cation, and not a genuine instrument, and the same line of argument has been followed in supporting this rule. The deed certainly has a very suspicious appearance, and the non-assertion of the plaintiff's right, if it were valid, for so long a course of years, and his own declarations as to not owning property, make it, we think, a very proper case for a new trial. The point whether the plaintiff by this deed, assuming it to be genuine, entitles himself to recover as against the present defendants, was not urged either at the trial or since.

Rule absolute.

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SEPTEMBER, 1856.

SUMMARY PROCEEDINGS TO EXECUTION IN DEFAULT OF APPEARANCE.—C. L. P. ACT.

By the 41st section of the Act, in demands for debts and liquidated sums, the plaintiff is at liberty to endorse on the writ of Summons and copy the particulars of his claim in the form contained in the Schedule. The effect of this endorsement in "special form" is greatly to accelerate the judgment, if the defendant does not enter a defence; for by the 60th sec., in case of the non-appearance of the defendant to a summons so endorsed, the plaintiff, in filing an affidavit of personal service, or rule, or order for leave to proceed, may, at the expiration of eight days from the last day for appearance, sign judgment for any sum not exceeding the sum endorsed on the writ, and sue out his execution. But there is a provision enabling the Court to let in a defendant to defend upon an application supported by satisfactory affidavits, accounting for the non-appearance, and disclosing a defence upon the merits.

As both these sections are taken from the English Common Law Procedure Act of 1852—the former from the 25th, and the latter from the 27th section—the English pratice will guide us in this country till our own Courts have established one. As these are very important sections, and likely to be brought early into play, we have considered that some extracts from a work by *Kerr*, (notes on the English Act) would be acceptable, at all events to the great body of country practitioners; we therefore subjoin them nearly as contained in the work referred to, observing that it is only when the defendant resides *within* the jurisdiction that final judgment on default is obtained:—

The final judgment under this (sec. 60, our Act) section is only to be obtained in cases where the writ of summons is specially endorsed (under sec. 41, our Act.)

The writ must have been served personally, or leave obtained to proceed, as if personal service had been effected under sec. 7, (sec. 34, our Act); in the former case the affidavit of personal service, in the latter the Judge's order must be filed in signing judgment.

The defendant may be let in to defend after judgment signed, upon an affidavit of merits, (*Listed v. Lee*, 1 Salk. 402), but the defendant must be *on the merits*. Pleas of the Statute of Limitations (*Maddock v. Holmes*, 1 B. & P. 288) of bankruptcy (*Evans v. Gill*, 1 B. & P. 52) or infancy (*Delafield v. Farmer* 5 Saunt. 856) (Marsh 391) are defences on the merits within this rule. A plea to an Attorney's action that no bill was delivered, was in *Beck v. Mordaunt*, (4 Dowl. 112) held not to be a plea to the merits, but in *Wilkinson v. Page*, 1 D. & S. 913. Tindal, C.J., expressed an opinion to a different effect.

The defendant must also account in some way for not having entered an appearance.

The defendant must generally pay the costs of the application (*Listed v. Lee*, sup.) and he must plead issuably on the same day: sometimes he may be ordered to bring money into Court: (see *Wade v. Simeon*, M. & W. 637.)