

C. P.]

NOTES OF CASES.

[Ontario.]

ordering the plaintiff, as administrator, to act under the directions of said Court; and defendant averred that the plaintiff never obtained the authority or direction of the Court to bring this suit; and that save as aforesaid, the plaintiff is not the administrator of W.'s estate and effects. To this the plaintiff replied that in two suits named, pending in Chancery, the plaintiff was appointed by the Court administrator pending these suits, with all the powers of a general administrator, under which authority he now brings this action.

WILSON, J., *held*, on demurrer to the replication, that as it appeared from the pleadings that the plaintiff was not a general administrator, but only *pendente lite*, the declaration should have alleged his authority to be so limited, and that the suits during whose pendency the plaintiff was administrator was still pending, and in this respect the declaration was bad, and that part of the plea traversing the plaintiff being a general administrator was good.

2. That the plaintiff having, under C.S.U.C. cap. 16, sec. 54, all the rights of a general administrator, might sue without the prior leave, and that that portion of the plea alleging the want of such leave was therefore no defence.

3. That the replication, in alleging that the plaintiff was a general administrator during the pendency of the suits, was bad.

Donovan for plaintiff.

Foy for defendant.

SPENCER V. CONLEY—DOOLEY, GARNISHEE.

(April 21, 1876.)

Garnishee order—Rival claimants to debt.

On an application under the C.L.P. Act, for a garnishee order for a debt alleged to be due by the garnishee to the judgment debtor, the debt was claimed by a third person, and on such ground the garnishee disputed his liability to pay it to the judgment debtor. The Judge to whom the application was made, under these circumstances, directed a writ to issue under sec. 291.

On a motion, in this court, by the garnishee, to set aside this writ, HARRISON, C.J., *held*, that in the absence of any power in the Judge to direct an interpleader issue, or summon such third party before the Court, the course adopted by him was the proper one, but that if the garnishee wished to avoid the responsibility of deciding between the rival claimants, he might file a bill in equity calling upon the parties to interplead.

Remarks as to the absence in the act of pro-

visions similar to these contained in secs. 23-30 of the English C.L.P. Act, 23-24 Vict., cap. 125.

J. K. Kerr, Q.C., for judgment creditor.

F. Osler for garnishee.

KILROY V. SIMPKINS.

(May 2, 1876.)

Promissory Note—Agreement—Failure of consideration—Tender—Pleading.

To an action on a promissory note for \$498, made by the defendant to the plaintiff, the defendant pleaded on equitable grounds that by an agreement made between the parties, a partnership which had existed between them was dissolved, the defendant to give the plaintiff the promissory note in question, and to pay certain debts and liabilities of the firm, and in consideration therefor to become the sole owner of certain property of the firm, and to have assigned to him by the plaintiff all the plaintiff's interest in certain debts and accounts due the firm, as well as certain debts due the plaintiff personally: that the defendant had performed his part of the agreement by giving the note and paying such debts and liabilities, but that the plaintiff, although requested to do so, had neglected to perform his part of the agreement by giving the defendant such a power of attorney or assignment as would enable him to sue for the said debts and accounts, whereby he was prevented from obtaining payment of the same; and that, except as aforesaid, there was no consideration for the making of the said note: and that such debts and accounts are equal to the plaintiff's claim on the said note.

HARRISON, C.J., *held* the plea bad, both at law and in equity, as only shewing a partial failure of consideration; and that defendant's remedy was by cross action.

Seem, that the plea was also bad for not averring a tender to the plaintiff for execution of the required power of attorney or assignment.

It was urged by the defendant that as the plea did not aver that the agreement for the dissolution was in writing, it must be assumed not to be so, and so in equity an account would have to be taken, and on this ground the plea was supportable.

Held, that this contention could not prevail, for that even if such an averment were necessary, the defendant could not take advantage of a defect in his own pleading; but that there was no necessity for such an averment, the distinction in this respect between the declaration and the subsequent pleadings being now abolished,