

Chancery.]

ANONYMOUS—COX V. KEATING.

[Chan. Cham.]

ANONYMOUS.

Solicitor—Order to pay over—Striking off roll—37 Vict., cap. 7, sec. 89 (O).

A solicitor included in his bill of costs rendered to his client, the fees of a commissioner appointed to take evidence, and received payment of such bill, but neglected to pay the commissioner's fees. On the summary application of the commissioner he was ordered to pay over the fees within a month, and in default to be struck off the rolls.

(May 17, 1876—BLAKE, V.C.)

A petition was presented in this matter by one G. G., against a solicitor, to compel payment of a sum of \$450, and in default praying that he might be struck off the rolls.

It appeared from the petition and affidavits that the petitioner had been employed by the solicitor to take evidence in Scotland to be used in a suit pending in Ontario; that his fees as such commissioner amounted to \$450, of which a bill had been rendered to the solicitor; that the latter had drawn upon his client and received payment of a sum sufficient to cover all his costs of the suit in question, including the fees of the petitioner.

W. R. Mulock for petitioner. The application is made under 37 Vict., cap. 7, sec. 89 (O); and see *Re Carroll*, 2 Chy. Cham. 323; *Re Walker*, 2 Chy. Cham. 324; *Re Toms and Moore*, 3 Chy. Cham. 41; *Re Atkin*, 4 B. & Ald. 47; *Ex p. Bodenham*, 8 Ad. & E. 959; *Re Knight*, 1 Bing. 91; *Re Hill*, L. R. 3 Q. B. 543.

Bethune, Q.C., for respondent. The respondent has not received the fees in question in privy with the petitioner. It is the case of an ordinary debt, and there is no jurisdiction in this court to enforce payment by summary process of this kind. The matter stands in the same position as the ordinary case of Sheriff's fees, which are included in an attorney's bill, and of which he has obtained payment. It could never be intended to bring such cases within the act referred to.

BLAKE, V.C.—It appears on the affidavits, and is not denied, that the respondent has received from his client sufficient money to pay the costs of the suit referred to in the petition, including the petitioner's fees; here the client was liable for the payment of these fees, and he has placed in the solicitor's hands money for the purpose of enabling him to pay them, and instead of paying them, the solicitor has put the money in his pocket. I have no doubt that such a case is a non-payment of money within the meaning of the act. The money must be

paid within a month, and in default the respondent must be struck off the rolls. The respondent must pay the costs of the petitioner.

Order accordingly.

CHANCERY CHAMBERS.

COX V. KEATING.

Replication—Introduction into replication of matter by way of confession and avoidance—Order 151.

Replication held irregular which contained new matter by way of confession and avoidance of the defence set up by defendant's answer. Such matter should be introduced by way of amendment to the bill.

(February 15, 1876—REFERENCE.)

This was a suit for specific performance by a vendee against his vendor. By the third paragraph of the defendant's answer, it was alleged that by the terms of the contract the plaintiff covenanted to pay the purchase money on the 1st October, 1875, and that the same had not been paid. The plaintiff, in his replication, admitted this allegation, and set up certain facts in excuse for his default. He alleged in effect that he attended the defendant and was prepared to pay the purchase money, and that he did not do so because he found an incumbrance outstanding on the property, which the defendant refused to remove. The defendant in his answer alleged that the petitioner had executed and registered a mortgage on the property, and he claimed, by way of cross relief, that in the event of the sale not being carried out, the plaintiff might be ordered to release the lands from the mortgage so executed by him. In his replication, the plaintiff admitted the making of the mortgage, but he set up that he afterwards procured it to be discharged.

Hoyles, for the defendant, now applied to take the replication off the files for irregularity, or to strike out the new matter thus introduced by way of confession and avoidance of the facts alleged in the answer.

Perkins (Beatty, Miller & Lash) for the plaintiff. The matter objected to is within the meaning of Order 151, which provides that admissions in the replication may be made, "with such qualifications as may be necessary or proper for protecting the interests of the party making the admissions."

MR. HOLMESTED.—I do not think that this replication complies with, or is within the spirit of Order 151. The system of pleading which prevails in this court aims at producing an issue between the litigants, in the course of at