

CHAMBERS.

(Reported by CHRISTOPHER ROBINSON, Esq., Barrister-at Law)

HENDERSON V. MOODIE.

False return—Declaration—Striking out count—Variance between copies filed and served

Where plaintiff in a declaration for a false return inserted three counts, the second alleging as a breach of duty on the part of defendant, neglect to levy, &c., and the third alleging as a breach that although defendant did levy, he falsely returned no goods, the third count was upon the application of defendant struck out as being substantially the same as the second—the real grievance being the false return in matter which way stated.

Scilicet, when the evidence is given in such a case an amendment would be allowed without difficulty in accordance with the facts found.

Held, also on an application to set aside a declaration on the ground of variance between the copy served and copy filed that a mere verbal error by the omission of words which leave the sense and substance unaltered, is not a ground for setting aside the declaration of copy served.

Scilicet however that "being in a hurry" is no excuse for a variance between the copy of pleading filed and that served.

(31 March, 1880.)

This was an action brought by the plaintiff against the defendant as sheriff of the county of Hastings, for a false return.

The declaration contained three counts.

First count—For that the plaintiff heretofore, to wit, on, &c., in the Court of Queen's Bench, at Toronto, by the consideration and judgment of the same Court, recovered against one Michael Manion a certain debt of forty five pounds fifteen shillings and six pence, and also ten pounds eight shillings and eleven pence costs, which in and by the same Court were adjudged to the plaintiff, and with his assent, for his damages, which he had sustained as well by the occasion of the detaining of the said debt as for his costs and charges by him about his suit in that behalf expended, whereof the said Michael Manion was convicted, as by the record and proceedings thereof still remaining in the same Court of our said Lady the Queen at Toronto aforesaid, will more fully appear. And that the said judgment being in full force, and the debt and costs remaining unpaid and unsatisfied, the plaintiff, on, &c., for the obtaining of satisfaction thereof, sued and prosecuted out of the said Court aforesaid a certain writ of our Lady the Queen called a *fi. fa.*, directed to the sheriff of the county of Hastings, by which said writ the said sheriff was commanded that of the goods and chattels of the said Michael Manion in the said sheriff's bailiwick he should cause to be levied the damages aforesaid, and that he should have that money before the said justices of the said Court at Toronto immediately after the execution thereof, to render to the plaintiff for his damages and costs aforesaid; and that the said sheriff should have then there that writ; which said writ afterwards, and before the delivery thereof to the said sheriff as hereafter mentioned, to wit, on, &c., was duly endorsed with a direction for the said sheriff to levy the sum of forty-five pounds fifteen shillings and six pence debt, and ten pounds eight shillings and eleven pence costs, with interest on the same from the 19th day of November, 1858, ten shillings for certificate of judgment, seventeen shillings and six pence for *fi. fa.*, besides sheriff's fees, poundages, and incidental expenses; and which said writ endorsed, afterwards, and before the execution thereof, to wit, on, &c., was delivered to the now defendant, who then, and from thence until, and at, and after the execution of the said writ, was sheriff of the said county of Hastings, to be executed in due form of law; and although there then and afterwards, and whilst the said last-mentioned writ remained in full force, were divers goods and chattels of the said Michael Manion within the bailiwick of the now defendant as such sheriff as aforesaid, whereof he could and might and ought to have levied the monies so endorsed and directed to be levied as last aforesaid, whereof the defendant all the time aforesaid had notice, yet the now defendant, so being sheriff of the said county of Hastings, not regarding the duty of his office as such sheriff, but contriving and wrongfully and unjustly intending to injure, prejudice and aggrieve the now plaintiff in this behalf, and to deprive him of the monies so endorsed on the said last mentioned writ, and directed to be levied as last aforesaid, and of the means of obtaining the same, did not nor would, within a reasonable time for that purpose which hath long since elapsed, levy the money last aforesaid, or any part thereof, but wholly neglected and refused

so to do, and therein made default; and afterwards, to wit, on, &c., falsely and deceitfully returned to the said Court of our said Lady the Queen, that the said debtor Michael Manion had not any goods or chattels in his bailiwick, whereof he could cause to be levied the damages and costs aforesaid, or any part thereof, as by the said last mentioned writ and the return thereof remaining of record in the said Court fully appears; by means of which said premises, &c.

