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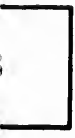

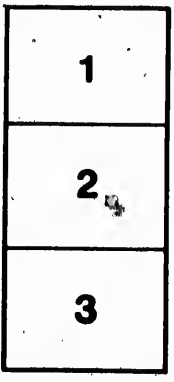

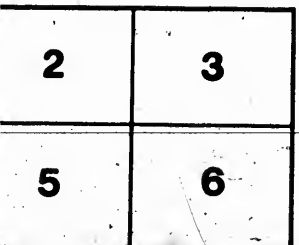

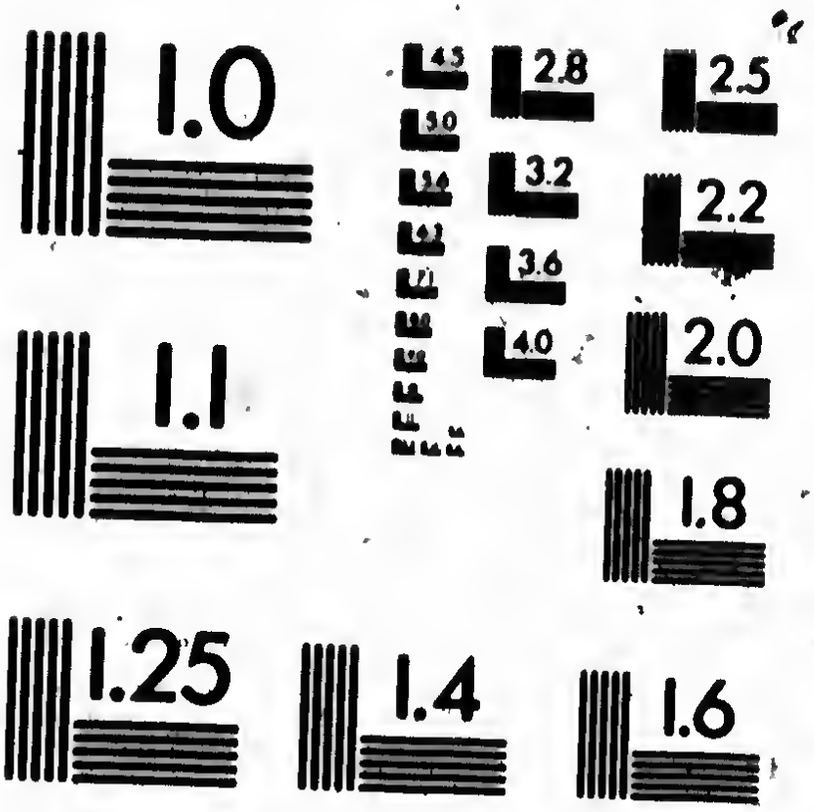

REPORTS

OF

POINTS OF PRACTICE,

&c. &c. &c.

DETERMINED IN CHAMBERS BY THE JUDGES OF THE COURTS OF QUEEN'S BENCH AND COMMON PLEAS.

BY J. LUKIN ROBINSON, ESQ., BARRISTER, ETC.

VOLUME I.

TORONTO:

HENRY ROWSELL, KING-STREET.

1851.

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CHAMBER REPORTS

OF CASES,

BEFORE THE JUDGES OF THE COURTS OF QUEEN'S BENCH AND COMMON PLEAS.

WALLACE v. GROVER ET AL.

Issuable pleas.

When a defendant is under terms to plead issuably, and pleads several pleas, and one not an issuable plea, all the pleas may be treated as non-issuable, and the plaintiff may sign judgment.

On the 28th September a summons was obtained to set aside interlocutory judgment—certain pleas being filed under a judge's order to plead issuably, and treated as not issuable.

The declaration was a covenant on an agreement between the plaintiff and the defendant, by which the plaintiff agreed on the 13th of February 1846, with the defendant, that he would, from date, work his saw-mill, and thence till 15th May, without delay, and would, on or before the 15th May, supply and deliver to the defendants at the plaintiff's saw-mill, or in some convenient place on the Otonabee, near by, with at least 100,000 feet of good merchantable sawed timber of such kinds as they might require, at least one quarter perfectly clean, and also with all the lumber over and above the aforesaid quantity which the said mill should cut from date to 15th May, to be as aforesaid, and delivered as aforesaid at the price or sum of 140*l.* for every 100,000

feet of such lumber, and so on for any excess. For which defendants agreed, that provided the plaintiff delivered such lumber as aforesaid, they would accept of the same, and would pay as aforesaid, and would give the plaintiff their negociable bank note at 90 days from date for 35*l.* on the execution of the said agreement, and pay the full balance due on such lumber on and after the 15th May, and after the delivery of the whole of the said lumber as aforesaid, by their negociable bank note at 90 days from date for the said balance, and would pay the said notes at muturity. Averment, that after the said agreement, and on the 15th day of May 1845, and before suit, the plaintiff furnished and delivered to the defendants at the said mill a large quantity of good merchantable sawed lumber, more than 100,000 feet, to wit, 200,000 feet, cut and made by the said mill, between the date of the said agreement and the 15th May, more than one quarter clear, and of such kinds as the defendants required, and that the defendants accepted the same—and general performance by plaintiff on his part.

Breaches—Copies not produced in *extenso*.

1st. Non-delivery of the note for 35*l.*

2nd. Non-delivery of the note for balance.

Plea—*Non est factum.*

2nd plea. That defendants did furnish the note for 35*l.*

3rd plea. As to so much of the declaration as alleged that the plaintiff did on the 15th day of May, 1845, deliver to the defendants at the plaintiff's mill, a large quantity of marketable lumber, more than

100,000 feet, cut and made by the plaintiff's mill between the date of agreement and the 15th of May 1845, and that more than one quarter was clear and such as defendants required; and also as to 2nd breach above assigned, the defendants say, that the plaintiff did not, after making the said agreement and after the delivery of the *said* note for £35, &c., to wit, on the 15th May, or before, deliver to the defendants at least 100,000 feet of sawed lumber, one quarter clear, &c., and of such kinds, &c.; but *per contra*, that the *lumber furnished and delivered* by the plaintiff to the defendants on or by the 15th May was then found to have a much less quantity, to wit, 10,000 feet less than one quarter clear, &c., and was not such as defendants required, or then required, for which reason, and no other, they did not give a note for the balance.

4th plea to 2nd breach—That plaintiff did not deliver the *whole* of the *said* lumber *therein* mentioned and *referred* to, at the place and within the time required by the said *agreement to have been delivered*, and for that reason and no other defendants did not pay the plaintiff for the said balance by giving their note in the said breach mentioned, concluding to the country.

MACAULAY, J.—The first plea to the 2nd breach is in truth a continuation of the plea to the first breach, and is strictly a part of it, though pleaded to a different part of the declaration,—or it may be regarded as a separate plea. It is conceded that if one plea be non-issuable, it vitiates the whole; and I certainly consider the last plea non-issuable.

The precise terms of the second breach is not before me, but I suppose it is prefaced, like the first, with a repetition of reference to what plaintiff alleged on his part previously in the declaration. The plaintiff avers that he delivered more than 100,000 feet, to wit, 200,000—the defendants plead that he did not deliver the whole *of the said lumber referred to at the place and within the time required* by the said agreement—leaving it uncertain whether it means to deny that the whole was delivered *by the time* or at the place or *at all*, or whether that the whole alleged under a *videlicit*—to wit, 200,000 feet was not delivered, or that 100,000 feet was not so delivered. It is that plaintiff did not deliver the *whole* of the *said* lumber mentioned in the declaration at the time and place, not saying or any other place, though another place was appointed by the agreement.

The 2nd plea seems also bad; it seems to admit the acceptance of the lumber exceeding 100,000 feet, but complains that plaintiff did not deliver at least 100,000 feet, one quarter clear, but that the lumber delivered was found to have a much less quantity, to wit, 10,000 feet less than one quarter clear. The latter might be true, and still there might have been delivered 100,000 feet of which one quarter was clear.

I look upon the last plea as clearly bad and insufficient, and, as argued, only calculated to provoke a demurrer, which would expose the declaration to objection, and it may be faulty in not sufficiently

shewing complete performance in all things on plaintiff's part.—4 Dow. 161; 10 A. & E. 21; 14 M. & W. 136; 2 D. & L. 861; 11 M. & W. 361.

Rule discharged with costs.

DAY V. HOLLAND.

Demurrer—Plea.

Demurrer set aside on the ground that it was wrongly dated, and leave given to amend plea. Time for moving to set aside demurrer.

On the 20th of September, 1848, a summons was taken out to set aside the demurrer to the defendant's plea, on the ground that it was wrongly dated, and for leave to amend the plea. It did not ask costs.

On the 26th August, 1848, the declaration was filed, and on the 29th a copy was served, dated the 26th.

On the 4th September, a plea of coverture was filed, not stating to whom defendant was married.

On the 6th September, the replication and demurrer were filed; and on the 16th of September the replication or demurrer to each plea was served, dated the 6th of August.

Objection to the summons—1st, that it was taken out too late; 2nd, that the irregularity was not clearly shewn.

MACAULAY, J.—The demurrer being only delivered on the 16th of September, it is not too late to move against it on the 20th; and it is wrongly dated, being filed on the 6th of September, and dated the 6th of August—it must therefore be set aside.

Though called a replication or demurrer, and a replication and demurrer, it is annexed to the affidavit of Mr. Robertson, and speaks for itself. As the application is made without costs, the defendant may have leave to amend the plea on an affidavit of merits.—3 Dowl. 196; 3 Wils. 14.

Order granted, with leave to amend.

McGILL ET AL. v. McLEAN, ONE, &c.

Interlocutory judgment.—Affidavit of merits.

Setting aside interlocutory judgment—wording of affidavit of merits—Must assert that plaintiff hath a *good defence to this action on the merits.*

On the 23rd of September, 1848, a summons was obtained to set aside the interlocutory judgment on the merits. Judgment was signed for want of a plea on the 14th of August, 1848.

On the 19th of September, the defendant made an affidavit, stating that this *action* was brought for moneys said to have been collected by the defendant for the plaintiffs, as trustees of H. Russell & Co., and that he had a *counter* claim *against the said plaintiffs*, for services rendered professionally to said H. Russell; that he sent instructions to his agent in Toronto to plead *in this cause*, who neglected to do so; and that he *verily believed he had a good defence on the merits.*

On the 29th of September, 1848, a supplementary affidavit was put in, stating that the plaintiffs had assigned all their interest as assignees of H. R. & Co. to Colin Campbell; that the deponent was

retained by the plaintiffs' agent to collect moneys of Merkley's, on a promissory note; and that this action was brought to recover the proceeds of said note, alleged to have been collected by deponent; and that he had a good defence to this action.

On the 2nd October, cause was shewn, and a counter affidavit filed, stating that defendant had been paid since action brought, and denying merits.

MACAULAY, J.—The affidavits do not assert a defence to this action on the merits: one says that the defendant has a defence on the merits, not adding, *to this action*; and the other says, that the defendant has a good defence to this action, not saying *on the merits*.—1 D. & R. 155; 3 Dowl. 218, 652; 1 C. & J. 287; 1 Dow. N. S 815; 6 Jurist, 825. When notice of assessment was served does not appear, nor where the plaintiffs reside.

Leave was given to plead the general issue, and a set-off only, forthwith, i. e., within 24 hours, upon condition of paying costs, and consenting to go to trial at the next Eastern District assizes, if the plaintiffs entered their record on the first day.

BLUE V. TORONTO GAS COMPANY.

Similiter.

A similiter need not be dated, whether pleaded by the party who ought to add it, or by the opposite party for him.

In this cause the replication to the pleas concluded to the country as to some counts, with a

general demurrer as to others, and the plaintiff's attorney served a joinder in demurrer and similiter with notice of trial, the objection to which was, that the year of our Lord was omitted before the figures 1848.

MACAULAY, J.—A similiter need not be dated, whether pleaded by the party who ought to add it, or by the opposite party for him.—9 Law Jour. 323; 12 A. & E. 428, S. C.; 3 M. & W. 409; 6 M. & W. 136; 6 Dowl. 98, 473, 313; 8 Dowl. 320; 3 Bing. N. S. 629; 7 Dowl. 660; 5 M. & W. 341; 3 B & P. 443; 4 Dowl. & Lown. 313; 16 Law Jour 151 Ex; 6 M. & & G. 692; 7 Scott N. R. 535; 8 Bing 296.

Summons discharged.—Costs to be costs in the cause.

IVES v. CALVIN.

Particulars.

Particulars ordered in an action on the case for disturbing a ferry—as to the number of passengers, goods, &c., conveyed.

Case for disturbance of a ferry, on divers days between the 1st of September, 1844, and August, 1846, from the city of Kingston to Garden Island and Wolf Island. Several counts.

Summons for particulars of the disturbance of the ferry mentioned in the declaration, with dates, numbers of passengers, quantity of goods and other things carried and conveyed, on a long affidavit of the defendant, stating that without more information he

could not defend the suit; that he did not know to what the declaration related, &c.; and that he might wish to pay money into court.

MACAULAY, J.—The following authorities show that this application should be granted:—

Doe Birch and Phillips, 6 T. R. 597. Particulars of breaches of covenant in ejectment for forfeiture granted.

7 T. R. 332. Particulars of claim, &c., in ejectment, allowed.

Collett v. Thompson, 2 B. & P. 246—particulars of objections to a title ordered, so far as relates to defects in fact.

Roberts v. Rolands, 3 M. & W. 543—to same effect.

Webster v. Jones, 7 E. & R. 774. In an action or escapes, between 13th May and 1st November, Abbott, C. J.—"You are not required to state the precise day of the escape for which you sue. The first principle of justice is, that a defendant should be informed what he is charged with;" and Holyrood, J.—"You can give the defendant some notion of the transaction on which your action is founded."

R. v. Flower, 7 Dow. P. C. 665. Indictment for nuisance. Particulars ordered, but not the dates. It was for filling up the Thames.

Regina v. Curwood, 3 A. & E. 815; 5 N. & M. Particulars of nuisances on indictment for throwing poisonous matter into the Thames, &c., ordered, on reading the indictment only.

Snelling v. Chennell, 5 Dow. P. C. 80. Particu-

lars refused, in tort, unless defendant swears he does not know for what cause of action plaintiff is proceeding.

Sowter v. Hitchcock, 5 Dow. 724. Particulars of want of repair refused.

1 Chit. Rep. 698. Indictment for conspiracy—particulars of the goods alleged to be fraudulently obtained, refused.

R. v. Hodgson, 3 C. & P. 422. Ordered on indictment for embezzlement.

Davis v. Chapman, 6 A. & E. 767; 1 N. & P. 699. Precise particulars of the escape required, with dates, if known to plaintiff.

Hislock v. Lediard, 2 Dow. N. S. 277. Particulars refused on trespass, *quare clausum fregit*, on a mere affidavit that defendant does not know the grievances intended to be relied on. Some special ground should be shewn.

Stannard v. Ultithorne, 3 Bing. N. S. 326. In case against an attorney for negligence in transacting an assignment. Particulars of demand refused. The declaration was deemed specific enough, and there had been reasonable overtures and offers.

R. v. Curwood, 1 Harrison, 310. Prosecutor in indictment for *nuisance* required to give particulars of the acts of nuisance intended to be relied on.—S. C. ante.

Retallick v. Hawkes, 1 M. & W. 573. Particulars of special damage laid in the declaration refused.

Pyke v. Stephens, 6 M. & W. 312. Particulars

of unsoundness of a horse refused. Not satisfactorily made out.

Brooke v. Failan, 2 Bing. N. S. 291; Dawes v. Anstruther, 2 M. & W. 817. Only granted on a strong case, shewing the necessity.

Particulars ordered.

SOVREEN V. RAPELJE.

Summons.

A summons is no stay of proceedings (unless so expressed) until returnable.

A summons for time to plead, dated 17th August, was obtained on the 18th August, returnable the 19th, at 12 o'clock, noon.

The action was instituted in the district office of Talbot, and the time for pleading confessedly expired on the 18th.

The summons (dated 17th) being served on the 18th, would have been ineffectual, had not the agent of the plaintiff's attorney consented to enlarge it till the next day; but the enlargement was also erroneously dated the 17th instead of the 18th.

On the same summons, *without date*, was a consent in usual terms, signed by W. D. P. Jarvis, agent for plaintiff's attorney.

On the 19th August an order was signed, and served the same day, giving one month's time to plead.

On the *same* day, judgment was signed at Simcoe, in the Talbot district—the hour not appearing.

It was contended that the summons, from the time

of service, operated as a stay of proceedings; at all events, that the plaintiff, being entitled to judgment on the 19th, and the summons being returnable the same day, the plaintiff could not sign judgment till it was disposed of.

MACAULAY, J.—We have always considered the summons no stay of proceedings (unless so expressed) until returnable; but if so, it is not shewn by the plaintiff that the judgment as signed before 12 o'clock, and if it was, there is an inconsistency in what the plaintiff's attorney was doing at Simcoe and his agent assenting to here. There was no time to communicate. The judgment so far as known at Simcoe was regular; according to what took place here (Toronto) it was irregular, if signed after his agent signed a consent for time to plead, which may have been done before such judgment was signed.

