

Province of New Brunswick.

SUPREME COURT.

Tuck, C. J.] WEATHERHEAD v. WEATHERHEAD. [Aug. 30.

Pleading—Set-off—Contract—Tort—60 Vict., c. 24, ss. 112, 113.

The Supreme Court Act, 60 Vict., c. 24, enacts under the title "Set-off and counter claim" as follows: S. 112, "A defendant in any action may set-off against the claim of the plaintiff any right or claim whether such set-off sound in damages or not." S. 113, "Such set-off shall have the same effect as if relief were sought in a cross action and so as to enable the Court to pronounce a final judgment in the same action, both on the original and on the cross claims." To an action for breach of contract the defendant pleaded a set-off in trover. The trover alleged was in no wise connected with the contract sued upon. On an application by the plaintiff to strike out the plea:

Held, that s. 112, read in connection with the title preceding it, and s. 113, included counter claim beside set-off, and was not confined to set-off arising in connection with the plaintiff's cause of action, and that the application should be refused.

D. Mullin, for the plaintiff. *H. A. McKeown*, for the defendant.

ST. JOHN COUNTY COURT.

Forbes, Co. J.] BANK OF MONTREAL v. CROCKETT. [August 30.

Practice—Form of order—Variance between order and summons—Application to rescind—Leave to sign judgment for want of a defence—Striking out appearance and plea.

A summons was taken out in an action calling on the defendant to show cause why the appearance and plea should not be set aside, and leave granted to sign final judgment for want of a defence. At the return the defendant objected on the grounds noted in *Bank of Montreal v. Crockett*, ante infra, to the appearance and plea being set aside, but the Court empowered the plaintiff to take out the order. The order taken out was merely for leave to sign judgment. The defendant now applied to rescind the order on the ground that there was a variance between it and the summons upon which it was granted.

Held, (1) The plaintiff was not obliged to follow the terms of his summons, but could take any part of the relief asked for if sufficient for his purposes. (2) Leave to sign judgment for want of a defence may be granted under Act 60 Vict., c. 28, s. 48, without the appearance and plea being set aside.

E. F. Jones, for the plaintiff. *D. Mullin*, for the defendant.