

tion of the detention. In *Haacke v. Marr* (8 C. P. 441), the distinction between such a plea and on avowry is pointed out, and it is held that an avowry must shew a good title in *omnibus*. That case was not referred to in the Court below, nor was this distinction noticed in the argument before us. But it confirms our opinion that the present avowry cannot be upheld.

We may as well add that no objection was taken to the plea in *Spry v. McKenzie*. It did not aver that the collector came to the inn as a guest, which, perhaps, was necessary according to the case of *Smith v. Dearlove* (6 C. B. 132).

On the whole, we are of opinion that this appeal must be allowed, and that the Court below should make absolute the rule to enter the verdict for the plaintiff.

The case of *Corbett v. Johnston* (11 C. P. 317), is so clearly distinguishable in its facts from the present that we merely mention it in order that it may not be supposed it was overlooked by us, especially as it was relied upon in the Court below.

Appeal allowed.

COMMON PLEAS.

(Reported by S. J. VAN KOUGHNET, Esq., Barrister-at-Law,
Reporter to the Court.)

WELSH V. LEAHY.

Common Schools—C. S. U. C., ch. 64, secs. 50, 51, 57 & 91, sub-sec. 2.—Pleading.

Declaration by a school teacher against defendant as sub-treasurer of school moneys, setting out an order signed by the local superintendent of schools in favor of plaintiff upon defendant, as such sub-treasurer, directing him to pay plaintiff \$27.80, and charge to account of county assessment for 1866, and alleging a refusal by defendant to pay plaintiff in pursuance of such order, with a claim for a mandamus, and £50 damages.

Held, on demurrer, declaration bad, as not showing that the check or order was drawn on the order of the school trustees, and in setting out a check void on its face, because drawn upon a fund over which the local superintendent had no control, and in not showing that the sub-treasurer had money in his hands belonging to the school section, or that the county council had made provision to enable him to pay the amount.

The declaration demurred to, in which there were two counts, substantially the same, is sufficiently indicated by the head-note to the case.

J. A. Boyd, for the demurrer, cited *Bush v. Beaven*, 1 H. & C. 500; *Taylor v. Jermyn*, 25 U. C. 86; *Benson v. Paul*, 6 E. & B. 273; *Ward v. Lovndes*, 1 E. & E. 940, 956; *Reg v. Mun. Coun. of Bruce*, 11 C. P. 575; *Hastings v. Bann. Nav. Co.*, 14 Ir. C. L. R. 534; *Smith v. Collingwood*, 19 U. C. 259; C. S. U. C. ch. 64, sec. 27, sub-secs. 9, 22, sec. 96, sub-secs. 1, 2; *Seymour v. Maddox*, 16 Q. B. 326; *Haacke v. Marr*, 8 C. P. 441; *Worthington v. Hulton*, L. R. 1 Q. B. 63.

T. H. Bull, contra, cited *Norris v. Ir. Land Co.*, 8 E. & B. 512; C. S. U. C. ch. 64, sec. 91, sub-sec. 2, ch. 23, secs. 1-8.

J. Wilson, J., delivered the judgment of the Court.

This declaration has been framed upon the assumption that a duty is cast upon sub-treasurers of school moneys and on county treasurers to pay the local superintendent's order, whether lawful or not, on behalf of a school teacher, in anticipation of the payment of the county school assessment or not, and that the order or check, as it is called

in the Statute, is lawful without the order of the school trustees.

This, we think, is not the law; for the primary duty is cast upon the municipality of the county to make the necessary provision to enable the county treasurer to pay the amount of such order, and that the cheque of the local superintendent is not lawful unless authorized by the order of the trustees.

In regard to raising the necessary funds for sustaining common schools, the 50th section of the Act respecting Common Schools enacts, that each county council shall cause to be levied yearly upon the several townships of the county such sums of money for the payment of the salaries of legally qualified common school teachers as at least equal the amount of school money apportioned by the chief superintendent of education to the several townships thereof for the year.

The 51st section enacts that the sum actually required to be levied in each county for the salaries of legally qualified teachers shall be collected and paid into the hands of the county treasurer, on or before the fourteenth day of December in each year; but notwithstanding the non-payment of any part thereof to such treasurer in due time, no teacher shall be refused the payment of the sum to which he may be entitled from such year's county school fund, but the county treasurer shall pay the local superintendent's lawful order on behalf of such teacher, in anticipation of the payment of the county school assessment, and the county council shall make the necessary provision to enable the county treasurer to pay the amount of such order.

The 57th section enacts that, if deemed expedient, the county council shall appoint one or more sub-treasurers of school moneys for one or more townships of the county; in which event each such sub-treasurer shall be subject to the same responsibilities and obligations, in respect to the paying and accounting for school moneys.

In enacting these clauses the Legislature took it for granted there would always be money in the hands of the county treasurer, from which he would be able to pay all orders drawn upon him by the local superintendents for the payment of the salaries of teachers, in anticipation of the school fund, in case it were not paid into his hands at the proper time.

The duty of the defendant was not to pay the order out of his own money, but from money of the school fund, if he had it, and if not, then from any money he might have in his hands, from which the county council had authorized him to pay it.

If the treasurer or sub-treasurer has the money and refuses to pay a lawful order of the local superintendent, a mandamus would lie; but if he has not, no duty lies on him, and therefore no mandamus ought to be granted.

The plaintiff, in the second count, on the same statement of facts as on the first count, claims damages against the defendant for not paying the local superintendent's order, and a mandamus. For reasons already given, we think he cannot maintain his claim to damages on the second count, nor to have the mandamus prayed for. Assume for the moment, that the defendant had money of the county school fund in his hands, or other moneys from which he was authorized to pay it; was the order set out a lawful order, which the defendant, as sub-treasurer, was bound to pay?