plaintiff's said close, and other wrongs to the plaintiff did, to the plaintiff's damage of three hundred dollars. and, therefore, he brings this suit, &c.

Robert A. Harrison, for defendant, obtained a summons, calling upon plaintiff to shew cause:

1. Why the declaration, copy and service thereof should not be set aside, upon the ground that the declaration was not for the cause of action in respect of which the plaintiff sued in the inferior court.

2. Or why the declaration should not be set aside or struck out as tending to embarrass the fair trial of the action.

3. Or why the declaration should not be amended, so as to make the same conform to the plaint laid by plaintiff in the inferior court, on grounds disclosed in affidavits and papers filed.

John Bell, Q.C., shewed cause. He contended that the declaration was for the same cause of action as in the court below: that it might be in a different form, but that so long at the cause of action was the same the difference in the form of action was of no consequence. He cited *Gunn* v. *Machenry*, 1 Wils. 277; *Bowerbank* v. *Walker*, 2 Chit. R. 517; *Blacklock* v. *Millikan*, 3 U. C. C. P. 34.

Robert A. Harrison, in support of the summons, argued that the cause of action in the court below was the entry of the bull, to sustain which proof of scienter would be necessary; but that here the cause of action was the entry of the defendant *with* the bull—a cause of action in respect of which plaintiff could not sue in the division court, and a cause of action, which, under the circumstances, he calculated could not at all be maintained in any court. He cited *Beckwith* v. *Shordike*, 4 Burr. 2092; *Coward* v. *Boddeley*, 4 H. & N. 478; 2 Chit. Archd. 9 edn. 1247.

DRAPER, C. J.—The first summons to the defendant states the cause of action to be that the defendant did "wilfully, negligently and maliciously commit damage to the personal property" of the plaintiff.

This was issued by a magistrate, and on the hearing dismissed.

The plaintiff then sued out a summons from the division court, to answer "in an action for damages, for the causes set forth in the plaintiff's statement of claim hereunto annexed." That statement was—"William Mason claims of John Morgan the sum of ninety-nine dollars for damages sustained."

The affidavit on which the writ of *certiorari* was granted shews distinctly that the plaintiff was complaining that defendant's bull had gored a filly belonging to the plaintiff.

The plaintiff has now declared, "for that defendant broke and entered a close of the plaintiff, called, &c., and then and there with a certain bull of defendant's tore up, &c., the earth and soil, and there with the said bull gored, wounded and killed two horses of the plaintiff's, then and there found and being depastured in plaintiff's close."

It seems to me that this is not merely varying the *form* of action in the court below, but varying the *cause* of action, and stating one not only not instituted in the court below, but which could not have been instituted there.

If the plaintiff had sued in the division court for damages for breach of contract, and had, on the cause being removed by *certiorari*, have declared for breach of promise of marriage, he would, according to the argument relied on for the plaintiff, have been regular, though the Division Court Act expressly enacts that those courts shall not have jurisdiction in cases of breach of promise of marriage.

I have not overlooked the provision in the C. L. P. Act, that a plaintiff may join different causes of action in the same suit; but I apprehend it applies to suits instituted irregularly in the superior courts, and not to such as are removed by *certiorari*. Here, too, the plaintiff has not joined different causes of action, but professes to declare on the cause of action in the court below. I think the declaration is irregular, and must be set aside with costs.

Summons absolute with costs.

GORE DISTRICT MUTUAL FIRE INSURANCE CO. v. WEBSTER.

Setting aside judgment on payment of costs within a time limited—Effect of tender of costs within the time—Right of plaintiffs to costs after refusal through error—Sharp practice condemned.

On the 1st March an order was made setting aside a judgment on payment of costs within a week. On the 8th March the costs were tendered, and through error refused. On the same day the defendant, treating the judgment as set aside, filed and served his pleas, together with a demand of replication. Plaintiffs afterwards demanded the costs, and on non payment issued execution.

Held, 1, That the tender of costs was in sufficient time.

Held, 2, That the tender was a compliance with the order setting aside the judgment on terms.

Held, 3, That the effect of the order, followed by the tender, was to set aside the judgment and execution, so as to make the filing and service of the pleas regular.

Held, 4, That where the conduct of the defendant's attorney was vexatious, this was a ground for refusing costs of the application.

Plaintiffs afterwards, to avoid judgment of non pros, took issue on the pleas, and then executed a power of attorney authorizing a party to demand payment of the costs, payment of which was refused on the ground that the power of attorney was not countersigned by the President of the Company.

Held, 1, That the duty to pay the costs continued, notwithstanding the refusal to receive them when tendered.

Held, 2, That the filing of the replication was not, under the circumstances, a waiver of plaintiff's right to costs.

Held, 3, That the plaintiffs were entitled to a substantial order directing the payment of the costs, and the costs of the application.

Quære: Plaintiffs' right, under the circumstances, to costs between attorney and client, to be paid by the attorney for the defendant, as a punishment for his vexatious conduct.

(Chambers, March 29 and May 8, 1864.)

The declaration in this cause contained a count on a promissory note made by defendant in favor of plaintiffs, and the common money counts.

On the 20th February last, final judgment was signed, in default of a plea.

On the 24th February defendant's attorney obtained a summons from Mr. Justice Adam Wilson, calling on the plaintiffs to show cause why the final judgment should not be set aside on the ground that an application had been made by the defendant's attorney for the defendant, residing in Dundas, to the attorney for the plaintiffs, residing in Galt, for further time to plead; to which application no answer was received until the 20th February, the day on which judgment was signed, and on the merits.

On the 1st March last, Mr Justice Adam Wilson made an order setting aside the judgment on payment of costs within one week, the defendant undertaking to go to trial at the then next assizes for the county of Waterloo, and to plead issuably within the same period of one week.

On the 4th March the master taxed the costs under the order of the 1st March at the sum of £6 6s. 2d.

On the 8th March the agent for the defendant's attorney tendered the costs to a clerk in the office of the plaintiffs' attorney, the plaintiffs' attorney being at the time temporarily absent in Berlin, which costs the clerk refused.

On the same day the agent for defendant's attorney filed pleas of non-fecit and never indebted, and served the same, together with notice to reply.

On the 9th March, the attorney for the plaintiffs having returned from Berlin to Galt, attended the office of the agent of the attorney for defendant, explained to him that the costs had been refused by the clerk through error, and that he (the attorney) was willing at once to join issue and go to trial on the money being paid; whereupon the agent for defendant's attorney stated he had returned the money to his principal in Dundas, but that he (the agent) would write for it.

On the same day the plaintiffs' attorney sent a telegram to the defendant's attorney, informing him that the costs had been refused through error, and would be accepted; of which telegram no notice was taken by defendant's attorney.

On the same day the plaintiffs' attorney instructed his agent in Dundas, by letter, to call upon the defendant's attorney and explain what had occurred, and at the same time receive the amount of costs if the defendant's attorney would pay the same.

On the 10th March the agent of plaintiffs' attorney at Dundas called upon the defendant's attorney for the costs, but the latter refused to pay them, stating that he was not acquainted with the handwriting of the plaintiffs' attorney, and expressing an opinion that a power of attorney was necessary before he would pay the amount.

On the 11th March the plaintiffs' attorney caused a written notice to be served upon the defendant's attorney, demanding pay-