filed 20th September. The first count was on an award, and the common counts were added. The defendant demurred to the first count; and "the defendant to the residue of the declaration pleaded that he never was indebted as alleged, and that the plaintiff at the commencement of this suit," &c., (pleading a set-off,) "which amount the defendant is willing to set-off against the plaintiff's claim."

On the 21st October the demurrer was set aside as frivolous. On the same day the plaintiff's attorney signed judgment for want of a plea in the following form:—

"*In the Court of Common Pleas.*

"WILLIAM JOHNSTONE, Plaintiff,
"vs.
"FRANCIS JOHNSTONE, Defendant.

"The 20th day of September, in the year, &c., 1861, William Johnstone, by George Robinson Vannorman, his attorney, sues Francis Johnstone, who has been summoned by virtue of a writ issued on the 9th day of September, in the year of our Lord one thousand eight hundred and sixty one. For that, &c.

"Interlocutory judgment signed this twenty-second day of October, in the year of our Lord 1861, as to the first count of the declaration for want of a plea to the first count."

Notice of trial and assessment of damages was given for the then following Guelph assizes. The plaintiff swore that the defendant had not pleaded to the first count.

For the defendant it was insisted that the plea of set-off stands to the first count.

The managing clerk to the defendant's attorney swore that the judgment was informal, and not signed according to the practice of the court, which was the very point in dispute.

On the 4th October the plaintiff filed a joinder in demurrer, and took issue on the plea of the defendant to the second count in the declaration.

DRAPER, C. J.—The judgment seems to me well signed according to the directions given in Chitty Archb. Prac. 921 (9th Edn.). The papers filed may be treated as the *incipitu* of the declaration, or of the roll containing an *incipitu* of the declaration.

Therefore the only objection of form to the judgment fails, and the question which remains is, whether the plea of set-off extends to the first count; as to which I think it is properly to be treated as pleaded to the second count only.

It does not appear that there was leave to plead and demur to the first count, and I conclude that there was no such leave, for filing a frivolous demurrer would not have been advisedly permitted.

Summons discharged.

WARNOCK v. POTTER.

Order—Surprise—Rescinding same.

Where the true state of facts was not laid before the judge who made an order for leave to amend pleadings, and he acted on an affidavit not conveying the right impression of the actual proceedings, he, on subsequent application to him on behalf of the party affected by the amendment, rescinded his order to amend.

(9th November, 1861.)

On the 30th October last Draper, C. J., made an order in this cause that the plaintiff might amend his replication served by making it correspond with the replication filed, and that the issue book might be amended by making it correspond with the replication; and that the notice of trial and all other notices should stand, and be deemed good and effectively served.

This order was made upon affidavits stating that the replication served was "by mistake" not a copy of the one filed; and that the issue book was made out incorrectly, omitting a plea of set-off.

On the 2nd November the defendant obtained a summons to rescind the foregoing order, or vary it in part so far as relates to the notice of trial and other notices served.

In support of this application defendant filed several affidavits from which and from others filed by the plaintiff the facts appeared to be that the declaration was served on the 19th October; that the time for pleading expired on the 26th October, that the defendant's attorney, with the apparent view of preventing the plaintiff from getting to trial at the Berlin assizes on the 4th November sent a clerk to the Deputy Clerk of the Crown's office, at Berlin, on the last day of pleading, with instructions not to file the pleas (never indebted, payment and set-off) "till after the hour of three of the clock in the afternoon; that he had sent copies of his pleas to his agents in Toronto to be served by them on the agents of the plaintiff's attorney there, but not to serve them until after three o'clock in the afternoon—the 26th October being on a Saturday; that the plaintiff's attorney was waiting in the Deputy Clerk of the Crown's Office, and as soon as the pleas were filed he filed a replication, and according to the clock in the Office of the Deputy Clerk of the Crown, both were filed before the hour of three in the afternoon; that the defendant's attorney lived at Elora; that the plaintiff's attorney had prepared an issue book, containing, as defendant's pleas, never indebted and payment, on which plaintiff took issue; that plaintiff served that issue book, with notice of trial, and notice for the defendant to appear at the trial before three o'clock on Saturday the 26th October; that the issue book served consequently did not correspond with the pleas filed, the plea of set-off being omitted, nor with the replication filed, as there was no issue on the plea of set-off.

This was stated in the affidavit on which was made the order of the 30th October, in the following words, "that the replication served on the 26th October was not a copy of the one filed."

In fact it appeared probable, as represented in the affidavit of the defendant's attorney, sworn on the 31st October, that the plaintiff's attorney took the step in this cause of serving the notice of trial, notice of examination of defendant, issue, and issue book before the defendant's pleas were filed or served; but it was certain that he made up the issue book, and served it and the notice of trial and other papers speculating on the chance that the defendant would plead the pleas which he (the plaintiff) set out in the issue book.

The reason for this course appeared to be that he had let a day slip by in declaring, and thus incurred the almost certain risk of being thrown over the assizes; and the defendant having pleaded differently from what he anticipated, he applied to amend his issue book, as if it was a mere clerical error in copying.

DRAPER, C. J.—According to the copy of the order of the 30th October, now before me, as well as according to the original summons of the 29th October, on which the order was made, the plaintiff did not ask to amend the issue book by inserting the plea of set-off, though in the affidavit of the plaintiff's attorney, sworn 28th October, he refers—not very distinctly—to the variance between the pleas filed and those set out in the issue book. I am not certain that the plea of payment is not omitted as well as that of set-off. The latter I have no doubt is.

Considering that the true state of facts was not before me when I made the order of 30th October, and that I was acting on an affidavit not conveying the right impression of the actual proceedings; and observing, moreover, that the leave to amend the issue book does not apparently extend to the pleas, but is confined to the replication, I think that order should be rescinded so far as respects the service of the notice of trial, and shall order accordingly. The defendant will then be obliged to move the court above to set aside the verdict, and the whole matter will be reviewed. In order to accomplish this I shall also order that further proceedings be stayed until the fifth day of next term.

Order accordingly.

RUTTAN, ONE, &c., v. AUSTIN.

Bills of Costs—Lapse of time in applying to have same referred—Refusal of Order

Where several bills of costs were delivered by plaintiff to defendant, the first in January, 1854, and the last in January, 1859, where there were several applications for payment, and a payment made in January, 1860, where an action was commenced in respect of the bills, in August, 1861, and no application made to refer the bills, or any of them till 4th November, 1861, a summons then obtained to refer them to the Master was discharged.

Read et al. v. Cotton, 6 U. C. L. J., 114 upheld.

(November 15, 1861.)

A summons was obtained on 4th November, 1861, to refer plaintiff's bill of cost to the Master of Queen's Bench for taxation, plaintiff to give credit for all payments, &c., master to certify what shall be found due on the bill, &c., and the costs of the reference; plaintiff to be restrained from prosecuting his action