

Cty. Ct.]

SPOULE V. FERRIER.—NOTES OF CANADIAN CASES.

[Ct. Ap.]

pleading relies," for if money lent is relied upon, why mention goods bargained and sold? or if goods sold and delivered constitute the cause of action or set off, why introduce a statement about money paid for the use of the opposite party at his request? Any one of these statements may be as concisely made as possible, but if only one is going to be relied upon the introduction of the rest destroys the conciseness, and if more than one is, or the whole are, relied upon, then each should be divided into one or more paragraphs containing, "as nearly as may be, a separate allegation."

Then again, it seems to me that the O. J. Act contemplates such a concise statement of claim, set off or counter-claim, as will disclose with reasonable certainty and particularity, the material facts relied upon, such a statement at least which, if made upon a writ of summons, would amount to a sufficient special endorsement to enable final judgment to be entered in case of non-appearance. Now, a summons issued under the Judicature Act and endorsed with the common counts without dates or sums, would certainly not entitle the plaintiff, in case of non-appearance, to enter final judgment; for, as Cockburn, C. J., said in *Walker v. Hicks*, L.R. 3, Q.B.D. 8, "a party who is placed in the predicament of being liable to have a judgment signed against him summarily, is entitled to have sufficient particulars to enable him to satisfy his mind whether he ought to pay or resist," and I think the same reasoning applies to a set off or counter-claim. It should be pleaded with sufficient particularity to enable the plaintiff to satisfy his mind whether he ought to go on with the action. Can it be said that a set off which does not disclose whether it is founded on money lent, goods sold and delivered or a general account stated, and without any dates or amounts whatever, does this? I think not.

It may be noticed, also, that the forms given in the Act all contain full particulars of the nature of the claim with dates and sums. These forms are not imperative but they are given as examples and the intention of the Act may fairly be deduced from them as requiring pleadings to be something of a similar character. If otherwise, why were they given at all?

I must, therefore, conclude that the form of pleading, known as the "common counts," is not now applicable to the procedure introduced by the O. J. Act, and the questions arise under this motion, should I strike out this paragraph or will an order to amend, and for particulars meet the case? And who should pay the costs? I see no objection to allowing the defendant to amend by separating any or all the counts he relies

upon into distinct paragraphs, with their proper consecutive numbers and adding thereto sums and dates and such other reasonable particulars as the nature of each claim will fairly admit of, and the order can also go for further particulars of the non-completion of the contract.

As to the costs, under ordinary circumstances a party pleading a statement of defence which is inadmissible, should pay the expense of having the statement struck out or amended, or of procuring an order for further particulars; but, as I understand, it has been usual to plead the common counts since the new procedure, and their admissibility has not been questioned before: the costs of the summons and order in this case will abide the event. On the question of costs each case will have, in a great measure, to be decided on its own merits, for there may be a difference between a pleading wholly made up of the common counts, and one in which the pleader, after having exhausted his facts and ingenuity in framing numerous statements of claim or defence, manifestly from force of habit, is unable to resist the temptation to throw in the common counts at the end, for what they are worth.

I see nothing in the objection to the common counts not being pleaded either as a defence or a counter-claim. The defendant's pleading is headed "statement of defence or counter-claim"; besides we have no rule requiring a party to state specifically that he relies upon any facts by way of set off or counter-claim, as they have in England.

NOTES OF CANADIAN CASES.

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COURT OF APPEAL.

GREEN V. WATSON.

Patent—Assignment of patent right.

The Court being equally divided the judgment of Ferguson, J., 2 O. R. 627, stood affirmed, and the appeal therefrom dismissed with costs.

Robinson, Q.C., and Bethune, Q.C., for the appellant.

E. Blake, Q.C., and Cassels, Q.C., for the respondent.