

ment of the costs, and directing payment of the amount to the agent of the plaintiffs' attorney in Dundas; but of this demand the defendant's attorney took no notice.

Plaintiffs' attorney thereupon treated the order of Mr. Justice Adam Wilson as abandoned, and placed a writ of execution in the hands of the sheriff.

On the 19th March defendant obtained a summons from the Chief Justice of Upper Canada, calling upon the plaintiffs to show cause why all proceedings on the execution should not be set aside or stayed, and why the filing or serving of the pleas and of the notice to reply should not be deemed a good filing and service under the order of Mr. Justice Adam Wilson, on the ground that the costs under the order having been tendered and refused, the order had been complied with.

On the 21st March the assizes for the county of Waterloo commenced, and terminated shortly thereafter.

*Robert A. Harrison* showed cause to the summons. He argued that tender on the 8th March was not "in a week" from the 1st March, within the meaning of the order; that "in a week" meant in seven days; that the first and last days were inclusive (*Moore v. Grand Trunk Railway Company*, 2 U. C. Prac. R. 227; *Ridout v. Orr*, 1b. 231; *Cameron v. Cameron*, 1b. 259; Rule Pr. No. 166; Con. Stat. U. C. cap 22, sec. 342); and that under any circumstances defendant's subsequent conduct showed he was not ready and willing to pay the costs, and so he was entitled to no relief. (*Cook v. Phillips*, 23 U. C. Q. B. 69.)

*S. Richards, Q.C.*, in support of summons, contra, argued, that the tender was in time (1 Arch. Prac. 11 Edn. 160, 161); and if so, that defendant, in strict law, was entitled to have his summons made absolute, and with costs (1b.).

*DRAPER, C. J.*—I take the tender and refusal of the costs taxed to be, for the purpose of fulfilling the terms of the order imposed upon the defendant, equivalent to payment, and therefore that he had done all that was required for setting aside the judgment.

The plaintiffs' attorney admitted that the refusal of his clerk to receive the costs was an error; and he, by a telegram, and through an agent, to whom he wrote for the purpose, applied to the defendant's attorney for them. But, owing to an ill-feeling between them, arising from earlier proceedings in the cause, the payment has been hitherto evaded by excuses which, in the mildest form of expression with which I can characterize them, are not such as a man of professional respectability should condescend to rely upon. If I felt that the question which I have to dispose of rested on their sufficiency, I could not be induced to grant this application.

In my view of the facts, the judgment was, by force of the order, and of the taxation and tender of the costs and the filing and service of the pleas, at an end. The plaintiffs should have taken issue, and have served notice of trial immediately. They would have had no difficulty in getting the costs paid, after a proper demand and refusal. The course the plaintiffs' attorney elected to take, after he became aware of the error his clerk had committed in refusing the costs, has, it seems, thrown him over the assize; but though this is to be regretted, I do not think I can impose any new conditions on the defendant. The proceedings on the execution, whatever they are, must be set aside. As for the writ itself, the order of Mr. Justice A. Wilson extended to it as well as to the judgment.

As I think the conduct of the defendant's attorney not to be approved, in reference to his withholding payment of the costs, I shall give no costs of this application.

On the 29th March the Chief Justice made an order directing that all proceedings under the execution should be set aside, and that the filing and service of the pleas should be deemed a good filing and service, and of the notice to reply under the order of Mr. Justice Adam Wilson.

On the same day the Toronto agent of the plaintiffs' attorney sent a telegram to plaintiffs' attorney of the result, and advised him, in order to avoid judgment of non-pros., at once to take issue upon defendant's pleas.

On the 31st March plaintiffs' attorney at Berlin took issue on the pleas, by filing and serving joinder in Berlin. On the same day the agent of defendant's attorney at Berlin received papers from the defendant's attorney to sign judgment of non-pros if joinder not filed, but too late to enable him to do so, as the joinder had been previously filed.

