

Cty. Ct.]

SAUNDERS V. RAYNER.—SPOULE V. FERRIER.

[Cty. Ct.]

Defendant admitted that he had given the instrument to C. for value, but claimed that C. had delivered it to M. for a gambling debt, that before plaintiff had given value for it, C. notified plaintiff that it had been delivered to M. for a gambling debt and that he believed M. had cheated him and that he C. claimed the document and the debt evidenced thereby, that C. about the same time gave a similar notice to the defendant, and upon this suit being brought indemnified him against the costs. *Held*, upon the above statement of facts that there was a good equitable assignment of the instrument to the plaintiff, and that he was entitled to recover.

COUNTY COURT OF SIMCOE.

SPOULE V. FERRIER.

Striking out statement of defence—Breaches of contract complained of not sufficiently set out—Pleading "Common Counts"—Judicature Act—Order for further particulars.

Pleading the "Common Counts" is no longer admissible under the rules of pleading introduced by the Judicature Act.

[Barrie, January 25, 1884.]

This was a motion for an order to strike out certain paragraphs of a statement of defence, and was made before the Junior Judge of the County of Simcoe, at Barrie. The facts are fully stated in the judgment.

H. Lennox, for plaintiff.

Lount, Q.C., for defendant.

Boys, J.J.—The statement of claim sets out that the plaintiff built a house for defendant, as per contract, and also did certain work and provided certain materials for defendant not included in the contract and claims a balance due of \$802.86 after allowing for admitted payments and goods supplied on account.

The defendant in answer puts in a "statement of defence and counter-claim," denying the allegations in the statement of claim and setting up payment and that the plaintiff agreed to perform the work in a good and workmanlike manner and to finish the same on or before a date mentioned, yet did not do so, causing the defendant great loss and damage. Also stating that by the contract sued on the plaintiff was to build the house on the same plan, of the same materials, and of the same size as certain houses named, with some exceptions also named, and the statement of defence then sets out "that the plaintiff failed to carry out the said undertaking and agreement and did not build the said house as agreed and did not have the said house finished by the said 1st day of September,

1882, whereby the defendant suffered loss and damages to the extent of not less than \$400."

Then follows—"The defendant says that the plaintiff, at the commencement of this action, was indebted to the defendant in an amount equal to the plaintiff's claim for money due," etc., being the common counts under the former practice for money due, goods sold, money lent, money paid, etc., with the usual termination "which amount the defendant is willing to set off against the plaintiff's claim." And the statement of defence ends with a payment into court of \$700.

I am now asked to strike out all the paragraphs of the defendant's statement of defence, except the one denying the allegations in the statement of claim, the one pleading payment, and the one pleading payment into court, on the grounds that the particulars in which the plaintiff failed to perform the work and the specific breaches complained of should be stated, and that the paragraph containing the common counts is defective in not being pleaded either as a defence or a counter-claim and as it does not give any particulars of the items of which it is composed and pleads matters of law instead of fact.

I think the paragraphs asked to be struck out are rather general in their allegations, but the remedy proposed by the plaintiff is too drastic considering the powers that exist to order amendments and the delivery of further particulars. The only doubt I have is regarding the common counts. At first I felt clear they could be allowed under the Judicature Act, but on further consideration it seems to me this feeling arose more from old familiarity and associations than from anything contained in the Act. Section 128, states that "Every pleading shall contain, as concisely as may be, a statement of the material facts on which the party pleading relies. . . . Such statement shall be divided into paragraphs, numbered consecutively, and each paragraph shall contain, as nearly as may be, a separate allegation; dates, sums, and numbers shall be expressed in figures, and not in words" (and see sec. 134). Now, in the common counts there are a number of separate allegations in the one paragraph, they are not numbered consecutively and each shows a separate cause of action or set off, so that at the trial, evidence might be given under this paragraph of matters as widely different as goods sold and money lent, or money paid for the use of the opposite party at his request, and money found to be due on a stated account embracing long and various dealings. Nor can such a form of pleading be said to "contain, as concisely as may be, a statement of the material facts on which the party