ONTARIO REPORTS.

PRACTICE COURT.

(Reported by Henry O'Brien, Esq., *Barrister-at-Law, Reporter in Practice Court and Chambers.)*

Maitland et al v. Cameron.

Issue—Irregularity—Service of notice of trial.

1. A joinder of issue should be properly entitled, and when the name of one of the plaintiffs was omitted it was *held* to be irregular.
2. Service of notice of trial, &c., on a person alleged to be a partner of the defendant, *held* insufficient, without some evidence of his authority or duty, either express or implied, to receive service of notices or papers.

[Practice Court, E. T., 1868.]

During Easter Term, *Anderson* obtained a rule calling on the plaintiffs to show cause why the verdict should not be set aside for irregularity, and for a new trial, with costs, on the grounds—1. That no joinder of issue in the cause was served. 2. That notice of trial was not served personally on defendant, who appeared in person, nor did it come to his knowledge in the proper time before the assizes, notice of such irregularities having been given to the plaintiffs' attorney before the trial, &c.

A. Kirkpatrick showed cause during the same term, referring to Reg. Gen. 1865, 138.

The defendant, in person, supported his rule, citing *Fry* v. *Mann*, 1 Dowl. 419; *McGuin* v. *Benjamin*, 1 Cham. R, 142; *Chase* v. *Gilmour*, 6 U. C. Q B, 604.

It appeared from the affidavits and papers filed that the joinder of issue served on the defendant was not properly entitled in the cause, the name of one of the plaintiffs being omitted, and that the notice of trial was handed to a partner of the defendant, at the chambers of the defendant, the defendant not being present. That as soon as the notice of trial came to the defendant's knowledge, on the 19th March, (the assizes in Kingston, where the trial was to be heard, commencing on the 26th March,) the defendant caused the defective joinder, the issue book and notice of trial to be returned to the plaintiff's attorney, with a written notice to the effect that no joinder of issue had been served, nor any notice of trial served personally on the defendant, and that if the plaintiff proceeded with the trial of the issue, that the defendant would move to set aside the verdict for irregularity. Notwithstanding such notice the plaintiff proceeded and took a verdict, the defendant not appearing or making any defence.

In his appearance the defendant gave his address, "his chambers, on King-street."

Morrison, J.—As to the irregularity in the joinder of issue, I think the objection must prevail; the defendant pleaded an equitable plea, to which the plaintiff had to reply, and the replication, although only taking issue on the defendant's plea, is a pleading, and, as such, requires to be served, and as said by Mr. Chitty, in his first volume on pleading, the names of the parties should be accurately stated in the margin. Here the names are inacurately stated, and, so far, irregular, and as notice of the irregularity was given to the plaintiffs as soon as the joinder came to the defendant's knowledge, the plaintiffs proceeded at their peril.

Then as to irregularity in, or rather the defective service of the notice of trial, as well as the joinder of issue, I am inclined to think that the service was not a good one. The clerk who made the service went to the defendant's chambers, on the 12th March, where he saw a partner of the defendant's, of whom he enquired whether the defendant was there, to which he replied that defendant had not come down from his residence, and then the clerk handed the papers to the partner. The general rule, as I take it deducible from the various decisions is, that a notice must be served on some person at a defendant's residence or chambers authorized to receive letters, notices or messages, such as a servant, a clerk of the defendant; that if the service is on a person, such as a friend of the defendant, staying at defendant's house, it is insufficient, and that, even if the party who served the notice swears that he *believes* the person served had authority to receive it.—*Brandon* v. *Edmonds*, 2 Dowl. N.S., 225; *Rowland* v. *Vitzitelly*, 1 D. & L 767. I cannot say that a partner of a defendant is a person authorized to receive such notices or papers, or that it is his duty to do so. Here it is not stated or shown that the partner was so authorized, or that he was in the habit of doing so for defendant. For all that appears on the affidavits filed by the plaintiffs on showing cause, this gentleman, assuming him to be a partner of the defendant, may have been at defendant's chambers, casually, on the day he was handed the papers, for it is not shown that he and defendant occupied the same offices. He may have been there as any stranger might be. The defendant swears that the notice of trial, &c., only came to his knowledge on the 19th March, and on the same day the plaintiffs' attorney was notified of the irregularities of the defective joinder, and the notice of trial returned. Under these circumstances I am constrained to give effect to the objection, and to make the rule absolute for setting aside the verdict.

Rule absolute.

COMMON LAW CHAMBERS.

Fields v. Miller.

Appeal—Forcing appellant to proceed—Judgment for costs of defence—Bond—Con. Stat. U. C., cap. 13, *sec.* 16.

Giving the necessary security is a proceeding prior to settling a case for appeal.

If an appellant fails duly to prosecute an appeal pursuant to leave, the respondent will, when leave to appeal has been given, be protected by the court withdrawing the leave.

Under Con Stat. U. C., cap. 13, sec. 16, sub-sec. 4, only one bond is requisite on a judgment for costs alone, that part of the statute referring only to judgments for the payment of *money*, as distinct from costs.

[Chambers, March 28, 1868.]

This was an action of trespass, in which judgment had been entered for defendant, pursuant to a decision of the Court of Queen's Bench; and upon which judgment execution was issued for the costs of defence.

The plaintiff gave notice of intention to appeal to the Court of Error and Appeal, on leave given for that purpose. He then filed the bond for security for the costs in appeal, and due prosecu-