It is not shewn when it was signed (i.e. the hour), and under the circumstances I think it better to set aside the interlocutory judgment without costs, leaving to the defendant the time to plead specified in the order of 19th August, unless extended on a future application.—See Barton v. Warren, 14 Law Journal, N. S., Q. B. 312.

WILLIAMS v. SMITH.

Non Pros.

Judgment of non pros set aside for an irregularity in the service of the demand of replication. Replying after non. pros not signed, a waiver of irregularity in serving the demand of replication.

On the 4th of September, 1846, a summons was

taken out to set aside the judgment of non pros, with costs, with leave to reply, or for the replication filed to stand, on the ground that the demand of replication was not duly served, or on the merits.

On the 5th September the summons was enlarged to Thursday next; on the 10th September it was enlarged till the 11th September, to enable the defendant's agent to get instructions.

On the 1st September, 1846, an affidavit of Richardson, the plaintiff's attorney, was put in, stating the action was trespass, *quare clausum fregit*, in Malden, Western district.

On the 18th of August, 1846, a declaration and demand of plea were filed; on the 21st of August pleas were filed, and copy with demand of replication left at a brother's house of plaintiff's attorney, not his residence; none were put up in the crown office.

On the 20th of August, judgment of non pros was signed.

On the 30th of August replication was filed, and a copy was tendered to the defendant's attorney, and delivered; the copy was then sent by post, and a compromise refused.

On the 1st September a notice was served on a clerk of the defendant's attorney at Sandwich, that an application would be made to the court on Friday (then) next, or so soon after as counsel could be heard, to set aside the judgment of non pros for irregularity.

On the 4th September an affidavit of Mr. Read was filed, stating that on 28th of August he sent a

replication to be put in, that Messrs. Hamilton & Foster were agents of Mr. Prince, the defendant's attorney.

On the 6th of September an affidavit of Richardson, the plaintiff's attorney, was filed, stating that no plea or demand of replication was served on him personally, or left at his place of temporary residence at Sandwich.

The summons was enlarged from the 6th to the 11th September, to enable answers to be received. It was served on the 4th.

MACAULAY, J.—When, as in this case, the plaintiff's attorney resides out of the district (see Richardson's first affidavit), service must be made by affixing a copy of the pleading in the crown office.

The defendant's attorney was not regular, so far as appears, and he refused to correct the error.

The only question is, whether the plaintiff's attorney waived the want of regular service of the copy of the plea, and demand of replication, by filing replication after the non pros, and apparently with knowledge thereof—I should think not. He only desired to reply and go to issue, and if he knew of an irregular non pros, he must have intended to overlook it. He had not waived anything on the 29th, when it was signed.

There is no time to delay longer—the assizes beginning at Sandwich on the 14th September inst. —the defendant's attorney had a notice of application on the 1st September, and should have sent down instructions. If any good answer can be given, he must move against my order; but I think such sharp

practice must be relieved against, and plaintiff be allowed to reply.—See 6 East. 549; Tidd's Practice, 8th Edition, 476.

Order made.

COMMERCIAL BANK v. G. S. BOULTON.

Time to plead de novo to an amended declaration. Wrong date in declaration served.

Semble—that to an *amended* declaration, either in term or in vacation, the defendant is not entitled to more than *four* days exclusive to plead de novo.

The copy of the declaration served being wrongly dated, is an irregularity, not a nullity.

In this case the defendant had demurred specially to the original declaration, upon which the plaintiffs obtained leave to amend, on payment of costs.

The amendment was made, and the amended declaration served, with a demand of plea, on the 8th September, and interlocutory judgment was signed on the 18th September, 1848.

This was a summons to set aside such judgment, as signed too soon; also, because the amended declaration was dated on the 8th of August, a day long before the date of the original, instead of the 9th September, on which day it was filed; but a former application on this ground was discharged, because interlocutory judgment had been signed, and now it was contended that the objection was cured by the judgment being only irregular and a subsequent step taken; also, that the affidavits used in the former application were relied on in support of this, without express leave.—See Fuller v. Hall, H. T. 5 Vic., in

our court; 12 M. & W. 715; 1 D. & L. 992, S.C.; 5 Scott, 595; 5 U. C. Rep. 129, Playter v. Cameron; 3 B. & A. 120; 8 Dow. 120.

MACAULAY, J.—The defendant does not appear to be sued as having privilege either as an attorney or otherwise, and consequently he is bound to plead to a declaration filed in vacation.

To an amended declaration after demurrer in the same term (or here in the same vacation), I think the defendant is not entitled at any rate to more than four days exclusive to plead de novo. This time he had, and it appears to me, therefore, the interlocutory judgment is regular.

The copy of declaration served is wrongly dated, but that is an irregularity, not a nullity.—4 M. & W. 373; 7 Dow. 208; 5 Dow. 259.

I think, therefore, the summons must be discharged with costs, the judgment being regular, and the only irregularity cured by delay.

Summons discharged with costs.

O'BIERNE v. GOWIN.

Security for costs granted.

Security for costs granted where the application was made by the plaintiff's attorney, in the name of the plaintiff, for costs, before issue joined, and the delay accounted for.

Sufficiency of statement as to the plaintiff's residence abroad.

On the 21st of September, 1843, a summons was obtained to stay proceedings for security for costs.

The declaration was served on the 18th of September, 1843. The defendant's attorney made affidavit that he became aware that the plaintiff had left

the province some time since, and told the plaintiff's attorney thereof, and of his defence, and was under the impression that the plaintiff would not proceed till he received the declaration; and that the plaintiff had departed from this province, and was then resident in the State of New York, one of the United States of America, and did not think he had any intention of returning, from expressions he had heard him the plaintiff use.

On the 25th of September cause was shown. It was objected that the application was—

1. Too late.

2. That the residence abroad was only since the suit, and was not sufficiently shewn to be permanent.

See Wells v. Barton, 2 Dow. 160, 499; 1 Hodg. 58; 3 Taunt. 711; Dowling vs. Harrison, 6 M. & W. 131, overruling, 6 Dow. 274; Gurney v. Key, 3 Dow. 559; 1 Archd. N. P. 246-8.

MACAULAY, J.—It appears to me the application is not too late, and that the residence abroad of the plaintiff is sufficiently shewn.

It is not clear whether he went abroad before or after the suit commenced, but the application is before issue joined, and the delay is accounted for.

His residence abroad is positively asserted, and there is nothing to shew or whence to infer that it is only temporary, the inference rather must be that it is permanent.

There are some circumstances in the affidavit of the plaintiff's attorney against the application on the ground of delay; but it shews that after suit, and

before leaving the province, the plaintiff settled with defendant, and that the suit is now proceeding only for the benefit of the plaintiff's attorney to enforce costs.

If the plaintiff was proceeding for his own benefit, he would be required to give security; and if his attorney wishes to proceed in his name against the defendant, instead of looking to his client for his costs, he should equally secure the defendant.

The merits of the receipt given by the plaintiff to the defendant cannot be decided upon this application; the defendant must first be heard thereon, and in the mean time collusion cannot be inferred, and the declaration can only be regarded as well served from the 18th September—any former service being waived by the plaintiff's attorney in the course he has taken—the defendant's attorney does not admit any previous knowledge of a declaration or of the plaintiff's intention to proceed—he in effect asserted the contrary.

Rule absolute.

McDADE EX DEM. O'CONNORS v. DAFOE.

Security for costs refused.

Security for costs refused, where the defendant had appeared and pleaded, and made his application after notice of trial, without accounting for his delay.

On the 18th September, 1848, a summons to stay proceedings till security was given for costs, the lessors of the plaintiff being minors, and the plaintiff (though real) insolvent.

It appeared that the defendant had been admitted to defend as landlord—that he had appeared and pleaded and entered into the consent rule—when not appearing.

Also, that notice of trial had been given for the next Victoria assizes, to be holden on the 9th of October next. That the plaintiffs were minors, and that plaintiff was very poor and insolvent.

Cause was shewn on the 25th of September. It was objected that the application was too late, and that poverty was no ground for such an application.

See Adams, 353–4–5; 5 B. & C. 208; 1 M. & G, 445; 1 D. & L. 980; 2 D. & R. 423; 9 Dow. 741; 4 M. & P. 215; 1 Mar. 4; 2 Taunt. 61; Smith v. Rae. Tidd, 578; 1 Wil. 130; 6 Dow. 556; Cow. 128; 1 Archd. N. P. 247; Str. 694, 932; Hard. 56; Barnes, 188; B. & P. 111.

MACAULAY, J.—The defendant must have appeared and pleaded in the early part of August last, to a declaration in which the same plaintiff and lessors were parties; and although he was well acquainted with the plaintiff's circumstances, he did not apply for costs till the 18th of September, and after notice of trial had been given for the next assizes, on the 9th October next.

There is nothing to show that the defendant was led to suppose the action would not be proceeded in, or to excuse the delay.

Discharged without costs.

BAYS v. RUTTAN, SHERIFF OF NEWCASTLE.

Costs of former action.

When the second action appears to be vexatious, the court will stay the proceedings till the costs of the first action be paid.

On the 20th of September, 1848, a summons was taken out to stay proceedings till the costs of a former suit were paid.

It was an action on the case for a false return to a *fi. fa.*, and plaintiff was non-suited at the trial last Cobourg assizes.

The costs were not paid, and the plaintiff was unable to pay the same, &c., although an execution was out and costs demanded.

The non-suit was owing to failure in the evidence, i. e., the non-production of the *fi. fa.*

See 3 D. & R. 53; 2 Dow. 141, 207, 260,; 3 Dow. 165; 2 T. R. 511 (note), 571; 1 T. R. 491; 7 Dow. 315; 6 Bing. 519; 3 Wil. 149; 8 Taunt. 407; 8 D. & R. 42; 2 Chy. R. 146; Tidd, 564; 3 B. & P. 23; Hullock on Costs, 463 to 467, 457, 458, 449; 1 Vent. 100; 2 Ray. 697, 1308; 2 Smith, 423; 3 Anst. 835; Styles, 413; Barnes, 125; 2 Str. 1206; Cow. 322; 3 Wil. 150, 142, 741; 2 Bla. 741; Richmond v. Campbell, E. T. 2 Vic.

MACAULAY, J.—The cases shew, that in the Common Pleas it is not usual to stay proceedings in an action till payment of the costs of former actions, unless the *merits have been tried;* while in the Queen's Bench it is usual, if the second action appears to be *vexatious*, which is the test here.

Rule discharged without costs.

ROSS ET AL. v. CAMERON ET AL.

Ca. sa., arrest under.

A defendant cannot be arrested on a *ca. sa.* where a *fi. fa.* has been taken out and acted upon, but not returned.

This was a summons to discharge the defendant Cameron from the custody of the Western sheriff, on a *ca. sa.* issued in this cause, on the ground that a *fi. fa.* had previously issued and been acted upon, but not returned.

The body of the *ca. sa.* was for £453 7s. 2d., and tested 20th of June, returnable last of Trinity term next. Issued 18th July, 1846, Indorsed for £450, and *fi. fa.* issued to the same sheriff on the 15th of May last, and was received on the 20th of May, under which he seized divers goods of the defendant, and sold the same, and £284 15s. 2d. was made. The *fi. fa.* was returnable on the 1st of Easter term last, the body of the writ was for £553 7s. 2d—the writ was returned on 31st August last.

See 2 Mar. 78; 6 Taunt. 370; 9 Price, 5; 1 Dow. 30; 2 Ch. R. 203; Barnes, 213; 1 Gale, 47; 2 Dow. 762; 2 Tyr. 174.

MACAULAY, J.—It appears to me the defendant should be discharged. It was objected that the defendant's surname is misnamed in the body of the summons, but that was ultimately waived, and at all events may, I think, be rejected as a palpable error, the words, the defendant, with his Christian name, shewing clearly who was meant. It was not objected that the *ca. sa.* varies from the judgment. The judgment was not shewn, but the writs differ £100.

It was not objected that the defendant should have applied to set *aside the writ*; if he had done so, it would be set aside, both writ and arrest, as irregular.

It may be said, so long as the writ exists the arrest is warranted. It is true it may be so; but, as it is clear that on a second application the writ would be set aside; and as the summons was not resisted on this ground, it is better to make this order absolute at once for his discharge.

To be discharged with costs, if defendant undertakes to bring no action of trespass for false imprisonment; otherwise without costs.—1 C. & M. 408; 1 Bing. 65; 5 M. & W. 605; 8 Dow. 231; 9 Dow. 57; 4 Dow. 357.

PROUDFOOT v. HOLDEN.

Judgment as in case of non-suit—peremptory undertaking—non-payment of costs.

Semble—that upon a rule for judgment, as in case of a non-suit, being discharged upon the peremptory undertaking and payment of costs, if the costs are not paid before the ensuing term the original rule *nisi* will be made absolute, though the rule for the peremptory undertaking has not been taken out by either party, or any bill of costs taxed, or allocatur served by the defendant.

This was a summons calling on the defendant to shew cause why proceedings in this rule, for judgment as in case of a non-suit, should not be stayed till next term.

The cause was taken down to trial last Home District assizes, but it was not tried, and the record was withdrawn.

In Michaelmas term last a rule for judgment of non-suit was moved on the usual affidavit, against

which cause was shewn by affidavit, and the rule was discharged on the peremptory undertanding.

In Hilary term last the original rule nisi was made absolute, on affidavit that the costs of the day, though a condition in the rule to discharge it on the peremptory undertaking, had not been paid.

Notice of this rule was not received by the plaintiff's attorney till after the term expired.

This application was made on an affidavit of special circumstance, calculated to shew that it was an undefended cause, and that in fact no costs had been incurred, and further, that payment of costs was not made a condition.

Neither party seemed to have taken out the rule (which was explained by Mr. Miller—it was taken out but not acted upon). It was taken out, but the affidavit of the defendant's attorney and the clerk of the practice court represented that the effect of the order, as made, was—upon reading the rule nisi, and upon the undertaking of the plaintiff to bring on the cause to be tried at the next assizes, and upon payment of the costs of the day, as well as the costs of the application, the said note shall be discharged, and further time allowed to the plaintiff to bring on the case to be tried pursuant to his undertaking, and that Mr. J. Hagerman, presiding in the practice court, so ordered.

MACAULAY, J.—As worded, it is not upon plaintiff's undertaking to pay such costs, but upon payment thereof—rendering it in effect conditional, contrary to the rule in England, which prohibits the

payment of costs (though ordered to be paid) being conditional.

The practice has, however, always been otherwise with us, and the payment of costs of the day, when required, is made a condition precedent to the absolute discharge of the rule nisi for a non-suit upon the peremptory undertaking. And it has been usual to make absolute the rule for non-suit in the term following the order for its discharge upon such undertaking, if the costs have not been paid; and this, although the rule for the peremptory undertaking has not been taken out or served by either party, or any bill of costs taxed or allocatur served by the defendant—it has been looked upon as incumbent upon the plaintiff to procure an appointment for taxation of costs, and to pay the same before the ensuing term, as a condition to be performed on his part.—Bergen v. Whitehead, E. T. 1 W. IV., Draper, 520; 2 Arch. Pr. 228; Benham v. Shaw, E. T. 11 Geo. IV., Draper, 121; 13 East, 187; Hollister v. Barnhart, H. T. 2 Vic.; Warren v. Grant, E. T. 2 Vic.; Doe Tenbroke v. Cole, H. T. 5 Vic.; McMillan v. Brock, 1 Cameron, 482; Mathewson v. Glass, 1 Cameron, 516.—The proceedings according to our practice, seem regular, and I cannot reverse the decision of the practice court in relation to the costs of the day.

As to English practice in taking out and serving rule—see 1 Scott N. S. 153; 1 G. & D. 50; 1 Dow. N. S. 449; 1 D. & L. 912; 9 M. & W. 248; 1 M. & G. 50; 5 Taunt. 1.

LOW v. MELVIN.

Mesne process—final process—weekly allowance.

A judge in chambers has no power to order the weekly allowance for prisoners charged in execution on final process.

The defendant being a close prisoner for debt, on mesne process, in the gaol of the Eastern District, on the 14th of May, 1847, an order was obtained of the Chief Justice, in chambers, for the weekly allowance of five shillings, to be paid on the third Monday next after service thereof, and upon every Monday thereafter while the said defendant should remain in close custody.

The defendant made oath that he did not consider the claim just, and therefore did not pay it.

On the 17th of August, 1847, the defendant made affidavit of non-payment, describing himself as in *execution at* plaintiff's suit, and referring to the said order as a rule of court.

A summons to discharge was obtained, and on the 30th of August cause was shewn, that the order ceased to be operative when defendant was charged in execution, a judge in chambers not having the power to grant an order for the allowance to debtors in execution.—45 Geo. III. c. 47, final process; 4 W. IV. c. 3, mesne process.

