ford in June to bring the cause down to trial at the last Brantford assizes.

By affidavits of the plaintiff's attorney and his clerk, it is shown that a note endorsed by the defendant for £25 had been placed by plaintiff's in the attorney's hands for collection in July, that inquiries were then made made for defendant, and it appeared that he was in Quebec looking after the building of the Post Office. A writ against him as an absent defendant was personally served there, and he settled the suit. About the 10th August the note in this cause was placed in the attorney's hand for collection, enquiries were made and the information obtained, was that the defendant was still at Quebec but they could not learn if he was soon to return to Upper Canada. On the next day a writ was issued against the other parties to the note as residents of this Province, and a separate action commenced against Elliott as a non-resident defendant, and he was served at Quebec on the 15th of August and put in a defence to the suit.

In the affidavits filed on behalf of the plaintiffs, the opinion is expressed that unless defendant had been served as an absent defendant he would not have visited Upper Canada in September, and he could have been served herein time for the last Brantford assizes. That defendant's desire was to delay and throw them over, and the attorney was obliged to take the course he did to serve the interest of his clients.

Burns, for the defendant contended that plaintiffs were bound to have proceeded against defendant at same time as the other parties to the note, and not having done so was not entitled to any costs except disbursements in the second action.

Harrison, on the contrary contended, 1st that plaintiffs could not have proceeded against defendant in the suit with the other parties to the note, defendant being at the time a resident in Lower Canada, and 2nd that even if plaintiffs could have so proceeded, it was not reasonable to compel them to do so, under the penalty of being deprived of full costs, the separate action against defendant.

The authorities cited by Counsel are referred in the judgment.

RICHARDS, J.—I shall refer to the statutes applicable to this cause as they are found in the Consolidated Statutes.

By cap. 42, sec. 23, the holder of a bill may serve all or any of the parties to it in one action and proceed to judgment, execution against the defendants as if they were joint contractors. Then follow several sections as to the mode of procedure and and the rights of several defendants between themselves and the plaintiff respectively. Sec. 35, provides in case several *suits* be brought on one promissory note against the maker or indorsers respectively, then shall be collected from the defendant the costs taxed in one suit only, at the election of the plaintiff, and in the other suits the actual disbursements only shall be collected or received from the defendant.

The 29th section provides that when several defendants are included in one process under the act, and any of them cannot be served therewith by reason of absence from or concealment within Upper Canada, then the action may proceed as against the other defendant or defendants without prejudice, and the plaintiff may afterwards sue the defendant separately who has not been served with process, and may recover costs as if the act had not been passed.

It is urged on behalf of the defendant that inasmuch as plaintiff could have issued a concurrent writ against the defendant to be served out of the province and against the other defendants to be served within Upper Canada, and has not done so, he is to be considered as in no more favorable position than if he had commenced a separate action whilst the defendant was within Upper Canada.

I am not prepared to assent to this proposition for it is undoubtedly more inconvenient to effect service on parties out of the Province than within, and when so served there is delay as to the time for appearance, and the other proceedings against an absent defendant in case of non-appearance are to be approved, directed by a judge's order, causing considerable delay and increase of expense, &c.

I do not think therefore that it is unreasonable that a plaintiff should proceed against such of the parties to a note as are resident in Upper Canada, and against any other party when he should return to the Province as an absent defendant before his return.

I do not think that the Legislature intended anything more than to deprive the plaintiff of the additional costs when he unreasonably and unnecessarily multiplied suits against the parties to a promissory note, bill of exchange, &c.

In the present case I think the plaintiffs were not bound to wait until the defendant came to Upper Canada before suing him separately if he was absent at the time of commencement of the action and such absence was likely to continue as it appears, from the affidavits filed it was so as to prevent the service here of a summons within a reasonable time.

The 29th section if construed literally might make it necessary to include the name of the absent defendant in the writ against the others in order to entitle a plaintiff to costs, if such absent defendant were afterwards sued separately. It seems to me that it would not be interpreting this section of the act in its true spirit, if we were *to hold it necessary to insert in a writ against the other* parties the name of a person then out of the province and likely to be so for some considerable time, when it was notorious he could not be served here merely for the purpose of enabling the plaintiff if he should sue him separately afterwards to recover his full costs of suit. The way in which the section is framed is evidently for the relief of plaintiffs, where he defendants are all named in the writ to enable the action to go on, when one is not served either from being absent from the Province or concealed within it. I think as already mentioned the object of the statute is to prevent the multiplying of suits for the purpose of making costs. I do not think the Legislature ever intended where a indorser on a note was absent perhaps in California or Australia, that a plaintiff in proceeding against the parties resident here should be compelled to insert his name in the summons as a matter of form when he could not be served here or issue a concurrent writ against him to be served there under the penalty of being deprived of full costs in the event of sueing such indorser separately to recover the amount from him.

I am not therefore prepared on the merits to direct the suggestion applied for to be entered.

If I thought the plaintiffs only entitled to collect or recover the full costs in one suit only, I am not prepared to say that the defendant is in a position to compel "*the plaintiff to elect*" to take the full costs in the same suit against the other defendants and only the disbursements in this suit.

The statute does not in words direct that the judgments are not to be entered in all the suits for the full costs, but that there shall be collected or recovered from the defendant costs taxed in one suit only at the election of the plaintiff, and in the other suits the actual disbursements only shall be collected or recovered.

It may be argued that the plaintiff is not compelled to make his election until the costs in all the suits are taxed, or until he has *collected* or *received* the costs in one. However it is not necessary in the view I take to decide this point

I see no reason to direct judgment to be entered or costs taxed here. If defendant thinks the costs not properly taxed they may be revised here without difficulty under the provisions of the statute.

The summons will be discharged without costs.

Summons discharged without costs.

MCNAUGHTON v. WEBSTER.

Interpleader—Attachment of debts—Books of account—Sale thereof by Sheriff.

A sale of books of account by sheriff, under an execution, does not pass the property in the debts or accounts therein charged.

Semble, that books of account and open accounts cannot be seized by sheriff, under 20 Vic., cap. 57, s. 22; at least they cannot be sold or transferred, but, if seizable at all, must be held by sheriff in security for judgment debt and collected as such in his own name.

An order attaching a debt in payment of a judgment, is a bar to any action brought for the recovery of such debt, so long as it is in force.

An interpleader will not be granted in order to try the validity of an attaching order, or to determine the amount due to the judgment debtor.

Any debt that a defendant could set off at law against his creditor may be attached under garnishee clause of C. L. P. Act, 1856.

Quære. What right has an attaching order on the party's right to set off?

This was a summons calling on the plaintiff and the Commercial Bank to shew cause why they should not appear and state the