

sulting with a number of my brethren, and I am clear that the objection is without foundation. Section 68 of the Act provides that the King's Bench, Chancery, Common Pleas, and Exchequer Divisions shall not sit as such Divisions; and there shall be no Divisional Courts of any of these Divisions; but the Divisional Courts shall be Divisional Courts of the High Court. An appeal is taken to "a Divisional Court of the High Court or to the Court of Appeal:" Rules 782, 783: and where to a Divisional Court, it is really to the High Court. When Rule 827 (1) or (2) speaks of "the Court appealed to," the distinction is indicated between the Court of Appeal and the High Court—not between certain members of the High Court and other members of the same Court. The objection is overruled. In my judgment, motions of this kind are generally best made before the Judge who tried the action, and who should be most conversant with the facts. As to that, however, much may be said on both sides.

As to the merits, I should not think of staying the execution until the trial of the counterclaim, even if it be seriously intended to proceed with a claim that cannot be expected to result in a substantial verdict. The counterclaim is, in my view, in any event, one which should not have been joined with the action. Many cases are cited in *Holmsted and Langton*, pp. 459-461, where just such counterclaims were held not capable of being conveniently tried in the action. There is no suggestion that the plaintiff is not a man of substance, or that, if a verdict were obtained upon the counterclaim, there would be any danger of its not being paid.

As to the claim, it will be noted that the sole ground of appeal is that the defendants should have been allowed damages (which they fix at \$214.50) for breach of warranty. There is no appeal against the remainder (\$738.75, less \$214.50, equals \$524.25), and no ground is alleged why this should not be paid. The execution should not be stayed as respects . . . \$524.25.

In respect of the \$214.50, it must be kept in mind that "the general rule and the right of the appellant is that, save in the excepted cases, proceedings below are stayed upon the appeal being perfected; . . . a proper case must be made out for allowing the respondent to enforce what has not yet become a final judgment, the appeal being a step in the cause: *Centaur Cycle Co. v. Hill*, 4 O. L. R. at p. 95, 1 O. W. R. 377, 401. All that is shewn here is the belief