MACAULAY, J.—I think the order ceased when the defendant was charged in execution.

It is generally understood, that when an order for the allowance on mesne process is attended with a confession of judgment that it ceases to operate, if the debtor is charged in execution under the judg-

meat before the arrival of the third Monday; and if a judge in chambers cannot order the allowance to a debtor in execution, upon a direct application, it cannot be done indirectly and by anticipation.

It is a hardship upon the debtor; but I do not see that the power exists to render the order in this case prospective, after the nature of the custody has been changed.

Rule discharged.

RIDLEY v. WILKINS.

Jurat, sufficiency of.

Held, that a jurat in these words, "sworn before me at Belleville, (not saying in what *district*) was sufficient.

Cause was shewn against a summons to set aside service of *ca. re.* for irregularity, with costs, on the ground that the notice was to appear on the 14th of February, a day out of term, and a Sunday.

To which it was objected, that the affidavit did not appear to have been sworn in the district of Victoria, or in what district. The jurat was, "sworn before me, at Belleville, this 9th day of February, 1847. Signed W. Penton, a com. B. R."

The defendant was described as of the town of Belleville, in the district of Victoria, gentleman.

See 3 M. & S. 493; 2 N. & M. 378; 7 Price, 662; 2 Dow. 234; 1 Taylor, 240; Henderson v. Harper et al, 2 U. C. R., 97; Brown et al v. Paror, 2 U. C. R., 98; 3 Dow. 17; 6 Dow. 192; 7 T. R. 451; 7 T. R. 661, 13 East.; King v. Hare, 4 Bing. 393; 3 M. & S. 493; 2 M. & W. 127; 9 M. & W. 13; 1 Dow. N. S. 134, S. C.; 9 East. 446;

8 C. & P. 439; 1 C. & F. 268; R. & M. 97; 2 Campbell, 508; 1 M. & R. 127; 2 Bur. 1189; 7 B. & C. 783; 3 Dow. N. S. 119; 1 D. & L. 622; 12 M. & W. 462; 1 D. & L. 698; 18 Law Jr. 52, B. C. N. S.; 14 Law Jr. Q. B. N. S.; 6 Juriet, 1045; 1 D. & L. 109; 1 B. & P. 105.

MACAULAY, J.—I consider the jurat of the affidavit sufficient, on the authority of 2 U. C. R. 97; though I think the weight of authority in favour of the objection; but there being a decision of the Practice Court expressly in point, I will conform to it, unless overruled by the full court.

Rule absolute, with costs.

RAY v. DURAND.

Award—umpire—time for making an award by umpire.

An award of umpirage is valid though made before the time limited for the award of the arbitrators, if they disagree and do not make an award afterwards.

An umpire need not be appointed in writing, if the rule of reference does not in terms require it.

On the 26th February, 1848, a rule nisi of last term was obtained for an attachment against the plaintiff, for not paying costs of defence pursuant to award.

Submission by rule of nisi prius, referring the cause and all matters at issue to Merill and Neill, so as they shall make their award by or before the 26th of September instant; and if they do not make their award by that day, then to the umpirage of such person *as they shall appoint*, so as the said umpire shall make his award by or before the 1st of October next; nothing about its being in writing.

On the 24th of September, an award of umpirage was made by John Geary, which recited the submission, and that on the 23rd of September the said arbitrators, not being able to agree respecting the matters in difference, and not being able to make their award, did appoint and choose the said Geary an umpire, who, having heard the said parties on oath, and all such witnesses as were produced, &c., made an award in favour of the defendant.

Both the arbitrators joined in an affidavit that they could not agree, and appointed the said Geary an umpire, on the 24th September.

The award was objected to on the ground that—

1. The appointment of umpire was required to be made in writing.

2. That the umpire could not make an award before the 26th of September, under the terms of the submission.

See 1 Lutz. 541-4; T. Jones, 167-8; 2 Sand. 132-3 (n.); 3 M. & S. 559; 5 M. & S. 193; Cameron's Rules, 334; Caldwell, 42; Watson, 56; 4 Taunt. 704; 4 Cam. 17; 15 East. 97; 2 B. & A. 218; 8 Taunt. 694; 1 N. & M. 17.

MACAULAY, J.—Although the authorities are conflicting on the subject, especially the older ones (see Watson on Awards, 59, 60), the late decisions seem to establish that an award of umpirage is valid though made before the time limited for the award of the arbitrators, if they disagree and do not make any award afterward.

The cases in 3 M. & S. and 5 M. & S. are not

precisely like the present; but I think the inference to be drawn from them is, that the present award is good, though the umpire was appointed and made it before the 26th of September, the arbitrators having disagreed previously, and not having made any subsequent award.

It may be a question, whether the umpire should not have been appointed in writing; but the rule of reference does not in terms require it; and that he was appointed verbally, by the mutual consent of the arbitrators, is distinctly shewn, by the affidavit of both arbitrators, and no objection on this head had been raised; and, as the attachment was ordered on the last day of last term, I see no sufficient reason for staying its issue any longer.

Rule absolute.

MOONEY V. JACKSON.

Frivolous demurrer.

A summons to set aside demurrer as frivolous was issued on the 16th of September. Cause was shewn on the 29th of September.

The declaration was filed on the 5th September, 1843. Case, 1st count: for distraining for more rent than due—enumerating certain goods. Inducement: "that *whereas at the several times* in this count mentioned, the plaintiff occupied a certain house and premises, as tenant thereof to the defendant, at a certain rent, whereof a certain sum, to wit, 7*l.* was in arrear. Plaintiff distrained for 9*l.* 5*s.* Alleging excess, and one-fourth, sufficient, contrary

to the statute. And the defendant, further contriving, &c., sold the said goods for less than might have been obtained therefor, &c. And the plaintiff further saith, though the defendant out of the proceeds satisfied unto himself the *said actual* arrear of rent and charges of *distress, appraisement, and sale*, leaving overplus, to wit, 3*l.* 10*s.*; yet the defendant, not regarding the statute in that case made and provided, did not, after satisfying the said just and true arrear of rent, appraisement, and sale, leave the overplus with the *sheriff* of the *said Gore* district or under-sheriff, for the plaintiff, or with any other person duly authorised, &c."

Demurrer. 1st—Because the house, &c., was not stated to be in the district of Gore nor in Canada, nor that the distress was in Canada or within the jurisdiction.

Also, that the declaration contained only one count, in which the plaintiff complained of separate causes of action; i. e., distraining for more rent than due, excessive distress, not selling for best price, and not paying over surplus.

MACAULAY, J.—The first ground of demurrer is certainly frivolous within the rule; nor do I see that the declaration may not be framed in cases embracing several different grounds of action, as in this case. It is not properly one count, but several counts all properly joined.

It is, however, objectionable on two grounds, as respecting the last cause of action. 1st. It does not admit the amount of rent distrained for to be in

arrear; but having denied that in the first count, it complains in the last, not that the goods sold for more than sufficient to satisfy the rent as claimed by the defendant to be in arrear and distrained for, but more than sufficient to satisfy what the plaintiff alleges was in arrear, being a less sum.

2nd. It does not appear that the distress really took place in the Gore district; there is no reason, therefore, why the defendant should pay the overplus to that sheriff.—See 2 W. & M. ch. 5, sec. 2. It should be left with the sheriff, &c., of the district where the distress was made, and that should appear.

It is one of the excepted causes in the rule as to venue. The venue is not local; but the place of distress is material to be alleged, in order to shew a breach of the statute 11 Geo. II. ch. 19, on the defendant's part.

Summons discharged on the point of frivolous demurrer.

MEYERS V. CAMPBELL.

Affidavit to hold to bail—sufficiency of—in not following the words of the act, "hath good reason to believe."

In this case it was held by MACAULAY, J., that an affidavit to hold to bail, stating that the plaintiff "had *reason* to believe," and not "had *good* reason to believe," (as required by the statute,) was bad, and that an arrest made under it must be set aside.

COMMERCIAL BANK v. DENWOODIE AND HOWCUTT.

Frivolous demurrer to a declaration on a promissory note.

Summons to set aside demurrer as frivolous.

Declaration dated 20th of June, 1846.

The plaintiff declared against the defendants as maker and endorser of a promissory note, under the statute: For that whereas said Denwoodie on the 20th of October, 1845, made his note and promised to pay, three months after date, to Howcutt or order 25*l.* at the Commercial Bank, M. D., who endorsed it to the plaintiffs. They then averred that *afterwards*, when it became due, to wit, on the 24th of January, 1846, said note was presented to the aforesaid bank, but not paid, of which defendants had notice, &c.

Demurrer. Causes: That the defendants were charged jointly and severally; that the note was alleged to have been presented a day *after* it was due, and that so Howcutt was discharged and no *joint* liability shewn.

2nd. It only appeared inferentially that the three months had expired at commencement of suit or had expired.

3rd. Suggested as general ground of demurrer—that the declaration was not according to the form, no place being stated where made.—See statutes 3 Vic. c. 8, and 5 Wm. IV. c. 1; Grant v. Eyre, 2 U. C. R. 426; 2 U. C. R. 127.

MACAULAY, J.—The form in the new rules of a declaration, on a promissory note against the *maker*, does not specify any *place* of making; and though

it is otherwise in the form given by the statute, I apprehend it is only ground of special demurrer, if objectionable.

The venue is by the new rules made to govern. It is now of no use unless as matter of description.—Archibald, Nisi Prius, 133; 2 Dowl. 680; 5 Tyr. 214. Time is said to be still necessary.—2 C. & J. 418; 3 Bing. N. S. 84.

As to the 1st objection. If Denwoodie is *severally* liable, that entitles the plaintiff to recover against him, and it is not sufficient for him to show that Howcutt is not also liable. They became liable in different capacities.—1 M. & W. 109; 2 Dowl. 754; 5 Dowl. 324; 2 M. & W. 91.

2nd. The declaration is entitled long after the note became due; and it has been decided in England that on this objection the Court will not look out of the declaration.

The second objection was overruled in Grant v. Eyre, 2 U. C. R. 426; and the 1st objection is in effect similar to the second ground of demurrer in that case which, as against the *maker*, was also overruled, so that Grant v. Eyre is quite in point against the defendant Denwoodie, on both the special causes alleged.

And as to the one suggested on the argument, it is no sufficient objection on general demurrer, and I apprehend would not be sustained even on special demurrer.

The new rule as to venue seems to be considered as dispensing with statements of place in the body of

the declaration, for the mere purpose of venue; and though in stating a promissory note the *place* where made might be used in describing it, it is not essential, nor is its omission material.

If no *place* appears thereon, then the place where made, as a fact, does not require to be stated. *Time*, not *place*, must still be laid to the material facts. The marginal *venue* indicates the *place*, once for all, as respects all material allegations, unless peculiar circumstances require the statement of place, and none such appear in this case.

Order absolute, to set aside demurrer; costs to be costs in the cause only in the judgment to be entered on the 1st count, with leave to plaintiff to sign judgment.

JOHNSON QUI TAM. v. WISEBROOKE.

Process and affidavit of service—filing of appearance per stat.

The entry of an appearance per stat. *before* the process and affidavit of service thereof is filed, is an irregularity—not a nullity.

On the 14th September, 1848, a summons was obtained to set aside the common bail filed per stat., and all subsequent proceedings, the same being filed without filing the process or affidavit of service thereof.

On the 20th of September cause was shewn.

On the 9th of September, 1848, an affidavit of defendant was filed, stating that he was served with copy of process annexed on the 12th of August, at suit of Abraham *Johnson*, but had not appeared

thereto; that on the 8th of September declaration and demand of plea were left with his wife at his residence, but that he had not pleaded.

On the 12th September an affidavit of Mr. Jones was filed, stating that the defendant handed him the declaration on the 9th of September. That process issued from the Gore office and notice to appear therein.

No appearance was entered for the defendant except a common bail by plaintiff's attorney. Copy annexed. Process was not filed, nor affidavit of service.

Declaration was filed on the 7th of September.

Process was issued on the 4th of August.

For the plaintiff, an affidavit of Mr. Miller, the plaintiff's attorney, was filed, stating that after the usual notice, and after commencement of the suit, he received a letter annexed, dated 24th July, 1848, from Messrs. Freeman & Jones, as attorneys of the defendant, and supposed they were defendant's attorneys, and sent the declaration to his agent in Hamilton to serve on them. He heard Mr. Jones had declined receiving it; it was served on the defendant. That deponent then met Messrs. Jones & Freeman with the declaration and demand of plea, which they said they had received from defendant. The deponent looked at it, and with their leave altered the style of the demand of plea, and then handed the declaration and demand of plea to said Freeman, who said he should consider the service as made then, and not when served on the defendant, which would give them

the full period to plead from that time, to which deponent consented. That he only heard of the application at Woodstock, on the 18th of September, and was not aware that common bail was filed, as he considered from the letter and acts of said Freeman, as attorney for defendant, that appearance had been entered.

The letter only solicited explanation, and spoke not of a suit.

The whole was relied on as waiving the appearance, although *irregular*.

The defendant's attorney contended it was *void*, as a nullity—the statute requiring an affidavit of service, &c., to warrant such appearance.—7 Dowl. 602; 2 Wils. 4; H. T. 2 Wm. IV., in our court.

MACAULAY, J.—According to Forrester v. Graham, (H. T. 2 Wm. IV. in our court,) as stated in the digest, the appearance was a nullity; according to Courtenay v. Bigelow (H.T. 5 Vic. in our court), *irregular*. The defendant himself admits service of process; and I am disposed to think the appearance per stat. is only irregular, being in itself a correct proceeding, founded on a process and service in fact, but entered without filing the affidavit of such service.

Then the question is, whether the irregularity is waived. I cannot say I think it is. The supposed attorney of the defendant at first declined receiving the declaration; then it was served on the defendant, who delivered it to Mr. Freeman, as his attorney; when Mr. Freeman met Mr. Miller neither of them knew the real state of the proceedings. Mr. Miller

supposed Mr. Freeman had appeared; Mr. Freeman may have supposed Mr. Miller had appeared per stat. If Mr. Freeman accepted service of the declaration, and with knowledge of the state of the appearance, or after a reasonable opportunity to have ascertained it, I should have deemed the objection waived or cured, there being an appearance in fact, and good in itself; but I do not think he had such knowledge or opportunity, nor can I say that I think anything occurred to compromise his right to search the proceedings, and object to their irregularity. There is no reason to suppose Mr. Freeman was instructed to defend until after service of the declaration.

Rule absolute with costs.

BANK OF MONTREAL v. DOWN ET AL.

Frivolous demurrer to declaration on promissory note, and in trespass.

Summons to set aside demurrer as frivolous.

1st case.—Declaration on promissory note, payable ——— days after date, not alleged to be due at commencement of suit.—5 Dow. 317, 324; 2 M. & W. 91; 4 Dow. 729; 7 Dow. 529; Gurney v. Hill, 2 Dow. N. S.; 1 M. & W. 209; Ty. & Gr. 448; 3 Ea. 155; 4 B. & Ald. 288; 4 Dow. 48, 759; 1 Dow. N. S. 773; 1 Chit. Rep. 400.

MACAULAY, J.—The demurrer must be set aside in this case as frivolous, the promissory note declared upon appearing to have become due before the *date* of the declaration.

ARMSTRONG v. HAMILTON.

Summons to set aside demurrer as frivolous.

2nd case, trespass.—Special demurrer, because close not sufficiently described; thus defendant, *vi et armis*, broke and entered the close of plaintiff, situate in the township of South Sherbrooke, being part of the north-east half of lot number 15, in the tenth concession of the said township; that is to say, that part thereof *then* in the occupation of the plaintiff, consisting of three fields or inclosures.—2 B. & Ad. 99.

Cause shewn.—1st, that summons should have been on reading the pleadings. 2nd, not frivolous. 1 C. M. & R. 900; 4 Jurist, 1840, 1062; 3 Dow. 455; 7 Dow. 529.

MACAULAY, J.—Rule ordered, the declaration being sufficiently certain, and all the pleadings being verified by affidavit filed. As to judgment, leave to sign is not moved. A deed of conveyance, or a will describing the closes as above, would be sufficient to pass the estate.

HENDERSON v. BOULTON, ONE, &c.

Attorney—demand of plea—when to be served—time to plead after service.

Semble: that a demand of plea upon an attorney under the 10th new rule, must be served in term time—and that the attorney has eight days after service to plead. (See next case of Ducett vs. Garrett.)

This was a rule issued in the Practice Court last term, calling on the plaintiff to shew cause in chambers on Wednesday the 17th instant, why the inter-

locutory judgment signed in this cause should not be set aside on the ground that it was signed too soon.