On the 2nd April last, plaintiffs executed, under their corporate seal, a power of attorney in favor of the agent of plaintiffs' attorney in Dundas, authorizing him to demand from defendant and his attorney payment of the sum of £6 6s. 2d., taxed under the order of Mr. Justice Adam Wilson.

On the 9th April a copy of the power of attorney and affidavit of execution were served on defendant, who said he had paid the costs to his attorney and referred the party to him; and the attorney, on the ground that the power of attorney was not countersigned by the president of the corporation, refused payment.

On the 3rd May last, plaintiffs' attorney obtained from Chief Justice Draper a summons calling on defendant, his attorney or agent, to show cause why defendant should not be ordered forthwith to pay to the plaintiffs or their attorney the costs taxed to the plaintiffs under and pursuant to the order of Mr. Justice Adam Wilson; why, in default of payment, the summons, obtained by defendant on or about the 24th day of February last past, should not be discharged with costs, the said order of Mr. Justice Adam Wilson and all proceedings had thereunder be set aside and vacated with costs, the pleas filed by defendant be set aside, and plaintiffs be at liberty to withdraw the joinder filed by them herein, and sign judgment as against defendant for want of a plea; or why such other order should not be made in the premises as to the presiding judge in Chambers may seem meet, on grounds disclosed in affidavits and papers filed; and why such order as to the costs of the application should not be made, as to the said presiding judge should seem meet, on grounds disclosed in affidavits and papers filed as aforesaid, with liberty to plaintiffs to refile, on the application, such affidavits and papers filed on former applications herein, as he might be advised.

Plaintiffs' attorney filed, on moving the summons, affidavits and papers disclosing the foregoing facts.

*S. Richards, Q.C.*, showed cause. He contended that as the order of Mr. Justice Adam Wilson did not absolutely direct the payment of the costs, there never was at any time an obligation on the part of defendant to pay them; but even if there was, it had been forfeited by refusal to accept the costs when tendered; or that plaintiff, by joining issue on the pleas filed under and pursuant to the order, had waived the costs, and could not now recover them. He also argued that the power of attorney was insufficient.

*Robert A. Harrison*, in support of the summons, argued, that plaintiffs had a right to the costs; that their right was inchoate till defendant availed himself of the terms of the order; that thereupon the right became and was absolute; that the right continued till discharged by payment; that tender is not payment; that the duty of defendant is reciprocal with the right of plaintiffs; that there was no waiver by filing the joinder, because that was done with intention to avoid a judgment of non-pros., and not with the intention of abandoning the costs of pleading the pleas; that the right is one thing and the remedy another: that if plaintiffs had not a remedy under the order of Mr. Justice Adam Wilson as framed, the court or judge had power to afford plaintiffs a new remedy, by making a new and substantive rule or order upon defendant or his attorney for the payment of the costs.

*DRAPER, C. J.*—The point for decision is, whether an order should be made that the defendant pay certain costs.

An interlocutory judgment had been signed, and A. Wilson, J., set it aside, and gave the defendant leave to plead on payment of costs. On the last day for pleading, the costs were tendered to a clerk of the agent for the plaintiffs' attorney, who, knowing nothing about the matter, declined to accept them. The pleas were nevertheless filed, and a notice to reply served. The next day the agent for plaintiffs' attorney, who was absent when the costs were tendered, telegraphed to the defendant's attorney that the refusal of the costs was a mistake, and requested their payment, that the cause might proceed. He wrote also to another attorney to demand them. But the defendant's attorney refused to pay them, setting up that the latter attorney was not legally authorized to receive them. Execution was then issued on the judgment. An application was made in Chambers to set aside the proceedings under the execution, and for the allowance of the pleas and demand of replication. This was granted, on the ground that the defendant, having tendered the costs, had acquired the right to plead under the order of A. Wilson, J., and that his proceeding was by nature of that order regular, and the interlocutory