, to furnish good seasoned white oak staves, good quality hoop iron, pine or whitewood lumber, good quality glue, paint, and all materials necessary for making first quality barrels or casks for refined oil, and to manufacture in a good and workmanlike manner fifty barrels per week, of forty gallons, or their equivalent in casks of eighty gallons each, for the term of twelve months from the date of said agreement; said casks or barrels to be made of thoroughly seasoned staves, plump seven-eighths of an inch in thickness, to have four hoops on each end, the chime hoops to be made of iron one and three-quarters of an inch in width, each of the other three to be made of iron one and a half inches wide, the centre pieces in heads of pine or whitewood one inch in thickness, heads to be painted and inlaid around the croze with white lead, the barrels or casks to be properly glued and thoroughly tested by being blowed off; the plaintiffs guaranteeing the barrels or casks to be tight, and not to leak oil, and in every way perfect and suitable for shipping oil to Europe; and to deliver them in the house of the defendants once a week, or as often as might be necessary, at and for the price and sum of five cents per gallon for all the barrels to contain on an average forty-four gallons each, and four

* Defendant, during the last Easter Term, obtained a rule in the Queen's Bench to reconsider the order of Draper, C. J., but that rule is still pending.—*Eds. L. J.*