

Chan. Cham.] McMARTIN V. DARTNELL—GLASS V. MOORE—WAUGH V. CONWAY [Div. Ct.

Sarah Shuter Hall was an infant: that she was in poor circumstances: that she was not able out of her own means to continue and complete her education: that she had lately been removed from school because she was unable to defray the necessary tuition and other fees and charges: that unless the said moneys were invested, and the interest or dividends thereon applied for her support and education that she could not continue or complete her education. In this affidavit Mr. Smith undertook to apply the interest or dividends aforesaid in and towards the support, maintenance and education of the petitioner, if such interests and dividends were paid out to him.

THE JUDGE'S SECRETARY, after consulting the Chancellor of Ontario, granted the prayer of the petition, ordering the said Sidney Smith to account when the petitioner attained her majority for the application of the dividends upon the said fund, which was directed to be invested in Dominion stock—such dividends to be paid out half yearly—the accrued interest since payment of said fund into court to be paid out forthwith to said Sidney Smith.

Re Coleman's Trusts, 1 Irish Eq. 292; *Re McFurlane*, 2 J. & H. 673; *Re Law*, 30 L. T. Ch. 572, were referred to.

McMARTIN V. DARTNELL.

Practice—Affidavit—Erasures and interlineations in—Not properly referred to in notice of action.

Smart, on behalf of the defendants Dartnell and Morland, applied for an order for security for costs against plaintiff. The application was supported by an affidavit of one Edward Taylor Dartnell.

S. H. Blake objected to the reading of the affidavit on the ground that there were numerous erasures and interlineations in it, which had not been initiated by the Commissioner before whom the affidavit was sworn, and also that the day upon which said affidavit was filed was not mentioned in the notice of motion.

THE JUDGE'S SECRETARY ordered the original affidavit to be brought before him from the office of Records and Writs. After examination:—The objections are good. Since the year 1860 erasures or interlineations in affidavits had to be initiated. The notice of motion ought to have mentioned the day on which the affidavit was filed, as it had been filed several days before the said notice of motion was served. The objections are fatal and the application must be refused with costs.

GLASS V. MOORE.

Practice—Order pro confesso—Setting down cause—Decree.

In this suit an order for substitutional service of the bill on the defendant by advertising had been made. The advertisement having been duly published and no answer having been filed although the time limited in that behalf had expired, an application was made to allow the service, the usual material being produced.

THE JUDGE'S SECRETARY.—The practice since the decision of His Honor Vice-Chancellor Mowat in *Mitchell v. Ellis* (not reported) has been changed. In mortgage suits, such as this, where the bill

has not been personally served, it is not proper to move for allowance of service according to the former practice. When a defendant in such cases is in default for want of an answer, an order *pro confesso* must be taken out, and the cause set down and heard *pro confesso*; instead of taking out a *præcipe* decree immediately upon the allowance of service, the decree is now made in Court.

DIVISION COURTS.

(In the Fourth Division Court, County of Wentworth, before His Honor Judge LOGIE.)

WAUGH V. CONWAY.

Division Courts—Jurisdiction—Reduction of claim by payment.

An action on an unsettled account exceeding \$200, which was reduced by payment to \$100, held, not to be within the Division Court jurisdiction.

Miron v. McCabe, 4 Prac. R. 171, considered.

[Hamilton, 7th Sept. 1868.]

In this action the plaintiff claimed \$104 17, gave credit for \$3 50, and abandoned 67c., reducing the claim to \$100.

The claim was for the amount of an account, one item being "balance of account due on building, \$55 17;" the other items being for hay, wheat and lumber sold by plaintiff to defendant. There had been no settlement of the building account, and no admitted balance, on the contrary, every item of that account as well as the account in suit was disputed. The building account was produced, and consisted of a number of items for building materials, teaming and labour, exceeding \$200, but reduced by payments to the balance claimed of \$55 17. It became necessary, therefore, to prove all the items of the building account, as well as of the other; the two accounts amounting to about \$300, when

Wardell for the defendant, contended that the court had no jurisdiction to try the case.

Durand for the plaintiff, cited *Miron v. McCabe*, 4 Pr. Rep. 171.

LOGIE, Co. J.—The 59th section of the Division Courts Act, contains a proviso, that no action shall be sustained for the balance of an unsettled account, where the unsettled account in the whole exceeds \$200. Under that proviso I have always held that I had no jurisdiction to try an unliquidated account exceeding \$200, though reduced by payment to a sum below \$100; the intention of the Legislature apparently being to prevent these small debt courts from investigating large and important transactions. *Miron v. McCabe*, 4 Pr. Rep. 171, however, seems to be an authority for the position urged on behalf of the plaintiff, that this court has jurisdiction to try a disputed claim exceeding \$200, where it has been reduced to \$100 by payment. The point certainly was raised in that case, but it does not seem expressly decided in the judgment; on the other hand in *Higginbotham v. Moore*, 21 U. C. Q. B. 326, the court assume as a matter of course, that in such a case the Division Court has no jurisdiction. It was an action to recover the amount of an account and, as amended, the balance due upon two notes, the amount of the notes being reduced by payment to the balance claimed; and there the court held that the notes being settled or liquidated amounts, the proviso in the statute did not apply,