Second count.—And that the judgment in the first count mentioned being in full force, and the said damages and costs in that count mentioned remaining unpaid and unsatisfied, the plaintiff afterwards, to wit, on, &c., pursuant to the statute in such cases made and provided, applied for and obtained, and an order was made, upon and by virtue of said judgment in the first count mentioned, by the Hon. W. H. Draper, C. B., Chief Justice of the Court of Common Pleas, at Toronto, dated, &c., whereby the said Justice ordered that all debts due and owing from one Paul Larkins, the garnishee in said order named, to one Michael Manion, the judgment debtor therein named as being the person in the first count mentioned, should be attached, to answer a judgment recovered against the above named judgment debtor, on, &c., by the now plaintiff, the judgment creditor in the Court of Queen's Bench, and being the same judgment described in the first count mentioned; and the said Justice did thereby further order that the then named Paul Larkins, the garnishee therein named, his attorney or agent, should attend before the said Justice, at the time and place therein mentioned, to show cause why he should not pay to the now plaintiff, the judgment creditor, the debt due from him to the judgment debtor, or so much thereof as might be sufficient to satisfy the said judgment debt due the now plaintiff the said judgment debtor. And that the said order so made as aforesaid, was duly served upon the said Paul Larkins, garnishee therein named; and that the said Paul Larkins, garnishee as aforesaid, did not appear upon the said summons and order at the time and place mentioned therein, and in pursuance thereof; and that afterwards, to wit, on, &c., upon proof of the service of the said summons and order, an order was duly made by the then presiding Judge in Chambers, at Toronto, for an execution to issue to levy the amount due from said Paul Larkins, garnishee as aforesaid, to the said Michael Manion, judgment debtor as aforesaid, towards satisfaction of the said judgment debt. And that afterwards, to wit, on, &c., the now plaintiff sued and prosecuted out of the said Court, upon and by virtue of said order, a certain writ of *fi. fa.* against the said garnishee therein named, Paul Larkins aforesaid, directed to the sheriff of the county of Hastings; by which said writ our said Lady the Queen commanded the said sheriff that of the goods and chattels of the said Paul Larkins, garnishee as aforesaid, in the sheriff's bailiwick, he should cause to be levied fifty-six pounds four shillings and five pence, being part of the amount of the debt due from the said Paul Larkins to Michael Manion attached in the hands of the said Paul Larkins by an order of the Hon. W. H. Draper aforesaid, dated, &c., pursuant to the statute in such case made and provided, to satisfy fifty-six pounds four shillings and five pence, which Geo. E. Henderson the now plaintiff lately in the Court of Queen's Bench recovered against the said Michael Manion, whereof the said Michael Manion was convicted, as appears of record; and that the said sheriff should have that sum before the said Court immediately after the execution thereof, to be rendered to the now plaintiff for his damages aforesaid; and that the said sheriff should have then there that writ; which said writ afterwards, and before the delivery thereof to the said sheriff, to wit, on, &c., was duly endorsed with a direction to the said sheriff to levy of the goods and chattels of the said Paul Larkins, the garnishee therein named, the sum of fifty-six pounds four shillings and five pence debt and costs, fifteen shillings for *fi. fa.*, with interest from the 5th day of October, 1859, besides sheriff's fees; and which said writ, so endorsed, afterwards, and before the execution thereof, to wit, on, &c., was delivered to the now defendant, who then and from thence until, and at, and after the execution of the said writ, was sheriff of the said county of Hastings, to be executed in due form of law; and although then and afterwards, and whilst the said last mentioned writ remained in full force, there were divers goods and chattels of the said Paul Larkins within the bailiwick of the now