On Wednesday last it appeared that the rule nisi had been inaccurately drawn up, the defendant's name being therein stated to be *Charles* instead of *James*, and that the same error was in the copy served, being the error of the clerk in drawing up the rule. The learned Judge (Macaulay) ordered it to be amended by inserting James in place of Charles and altering the return day from Wednesday to Thursday, that the amended rule and order therefor might be served. This amendment was made on payment of costs, and was granted because he considered that it was competent to a judge in chambers to grant such an amendment—there was something to amend by, namely, the motion and other papers filed—it was the mistake of the clerk, and the objection was not a mere technical or captious objection, for although only an irregularity, it turned upon an unsettled question—whether the defendant had more than four days to plead after a demand of plea, such demand being served in the term.

Cause was shewn on Thursday, and the facts appeared to be, that the bill was filed and copy served on the 24th of November, 1846, in the vacation between Michaelmas and Hilary Terms last—that on the copy served was endorsed a notice to plead within the first four days of the next term (being Hilary last), otherwise judgment.

On the 4th of February (being the 4th day of last term) a demand of plea, dated 1st February (1st day

of term) was served, and on the 10th February, in said term, judgment by default was signed.

The defendant claimed eight days' time to plead—the plaintiff contended that he was only entitled to four, and that if entitled to eight, the notice to plead was equivalent to a demand; and though served in vacation, the defendant was bound to plead according thereto, the time mentioned for exceeding eight days. Two questions therefore arose—

1st. The effect of the notice.

2nd. The time within which the defendant, an attorney, was bound to plead.

MACAULAY J.—The notice was not a demand of plea, it was not served as such; but in pursuance of the English practice, and if the defendant has eight days in term or eight days after demand of plea in term to plead, it required him to plead too soon.—2 Dow. 405; 5 Dow. 113.

The case depends upon our own rules and not the English practice. The statute 2 Geo. IV, c. 1, sec. 6, provided for proceeding by bill in any case where by reason of privilege such proceeding is practised in Court of K. B. in England, and the like proceedings had, as in that court, unless altered by rules of our court.

It has been held in this court, that bills cannot be filed against attorneys in any but the principal office at Toronto. Smith v. Ralph, in Taylor R. 268, and Campbell v. Barrie, same Rep., Taylor, 325, it was held that a rule to plead might be given in vacation as well as in term, under rules M. T. 4 Geo. IV. c. 4,

No. 6. But a rule to plead was necessary.—Mead v. Bacon, Taylor 235; and Madill v. Small, Taylor 243.

In E. T. 11 Geo. IV. it was ordered that no rule to plead, reply, or rejoin, should be necessary, but that a demand should be sufficient with respect to a plea in actions by non-bailable process.

Touching the construction of the former rule, see Small v. Mackenzie, Draper, 253, and by rule H.T. 1 Wm. IV., when, by reason of any privilege, the proceedings are not commenced by *ca. re.*, a demand of plea may be served at any time when by the practice in England a rule to plead might be given, and not before; and that the service thereof should suffice without any rule to plead. This rule seems to have been made in consequence of the case of McInarry v. Foster, Draper, 491—in which it was held that an attorney could not be compelled to plead to a bill filed in vacation till the following term; and that the demand of plea should be in term time and not in vacation. It will be seen that I dissented from this construction of our rule, on the ground that if a rule to plead might under the old rule, No. 6, be entered in vacation, and a demand of plea suffice as in respect of non-bailable actions under rule of E. T. 2 Geo. IV, it followed that a demand of plea in vacation was rendered regular, and the defendant was bound to plead thereto in eight days.

In the case of Fraser v. Boulton, in M. T., 2 W. IV. it was held, that upon a bill filed in vacation judgment by default could not be signed in the same vacation.

In Moore v. King, E. T., 5 Wm. IV, it was con-

elected that an attorney was entitled to four full days in term to plead after demand of plea, but the application to set aside the judgment was then held too late.

In Sherwood v. Bouiton, M. T., 3 Vic., it was held, that whether the bill was filed in term time or in vacation, the demand of plea must be served in term or within four days after it, and that the defendant was entitled to four full days in term to plead—and in Hamilton v. McDonell, H. T. 3 Vic., it was decided that a demand of plea must be served, and that a rule to plead or a notice to plead were not sufficient.

In this state of the practice the new rule was passed, that defendant should not in any case be entitled to an imparlance, nor should a rule or notice to plead, reply, rejoin, &c., be necessary in any case, whether bailable or non-bailable, and whether privileged or otherwise; but that a demand should be sufficient, and that the parties respectively should be bound to plead, reply, rejoin, &c., in eight days after the service of such demand, unless otherwise ordered by the Court.

In Haigh et al. v. Bouiton, 1 U. C. R. 340, it was held by McLean, J., in Practice Court, that notwithstanding the 10th New Rule, a demand of plea must be served on an attorney in term or within four days thereafter, and that he could not be compelled to plead in vacation to a bill filed in the same vacation. (See also Cornwall v. Baldwin, 1. U. C. R., 391, before Jones, J.

In the case of Gibb v. Miller, before me in chambers, previous to last term, I expressed a contrary opinion, not being aware that the rule had received such a construction by two judges, and considering it an unsettled point. The question is now before the full court, upon an appeal from a decision of McLean, J., in chambers. It is obvious, that in the present case the question is not, whether the demand of plea can be served in vacation, but whether the defendant has eight days to plead after a demand of plea delivered in term more than eight full days before the end of the same term.

In the first place, it is contended that a demand of plea in vacation is good, and that the notice to plead was equivalent to a demand of plea—the answer is, that it was unnecessary, (see new Rule 10), and has been held not equivalent to a demand of plea, that was not intended as such, and that a subsequent demand of plea was served, shewing that it was deemed necessary to be superadded. Had a demand of plea been served with the copy of the declaration, I still think the defendant ought to have been bound to plead within eight days after such demand. The Rule No. 10, after doing away imparlances and rules and notices to plead in cases bailable or non-bailable, privileged or otherwise, declares that a demand shall be sufficient, and the parties respectively be bound to plead in eight days after the service of such demand. Now parties respectively, mean defendants in cases bailable or non-bailable, *privileged* or otherwise, and includes attorneys if within the rule

at all. In some privileged cases a process precedes the appearance and declaration, when I suppose it will not be contended that a plea may not be regularly demanded in vacation, and the defendant be obliged to plead thereto in eight days. In other privileged cases the first step is a bill filed, the defendant being considered already in court, as attorney; and the argument is that they are bound to plead in eight days after service of a demand of plea, that such service can only be regularly made in term time, and that without a regular service the defendant cannot be compelled to plead. But it appears to me, that the very object of the rule was to do away the practice contended for on this head, and to require all parties, privileged or otherwise, to plead in eight days after a demand of plea. A demand of plea is not substituted for a rule to plead, but rules to plead are abolished and done away with, and the demand of plea declared to be sufficient. Now, by the practice in England a demand of plea could be regularly served with or at any time after the declaration or bill, whether in term or in vacation; and the true test is, whether the demand of plea as such is regularly served. It cannot precede the filing or service of the bill, but may accompany it, and being regularly served, nothing more is requisite, and the defendant is bound to plead, not within the time limited in England, but in eight days after such service. The fallacy seems to me to be in treating a demand of plea as substituted for a rule to plead, whereas a demand of plea was always necessary, and it alone with us is made suffi-

client without any rule to plead: when the right to imparl and rules to plead were both done away with, and a demand of plea of itself declared to be sufficient, it followed that no day in term was necessary, because a demand of plea could be served at any time after bill filed and copy served. The construction contended for, is in effect to oblige some privileged defendants, i. e. those sued by summons instead of the ordinary *ca. rs.*, to plead to a declaration filed in vacation within eight days after demand of plea, while other privileged parties, viz., those sued by bill, are not so bound to plead, but have a longer time. It appears to me the rule No. 10 should receive one uniform construction and application, and that the defendants, whether in cases bailable or non-bailable, privileged or otherwise, should plead in eight days after a demand of plea (regarded strictly and only as a demand of plea,) has been regularly served, and that as respects imparlances or rules to plead, the practice should be governed as if they had never existed. I entertained and expressed similar views in Mahaney v. Foster, under our former rules. But if not bound to plead except to a demand of plea served in term, it would still seem that the time allowed is eight days, it seems to be implied by the rule, the effect of which would be to extend the time for pleading in case of attorneys served by bill to eight days instead of four, and in this view the judgment was signed too soon, and must be set aside. If the court shall hold that a demand of plea can only be served in term, and that the time is extended

to eight days, a question will arise whether the demand of plea must be made eight days before the end of the term, in order to compel the defendant to plead before the next ensuing term, and if not, then how long before the expiration of the term must demand must be made to compel a plea within eight days thereafter.—See 4 U. C. R., 113.

Rule absolute.

DUCATT v. GARRETT.

Attorney.—Time to plead after service of demand of plea.—Term—vacation.

An attorney must be served with a demand of plea in term time—and has eight days after service to plead—full *four* of which must be in term—the remaining *four* may be in vacation.

A summons dated the 2nd Sept. 1848, was obtained, to set aside the interlocutory judgment for irregularity.

The declaration was filed in full term on the 5th August,—a copy was served on the 7th of August with demand of plea, being the 2nd Monday.

Judgment was signed on the 22nd of August.

The question was, whether the defendant was entitled to a demand of plea eight days before the end of the term—in other words, whether the defendant was entitled to eight days in term to plead, after demand of plea. See new Rules No. 10, Sherwood v. Boulton, M. T. 3 Vic.; 4 U. C. R. 113, Widmer v. Small. The plaintiff relied on the practice—also on justice and delay.—1 U. C. Rep. 340, Haigh v. Boulton.

Notice of assessment was served on the 20th August, dated 22nd August, for the Niagara sessions.

MACAULAY J.—I think the interlocutory judgment is regular. The demand of plea in our practice, answers the double purpose of a rule to plead and demand of plea, and the fictions require that so far as it is substituted for a rule to plead, it should be served in term. Now a rule to plead served four full days before the end of the term, required an attorney defendant to plead at the expiration of such rule, provided a plea were also demanded.

As a rule to plead therefore, the demand of plea must be served as early in term as a rule to plead would be required under the old or English practice; but such rule is a four and not an eight day's rule.

As a demand of plea, it seems to be conceded that an attorney has eight days, like other defendants under the new rule, and I doubt not I have so decided (as stated); but when I so held, I looked upon attorneys and other defendants as in like circumstances, and that a demand of plea might be served at any time. It has since been held that the demand in the case of an attorney must be served in term in lieu of a rule to plead; and if that privilege remains and the old rule in favour of attorneys continues, (see 1 U. C. R. 340), it might form a question whether *an attorney* can under the new rule claim eight days—but having been so held, it is probable it will be so continued to be held—but as a demand of plea, it only entitles the defendants to eight days from the time of service, whenever served—as a substi-

term for a rule to plead, full four days of those eight days must be in term.

On the merits (if affidavits sufficient) the defendant may have leave to plead on terms of pleading forthwith, adjusting forthwith, and accepting one day's previous notice of trial for the next Niagara sittings, and on payment of costs.—(See Henderson v. Boulton in the preceding case in these reports.)

CARROLL ET AL. v. TYSON ET UX.

Venue.

A venue once changed will seldom be changed back again, without a peremptory undertaking on the part of the plaintiff.

Case—Slander.

On the 16th of September, 1846, upon a previous summons, the venue was this day changed from Gore, where there was to be a coming sittings that autumn, to Wellington, where there was no autumn sittings, on affidavit of the defendant that the causes of action, if any arose in the Wellington and not the Gore district or elsewhere out of the Wellington district, that both plaintiffs and defendants resided at Bridgeport, in the township of Waterloo, fourteen miles from Guelph, the district town of the Wellington district, and thirty-eight miles from Hamilton, the district town of the Gore, and that cause of action, if any, arose at Bridgeport,—that deponent was well acquainted with the plaintiffs' circumstances, and that they have not property sufficient to pay the costs if unsuccessful; that the defendants will require the attendance and

evidence of eight or nine witnesses on the defence, who all reside within two miles of Bridgeport. The application for the order was made before plea.

On the 21st of September, 1846, a summons was issued to restore the venue on the affidavit of the plaintiff, that two of his witnesses, necessary and material, at present residing at Waterloo, in the district of Wellington, intended removing to the United States, in January next, and unless the cause was tried at the coming Gore assizes, he would be deprived of their evidence—a circumstance known to the defendants—and if not retried, the justice sought by plaintiffs in their suit, would be defeated.

MACAULAY, J.—What the pleas are, or whether the cause is at issue, is not shewn. The venue may, I believe, be changed in slander, without the summons on the usual affidavit, with leave to the plaintiffs to bring it back on the peremptory understanding.

It is a question whether it can be regularly done from a district in which there is a coming autumn assize into one where there is no assize till the spring circuit, as in this case, but it has been done in some cases, and was in this. If regularly changed, then the application to restore it (if regular, without shewing the issues to be tried, &c.,) must be compared with the affidavit on which it was changed, and in doing so there appears to be inconveniences on both sides; and under such circumstances, the venue being regular where it is, must remain.

I do not think a sufficient ground laid to bring it back, without the peremptory undertaking which the

plaintiffs cannot accordingly enter into. It is at present in the district in which the cause of action, if any, arose. The plaintiffs must examine the witnesses, whose attendance they require, before the proper officer, for which there is plenty of time between this and January next, if they desire to obtain their evidence, in the event of their absence from the province, at the time of trial.—7 Dowl., 208; 1 H. Bl., 417, 183; 6 Scott, 277.

Summons discharged.

BUCKLEY ET AL. v. GIBSON.

Prisoner—Interrogatories, when to be filed.

On the 14th of August, an application was made by a debtor in execution, for his discharge, under the 10th and 11th Vic. ch. 15, sec. 3. On the 15th of August, the plaintiff filed interrogatories. *Held*, per Jackson, that the plaintiff had all Saturday, the 15th, to file his interrogatories. Semble, that they must be filed before the expiration of the fifteen days limited by the act.

This was a notice of application, made under the statute 10 & 11 Victoria, ch. 15, sec. 3, which enacts, that any party in close custody in execution for debt, might give *fifteen days' notice* of application for his discharge, and upon proof thereof, and making the affidavit required, the court or a judge might order his discharge, provided he should have satisfactorily answered interrogatories which the creditor might cause to be filed and served *before the expiration of the said notice*, in the same manner and to the same purport as prisoners in debt were required to do.

On the 14th August, 1847, being Saturday, notice

was served of an intended application, after *fifteen* days *from* this date, to wit, on the 30th of August, instant.

On the 30th, Monday, at 11 o'clock, a. m., interrogatories were filed, and at twelve o'clock at noon of the same day, application was made.

It was objected—

1st. That the plaintiff had all Monday, the 30th, to file the same, it being the last of the fifteen days, Sunday, the 29th being a *dies non*.

2ndly. That if the fifteen days expired on Saturday, still the plaintiff might file the interrogatories at any time before the application for damages was actually made.

The Act of 1822, c. 1, s. 22, provides that the first and last days of all periods of time limited by that act, and thereafter to be limited by any rule of court, &c., for the regulation of practice, should be inclusive.—See 2 M. & W. 240; 2 Camp. 294; 9 B. & C. 134, 603; 1 Ch. Pr. Law. 775; 2 Do. 69, 148.

MAGAULAY, J.—It appears to me, the day of service was to be excluded in the computation of the fifteen days, and then the last day being a Sunday or *dies non*, the plaintiff had all Monday, the 30th, to file interrogatories.

But I at present am under the impression, that under this statute they must be filed before the expiration of the fifteen days limited thereby.

Application refused.

Morell v. Caspar et al.

Declaration—date of.

A declaration dated "A. D." instead of "in the year of our Lord," may be set aside for irregularity.

On the 23rd of March, 1848, a summons was obtained to set aside the filing and service of the declaration on Smith, one of the defendants, for irregularity, with costs; the date of the declaration not containing the words "in the year of our Lord," but "A. D. 1848"—thus, "On the twenty-first day of March, A. D. 1848."

Macaulay, J.—The declaration must be entitled of the day of the month and year in which filed, and shall commence as follows: In the Queen's Bench, ——day of——, in the year of our Lord——. See Holland v. Tealdi, 8 Dowl. 320; Doe Ashman v. Roe, 1 Bing. N. S. 253.

Rule absolute without costs, with leave to amend.

Note.—See Rayner v. Henderson et al., in Chambers.

The Queen v. Heathers.

Time of filing answers to interrogatories, where prisoner is confined in one district and answers are filed in another.

Answers to interrogatories were filed and served in Toronto, on Friday the 25th of August. The weekly allowance was not paid at Barrie, on Monday the 28th of August.

Held, per Jackson, upon a summons to discharge the prisoner, for the non-payment of the weekly allowance, that a reasonable time had not elapsed between the filing of the answers and the non-payment of the allowance, and that the summons must be discharged.

The defendant was in close custody in gaol at Barrie. He obtained an order for the weekly allowance.

Interrogatories were filed by the plaintiff.

Answers were filed and served in Toronto, on Friday, the 20th of August instant, 1847; the weekly allowance was not paid on Monday, the 23rd of August, 1847. A summons was then obtained to discharge the defendant from close custody.

