CHANCERY CHAMBERS.

Reported by G. SAMUEL G. W. WOOD, Esquire.)

BESSEY v. GRAHAM.

(2nd February, 1863.)

Error in Master's Report—Amendment—New upset price—Postponement of sale.

Wood, on behalf of plaintiff, made an *ex parte* application, under the following circumstances:

The bill had been taken *pro confesso* against defendant. Decree for sale. No subsequent incumbrancers. After the final order had been made and the advertisement of sale for 14th February published, it was discovered that the Master's clerk in making up the report had omitted to include two items of interest, amounting together to £141 14s. 5d., as set forth in plaintiff's affidavit of claim. The error appeared on the face of the papers filed, containing the clerk's calculation in pencil below the account as sworn to by plaintiff.

Upon an affidavit stating the facts, and production of the papers from the master's office, his honor V. C. Esten held there was no necessity for appointing a new day for payment, and granted an order referring it to the master to take a fresh account of plaintiff's claim, and to amend his report; and leave was given to fix a new upset price and to postpone the sale if necessary.

S. G. Wood for plaintiff.

DIVISION COURTS.

(In the Third Division Court, County of Elgin, before His Honor JUDGE HUGHES.)

DAVID STEWARD, Plaintiff v. ISAAC MOORE AND JESSE KIPP, Executors of the last Will and Testament of JAMES W. BOWLBY, Defendants.

Action on promissory note of the testator, who made his will, appointing the defendants and one David Harvey executors. All the executors took probate and administered, but Harvey alone managed the estate. The suit was brought, however, against Moore and Kipp (without noticing the name of Harvey in any way.) They were served with summons from this court to appear at the sittings on the 6th January, 1863. The plaintiff appeared on that day, but the defendants made default; judgment was, therefore given for the plaintiff for the amount of his claim.

On the 21st January (15 days after the trial) the defendant Kipp applied to the judge, upon affidavits, for a summons calling upon plaintiff to show cause why the proceedings should not be set aside for irregularity—

1st. Because the executor, David Harvey, had not been sued.

2nd. Because Harvey had had the management of the estate, and transacted all the business connected with it, and knew nothing of the proceedings.

3rd. That the defendant (Kipp) did not appear at the trial, because he was returning officer at the municipal election.

4th. That the executors were prepared to shew what assets had come to their hands, and how the same had been administered.

The other executor, Harvey, also made an affidavit substantiating these facts, and that he had no knowledge of the suit until after judgment was obtained, otherwise he would have been present at the trial, and would have been prepared to shew what assets had come to the hands of the executors, and how the same had been disposed of; and also setting forth what sums the executors had expended in proving the will and for legal advice, and other expenses in reference to the estate; and that there was not sufficient property in the hands of the executors to pay the judgment and costs, and the amount expended. Neither of the affidavits stated the actual sum received; nor the value of the estate; nor the sum actually expended in detail. The defendant, Moore, made no affidavit shewing what reason he had for not appearing to the summons; nor was it shown why the defendants did not inform the other executor (Harvey) that they had been served with process.

Paul, for the defendants, cited Addison on Con., 1063; Chit. Arch. Prac., 1170, Action against Exr.; Williams on Exrs., 1760, 1824, 851; *Elwell* v. *Quash*, Stra. 20.

White, for the plaintiff, cited the 57th sec. of the D. C. Act, the 69th sec., the 107th sec.; and the rules of the Div. Courts, Nos. 40, 41 and 42.

HUGHES, Co. J., delivered the following judgment:—

1st. It is quite true that if there be several executors they should all be sued, in case they have all administered and have assets, or the defendant sued may plead the non-joinder of the others in abatement; but if one hath not proved nor administered, he may be omitted. 1 Chit. on Pl. (Greening's) 51; Toller, 367; 1 Moo. and P., 663; 4 T. R., 565. This is the rule of the superior courts.

2nd. Setting up the non-joinder, however, of a co-executor as a defence must, in the superior courts, be taken advantage of by a plea in abatement, and, in ordinary cases, such a plea must be put in within four days of the service of the declaration. In inferior courts it is no doubt necessary that such a plea must be made as soon as conveniently possible (as at the next court), and at all events before any next step is taken.

3rd. I think, therefore, that the non-appearance of the defendants at the trial, and no defence being made for them, ought to preclude my interfering to disturb the judgment given.

4th. The 57th section of the Division Court Act enacts — that any executor or administrator may sue or be sued in the division court, and the judgment and execution shall be such as in like cases would be given or issued in the superior courts. The 69th section enacts that any case not expressly provided for by that act, or by existing rules made under that act, the county judges may, in their discretion, adopt and apply the general principles of practice in the superior courts of common law to actions and proceedings in the division courts.

5th. The general rules of the court do not provide for an amendment in a case where it appears at the hearing that a *less* number of persons have been made *defendants* than by law is required. The 39th rule provides for a case where a *greater* number of persons have been made *plaintiffs* than by law required. The 40th rule, for a case where a *less number* of persons have been made *plaintiffs* than by law required. The 41st rule, for a case where *more* persons have been made *defendants* than by law required; and the 42nd rule for a case where *all who have been made defendants* have not been served with the summons, so that I must be guided by the general practice of the superior courts, and discharge this application because it was not taken advantage of at or before the trial, and because in the superior courts it would be too late to make such an application after verdict.

6th. The 85th section of the Division Court Act enacts that if on the day named in the summons the defendant does not appear or sufficiently excuse his absence, or if he neglects to answer, the judge, on due proof of service of the summons, &c., may proceed to the hearing on the part of the plaintiff only, and the order, verdict or judgment thereupon shall be *final and absolute*, and as valid as if both parties had attended.

7th. The 107th section permits the judge, upon the application of either party, within fourteen days after the trial, upon good grounds being shewn, to grant a new trial upon such terms as he thinks reasonable, and in the meantime to stay proceedings. I think under the ruling of the Court of Queen's Bench in *Smith* v. *Rooney*, 12 U. C. Q. B. 661, it is beyond my authority to disturb a verdict after the fourteen days, expressly limited by the Division Court Act, have expired. It has been ruled that the judge of an inferior court may grant a new trial for matters of irregularity, as where the proceedings have been contrary to the practice and rules of the court: (*Bayley* v. *Boone*, 1 Str. 392; *Jewell* v. *Hill*, 1 Str. 499.) A verdict may be set aside by motion for misconduct of the jury, as where they toss up, or draw lots, or otherwise determine by chance which way the verdict shall be, without further conference after such determination: (*Lord Fitzwalter's case*, 1 Freem. 415; *Foster* v. *Hawden*, 3 Lev. 205.) There is, however, no complaint of anything of that kind here, nor of anything which the superior courts would treat as an irregularity.

8th. Had the application been made within fourteen days after the trial, I should have ordered a new trial upon the merits upon payment of costs: as it is I think I have no authority to do so.

The summons must, therefore, be discharged.