

Eng. Rep.]

LAURIE V. SCHOLEFIELD.

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2nd counts. To the third count the defendant pleaded that the dwelling house was not the plaintiff's, as alleged. To this plea there was a demurrer. Now these counts contain several and distinct causes of action, and I think it clear, upon the principle and authority of *Walsh v. Jones*, 1 E. & B. 383, and *Kerkin v. Kerkin* 3 E. & B. 398, that the prohibition, if granted, should be restricted to the cause of action contained in the third count. Causes of action of this nature, though capable of being joined in one action under the provisions of the Common Law Procedure Act, are still so far distinct, that a judge may, if he thinks fit, order one or more of the causes of action contained in several counts to be tried separately from those in another or others; and I can see no reason, therefore, why a prohibition may not, nor, indeed, why it should not, be restricted to that count, which alone is in excess of the jurisdiction, leaving the others to be disposed of by the County Court, as the proper court wherein they should be tried. It further appeared that, what in fact has been done, is, that at the trial which came on before the summons was served, the judge, by an order made on the record, has expunged the third count and all the pleadings in respect thereof from the record, and thereupon, the trial of the issues joined on the other counts proceeded, and a verdict has been rendered on them alone. This, as it appears to me, is just what the exigency of the case required the judge to do, and the defendant has therefore obtained all the relief that he was entitled to, or that he should have received by a writ of prohibition. It is therefore unnecessary that the writ should issue, and the summons must be discharged.

Summons discharged.

ENGLISH REPORTS.

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Continuing guarantee—Practice—Pleading—Rule 14, H. T. 1853.

R. & Co., manufacturers, opened a banking account with L., who placed £1,000 to R. & Co.'s account, on A. & B., executing the following guarantee:—"In consideration of L., agreeing to advance and advancing to R. & Co. any sums of money they may require during the next eighteen months, not exceeding in the whole the sum of £1,000, we hereby jointly and severally guarantee the payment of any such sum that may be owing to L. at the expiration of the said period of eighteen months, and undertake to pay the same on demand in the event of R. & Co. making default in the payment of the same. Signed, A. & B., R. & Co. paid into L.'s bank to their account more than £1,000 during the eighteen months, but they overdraw their account several times during the same period. At the end of the time R. & Co. made default in payment of the £1,000, and had overdrawn their account £24, whereupon L. sued A. on the guarantee. After the action brought, L. paid L. £500, his share of the liability. L. obtained a verdict against A. for £1,000.

Held, first, that this was a continuing guarantee, and that in placing a construction on it, the position of the parties as well as the words of the contract were to be considered, so that it was not to be avoided by L. allowing R. to overdraw his account to an amount together with the sum of £1,000 exceeding £1,000.

Secondly, that rule 14 H. T. 1853, applied to actions on guarantees, and that therefore the payment of the £500 by B., could not be given in evidence in reduction of debt, but ought to have been pleaded in bar.

[17 W. R., 931.]

Action by the public officer of the Union Bank of England.

The declaration stated that in consideration that the bank would agree to advance and advance to the firm of Russell & Co., sums of money that they might require during the then following eighteen months, not exceeding in the whole the sum of £1,000, the defendant promised and guaranteed to the bank the payment of any such sum that might be owing from the firm of Russell & Co., to the bank at the expiration of the said eighteen months, and undertook to pay the same on demand in the event of the said firm of Russell & Co., making default in the payment of the same; and the bank performed the said consideration for the said promise and guarantee, and advanced to the said firm divers moneys, amounting to £1,000, which they required during the eighteen months, and at the expiration of the said eighteen months, there was owing from the said firm to the bank, £1,000, for and in respect of the said advances, and all conditions were fulfilled, &c., yet the said firm have not, nor has the defendant, paid the said £1,000, and the same remains due and unpaid. And the plaintiff claims £1,100.

Pleas.—first, *non assumpsit*; secondly, that there was not owing from Russell & Co. £1,000, or any part thereof; thirdly, that before action the defendant, by one Black, satisfied and discharged the claim by payment; fourthly, that before action Russell & Co. discharged the said claim by payment; fifthly, that the said promise and guarantee was made by the defendant and accepted by the co-partnership solely as a surety for Russell & Co., and that in violation of the said condition in the said guarantee, and without the defendant's consent, the bank made advances to Russell & Co. during the eighteen months greatly exceeding in the whole the sum of £1,000, and thereby the defendant was discharged and released from liability on the guarantee. At the trial before Mellor, J., at the last Spring Assizes at Kingston, the following facts appeared:—

In February, 1867, Russell & Co. desired to open a banking account with the plaintiff's bank, and they were at the same time desirous of obtaining an advance of £1,000 from the bank. The advance, according to the rules of the bank, could only be made upon satisfactory security being given for its repayment. Russell, a partner in Russell & Co., opened an account on the 2nd of February in the usual way, and paid money into the bank to the credit of the firm. At the time the account was opened, it was arranged that the bank should make the advance of £1,000 on having the same secured by the joint and several guarantee of Black & Scholefield.

On the 4th of February the plaintiff gave to Russell & Co., the following guarantee, and on the 8th of February, Russell & Co. brought it back duly signed.

The following is a copy of the guarantee:—

"In consideration of the Union Bank agreeing to advance and advancing to the firm of Russell & Co. any sum or sums of money they may require during the next eighteen months, not exceeding in the whole the sum of £1,000, we hereby jointly and severally guarantee the pay-