

very protection which the statute expressly granted to them.

We think then these were *acts done* by the bailiff, and that the remedy adopted being by the election of the party upon the covenant, the same rule must be applied in such a case as to notice of action and otherwise, as if the claim had been made by the ordinary and appropriate form of action at the common law. It was not questioned at the trial that these acts were not done *in pursuance of the act*, and probably it could not have been done so successfully; we must, therefore, assume that they were so done. Unquestionably they were done by the bailiff "in his office of bailiff," otherwise the plaintiff can have no remedy on the covenant. Should this defence, then, of want of notice, have been specially pleaded by the bailiff?

The 194th section enacts, that "if tender of sufficient amends be made * * the plaintiff shall not recover; and in any such action the defendant may plead the general issue, and give any special matter in evidence under that plea." And it concludes thus, "And see the act to protect justices of the peace and other officers from vexatious actions." This section, and the 193rd section, which begins, "any action or prosecution against any person for anything done in pursuance of the act," &c., and which provides for the notice of action being given, were both contained in the one section (sec. 107) of the 13 & 14 Vic. ch. 53. In this previous act the words at the end of that section, "and it shall be lawful in any such action for the defendant to plead the general issue," &c., the word "*such*" clearly applied to the whole of the section, and had not reference to "all actions and prosecutions" mentioned at the beginning of that section, and were not confined to those actions only in which tender of amends had been made or money paid into court.

If sections 193 and 194 can be construed as section 107 in the act of 1850, then these defendants, or the bailiff at any rate, were not required to plead the want of notice. There are three sections, the 192, 193 and 194, contained under the one heading of the consolidated act, which reads "Limitations and Notices of Actions for things done under this Act." If the words "in any *such* action" in the 149th section apply to the actions under the heading above mentioned, and which are more expressly mentioned in section 193 as "any action or prosecution," then it was not necessary to plead specially. No doubt this was the construction of the act of 1850, and it appears to have been the like intention of the legislature in the present consolidation; but the question is, whether we can judicially declare it to have been so enacted. If the restricted meaning be applied to this section, then the defendant is permitted, where he has made a tender or paid money into court, to plead the general issue and to give any special matter in evidence under it, and not merely the fact of such tender or payment into court. But why, because he has tendered amends, should he be allowed to give any special matter in evidence, accord and satisfaction, for instance, or leave and license, arbitrament and award, or release, or any other special defence, having no necessary connection with or relation to such tender, but

all of them, in fact, inconsistent with and repugnant to it?

The reference also to the "*Vexatious Actions*" Act in this section is very important, which extends to "any officer or person fulfilling any public duty, for any thing done by him in the performance of such public duty," and would include this bailiff; and in which act the defendant is authorised to plead the general issue, and to give the special matter of defence, excuse or justification in evidence under it.

We think that the words "and in any *such* action" means any action, and not only an action in which a tender or payment into court has been made, and are to be read as a separate member of the section. By this construction the original intention of the act is preserved, and it is made reconcileable, also, with the "*Vexatious Actions*" Act, and with itself. We refer to the observations of Lord Chelmsford on the word "*such*" in the case of *The Eastern Counties Railway v. Marriage*, 6 H. & N. 941.

We, therefore, think that the bailiff was entitled to a notice of action before the action was brought against him, and that he is entitled to the benefit of this objection, which was covered by the plea of the general issue by statute, and which was taken at the trial, and renewed by him in the present rule.

We are not satisfied the sureties are entitled to raise this objection for themselves, even if they had pleaded a plea which would have raised the question, although they may, perhaps, be entitled to set up as a defence to any proceedings taken against themselves, any matter of defence which could have been available to their principal, if he had himself been sued. If, therefore, they are not entitled to be notified before they are sued, it may be they can plead the want of notice to the bailiff in their own protection. If this be not so, it would, in effect, be making the bailiff liable in every case, without a notice, because his sureties must be entitled to be indemnified for all recoveries had against them as his sureties. But it is not necessary to decide this, for they have pleaded no plea of this kind, although the case was argued for them as if they had the right to the benefit of this objection. The result, however, of the decision in favor of the bailiff, is to acquit the sureties also, for the recovery must be against all the defendants or against none of them. It is, therefore, not necessary to notice any of the other objections.

The rule, therefore, will be absolute to enter a nonsuit.

Rule absolute accordingly (a).

INSOLVENCY CASES.

(In the Insolvent Court for the County of Westworth.)

RE STEVENSON, AN INSOLVENT.

A creditor, although not named in the schedule annexed to the deed of assignment or composition made by the insolvent, may oppose the confirmation of his discharge. The insolvent should be present when application is made for the confirmation of his discharge. Debts must be proved before the assignee, and not before the judge.

The insolvent applied for a confirmation of the discharge executed by a majority in number of

(a) In this case leave has been obtained to appeal.