which pointed out that the rule should not be disposed of in such a manner as to exclude the right of appeal, had its due weight. The rule is made absolute for a new trial on payment of costs, with leave to the plaintiffs to amend their declaration if they think proper so to do, In a preliminary judgment in this cause, I stated it as my opinion, that to enable plaintiffs in an action of Replevin to recover substantial damages, the non return of the goods, or the inability of the Sheriff to replevy them, or any part thereof. by reason of the same having been secreted by the defendants, or eloigned should be alleged in the declaration as a special damage, I adhere to that opinion still. I would refer to the case of Goldicut v. Beagin 11 Jurist, Ex. 544, and the Molson Bank v. Bates, 7 U. C. C. P. 312.

Rule absolute for a new trial, on payment of costs, with leave to amend the pleadings.

CONTESTED PARLIAMENTARY ELECTIONS.

In the County Court of Essex—A. CHEWETT, Esq., Judge.

IN THE MATTER OF THE CONTESTED ELECTION OF THE COUNTY OF ESSEX.

An application to commit the sitting member for contempt in not attending the investigation before the County Judge, as a witness for his adversary, refused.

The facts sufficiently appear in the judgment delivered by

CHEWETT, Co. J.—On the 23rd February, at the rising of the court, application was made on affidavit to commit the member declared elected, for contempt in not appearing to give evidence when then called. I took till the 24th February to consider the application. On the 24th February, the application was renewed to commit John McLeod, the sitting member, for not having attended on warrant to give evidence.

I refused the application, stating that I was not satisfied that I had the power to commit the sitting member, or that, if I had such power, that he ought to be committed on this occasion, he being the member declared to be elected, and being served on the 22nd February, and called in court to appear and give evidence on the 23rd, at the rising of the court—Parliament meeting on the 25th. As it might reasonably be believed that he was, on the 22nd, preparing for it, and was on the route on the 23rd, to attend Parliament on the 25th, and therefore engaged in his duties a part of which I conceive is to use due diligence to be there in time, and which, under and by the 129th section of the Act of 1851, in the case of a member, these circumstances of themselves would present a lawful excuse for not appearing here to give evidence, and if so, proceedings for and commitment following is not as I conceive the proper course.

Then I am not certain that a member declared to be elected and the party contesting his election are the sort of persons contemplated in the 16th Vic. ch. 19, and liable to be called on by their adversaries to give evidence here, wherever else or by whatever proceeding they may be compelled to do so. I have not the cases at hand cited in the *Upper Canada Law Journal*, February number, p. 31, on these heads.

As in the preamble of that act it is recited—"That it is desirable that full information as to the facts in issue in criminal and civil cases should be laid before the persons who are appointed to decide upon them, and that such persons should exercise their judgment on the credit of the witnesses adduced and on the truth of the testimony," it might be intended that the parties contemplated in the act might be compelled to appear before the Judge Commissioner, whose duty only is to take the evidence, but who could not exercise his judgment on the credit of the witnesses adduced, or on the truth of the testimony; or if he did, from his appearance in giving testimony, exercise his judgment on their credibility, he is not anywhere empowered by statute to transmit his impressions or his opinion of the credibility of this or any other witness to the select committee. Indeed that would be useless, as the committee alone, like a judge or jury, must exercise that judgment.

It is true the evidence may be examined under a commission from the ordinary courts of record (sec. 3), but that is only where the witnesses reside in a foreign country, *ex necessitate rei*, or as of necessity, and does not apply to this procedure in the nature of a commission, where the witnesses are in this country.

If the statute intends parties such as these, then what is the penalty for not appearing on subpœna, or notice, or warrant?

By the 2nd section, it is ordered that such non attendance shall be taken as an admission *pro confesso* against them in such suit or action, whatever effect that may have upon their position before the select committee.

This act is not embodied in the Controverted Elections Act, so that the one may be used towards executing and carrying out the other, and does not admit of the application of the power of summary attachment for non attendance, given in the Act of 1851, as the penalty, instead of its being taken *pro confesso* against them, as in 16 Vic. ch. 19, sec. 2, and no other resort is by the latter act given in lieu of or together with it, as is often done, by providing that the new remedy shall not deprive parties of those already existing, if there are any.

I conceive the course towards obtaining the evidence of the member declared to be elected in this case, under these circumstances, is the same as that for any other member whose evidence is wanted. It is under the 129th section of the Act of 1851, upon application, by the Judge Commissioner certifying to the Speaker that his attendance to give evidence is requisite. The necessity is to be made to appear in some satisfactory manner to the Judge, who is to certify, so that the Speaker may be able to report the reasons for the same to the House, for its direction thereupon, and thereby ascertain if such attendance here is proper, and whether it could be had under the order of the House or otherwise.

COURT OF COMMON PLEAS.

[From the Law Times.]

EMERY *v.* BARNET

County Court—Question of title—Jurisdiction—19 & 20 Vict c. 108, s. 50—Landlord and tenant—Estoppel.

The plaintiff, as landlord, levied his plaint in the County Court, under s. 50 of 19 & 20 Vict. c. 108, against the defendant, to whom he had let certain premises, for the recovery of premises and for rent. When the case came on for hearing it appeared that the defendant had gone out of possession of the premises, on a third person setting up a claim to them, who paid him for his crops; and the defendant sought to set up that third person's title against the plaintiff his landlord. The County Court Judge, on objection made that question of title arose, without inquiring whether the defendant went out of possession voluntarily, or was evicted, dismissed the case on that ground:

Held, that the duty of the County Court Judge was to have gone further, before he dismissed the case, and have ascertained whether the defendant went out voluntarily or by compulsion: if voluntarily, then the defendant was estopped from setting up the title of the third person, and the County Court has jurisdiction; if evicted by compulsion, then defendant is not so estopped, title comes into question, and the jurisdiction of the County Court is at end.

Bovil on a former day having obtained a rule calling on the judge of the County Court of Shropshire to show cause why the said judge should not hear and determine a plaint, in which one Emery is plaintiff and one Barnet the defendant, for the recovery of a tenement at Stokeheath in that county, and for 11*l.* 8*s.* 3*d.* rent and arrears of rent due from defendant to plaintiff in respect of the said premises. At the hearing of the plaint, it was proved that on 25th March. 1856 the plaintiff verbally let the said premises to defendant at the yearly rent of 8*l.*, and that defendant entered and occupied the premises and paid in Feb. 1857, half a year's rent due the 29th Sept. 1856. That afterwards the plaintiff and defendant on the 7th of April 1857, signed an agreement or demise in writing for the tenancy of the said premises from 25th March 1857 at the like rent of 8*l.*, payable half-yearly, terminable by six months' notice on either side on or before the 29th Sept. in any year. That a person named Stone came forward and set up a claim to the premises, and the defendant informed plaintiff that notice had been given to him not to pay any more rent. The defendant offered to give up possession of the premises, to the plaintiff prior to 29th Sept. 1857, in terms which were not agreed to. That on 22nd Sept. it was verbally agreed to between the defendant and one Dutton, with the consent of the plaintiff, that defendant should give up the premises to him on the following Michaelmas-day; that Dutton should pay defendant for his hay on the premises, and that defendant should pay rent up to that day; but that defendant did not carry out the said agreement, but, on the contrary, gave up the said premises before the said Michaelmas day to the said Stone, who claimed to be entitled to them. That on the 29th Sept. 1857 due notice was served on defendant by plaintiff, to quit the premises at the next Lady-day; and on the