

C. L. Cham.]

CONROY V. PEARSON.—WATSON ET AL. V. BREWER

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in the poll book which was not in the certified list, but perhaps if he had no certified list at all he might insert the candidates names in his poll book notwithstanding the clerk's neglect; *Seale v. The Queen*, 8 E. & B. 22.

What the returning officer did in this case he may be presumed, from the affidavits, to have done with the clerk's assent, and I think the clerk could then have corrected his certified list.

While I think the election should not be avoided, I do not think the proceedings have been taken without just and reasonable cause for contesting the legality of the proceedings, and although I give judgment against the relator it must be without costs.

Summons discharged without costs.

COMMON LAW CHAMBERS.

(Reported by HENRY O'BRIEN, Esq., Barrister-at-Law,
Reporter in Practice Court and Chambers.)

CONROY V. PEARSON.

A writ of summons is returnable on the day of its service.
[Chambers, February 20, 1868.]

This was a summons to set aside a declaration with costs, on the ground that the plaintiff did not declare within one year after the writ of summons was returnable.

The writ of summons issued 8th February, 1867, and served 12th February, 1867: appearance entered 20th February, 1867: declaration dated and filed 8th February, 1868, and served 13th February, 1868.

Oster showed cause, and contended that the writ must be considered as returnable when the time for appearance expired, namely, the 22nd February, 1867; and, if so, the declaration was filed and served within the year: *Hodgson v. Mee*, 3 A. & E. 765; *Barnes v. Jackson*, 1 B. N. C. 545; *Tidd's Prac.* 166; *Harrison's C. L. P. Act*, 132.

C. W. Paterson contra. The writ was returnable on the 12th February, 1867, the day of its service: *Eadon v. Roberts*, 9 Exch. 227; *Patterson v. McCollum*, 2 U. C. L. J. N. S. 70; *Wallace v. Frazer*, 2 U. C. L. J. 184; *Tyson v. McLean*, 1 U. C. Prac. Rep. 339; *Swift v. Williams*, 5 U. C. L. J. 252; *Arch. Prac.* 11th edn. 157-187; *Lush's Prac.* 399.

ADAM WILSON, J.—In a matter of this kind, it is of no consequence what the decision may be, so long as it is settled for guidance in future cases. In *Arch. Prac.* 157, it is said, "The writ of summons does not specify any particular return day, and the return day is now considered the day of the service of the writ on the defendant."

The C. L. P. Act, sec. 81 declares that "a plaintiff shall be deemed out of Court unless he declares within one year after the writ of summons or *capias* is returnable."

The summons was returnable in my opinion on the day of its service, the 12th February, 1867. The plaintiff should have filed and served his declaration therefore on the 11th February, 1868, (See C. L. P. Act Sec. 342). Instead of doing so, he did not completely declare till the 13th of February, when he served his declaration.

The order must go. *Summons absolute.*

WATSON ET AL V. BREWER.

Ejectment—Particulars of claim—At what stage.

A defendant is entitled to particulars of a plaintiff's claim in an action of ejectment after appearance, or at any other stage, if it appear proper to a judge that he should have them.

[Chambers, Feb. 20, 1868.]

In an action of ejectment, the notice claimed title by reason of the forfeiture by non-observance of the covenants on the part of defendant, contained in a lease of the land from plaintiff to defendant.

The defendant appeared, and denied the plaintiff's title to eject him from the lands by reason of such forfeiture, and he asserted title in himself by virtue of such lease.

The defendant then applied for particulars of the alleged forfeiture, which was opposed on the ground that it was too late for him to ask for particulars of his appearance.

ADAM WILSON, J.—The question is whether the defendant should or could have applied for particulars before appearance, and whether he is still in time in his application.

In *Arch. Pr.* 11th ed. 1039, it is said, "where the ejectment is brought for a forfeiture by breaches of covenants, &c., a judge upon summons, will order the plaintiff to give the defendant, after appearance entered, a forfeiture of the covenants and breaches, &c., on which the forfeiture is founded."

As a general rule, the defendant cannot take any step in the action without entering an appearance, *Arch. Pr.* 11th ed. 216. But by our rule, No. 21, following the English rule, particulars may be ordered before appearance. It is also laid down in *Arch. Pr.* 1441, that it is discretionary with the judges, to make an order for particulars at any time before trial. In the Queen's Bench, the old practice was to give particulars before appearance, not so in the Common Pleas; but the latter court afterwards adopted the practice of the former: *Tidds Pr.* 9th ed. 596.

It is said to be laid down in *Arch. Prac.*, 12th ed., 1554, that particulars of breaches in ejectment, cannot be given after appearance. (I have not seen this edition, as it has been abstracted from the Osgoode Hall library, as many others of the new editions of such useful practical works have been, by those who are obliged to be trusted with them. This conduct has been pursued so systematically for many years past, and always upon the latest and best editions, that the taking cannot be supposed to be from mere forgetfulness. The concern is whether it is by any of those who are qualifying for the practice of the law, or of those who are practising it. The habit is so persistent and notorious, that it is felt to be a scandal in the profession.)

I do not think a defendant can be prevented from getting particulars because he has appeared in ejectment, more than in other actions; nor do I think a judge might not order them at any time, if it appeared to be proper that the defendant should have them. The defendant swears that "he does not know upon what grounds the plaintiff's claim to eject him from the land in question."

The order must be granted.

Order accordingly.