Cause was shown by the plaintiff, contending that a reasonable time had not elapsed between the service of answers here and the following Monday, to enable the plaintiff to examine the answers, and, if fit, to attend at Barrie (Simcoe District) with the money.—See Stat. 2 Geo. IV., ch. 3.

MACAULAY, J.—I feel persuaded it has been held, that service of answers *here* on the Monday did not entitle the prisoner to the payment of the allowance on that day in another district, on the ground that the plaintiff had not a reasonable time to do so; and I certainly think the time here was not reasonably sufficient.

The act says the debtor shall have no benefit from the order till he has fully answered, &c. Now I think this must have a reasonable construction, and that he should so answer in time to enable the plaintiff to comply with the order; otherwise he might, by delaying the answers to the latest moment, always secure a default of payment, and so take advantage of his own wrong.

Rule discharged.

MERCHANTS v. SEVEN ASH BANK.

Frivolous demurrer to declaration on a promissory note.

A rule nisi was obtained on the 22nd of March, 1856, to set aside the demurrer as frivolous, and for leave to sign judgment.

Declaration: Assumpsit on a promissory note, made by the defendants Shiith and Bird to the plaintiff on the 15th of Sept., 1855, for 16*l.*, payable 1*l* months after date. Also, on the common counts for goods sold and delivered, and on the account stated. Breach —yet they have not paid the said moneys or any part thereof to the plaintiff.

Cause of demurrer: That it was not alleged in the declaration or breach that the moneys sought to have been recovered had not been paid by one of the defendants—only that the defendants jointly had not paid.—See 1 Ch. Pl. 324; Chitty on Bills, 393; 6 Crompt. 78; 2 Crompt. 604; 4 M. & S. 33; 1 Sm. 231; 1 Sand. 235, note 6; Com Dig. Pl. C. 44.

MACAULAY, J.—I think this demurrer should be set aside as frivolous. Costs to be costs in the cause.

KING'S COLLEGE v. GAMBLE & BOULTON, EXECUTORS OF D'ARCY BOULTON.

8 Vic., ch. 13—writ of enquiry from Queen's Bench to District Court, may issue to assess contingent damages upon demurrer—Statement for the issue of a writ of enquiry—what it must show.

Under the 8 Vic., ch. 13, a writ of enquiry may issue from the Queen's Bench to the District Court, not only to try the issues in the country, but also to assess contingent damages upon demurrer.

The summons for the issue of the writ of capias need not be entitled "plaintiff and defendant."

The summons should show the issue—also the amount endorsed on the original process—and the nature of the action.

On the 26th of March, 1846, a summons was obtained to try this cause before the judge of the District Court—to try the issue, and to assess contingent damages on the demurrer, on the affidavit of Henry Eccles, partner of the plaintiff's attorney, stating that this was an action of assumpsit to which the defendants had pleaded to the first count, payment by the testator, and to the second count non-assumpsit by the defendants, on which first plea the plaintiffs had taken issue, and to the second demurred specially; that the sum sought to be recovered in this action did not exceed 25*l.*, and that the trial would not, as he believed, involve any difficult question of law or fact.

On the 25th of March cause was shown. First objection, that summons was not entitled "plaintiffs and defendants."—3 Ch. Pra. 55.

2nd. That the venue was not shewn, and so it did not appear that the Home District Judge was the proper judge to try the cause.

3rd. That it did not appear there were not more than two counts, or that the cause was at issue.

4th. That the amount endorsed on the copy of process served was not stated, which was the test.

5th. That the act did not authorize the assessment of contingent damages on demurrer in the District Court.

MACAULAY, J.—The statute 8 Vic., ch. 13, secs. 1 & 2, recites, that it would tend to diminish the

expense and expedite the determination thereof, if the judges of the District Courts were authorized to execute writs of enquiry to be issued out of this court. It refers to 2 Geo. IV., ch. 1, sec. 20, and enacts, that it shall be lawful in every action, in which judgment shall go by default, or which judgment shall be given for the plaintiff on demurrer, and there shall be issues of fact to be tried, and in which damages are required to be assessed, to issue a writ of enquiry to the judge of the District Court of the district in which the venue in such action is laid, to be executed at the first or second sittings of such court next after the issue thereof; and six days' notice of the execution thereof shall be given to the defendant's attorney, to be returned within ten days after execution, and that plaintiff may enter judgment thereon in six days.

Section 51 enacts, that in any action pending in the Queen's Bench for any debt or demand, in which the sum sought to be recovered or endorsed on the copy of the original process served shall not exceed 25*l.*, or in which the amount shall be ascertained by the signature of the defendant, the court or judge, if satisfied that the trial will not involve any difficult question of fact or law, may order the issue or issues to be tried before the judge of the District Court of the district where the venue in such action shall be laid. A writ to issue (sec. 52) requires 8 days' notice of trial, and the writ to be executed at one or two sittings, and to be returned in ten days, &c.—See Im. Stat. 3 & 4 Will. IV., ch. 42, sec. 17.

This act, sec. 51, does not include summons for

unliquidated damages.—11 Law Jour. 153, 154, Q. B. 60, C. P.; [illegible] N. S. 496, 506; 5 M. & W. 155; 16 Law [illegible] N. S. Q. B. 220; 11 A. & E. 961; 3 M. [illegible]

The sum [illegible] on the process governs.—1 Hodges, 23, Trotter v. Bass; and see 2 C. M. & R. 415; Edge v. Shaw et ux.—1 Arch. N. P. 282. The order is issued upon the production of the summons and declaration.

1. The first objection seems untenable.—See 3 Ch. Prac. 556.

As to the second, I think it should be shown that the cause is in the Home District.

2. It sufficiently appears that the cause is at issue, the plaintiff being at liberty to add the similiter and joinder in demurrer as of course.—Cam. Rules, 27, No. 19; 2 D. & L. 494; 9 Jurist, 135.

4. I think the amount indorsed should be shewn, and also the nature of the action, so as to shew that it is a debt or demand within the meaning of the act. —1 Hodges, 23; 14 M. & W. 71; 2 D. & L. 893; 14 L. J. N. S. 304; 4 Dowl. 569.

5. If otherwise unobjectionable, the plaintiff could clearly proceed to try the issue, under sec. 51 of the act; or both issues, if both were issues to the country: but that not being so, I do not see why contingent damages may not be assessed at the same time, in order to prevent a second inquiry under sec. 54, should plaintiff hereafter succeed on demurrer.

The assessing of contingent damages seems to me incidental to the right to try the issue.

The question really is, whether in England, under the act 3 & 4 Wm. IV. ch. 42, sec. 17, a writ of trial could go to try issues and also assess contingent damages; for both there and here such writs may plainly issue, to try issues alone, or to assess damages after judgment, by default or on demurrer; and it has been decided in this court, that the trial of issues and assessment of damages absolutely may be had at the same time, by virtue of the two sections 51 & 54 taken together.

The plaintiff may proceed to try issues of fact before distinct issues of law are determined, though it may effect an application to amend.

9 Jurist, 925; 3 Dowl. N. S. 961; 7 Jurist, 514; 12 L. J. 223, C. P; 5 M. & G. 605; 6 Scott, N. S. 656; 1 Tidd's Forms, 8th Ed. 295, are in point to show, that by the equity of the statute, a writ for trial of issues may include assessment of damages upon issues in law contingent.

Summons discharged upon the 2nd and 4th objections—costs of the defendants to be costs in the cause, if they succeed.

LORING v. CLEMENT.

Summons to set aside demurrer as frivolous, to a declaration in trespass *quare clausum fregit*, discharged.

Declaration.—Trespass, *quare clausum fregit*, for that defendant, on the 15th December, 1845, at *Arvida*, broke and entered divers, to wit: 10 messuages, 10 cottages, 10 barns, 10 stables, 10 coach-houses, 10 out-houses, 10 yards, 10 gardens, 10

orchards, 500 acres of arable land, 500 acres of meadow land, 500 acres of pasture land, 500 acres of wood land, 500 acres of land covered with water, and 500 acres of other land with the appurtenances, of the plaintiff, situated and being in the township of Louth, district of Niagara, being composed of lots numbers 6, 7 & 8 in the 9th concession, and lots numbers 7 & 8 in the 7th concession of the said township of Louth, and ejected the plaintiff and took the profits, &c.

Demurrer.—Because it did not set forth the *premises* in the declaration mentioned, by *metes and bounds*, or abuttals, or in any other way pursuant to the rule of court.

Summons to set aside demurrer as frivolous.

See Cameron's Rules, 50, Rule 1.—In actions of trespass *quare clausum fregit*, the close or place in which, &c., must be designated in the declaration by *name* or *abuttals*, or *other description*, or defendant may demur specially.—9 M. & W. 249; Cameron's Rules, 23, 404; Chitty, jr. Pol. 722, 2; 3 Dowl. 395; 3 Chitty Prac. Law, 756; 2 B. & Ad. 99; 3 A. & E. 161; 1 H. & W. 170, S. C.; 4 N. & M. 635; 1 M. & W. 216; 9 M. & W. 249; 1 M. & G. 464; 2 Bing. N. S. 617; 1 Q. B. 439.

MACAULAY, J.—It is urged for the defendant, that the designation by lot ——, number ——, and a concession, is not a *name* within the Rules.

If the declaration was for breaking and entering the lots mentioned, &c., I should certainly think the lots so were sufficiently designated by name, though

consisting of several closes. The lot No.——and concession is the usual name by which lands are designated in townships.

But the declaration may be uncertain in relation to the messuages, cottages, barns, &c. If the plaintiff declares for the whole of the lots by name, it may do; but if he also add a multitude of houses, barns, coach-houses, gardens, &c., I think they require something more definite as to locality and description: at least, it is not so clear, in my impressions, as to warrant me in setting aside the demurrer as frivolous. Would such a description be good, as a new assignment, before the new rules?

Rule discharged.

BREDEN ET AL. v. LISLE.

Summons to set aside demurrer as frivolous, to a declaration upon a special agreement, discharged.
Demurrer set aside, because the date of the demurrer did not agree with the date of its filing.

On the 18th of September, 1848, a summons was obtained to set aside the demurrer, as not being dated the day on which it was filed—and as being frivolous.

It was dated on the 14th of September, and filed on the 15th.

The declaration was on a sealed agreement, dated the 4th Sep., 1847—setting forth that the defendant would, between the opening of the navigation and the 1st July, 1848, deliver at the city of Kingston to the plaintiffs, in such numbers as they should require, 150 head of cattle, and although the plaintiffs after

making the said indenture, to wit, on the 1st October, 1847, paid the defendant a large sum in part payment for said cattle, and before the time when the same was to be delivered to the plaintiffs or the price paid, according to the said covenant; and though the plaintiffs (afterwards and during the time when the said cattle were to have been delivered by the defendant to the plaintiffs as aforesaid, to wit, on the 30th of June, 1848) requested the defendant to deliver to the plaintiffs at the city of Kingston the said cattle, to wit, 150, yet the defendant did not at any time between the commencement of the season of navigation and the 1st July, 1848, nor at any time before or afterwards, deliver to the plaintiffs at the said city of Kingston the said 150 head, &c., but hath hitherto always neglected and refused, and still doth neglect and refuse, &c.

General demurrer, that the request was not averred between the opening of the navigation and the 1st July, 1848.

MACAULAY, J.—It is not clear to me that any request is necessary to be alleged, the defendant being at all events bound to deliver the whole number of cattle between the opening of the navigation and the 1st July, 1848, and it being alleged that he did not in fact deliver any. Unless requested within that period, he had until the ultimate day; but an omission to request would not discharge him in toto, seeing that a large sum was advanced on the contract. But, if material to be alleged, I am not satisfied the allegation of request is sufficient. A test is, to sup-

pose it traversed by plea—it would be, that the plaintiffs did not, during the time when the said cattle were to have been delivered by the defendant to the plaintiffs, request the defendant to deliver the same, or any part thereof. Now such a plea would imply on the face of it, the admission that none were delivered within the period specified, or indeed at all, and would rest the defence on the want of a request, as if that exonerated the defendant from his covenant to deliver.

The same might be said of a plea denying a request between the opening of the navigation and the 1st July, and tends to shew the allegation immaterial. If a plea traversing it would not raise a material issue and bar the action, the allegation must be an immaterial one.

Still, it may be argued that the defendant was not bound to deliver more than 150 head of cattle, at all events, and only so many of that number as the plaintiffs might request, leaving it optional with them to demand as few as they pleased.

The question is, what is the agreement in substance and effect? I have a strong impression on this head, but it is an arguable point, and the averment of request (if necessary) is not explicitly laid within the period and in the terms of the agreement, though it may be so in point of substance.

The declaration may be objectionable for not shewing what price the plaintiff was to pay—at what period—or in what proportions; still the declaration avers the advance of a sum before it was due, with-

out setting out that part of the agreement. £1000 appears to have been paid in the first instance.—6 Jur. 537; 5 Scott, 566; 6 Scott, 890; 1 Dowl. N. S. 76; 10 Jur. 617.

Per Rep.—On the 21st of September, 1848, the summons appeared to have been enlarged, as to the objection that the demurrer was not dated the day on which it was filed, and it is supposed to have been then made absolute on this ground.

DOWDING V. JOHN EASTWOOD AND JOHN EASTWOOD, JR.

Amendment of declaration after verdict set aside.—Costs.—Right of defendant to plead de novo.

The plaintiff proceeded to trial against two defendants as partners, and had a verdict. The verdict was set aside on the ground that the partnership was not proved. The plaintiff then applied to amend his declaration, by striking out the name of one of the defendants: *Held per Judicem*—that the amendment might be made—with costs to the defendant struck out, as upon a nolle prosequi. *Held* also, that the defendant might plead de novo, without swearing to his defence, within two days after the amendment, and payment of costs.

In this case a summons was obtained to shew cause why the precipe and writ and all subsequent proceedings and pleadings—or why the declaration and subsequent pleadings should not be amended by striking out the name of John Eastwood, the younger, and striking out the *s* in the word defendants, so as to make it defendant.

A promissory note, it seems, was indorsed to the plaintiff by John Eastwood & Co. per J. Eastwood, Junr.; and not being paid, both were sued as partners. Before the plea, *Mr. Grant*, as their attorney, offered to pay part, if time would be given for

the residue, but intimated that should with a legal defence which he had not mentioned. His overtures being refused, the defence proceeded—

1st. That the note was not made by the maker as alleged.

2ndly. That defendants did not endorse modo et forma.

3rdly. No notice of dishonour—and issues.

Before the trial, the plaintiff's attorney acquired some knowledge of the intended defence, but went on and obtained a verdict at the last Home District assizes; this verdict was set aside last term without costs, on the defendant's application, there not being sufficient evidence of a partnership, but the fact being rather disproved.

It was contended that the amendment could not be granted at all, but the plaintiff contended that the declaration might be amended by striking out one of two names of the defendants in a joint action of contract, without touching the writ, to obviate the argument of there being nothing to amend by.

MACAULAY, J.—The difference between the stat. 2 Wm. IV. c. 39, s. [illegible] and the rule of court in this court—Cameron's [illegible]3—the latter ordering, and the former having [illegible] construed to make the original process the commencement of the suit, was pointed out; but the construction in England and the rule here seem to [illegible] to the same thing.

In England, it has been decided that the declaration must correspond with the writ in the cause of action, and that the plaintiff cannot declare sepa-

mately against two defendants, but it has been nevertheless held, that he may declare against one of several defendants, and that in an action of contract, the name of one may be struck out of the declaration after plea, although the writ remains against two or more.—1 A. & E. 750; 1 Bing. N. S. 71; 2 Dow. P. C. 96, 633, 821; 3 Dow. P. C. 656; 4 Dow. P. C. 297; 9 Dow. P. C. 529; 5 Tyr. 618, S. C. Caldwell v. Blake; 5 Jurist 507, S. C.; Palmer v. Beal, 6 C. & P. 545; Fox v. Clifton, C. P. Mich. 1829.

I think, on reference to the cases, that I best meet their spirit, and the spirit of former decisions in this court, which indicate the views entertained here, if I follow the one of Palmer v. Beal, and allow the amendment, as was done there, i. e. to the extent of the declaration, without destroying the writ.

As to terms, I think it should be on payment of costs to the defendant, whose name is struck out, as if upon a *nolle prosequi*, were he one of several defendants in a joint action of tort; that is, all his costs of the defence, *exclusive* of the costs of the trial and application to set aside the verdict, to which he is not entitled.—8 D. & R. 220; 5 B. & C. 458; S. C. 7 T. R. 270; 2 Dow. 738; 2 Q. B. 642; 1 B. & A. 566; 2 B. & A. 317.

It is true the defendant did not at once distinctly apprise the plaintiff of the defence, or the non-existence of a partnership, as was done in Palmer v. Beal; but these are minor points of complaint on both sides, and I am not disposed to permit them to

influence my discretion as to costs. The plaintiff had reasonable grounds to suppose both were partners; but now admits that he was in error, and desires to rectify such error. I think it can only be done on the terms of indemnifying the party discharged as to the costs of defence as upon a *nolle prosequi*. It is what in the result he must be entitled to, unless the plaintiff is relieved by the amendment.

