

NOTICE OF ACTION.

of replevin notice is not necessary, although damages are recoverable therein for the goods which cannot be found to be replevied: *Folger v. Minton*, 10 U. C. Q. B. 423; *Manson v. Gurnett*, 2 P. R. 389; *Kennedy v. Hall*, 7 C. P. 218; *Applegarth v. Graham*, 7 C. P. 171; *Lewis v. Teale*, 32 U. C. Q. B. 108; and see *Ibbotson v. Henry*, 8 O. R. 625. Notice is not necessary when the action is for an injunction: *Flower v. Leyton*, 5 Ch. D. 347. Nor when it is brought against a registrar of deeds to compel the removal from the register of an instrument improperly registered: *Industrial Loan Co. v. Lindsey*, 4 O. R. 473, 3 O. R. 66.

We have now to consider how the objection of want of notice of action must be raised. The true rule appears to be, that where the defendant is entitled to plead, and does plead "not guilty by statute," it is not necessary to plead specially the want of notice (see Rule 145). But in all other cases the want of notice must be specially pleaded. In *Dale v. Cool*, 4 C. P. 460, and *Pearson v. Ruttan*, 15 C. P. 79, it was expressly held that the defence is available under the plea of "not guilty by statute," and see *Hermann v. Seneschal*, and *Roberts v. Orchard*, *supra*. It is not, however, available under a simple plea of "not guilty," *Timon v. Stubbs*, 1 U. C. Q. B. 347; *Verratt v. McAulay*, 5 O. R. 313; *McKay v. Cummings*, 6 O. R. 400. In *Fowke v. Robertson*, 6 O. S. 572, however, the objection appears to have been allowed though not pleaded specially, and it does not appear from the report that a plea of "not guilty by statute" was on the record; and, in *Davis v. Moore*, 4 U. C. Q. B. 209, Macaulay, J., referring to Tyrwhitt's Plgs., seemed to think that the objection might be taken under a plea of "not guilty," though not pleaded "per statute." This, however, was a mere dictum. In *McLeish v. Howard*, 3 App. R. 503, there was a plea of "not guilty by statute" on

the record, as appears from the printed appeal book, but the Court of Appeal, without apparently much consideration of the subject, seems to have thought that the defence of want of notice was not available thereunder; but this expression of opinion was a mere dictum, and not necessary for the decision of that case.

The objection of want of notice must be taken at the trial: it will not be allowed to be taken for the first time on a motion to set aside the verdict: *Armstrong v. Bowes*, 12 C. P. 539; *Moran v. Palmer*, 13 C. P. 528. But when a new trial has been ordered, the objection of want of notice, though not taken at the first trial, may be raised on the new trial: *Bross v. Huber*, 18 U. C. Q. B. 282; *Nevill v. Ross*, 22 C. P. 487. In Taylor on Evidence (8th ed.) 54, it is said that the question whether a defendant is entitled to notice of action is a question for the judge, and the learned author refers to *Arnold v. Hamel*, 9 Ex. 404, and *Kirby v. Simpson*, 23 L. J. M. C. 165; but a reference to *Arnold v. Hamel* will show that that case turned upon the peculiar wording of the statute under which the notice was required, and which virtually precluded any evidence being submitted to the jury unless notice was first proved, and *Kirby v. Simpson* is no stronger authority. Neither case, we think, establishes a rule of universal application. It would perhaps be more correct to say that where the question of the right to notice is a mere question of law it is for the judge alone, but where the question turns on a disputed question of fact, then that question of fact must be submitted to the jury, and upon the fact so found the judge must determine the law. For example, where the statement of claim shows on its face that the action is brought against the defendant for something done by him in the execution of a public office held by him, or where this fact appears by the plaintiff's own evidence, then the question