

Co. Ct.]

LEE V. BEALL—LAW STUDENTS' DEPARTMENT.

IN THE COUNTY COURT OF THE COUNTY OF ONTARIO.

LEE V. BEALL.

Practice—Service of a writ against a British subject residing without the jurisdiction—Not irregular when served within the jurisdiction.

[Whitby, March 26—DARTNELL, J. J.]

The papers filed showed that a writ, for service out of the jurisdiction, was taken out on the 27th of February, 1879; that the defendant was a permanent resident of the City of Montreal, but being temporarily in the Village of Port Perry, in the County of Ontario, was served with a copy on the 5th day of March instant. A summons was taken out to set aside this service as being irregular.

DARTNELL, J. J. There does not seem to be any express decision upon this point of practice; the cases cited of *Hasketh v. Fleming*, 1 Jur. N. S. 475; *Green v. Braddyll*, 1 H. & N. 69; and *Medcalf v. Davis*, 6 Pr. Reports, 275, not being in point. A careful consideration of the clause of the C. L. P. Act bearing upon the subject leads me to believe that the intention of the Act was that judgment could not be entered against a British subject, residing without the jurisdiction, unless he had been served with a writ in the prescribed form. If this defendant had been served with the ordinary form of summons for service within the jurisdiction, no doubt it could have been set aside, on its being shown his residence was beyond it. It is not usual for Courts to set aside process or proceedings, where there has been a substantial compliance with the governing statute or rule. I think here that there has been such compliance. The defendant has received all the notice required, and what he in effect asks is, that the plaintiff, if he fail in his action, or he himself if the judgment be against him, should be saddled with the additional cost of service in Montreal. It is urged that the statutory endorsement that the "writ is for service out of Ontario," implies that such service cannot be made within it; but I think the reasonable meaning of this is,

that it is for "service on a party living out of Ontario." It is urged that I could amend under sec. 38; but there is really nothing to amend. There is "no mistake or inadvertence," and besides this section is an enabling enactment, and the application must be made by the plaintiff, and cannot be made on a motion by the defendant.

As the point is a new one, and as the summons was moved without costs, I discharge it without costs. The defendant will have four days further time to appear.*

LAW STUDENTS' DEPARTMENT.

EXAMINATION PAPERS. MICH. TERM, 1878.

FIRST INTERMEDIATE.

Smith's Common Law, and Con. Stat.
chaps. 42 & 44.

1. In how far will assault and battery be justified on the ground of its being in defence of a house?
2. What is the meaning of the term "*Merger*" in relation to contracts? Illustrate your answer.
3. "Estates for life are usually given *without impeachment of waste*." Explain the meaning of the italicised words in this quotation, and state in general terms the rights of the grantee of such an estate.
4. A person owns a piece of vacant land adjoining a dwelling house, also owned by him, having a window overlooking the vacant land. He sells the vacant land to A and the house to B. Will it make any difference in the right to access of light to the house whether the conveyance to A is made before that to B; and, if so, what difference will it make?
5. What is the effect of the words "*lost or not lost*" in a Marine Policy of Insurance?
6. Explain fully the effect of the words "*and not otherwise or elsewhere*" following the name of the Bank at which a promissory note is made possible.
7. What is the effect of one of two joint contractors making a payment on account, after the remedy on the contract is barred by the Statute of Limitations?

[* The converse of this case was decided in *Chambers v. Morrison*, J. on appeal from Mr. Dalton, in *Snow v. Cole*, 7 Prac. R. 168. Ed. L. J.]