As to the remaining defendant, his right to costs must depend upon what he does. If he elects to waive the present plea, he should receive the costs of those pleas, and of course the costs of resisting this application, to which both defendants are entitled.

Mr. Grant claims the right for him to plead *de novo*, and suggests usury as the intended plea, waiving the present plea; but it is opposed on the ground that an affidavit in support of such defence ought to be filed to warrant my giving *leave* to plead *de novo*.

The defendant's attorney contends, it is of course upon an amendment of this kind, without *leave*.—Rule T. T. 5 & 6 Geo. II. (b); and Rule 10 Geo. II. (b.); 3 B. & A. 137; 2 Dow. 107; 6 Taunt. 400. It seems so in the Q. B. and C. P., though different in the Exchequer.—12 M. & W. 715; 1 D. & L. 992; 2 Salk. 517.

2 Tidd. Pr. 764 & note; (6 Taunt. 400, Accords;) says the defendant may plead *de novo* if *necessary*, or when the amendment is of a nature to occasion any alteration of the pleas, but *not* otherwise; *sed vide* Lush Prac. 387—that in Q. B. an amendment after plea in all cases entitles the defendant to plead *de*

move, and to have two days for that purpose, after the amendment and payment of costs—recognized in Smith v. Heern, 12 M. & W. 715. Supra in Exchequer. See also 1 Arch. (New) Prac. 277, Accords; 1 Arch. (Old) Prac. 131.

It seems thus far clear that the defendant is re-entitled to plead *de novo*, if the amendment be such as may require it, by altering his position, &c. So here, after the amendment, the sole defendant, the real endorser, may no longer desire to deny the endorsement of notice of non-payment; but he may have another defence, as usury, and he may say that while the defence was joint, denying a joint liability even *prima facie*, it was unnecessary to go into a defence which would admit a *prima facie* liability.

The plea suggested *prima facie* liability of the elder Eastwood alone, which in effect abandons the defence formerly pleaded, and I think he is entitled to plead *de novo* under the circumstances.

I cannot try or decide the merits between the parties on this application; and although the signatures of the defendant imply an acknowledged liability, still they may have been made consistently with the defence in point of fact now suggested. There may be no merit in it, but I do not see that I can preclude it, or call upon the defendant to swear to the defence, as a condition of permitting him to plead it.—See Zavitz v. Heron, Mich. 1 Vic. Cam. Digest.

Rule absolute.

McINTOSH v. CUMMINGS.

Ca. re.—setting aside service of.—Tests.

The writ of *ca. re.* if tested a day *out of* term, will be set aside. The original *ca. re.* must be presumed to correspond with the copy, till the contrary be shewn.

On the 15th of February, 1848, a copy of non-bailable *ca. re.* was served—Eastern District.

On the 22nd of February, an affidavit of defendant was made, to move against the writ and service.

On the 26th of February a summons was issued—being issued on the *last* day for appearing, to set aside the *ca. re.*, or service with costs, on the grounds,

1st. That the writ was tested of a day *out* of term; or

2nd. That the copy served was so tested, *i. e.*, on the 4th February, being the 11th Vic.

Hilary Term *commenced* on the 7th February, 1848, being the 11th Vic., and ended 26th February.

The copy served was tested on the 4th of February, 11th Vic., and marked issued 4th February, 1848. It was returnable on the *last* day of Hilary Term next.

Notice was indorsed to appear on the 19th of February, 1848, dated 4th February, 1848.

On the 28th February, 1848, cause was shewn—

1st. That application was too late.

2nd. That the contents of the original writ were not shewn.

3rd. That there was no proof that the copy varied from the original writ.

To this it was replied, that the teste being in vaca-

tion, and the month and day both wrong, the writ was void.

That the original will be intended to be similar to the copy, the copy being presumed to be a true copy. See 2 Jur. 1012; 3 D. & L. 350; 2 D. & L. 655; 8 Dow. 221; 5 Taunt. 664; 2 Burr. 967; 5 Burr. 2588; W. Bl. 683; Stra. 399; 3 Dow. 15; 4 Dow. 48; Foster v. Daley, 21st February, 1848, in chambers.

MACAULAY, J.—The cases shew that the original is to be presumed to correspond with the copy, until the contrary is shewn; consequently, in what is before me, I must intend that the original and copy are both tested the 4th February, which is a day out of term.

Formerly, there was a rule of this court expressly requiring writs issued in vacation, to be tested the last day of the preceding term; at present, I believe it depends on the English practice, which, irrespective of and before the new rules, was to the same effect; and the case of Armstrong v. Scobell, M. T. 4 Wm. IV., in this court, recognized such practice; and writs not so tested, seem to be regarded as void, on the ground, probably, that looked upon as judicial process issued by the court, such issue could not be an act of the court in vacation, when it was not sitting.

Whether the defect be one curable by delay or waiver, or not, I consider it one of that description, that it is not cured by the delay that has taken place in this instance—2 Burr. 967; 5 Burr. 2588; Str.

296—the application having been made before the expiration of the time for appearing, and before any subsequent step has been taken by either party. The writ was served in the Eastern District, and the application is made eleven days afterwards.

Were it a trifling irregularity, perhaps the neglect of the defendant to do anything until the seven days after service, when he made the affidavit, might be successfully urged in opposition to a summons issued four days afterwards, but I am not prepared to say that it would prevail—2 D. & L. 656; 8 Dow. 231. All such objections must be made promptly, and with as little delay as may reasonably be allowed to the party to take legal advice, and prepare the papers necessary to support the application, and transmit the same, with instructions, to the place where the court sits.

On the whole, I think the objection in this case fatal, and that the proceedings must be set aside with costs.

Rule absolute.

CRAIK v. ALLEYN.

Time given to reply—but only, under the circumstances, on payment of costs.

On the 23rd of Sept., 1846, the plaintiff obtained a summons for a month's time to reply on the affidavit of Mr. Smith, that the defendant's second plea required a special answer; that his attorney had written for instructions to reply, but had not yet received

them; and that the time for replying expired at one o'clock that day.

Summons issued, with stay of proceedings.

On the 24th of Sept., 1846, cause was shewn. An affidavit of Mr. Durand, agent for plaintiff's attorney, was read, stating that the pleas were filed and served on the 15th of Sept, and that the time to reply expired on the 22nd of Sept.; that at ten o'clock A.M., on the 23rd, when he was about to go to the office and search for replication and sign judgment, if none there, that Mr. Smith, clerk of plaintiff's attorney, came and asked for time to reply, which being declined, he said he would deliver a replication by one o'clock that day, or that the defendant might sign judgment of *non pros*, to which Mr. Durand assented; that soon after one o'clock he was going into the office to sign judgment of *non pros*, when Mr. Smith served him with the summons aforesaid, and after he had received the papers in the cause and drawn the necessary papers, judgment rule, bill of costs, &c., to sign such judgment; that time to plead had been refused to the defendant, unless on terms, when asked, on the 14th Sept., and that unless costs are not made a condition of giving time to reply he will lose the labour and trouble incurred as aforesaid.

MACAULAY, J.—It is certainly not usual to make payment of costs a condition of granting time to plead or reply, for in all such cases the opposition made is ineffectual, and the costs, I suppose, constitute costs in the cause; but there may be exceptions.

The defendant is called upon to shew cause why this indulgence should not be granted. The cause he shews is, an understanding with the clerk of the plaintiff's attorney, managing the case seemingly, that he might sign a *non pros* at one o'clock yesterday, if no replication filed, instead of which he obtained this summons, and served it after the papers for *non pros* had been prepared.

It may be said the defendant's agent, having assented to wait till one o'clock, should not have taken any steps or incurred any costs till then, and it is a good argument, had the plaintiff's agent complied with his promise; but it is another thing to say that after such an arrangement he should obtain this summons, and intercept the defendant's agent on entering the office to sign a *non pros*, and then serve him with it, and to claim exemption from costs.

That the defendant was regular, and had a right to sign judgment of *non pros*, is not disputed; and after what has taken place, I think the defendant may fairly claim that payment of costs should be made a condition of granting the time required, and the order is made only on those terms.

The plaintiff's attorney should have applied earlier for time to reply, and, at all events, not have entered into an arrangement or made a promise incompatible with the application for time as made.—4 Dowl. 1; 1 H. & W. 283; 4 Dowl. 768.

Rule absolute on payment of costs.

BAKER v. McKAY.

Arrest, under a ca. sa., of an executor signing a confession of judgment. Summons to set aside ca. sa., on the ground that the defendant had been arrested for a sum under 10*l.*, exclusive of costs,—discharged upon the facts stated below.

A summons was obtained to set aside the writ of *ca. sa.* for irregularity, with costs, and for defendant's discharge &c., on the grounds—

1st. That the affidavit did not conform to the statute, in stating that the defendant had made some secret *or* fraudulent conveyance of his property, instead of *and*.

2ndly. That the defendant had been arrested on a judgment, the amount of which was below the sum of 10*l.*, exclusive of costs, and within the jurisdiction of the Court of Requests.

3rdly. That the judgment in the Court of Requests was obtained against the defendant as executor.

Upon cause being shewn, the first point was abandoned.

2nd. As to the 2nd ground, it appeared, as collected from the affidavits on both sides, that on the 19th of August, 1837, the plaintiff recovered a judgment against one John McKay for 6*l.* 16*s.* 3*d.*, but how much of this was made up of costs, was not shewn, and the amount therefore of the original debt did not appear.

On the 22nd of October, 1845, the plaintiff instituted an action against the defendant, as executor, and Elizabeth McKay, as executrix, of said *John* McKay, who had died since the judgment, at which

time the *debt* with interest amounted to 10*l.* 5*s.* 12th Nov. 1845.

The defendant confessed judgment *alone* as for his own personal debt in this court, for true debt, 16*l.* 10*s.* 8*d.*, with interest, made up as follows, namely:—

	£	s.	d.
Court of Requests.....	6	16	3
Interest thereon	3	8	3
	10	5	0
Costs in District Court suit	6	5	8
	£16	10	8

Stay of execution to 1st Dec. 1845.

The defendant's affidavits represented that he was an illiterate man, and was not aware that by signing the cognovit he became personally liable as an ordinary debtor, and not as executor. They also represented, that the Court of Request's judgment had been assigned by the plaintiff to a brother of the plaintiff's attorney; but in answer it appeared, that it was the judgment in this court which was so assigned on the 17th Feb. 1846.

On the 27th of May, a *ca. sa.* issued on the affidavit of the assignee, as the plaintiff's agent, indorsed for 18*l.* 19*s.* 1*d.*, with costs, or 16*l.* 13*s.* 8*d.* from 1st Dec., and costs made up as follows:—

	£	s.	d.
Judgment, Court of Requests ..	6	16	3
Interest thereon	3	8	9
	10	5	0

District Court costs	6	5	8
	16	10	8
Costs, Judgment on Cog.	2	8	5
	18	19	1
Fi. Fa.	1	2	6
Al. Fi. Fa.	1	2	6
Ca. Sa.	1	2	6
Postage	0	4	6
	£22	11	1

The plaintiff's affidavits represented that after a suit had been brought in the District Court, on the Court of Request's judgment, against the defendant and his co-executrix, the defendant called at the office of the plaintiff's attorney, and confessed judgment in this court for the whole debt and costs in both suits, under the protection of the clerk of his attorney, who made oath that he fully understood that the co-executrix was left out, and he solely and personally liable; also that the defendant said he and she were devisees of testator, and had divided the property upon terms requiring him to pay all the debts.

MACAULAY, J.—The judgment is not moved against, but the writ of *ca. sa.* only, so that in the application the judgment stands unexcepted to, and binds the defendant personally and in his own right, and renders him liable to arrest on a *ca. sa.*, if the case is not within the statute 5 Wm. IV. ch. 3. s. 2, which enacts, that it shall not be lawful to take in execution for costs only, "nor in any case in which

the judgment shall not be rendered for the sum of 10*l.* or upwards, exclusive of costs."

There is no application to reduce the levy, so that if the arrest be legal to any extent, and the *ca. sa.* therefore valid, it must fail, though it may be excessive.—See stat. 5 Wm. IV. ch. 3, s. 2, as to arrest for costs; 49 Geo. III., ch. 4, s. 2, costs in actions on judgments; 1 T. 716, arrest of debtor; 7 Jurist, 724; 1 Dow. & Lownd. 763; 1 Dowl. N. S. 774; Bligh v. Brown, 3 Dowl. 266, 17 April, 1846.

Summons discharged.

VAUGHAN v. HUBBS ET AL.

Local action—Amendment of declaration, when improperly commenced—Construction of 8 Vic. ch. 36.

The plaintiff commencing a local action in a wrong district—that is, neither in the district in which the cause of action arose, nor in the Home district—cannot afterwards, under the 8 Vic. ch. 36, be allowed to amend his declaration by changing the venue to the proper district. The irregularity is in the issue of the original process, and incurable.

This was an action of debt upon a recognizance of bail, which (it is said) was enrolled as taken in open court.

The original *ca. re.* issued out of the office of the deputy clerk of the crown of the Midland District, with a testatum to the District of Prince Edward, under the stat. 8 Vic. ch. 36.

Appearance was entered in the Midland District office; and the venue was laid in the Midland District. The defendant having demurred to the declaration, because the action was local, and should have been brought in the Home District, where the record was, a summons was obtained to amend the declaration,

by issuing Writs for Midland District, and for an order for the transmission of the papers to the same office.

MACAULAY, J.—The statute provides that original and testatum writs of mesne process may be issued by the deputies of the clerk of the crown, in the same manner as may be done in the principal office at Toronto; and that on changing the venue, the papers may be ordered to be transmitted to the principal office here.

The effect of this act is, to subject a party residing in one district to be served with process binding him to appear in any other wherein the process issued; but where the venue is local the action must still be brought in the Home Office, or in the district where the cause of action arose.

It is not competent to parties to bring suits in one deputy's office, and to lay the venue in another district. To warrant this, it must follow, that nisi prius records may be passed by the deputy in one district to be tried in another district. This I do not take to be the meaning of the act. I do not think that for a trespass to the close in the Home District, process can be issued from the Midland District office, and the proceedings be carried on to judgment there, including a trial in Toronto, upon a nisi prius record passed at Kingston.

Now here it seems the action is local, and must be brought in the Home District, where the record is; if so, a change of venue does not cure the objection. The process is the commencement of the suit, and

the action is brought in the Midland District; that fact cannot be altered by altering the venue.

If upon such process the venue cannot be laid in the Home District, retaining the proceedings in the Midland District, the object of the application is not to change the venue so much as to change the district in which the action is brought, and the venue can only be changed, under the statute, by the court or a judge, when the action is rightly brought in the first instance.

If the plaintiff, retaining the proceedings at Kingston, can lay the venue here, he may amend to that extent, which would be altering or changing the venue; but that is not what he wants. He wishes to change the whole proceedings from the Midland to the Home District, and to treat them as if commenced here originally. That cannot be done—the *fact* cannot be altered. The foundation is imperfect—the *suit* is brought in the wrong district. Process may issue from the Home Office to any district, in local actions, but then the venue is laid in that district. The statute has not this effect in relation to other districts. Where the action is local, it can only be brought in the Home District, or in the district in which such cause of action arose; though in actions not local, process may be issued from any one district into another district. The irregularity is in the issue of the original process, and incurable.

This summons must be discharged. Costs to be costs in the cause.

Rule discharged.

CARRUTHERS V. SWORD.

Mistake in entitling a plea—Interlocutory judgment.

Where a plea is filed in due time, but there is a mistake in the entitling of the cause, the mistake should be moved against for irregularity; it will not warrant the plaintiff in treating the plea as a nullity.

On the 11th of September, 1849, a summons was obtained to set aside the interlocutory judgment, on the ground, that the plea was filed and served in due time, but that the christian name of the plaintiff was incorrectly stated in the margin or title thereof.—7 D. & R. 511. To this it was objected: 1st, that the affidavit did not shew that the pleas were filed; it only spoke of the filing the declaration copy annexed, (and yet none was annexed,) of the service of copies of pleas.

The learned judge (Macaulay) overruled this objection.

2nd, That the interlocutory judgment was wrong. It was the usual incipitur of the roll, commencing with the declaration, and said to be the usual form of proceeding by several gentlemen of large practice present.

The learned judge also overruled this objection.

MACAULAY, J.—As to the first objection, had the affidavit been sufficient to shew a plea filed in due time, though there was a misnomer in one of the names of one party in the entitling, I should have held the judgment irregular, deeming the mistake in the name a matter of irregularity to be moved against, but not warranting the plaintiff in treating the plea as a nullity.

Fralick v. Huffman.

Filing of papers by Deputy Clerk of Crown—Receipt of papers out of Office—in the street—not a filing.

A Deputy Clerk of the Crown should not file papers at his private residence, apart from his office and out of office hours.

The delivering of a paper to him in the street, is not "filing or entering it."

