agent to show cause why the estreat of the recognizance of Henry Smyth and Alfred Smyth for the due appearance of above defendant, dated 27th October, 1864, should not be set aside, and why the *fieri facias* issued thereon on the 5th April, 1865, and returnable into this court, should not be set aside on the ground that no forfeiture of the said recognizance had taken place, no indictment having been found against the said Joshua Ritchie, at the Court of Oyer and Terminer and General Gaol Delivery, in the county of Kent, at which the said Joshua Ritchie was to appear, and that no breach of the condition of the recognizance had been made, and on grounds disclosed in affidavits filed.

It appeared that on or about the 25th October last, Joshua Ritchie was committed to the common gaol of the county of Kent, to await his trial at the then next Court of Oyer and Terminer for the county of Kent, charged with a breach of the Foreign Enlistment Act; that on the 27th October last he was admitted to bail, to await his trial at the said court; and that the recognizance was in the ordinary form.

The condition of the recognizance, which was also in the ordinary form, was as follows: "The condition of the within written recognizance is such, that whereas the said Joshua Ritchie was this day charged before, &c., for that, &c.; if, therefore, the said Joshua Ritchie will appear at next Court of Oyer and Terminer, &c., to be holden, &c., and there surrender himself into the custody of the keeper of the common gaol there, and plead to such indictment as may be found against him by the grand jury for and in respect of the charge aforesaid, and take his trial upon the same, and not depart the said court without leave, then the recognizance to be void, &c."

The witness for the prosecution not appearing, the grand jury had no opportunity of finding a bill; but the accused, notwithstanding, was called, and not appearing, his recognizance estreated.

Robert A. Harrison showed cause, and argued that the condition of the recognizance was not simply to appear if a bill were found, but absolutely to appear at the court, and there surrender himself, and (in the event of a bill being found) plead to such indictment, &c.

D. McMichael, in support of the rule, contended that such was not the legal effect of the condition, and that in practice the accused was never required to appear unless a bill were found.

Hagarty, J.—I am aware the construction for which Mr. Harrison contends has prevailed in some counties, and I think, looking at the object of the recognizance and the reason of the law, that his criticism of the words of the recognizance is too sharp. I do not think it was intended by the Legislature that the accused should appear and surrender himself unless a bill were found. The estreat of the recognizance here was therefore premature. The rule must be made absolute for the relief of bail.

Morrison, J., concurred.

Per cur.—Rule absolute.

COMMON LAW CHAMBERS.

(*Reported by* Robt. A. Harrison, Esq., *Barrister-at-Law.*)

Dunn v. Jarvis.

Con. Stat. U. C. cap. 22, sec. 57—Final judgment in default of a plea—When regular.

Where plaintiff's declaration contained two counts—the first in case against a sheriff for alleged breach of duty in not paying over money levied under an execution, and the second for money had and received—it was *held*, that plaintiff could not in default of a plea sign final judgment under sec. 57 of C. L. P. Act.

[Chambers, April 19, 1865.]

T. H. Ince obtained a summons calling on the plaintiff to show cause why the final judgment entered in this cause should not be set aside, upon the ground that the action was one for damages, which could only be assessed by a jury, and upon grounds disclosed in affidavits and papers filed.

John O'Connor shewed cause.

The declaration contained two counts, the first in case against a sheriff for alleged breach of duty in not paying over money levied under an execution, and the second a count for money had and received. There being no plea filed or served, plaintiff entered final judgment, under sec. 57 of the C. L. P. Act.

Richards, C. J.—I think the declaring against the sheriff in case for a breach of duty, is not a proceeding in which final judgment can be entered under secs. 55 or 57 of Con. Stat. cap. 22. The action sounds in damages, which must be assessed by a jury. This is the best conclusion I can form in the haste in which I have been called upon to decide, and I must therefore set aside the judgment with costs. The joinder of the count for money had and received will not make the whole judgment regular, as the case of *Westlake* v. *Abbott*, 4 U. C. L. J. 46, decides.

Hooper v. Burley.

Ejectment—Judgment as on a vacant possession—Irregularity of—Idle and useless affidavits and statements in affidavits to be disallowed on taxation.

Held, upon the facts disclosed in the affidavits filed in this cause, that the premises for which the action of ejectment was brought were vacant when the action was commenced and that judgment as on a vacant possession was duly obtained and entered.

Where plaintiff filed many useless affidavits and had a great many repetitions as well as idle statements on information and belief in affidavits filed, a direction was given to the master that they should not be allowed to the plaintiff on taxation, though he discharged defendant's summons with costs.

[Chambers, April 24, 1865.]

Ejectment, for that part of No. 36, 6th Concession, Ernestown, containing sixty-six acres, being that part of the north east half which lies north of the travelled road leading, &c.

Notice of plaintiff's title, under a deed of assignment from Nicholas Hinch to the plaintiff, of a mortgage made to George Hinch, deceased, dated 23rd February, 1858.

Writ served by affixing a true copy thereof and of the notice of title to the front door of the dwelling house on the premises, on the 18th February, 1865.

Affidavit of Alexander Dulmage, that defendant does not reside in Upper Canada, but is supposed to reside either in British Columbia or