agreement; and it does not contradict or vary any of its terms. The defendant has to perform all the stipulations of his contract with the plaintiffs exactly as the contract provides; he is to make the cash payment and give the notes, and pay the notes on the days appointed. But by a separate and distinct transaction, the plaintiffs are to take this second-hand separator from the defendant, and, instead of paying him the price of it, they are to apply it toward the payment of the first of the $200 notes.

I think, therefore, the demurrer to the plaintiffs' replication should be allowed with costs.

Mulock, Q.C., for plaintiffs.

Howell, Q.C., for defendant.

MASSEY CO. *v.* HANNA.

KILLAM, J.] [July 30.

Practice—Prohibition—Grounds for—Cost of.

Plaintiffs issued writ in a county court. Defendant filed dispute note objecting to jurisdiction, and obtained rule for a prohibition. Before the filing of dispute note and the motion for rule, plaintiffs discovered their error and notified the clerk of county court not to proceed with the action, and, on being served with the rule, notified defendant that they did not intend to proceed, and undertook to withdraw and pay costs of county court action.

On the return of the rule,

Patterson, for the plaintiffs, submitted to the prohibition, but argued that under such circumstances no costs should be allowed to the applicant.

Mulock, Q.C., in reply.

Held: From the decisions in *Rex* v. *Keating*, 1 Dowl. 440; *Pewtress* v. *Harvey*, 1 B. & Ad. 154; and *Ex parte the Overseers of Everton*, L. R. 10, C. P. 245, it appears that the statute 1 W. 4, c. 21, s. 1, providing that "the party in whose favor judgment shall be given" in prohibition "shall be entitled to the costs of attending the application and subsequent proceedings" does not apply when there are no pleadings in prohibition. See also *Wallace* v. *Allen*, L. R. 6 C. P. 245, and *Nerlick* v. *Clifford*, 6 P. R. 212, in the latter of which costs were refused where the question had not been raised in the lower court.

"It is clear upon the authorities cited in *Nerlick* v. *Clifford* that there is no absolute right to prohibition where the defect does not appear on the face of the proceedings and the party applies before he has an opportunity of raising the question in the court below. If the applicant had waited until the plaintiff had learned of the objection to the jurisdiction being taken, he would have found that an application would be unnecessary.

"I think that, in the absence of special circumstances, as to which I say nothing, the old practice should be followed when no cause is shown and the application is made without giving the court below an opportunity of deciding the point. Encouragement should not be given to parties to come to this court unnecessarily in reference to small claims which the county courts are established to deal with." *Brisebois* v. *Poudrier*, 1 M. R. 29; *Wright* v. *Arnold*, 6 M. R. 1; *Watson* v. *Lillico*, 6 M. R. 29; *Montreal* v. *Poyner*, 7 M. R. 270; *Mitchell* v. *Saver*, 20 Ont. 17; and *Field* v. *Rice*, 20 Ont. 309, considered.

Rule absolute without costs.

Notes of United States Cases.

ALABAMA SUPREME COURT.

MORRIS *v.* BIRMINGHAM NATIONAL BANK.

Accommodation note—Liability of indorser.

In an action by the indorsee of a note against the administrator of a deceased indorser, it was shown that the note was made for the accommodation of the indorser and discounted for him by the indorsee.

Held, that the indorser of a note, made for his accommodation, is not discharged from liability by the failure of the holder to demand payment of the maker and to give such indorser notice of non-payment.

OHIO SUPREME COURT.

CINCINNATI, ETC., RY. CO. *v.* CITY, ETC. TELEPHONE ASSO'N.

Electric street railways—Ground circuit—Rights of telephone companies.

The dominant purpose for which streets in a municipality are dedicated and opened is to facilitate public travel and transportation, and,