Where the defendant's attorney is present at the opening of the office in the morning, to file a joinder in demurrer, and the plaintiff's attorney is also present, to sign judgment, the defendant's attorney is entitled to precedence.

On the 15th of September, 1848, a summons was obtained to set aside the interlocutory judgment signed in this cause.

The action was an action of covenant, for payment of money; to which the defendant pleaded thus:—The defendant, by A. C. his attorney, as to the sum of 50*l*., parcel of the sum of money in the breach of covenant above assigned, saith, &c., pleading payment before suit; concluding with a verification.

Special demurrer.—Because the plea did not answer the whole declaration, though it professed to do so.

It appeared that the plaintiff, having demurred to the plea, demanded a joinder on the 4th September.

That on the 12th of September, the plaintiff's attorney went to the district office at Kingston, where the proceedings were conducted, to sign interlocutory judgment, but found it locked; that having waited till about a quarter past ten o'clock, he was going to the Clerk of the Crown's residence, when he met him on the way to his office, told him his object, and

gave him the judgment paper, which the Clerk said he might consider as filed from that moment. He went with the Clerk to his office, and at the door met the clerk of the defendant's attorney, who, before the Clerk unlocked the door, offered him a joinder in demurrer; which he looked at, but returned, saying it was too late, as judgment had been signed. That he then went in, and marked the interlocutory judgment as filed. At that moment the clerk of the defendant's attorney entered the office, and again requested him to receive the joinder; but being refused, he requested the plaintiff's attorney to waive the interlocutory judgment, who declined.

The application was rested on the regularity of the proceedings; and the plaintiff's attorney, in his affidavit, complained of the defence being vexatious and without any merits.

MACAULAY, J.—In the first place, if the Deputy Clerk of the Crown is in the habit of filing papers at his private residence, apart from his office, and out of office hours, it is an irregular practice. The office should be open at stated hours, and all papers to be filed should be served and filed there.

Secondly, I do not consider the delivery of the interlocutory judgment paper to him in the street, filing or entering it; consequently, when the office was open in the morning, both parties were there, —the defendant's [illegible]ey to file a joinder in demurrer, and the plaintiff's attorney to sign judgment,— and the former was entitled to precedence; for until judgment was actually signed, the defendant might

join in demurrer, though the time for serving and filing a rejoinder expired the day before; and had it been filed, a copy might have been forthwith served on the plaintiff's attorney on the spot.

Thirdly, As to the necessity of the defendant's filing and serving a joinder in demurrer, upon the demand thereof by the plaintiff's attorney, see 3 B. & P. 442.

Fourthly, But the proceedings are wrong on another ground. The plea is not bad as not answering the whole declaration. It does not profess to answer the whole declaration, but only as to 50*l.*; and if the breach assigned in the declaration included it, or did not exclude that sum from the plaintiff's demand, the plea was the proper mode for the defendant to avail himself of the payment. Its being indorsed on the mortgage would not dispense with a plea of payment, if its non-payment was assigned as a breach of covenant, or included in a general breach as to all the debt covenanted to be paid. Without seeing the declaration, I cannot tell how this is.

At all events, the residue of the declaration is left unanswered, and the plaintiff should have signed judgment therefor, as by default. To a certain extent, therefore, he is entitled to judgment; and if the suit is not discontinued by his demurring without taking judgment for that part of the declaration not answered, the judgment should be set aside so far as respects the plea and demurrer, and be amended so as to stand for the residue, with twenty-four hours to the defendant to join in demurrer.

Revision of taxation. Judge in [illegible] may order a revision. The master may examine into [illegible] of an affidavit of disbursements for witnesses' expenses, &c.—or of counsel's receipt for fees. The counsel's fee should be exclusively, as for fee with brief at the trial. If party is dissatisfied with the master's ultimate decision, he should move by way of appeal.

On the 14th of September, 1849, a summons was obtained, to shew cause why the taxation of costs should not be revised, on the following grounds:—

1st. That 15*l.* 8*s.* fees, alleged to have been paid to witnesses, were taxed without a sufficient affidavit of disbursements.

2ndly. That fees were allowed to two witnesses not called to give evidence.

3rdly. That two counsel fees were taxed, although only one conducted the trial for the defendant, &c.

An affidavit of A. B., plaintiff's attorney, was put in, stating that the cause was tried, and the verdict for the defendant given, on the 2nd of June last; that a new trial was granted on payment of costs; that costs were taxed on the 5th of September; that he objected to the allowance of two counsel fees at the trial, while only one appeared; that nevertheless two were allowed, i. e., 5*l.* and 2*l.* 10*s.*; that a receipt for two counsel fees, from E. D., for 5*l.* at trial, and 2*l.* 10*s.* term fee, was produced at taxation; that E. D. took no part in the cause at *nisi prius*, or in term, and he believed that he did not hold a brief on the defendant's part at the trial in term; that he objected to the affidavit of disbursements, because the defendant was named William

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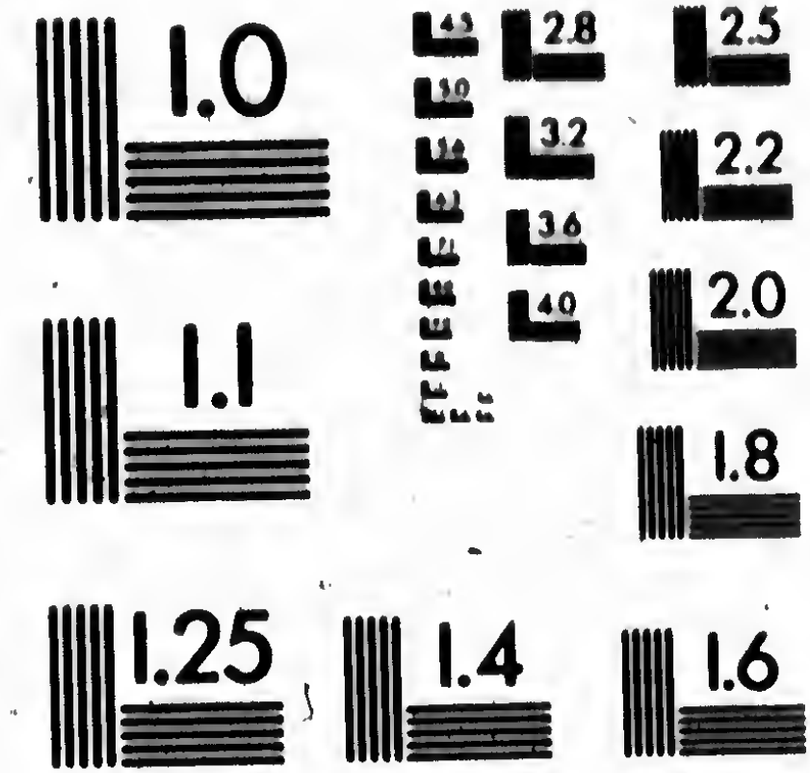

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Switzer, and it was signed William R. Switzer, which objection was overruled; that he solicited delay, to disprove the affidavit, but was refused.

An allocatur and copy of affidavit, 31*l.* 1*s.* 11*d.*, were annexed. The cause was entered No. 228. Subpœnas were served on the 8th of May, being the commission day of the assizes; that Daniel Switzer did not attend the assizes twenty-seven days, and believed he did not attend half the number of days alleged, as plaintiff's attorney some time after the assizes commenced, spoke of sending for his witnesses; that two witnesses, Jeffery and Graham, were not called or examined on the trial, and that he objected to the allowance of fees to them on that ground.

The affidavit of disbursements was by the defendant. It was in the usual (printed) form; that the witnesses were subpœned, but did not say when.

Daniel Switzer was allowed for twenty-seven days' attendance, 6*l.* 15*s.*, exclusive of three days for travelling thirty miles to and from court, 1*l.* 10*s.*, although the assizes had lasted twenty-five days.

Cause was shewn, and it was contended that the summons should not have been to *revise* taxation, as the master had decided the points already against the plaintiff; that the plaintiff should have moved against his decision, as on appeal.

2ndly. That the judge in chambers could not interfere to overrule the master.

An affidavit of E. F., defendant's attorney, was put in, stating that he employed C. D., as counsel for

the above defendant *in this cause*, some time previous to the commencement of the assizes at which the same was tried, and paid him the sum of 5*l.*; that the said C. D. acted as such counsel, and advised with deponent as to the intended defence, and was present during the trial of this cause.

MACAULAY, J. — The recipts shewed to the master are not before me, or produced; but C. D., as I understood him yesterday, said he had given a receipt for 5*l.*, as counsel fee on the trial of this cause; without seeing it, I of course am not aware of its precise terms.

1st. I think the taxation may be objected to on a motion or summons to revise. It is, I believe, the usual course, adding where it is by way of appeal, that the master should allow or disallow the items objected to or in question.—2 Dowl. 21,76; 8 M. & W. 552.

2ndly. I think the court may interfere with his decision.

3rdly. As to the signature to the affidavit, no authority is produced to shew that it is wrong, or inadmissible, because the letter R. forms part of the deponent's name as signed. It may be taken to be the affidavit of the defendant in the cause, as E. F. swears it is.

4thly. I think the order should go to revise taxation in reference to the number of days allowed for Daniel Switzer's attendance as a witness, for whom it seems one or two days too much have been allowed.

I think it was competent to the plaintiff's attorney to contest the accuracy of the affidavit, and that when so large a sum is charged, it was reasonable that he should have time to do so. This, of course, was in the discretion of the master, but I think he will shew a sound discretion in allowing time, if he apprehends that an excessive charge is attempted. In his place, I should be disposed to call for the subpœnas served —14 Law Journal, Q. B., 210; 11 Jur. 689; 3 Dowl. 802; 3 N. & M. 572; 1 B. & C. 267; 9 Dowl. 394; 1 D. & R. 165; 8 Bing. 431; 1 Dowl. 411; 9 Dowl. 251; 1 Price, 511; 2 Ch. 200; 7 Taunt. 337; 11 L. J. 96, Q. B.; ib. C. P. 224; 2 Dowl. N. S. 125; 4 Bing N. S., 123.—(It was stated by the plaintiff's attorney that the subpœna was produced, and his affidavit admits service on the first day of the assizes)—and for proof of the time when, and place where served, with a view to the corroboration of the defendant's affidavit, he might also enquire who paid the witnesses on behalf of the defendant, and when; and require to be otherwise assured that the witness did attend as charged, and necessarily or *bona fide*.

5thly. As to the two witnesses not examined, in the absence of anything to shew them not material or not *bona fide* in attendance as witnesses in this cause, it was in the discretion of the master, if satisfied they did so attend and was paid, to allow the charge.

6thly. As to the counsel fees, no brief to C. D. is spoken of, and whether charged or not, does not appear—E. F.'s affidavit is not explicit. The plaintiff

here is to pay the costs of the day, not of the cause; and if, the defendant's attorney paid C. D. 5*l*. otherwise than as fee with brief, as counsel on the trial of this cause, it ought not to be allowed.

From all that appears, I am not satisfied C. D. is retained as counsel at the trial exclusively, and that he attended as such.—2 M. & W. 730-2; 5 Dowl. 378; 2 Dowl. 374; 5 Bing. N. S. 246; 8 Dowl. 372; 13 M. & W. 9; 2 D. & L. 246; 14 L. J. Q. B. 210. It is not alleged he took any part in the defence at the trial, nor did I understand him yesterday to allege that the 5*l*. he received was exclusively as fee with brief on the trial. It will never do to allow disbursements made *alio intuitu*, and in earlier stages of a cause, to be treated as fees to counsel at the trial, when the result throws the costs of the day on the opposite party, and when they did not attend or act as such counsel, and when (for all that is shewn) no brief was delivered.

An examination into the practice in England will shew, that the members of the bar are scrupulously delicate in relation to briefs and fees therewith, or in acting without them; and since such fees are taxed and allowed on the receipt of counsel in this country, there should be no room for questioning or doubting the perfect accuracy of such receipts to the full extent. They are not, however, conclusive on the officer taxing, or the opposite party—12 M. & W. 730.

I think an order should go to revise costs; and that upon such revision the master should treat this

item as open to review and reconsideration on any new matter which the plaintiff's attorney may lay before him. If dissatisfied with his ultimate decision, any renewed application here must be by way of appeal upon specific exceptions, supported by distinct affidavits or proof.

I will only add, that if C. D. was really retained and paid 5*l*., as fee with brief at the trial, the fees taxed to counsel are reasonable; but it certainly is not usual in this province to retain a second counsel, and then for the attorney on the record, who is also a barrister, to conduct the case alone, though of course it may so happen in a particular instance.

The master may have acted under a misapprehension as to the extent of his discretion. I therefore grant the plaintiff the benefit of a review of the taxation before him.

Rule absolute for revision of taxation.

EDMUNDSON v. SCOTT.

Setting aside copy of amended pleas.

Summons to set aside the copy of amended pleas *and* the service thereof, held good. There were several objections to the wording of the summons taken, and overruled, as mentioned below (which see).

On the 16th of January, 1849, a summons was obtained to set aside the copy of the amended pleas of the defendant, served in this cause, and the service thereof, for irregularity, with costs, on the following grounds:—

1st, That the same was not a true copy of the

original amended plea filed, the original being dated 1849, and that served 1848.

2nd, That the original was entitled correctly in the surname of Edmundson, and the copy served was Edmunson, omitting the letter "d."

3rd, That the copy served was dated a day prior to the commencement of the suit.

The affidavit of Mr. Durand, plaintiff's attorney, stated that the copy was served on the 13th January, 1849; that the original was filed on the 12th of January, 1849; that the suit was commenced in September, 1848, with a verified copy of the original; and the copy served annexed.

The original was dated on the 12th of January, 1849, and was filed the same day. The copy was dated on the 12th of January, 1848.

On the 17th of January, 1849, cause was shewn, and it was objected—

1st, That the summons to set aside the copy *and* service was bad; it should be *or* service.

See 5 M. & W. 605; 9 Dow. 57; 8 Dow. 231, 837; 1 Scott, N. R. 415; 10 M. & W. 662; 6 Dow. 480; 4 A. & E. 10, 11; Cam. Rules, 406; 4 Dow. 480.

2nd, That the copy of the original plea, as verified by Mr. Durand's affidavit, was not a true copy, as shewn by the affidavit of Mr. Reid and production of original.

MACAULAY, J.—It is sufficient for the purpose of the application, and the paper produced as the original is not verified as the original, nor is a verified copy thereof produced.

3rd, The words "original filed," in the summons, are uncertain; the word "plea" should have been introduced.

MACAULAY, J.—It is sufficiently certain.

4th, The surname was wrongly spelt, and Edmundson was called *defendant* instead of *plaintiff*, in the summons.

MACAULAY, J.—I think this objection not a valid one. Surname seems the correct spelling; but the rule of *idem sonans* would probably apply to the name of the plaintiff, the omission of "d" not affecting the pronunciation.

5th, That the summons asks too much, objecting to service and variance in the name.

MACAULAY, J.—It only states several grounds in support of one application?

As to the first objection, MACAULAY, J.—The application should be to set aside the copy *and* service, or the service *alone*, but not the copy alone without the service also.

In 4 A. & E. 10, 11, a judge's order to set aside a writ of summons and service thereof, was amended by the court, by inserting "copy of the writ" instead of "writ;" so that it became an order to set aside the copy and service, &c.

The summons, therefore, is not open to the first objection, and the copy served is clearly dated inaccurately in the year, and the service is therefore invalid. On this ground, the application must be granted, with costs.—6 Dow. 480; 8 Dow. 231; 4 A. & E. 10 11.

CAMPBELL V. ANDERSON.

The plaintiff will not be allowed to controvert the answers of a prisoner in custody for debt under a *ca. sa.* (under the statute 10 and 11 Vic., chap. 15, sec. 3) if the answers in themselves are full and satisfactory.

This was a Summons for discharging the defendant from close custody for debt under a *ca. sa.* under the statute 10 and 11 Vic. ch. 15, sec. 3.

Interrogatories were filed and answered, and the question was, whether they were answered satisfactorily.

Being particularly interrogated about a lot of land on Barnhart's Island, and his goods and effects, the defendant stated that he once owned the lot, but executed a mortgage of it to a bank at Ogdensburg—which had failed—that, though executed in order to procure stock in such bank, it was in fact intrusted to the plaintiff, who therewith retired securities of his own—that the defendant owed plaintiff £50, and was to receive £200, being the amount of the mortgage, but that the plaintiff had not paid him anything—that the farm had since been sold under a decree in Chancery in the State of New York, as assets of the bank, and it was totally lost to the defendant—that he had no right, title or interest therein at law or in equity. He admitted, however, that upon the Chancery sale it was bought by his attorney, Mr. Myers, though he denied its being for his benefit. He admitted, also, that he was in possession of the farm still, and had it worked on shares with persons mentioned.

As to the crops and personal property, he admitted having a right to half the crop and to certain goods which he enumerated, but all of which he represented as being under mortgage to the full value to creditors, and for sums mentioned—but when so mortgaged was not stated—the reason assigned was to prevent their being attached and sold under value at sheriff's sale.

MACAULAY, J.—I cannot allow the plaintiff to controvert these answers by affidavit. It is said to have been refused by other judges, and I do not see that the plaintiff can rebut the answers, if *full* and *satisfactory* in themselves.—See statute 45 Geo. III. ch. 7; 2 Geo. IV. ch. 8—Interrogatories must be fully answered. 11 Geo. IV. ch. 3, sec. 9; *fi fa* may issue notwithstanding *ca. sa.*—4 Wm. IV, ch. 10, sec. 4; 10 and 11 Vic., ch. 15, sec. 3, enacts that it shall be lawful to discharge the debtor, provided he shall have satisfactorily answered on oath interrogatories to be filed and served *before* the expiration of the notice.

Sec. 4—That when interrogatories are satisfactorily answered, *and a conveyance* by the prisoner of any means, or valuable interests of any kind he may have, or be supposed to have (except bedding and implements of house-keeping, not exceeding £10) made *towards paying the claim against* him, to the satisfaction of the court or judge, such prisoner shall be entitled to his discharge—but not to operate as a discharge of his liability to pay the claim for which he is in custody.

The answers appear to me full, and are (taking them to be true) satisfactory, so far as to entitle the defendant to his discharge, on executing an assignment of all right, title, claim, interest or demand, at law or in equity or otherwise howsoever, in, to or out of the lands or other property mentioned in the answers, and any other property, real or personal, of the defendant to the plaintiff, towards paying his claim.

The only thing is to determine on what terms as to value. Perhaps a general assignment to the plaintiff in trust, or to apply any thing received thereby in reduction of the debt, would do, leaving the plaintiff liable to account and at liberty to proceed against the defendant by execution against defendant's lands or goods.

Prisoner discharged.

Per Reporter.—The form of order was afterwards settled by the agents of both parties.

ECCLES V. JOHNSON.

Issuable plea.

The non-delivery of a bill of costs is not an issuable plea; a plea denying the retainer is.

On the 28th of September, 1848, a summons was obtained to set aside the interlocutory judgment, and for leave to plead, on an affidavit of merits.

Assumpsit for bills of costs in Chancery.

Venue—Home District, where the assizes began.

on the 5th of October, 1848. The defendant lived at Bytown.

The declaration was served on the the 25th July.

Judgment was signed on the 2nd of August last, upon an appearance entered by plaintiff for defendant, per statute. When this was first known to the defendant, or when notice of assessment was given, did not appear.

On the 29th of September, cause was shewn. It was objected, 1st, That the summons was too late.

2nd, That the defendant should not be allowed to plead a denial of the service of bill.—3 Dow. 213, 497; 1 Gale, 59 S. C.; 4 Dow. 112; 1 Hod. 196; 1 Dow. N. S. 815; 6 Jurist, 825; 2 Bing. N. S. 140.

3rd, Or deny the retainer; the plaintiff's witness to prove the same, being in Europe, and it being impossible to obtain his attendance for the next assizes, though it might have been done had the defendant pleaded *before* the 2nd of August.—3 Chy. Prac. 681, 737.

MACAULAY, J.—It has been decided that non-delivery of the bill of costs will not be allowed as an issuable plea; of course a plea denying the retainer, would be. But to admit that plea, would be tantamount to putting off the trial, and the delay is not satisfactorily accounted for.

It therefore resembles an application after a trial has been lost, and there is no time now to refer to the defendant to disclose what his merits are. If, therefore, he is willing to accept the application, restricted as to both pleas, he may have an order on payment

of costs; if not, I must refuse it, referring the defendant to the court in term, on a further affidavit, shewing that such is the point of his defence.

Per Rep.—The application was renewed the next term in full court, and refused, upon the circs then laid before the court.

McLELLAN V. LONDON.

Costs of former trials.

Except in cases of remanets, when made such by the court for want of time, if a case goes down for trial a second time, the party succeeding will not be entitled to the costs of the former one.

On the 13th of December, 1848, costs were taxed for the plaintiff.

The defendant had an order to revise.

The plaintiff forgot, at the revision, to add items struck out of the former taxation, viz., costs of going down to trial on the first occasion.

The case was taken down to trial, and, by consent, referred to arbitration, by rule of nisi prius, without any verdict being taken.

The reference proved abortive, without the fault of either party, and the cause was taken again to trial, when the plaintiff obtained a verdict, and desired to tax the costs of both occasions; the former as upon a remanet, as it were.

See 5 Bur. 2693; Tidd, 833; 3 B. & B. 306; 7 Moore, 147; 1 Price, 310; 6 T. B. 71, 144, 131; 3 Dow. 372; 5 M. & W. 87; 7 Dow. 344; 1 Str. 300; 12 M. & W. 25; Rule H. T. 2 Wm. IV., sec. 64; 7 B. & C. 57; 4 M. & W. 502; 7 Dow. 225;

1 East. 111; Watson on Awards; 9 M. & W. 53; 2 Wil. 366; 1 C. & M. 203; 2 Dowl. 123; 3 Dowl. 372; 1 Dow. 384, &c.; Tidd, N. P. 157; Arch. Pr. 762; 3 B. & A. 383.

MACAULAY, J.—If there had been a verdict, subject to a reference afterwards set aside, and nothing said respecting costs, the plaintiff, succeeding on the second trial, would not be entitled to the costs of the former trial. It is analagous to a venire de novo.

The result of the cases to the present time seems to be, that except in cases of remanets, when made such by the court for want of time, &c., if a case goes down to trial a second time, the party succeeding is not entitled to the costs of the former one, as where the failure on the first occasion has been by the act of the parties, and in many instances even where it is by the act of the court or jury.

The case in 5 Bur. 2693, seems virtually overruled.—See 1 C. & M. 2.

HOUSE v. INTY.

Adding new counts to meet a set-off.

A plaintiff will be allowed to add a new count to meet the defendant's set-off, provided it be for a cause of action already embraced in the declaration, the defendant having leave to plead *de novo*.

In 1848 a summons was obtained to add counts for goods sold, board and lodging, and account stated, to a declaration containing a single count for money paid.

The defendant was held to bail for 16*l*., money paid, and the cause was apparently at issue, but

when the process was returnable, did not appear, probably in Michaelmas Term last. It was ready for trial at the last Niagara Assizes, when, owing to defendant's pleading a set-off, it was discovered that the plaintiff, to meet it, should have declared for his whole demand, which he had not done.

It was objected by the defendant's agent that the practice would not admit of the addition of counts for new or additional causes of action, not merely varying the cause of action already contained in the declaration.

See 1 B. & M. 673; 4 B. & Ad. 369; 5 A. & E. 800; 6 Moore, 330; 6 Taunt. 300, 483, 419 58; 1 Mar. 567; 2 Dow. 272; 3 N. & M. 453; 3 M. & Scott, 339; 1 Bing. N. S. 170; 2 Scott, 842; 1 Dow. 173.

MACAULAY, J.—Upon the plaintiff's undertaking not to go at the trial for any cause of action not already embraced in the declaration, except for the purpose, and so far only as may be necessary to meet the defendant's plea of set off, I think the application may be granted on payment of costs and with leave to the defendant to plead *de novo*.

MOLSON V. MONRO.

Payment of money into Court before declaration.

A summons may be taken out to pay money into court before declaration, but it must be afterwards pleaded to the declaration.

Summons to pay money into court in *assumpsit* before declaration. See 1 Jurist, 336; 2 Jur. 325; 6 Dow. 427; 8 Dow. 703, 784; 1 Bing. N. S. 793.

MACAULAY, J.—It would seem admissible, but must be afterwards pleaded to the declaration.

MOFFATT v. MCNAB.

Writ of trial to District Court—Nolle Prosequi as to all the counts but one.

A writ of trial may go to the District Court in a suit where there are three counts in the declaration, upon the plaintiff entering a *nolle prosequi* as to all the counts but one.

A summons was obtained for trial in District Court.

The affidavits did not shew what the counts in the declaration were, or the pleas, except that it was brought on a promissory note, and that the pleas were *non fecit* and *non assumpsit*.

The note was for 1000*l*. bearing interest from date.

The insufficiency of the affidavits was objected to.

It was stated that the counts were three—one for interest and an account stated; but that the plaintiff had only one cause of action, viz. on the note.

MACAULAY, J.—Upon entering a *nolle prosequi* to all the declaration, except the count on the note, the application may be granted. See 2 Bing. N. S. 167; 2 P. & D. 315; 10 A. & E. 222.

ROBB v. REID.

Filing warrant to prosecute.

Upon the application of the defendant in the suit, proceedings will be stayed till the plaintiff's attorney files his warrant to prosecute.

On the 1st of September, 1849, a summons on A. B. an attorney, was obtained, to shew cause why

all proceedings in this action should not be stayed until his warrant to prosecute be filed, or why all proceedings should not be set aside, on grounds disclosed in affidavits filed.

There was an affidavit of the plaintiff denying the having instructed or authorized the action, or wishing it continued.

To this it was objected, that the summons should be served on the plaintiff, and not on his attorney, to stay proceedings.

The application seems to have been made on behalf of the defendant, not the plaintiff. 1 T. R. 62; 1 Ch. R. 194; 3 Dow. 496, 193, 493; 1 C. M. & R. 64, 402; 13 M. & M. 702; Hubbart v Phillips much in point, 2 Dow. 707 & 14, L. J, Ex. 103, S. C.; 11 Ju. 564; 2 Ch. Rep. 170, 171; 3 B. & Adol. 785; 16 L. J. Q. B. 339; Hoskins v. Phillips, 9 C. & P. 596; 3 Bing. N. S. 391.

MACAULAY, J.—I think the order should go to stay proceedings until the warrant to prosecute is filed.

DOE NICHOLS V. HERON ET AL.

Adding a count to a declaration in ejectment refused.

Application to add to a declaration in ejectment a demise by A. B. after issue joined—refused under the circumstances of the case.

A summons was obtained to add a count to the declaration on the demise of Charles Rice.

It was sworn that issue was joined before last Home District assizes, in which district the venue

was; that the plaintiff claimed title under a conveyance from one Charles Rice who *professed* to be the grantee of the Crown, and that the plaintiff's attorney deemed it advisable that the declaration should be amended.

This application was opposed by the affidavit of the defendant Heron, who swore that Charles Rice was the original nominee of the Crown; that in 1798, before the patent issued, he assigned under his hand and seal all his right and interest to Thomas Mosley, and undertook to give him a title deed as soon as a patent issued; That Mosley in 1799 assigned to Samuel Heron, the defendant's father, and bound himself to give a deed, &c; that possession had been ever since held by Thomas Mosley and his family; that large improvements of great value had been made; that a patent issued in the name of Charles Rice (but *when* was not stated); that many years ago he died and left the province, and had not since been heard of, that deponent can ascertain; that no other Charles Rice ever had a right, &c. and that on the 4th of April, 1848, the date of the alleged demise of the lessor of the plaintiff, no person of that name was in possession of the premises or any part thereof. Ch. R. 536; 2 Ch. R. 302—a receiver appointed by Chancery, added two years after suit; 1 D. & R. 173; 1 B. & C. 121—term not extended unless quite clear no injustice would be done; 6 M. G. 10, 34; Doe, ex dem. Bacon & Brydges, 1 D. & L. 934; 6 Bing. N. S. 240. A count added after the trial on terms, but

the lessor of the plaintiff was not allowed to abandon the demise already stated, or to exclude the defence in evidence as on the first trial.

MACAULAY J.—I do not think this is a case in which the amendment ought to be granted. The effect would be to aid a party who has taken a conveyance from a person not in possession, against those who have been in possession fifty years, under circumstances rendering the *identity* of the person under whom he claims a material question, and which might if this amendment were granted be evaded.

I do not feel at liberty to grant the application on two grounds. 1st. Because its object is to assist a party taking what may be a pretended title by resorting to the title of a person out of possession for fifty years, through and under whom he is not shown to be entitled in point of fact, though ostensibly so—the *identity* is a matter of dispute.

2ndly. Because, if the lessor of the plaintiff has a conveyance in 1848 from the grantee of the crown, the effect would be to enable him to evade the question of identity, and also the objection to a conveyance executed by a party out of possession upwards of forty years. See 4 Wm. IV. ch. 1, sec. 29.

It is not an amendment calculated only to meet objections beside the merits—or to support what is otherwise apparently a meritorious title—but to assist in the expulsion of those, who till the contrary is shown, must be presumed to have the better right, and it is not presumptively shown on the face of the

affidavits before me, that the better right, in other words, the merits, are with the lessor of the plaintiff, but on the contrary. It was said by his attorney that he purchased without knowing anything about the possession. It was heedless in him to do so.

I do not see that the lessor of the plaintiff has any permission or authority express or implied, to use the name of the grantor of the crown as a lessor in this action.

PERRIN v. BOWES AND STRACHAN.

Leave to amend allowed, when there was a doubt as to whether the defendant was to amend 10 or 14 days after judgment given.

On the 8th September, 1849, a summons was obtained for leave to amend the pleas demurred to.

The opinion of the court was pronounced on the 21st August last, being the second Tuesday after last term. At the request of the defendant's counsel, time was given to apply to amend, but whether within ten or fourteen days, was a point of misunderstanding.

The defendant's counsel noted it at a fortnight, within which the application was said to be made. It was said the officer, Mr. Radenhurst, noted it ten days; Mr. Robinson, the Reporter, fourteen days. The ten days had expired — but not the fourteen. The question was, whether the court would give, under these facts, time to plead beyond the ten days which had expired.

MACAULAY, J.—My own recollection is that I first stated ten days, but owing to the next mentioned case having been by the Chief Justice allowed a fortnight,

I said this might as well be the same, considering it a matter of indifference. My remark may have induced Mr. Robinson to write down a fortnight. On comparing dates, the fortnight seems to me to have expired before the application. But as the merits are sworn to, and as the court were disposed to grant leave to plead issuably after the consideration of the demurrer in a novel and important case, and as no judgment was absolutely entered, it is, I think, better to grant the order. See 1 Hodges, 144; 4 Q. B. 642; 16 L. J., C. B. 95; 3 C. B. 418, S. C; 1 Scott, 364; 1 Bing. N. S. 481, S. C. The court might have allowed the defendant to withdraw the demurrer and plead at once. It was only deferred to exact an affidavit of merits. 1 Bing. N. S. 740; 1 Scott, 424.

WATT v. BUHL.

Setting aside Plea.

The court will not set aside a plea, unless a clear case of fraud is made out.

On the 1st of September, 1849, a summons was obtained to set aside the plea of set-off on ground declared in affidavit, &c.

The affidavit of Geo. Kerr stated that a written undertaking given by the defendant to the plaintiff on the 20th of March, 1847, to pay to him or order £52,—two months after the plaintiff and wife made a deed to the defendant of certain premises—was a promissory note: that said Kerr was a creditor of the plaintiff, and acceded to some arrangement by which he released a mortgage he held in security

on receiving the aforesaid writing which the plaintiff indorsed to him in blank, as soon as given, in the presence of the defendant who knew the circumstances; and that the said Kerr supposed it to be a note negotiable, &c.: that it was transferred by the said George Kerr to *Dawson Kerr* honestly, and for a bona-fide consideration, and that unless allowed to recover, a manifest injustice would be done to him—and if that the set off was allowed, he would be defrauded out of his just rights: that the set-off (a promissory note in 1848, for £40 odd) accrued after the assignment from the plaintiff to George Kerr was payable, the deed having been given two days after the date of the above mentioned instrument, which constituted the set-off.

The defendant denied representing it as, or intending to give, a promissory note: that in July, 1848, he (Geo. Kerr) became bankrupt, &c.: that in the arrangement it was understood he (defendant) was to settle with Geo. Kerr, accounts existing between them: that Dawson Kerr, George's father, knew of and was present at the arrangement, and the defendant complained that the transfer to Dawson as alleged operated to his prejudice, having claims against George's estate, and that he proved before the Commissioner of Bankruptcy £34 and upwards &c.

MACAULAY, J.—Dawson made no affidavit—the plaintiff authorised him to bring this suit. Geo. Kerr in his affidavit complained of the defendant—defendant in reply complained of George Kerr. *Prima*

facie,—defendant had a right to plead the set off. It is not alleged he obtained the subject matter of the set-off with a view to thwart George or the holder of this writing, or that it did not accrue bona fide. See 4 U. C. R. 350; 7 Taunt. 421; 4 B. & A. 419, 249, 429; 2 Dow. 393; 5 B. & Ad. 96; 1 B. & P. 47; 3 B. & C. 422; 7 Moore, 617; 2 Dow. 392; 1 Y. & J. 362; 4 Dow. 63; 4 Tyr. 294; 2 C. M. & R. 394.

I have not found any case in which a plea involving a meritorious defence has been set aside because the assignee of the plaintiff would thereby suffer.

It is not a question between Geo. Kerr and the defendant, but a third person, as assignee to George Kerr. It is not shown that the set-off was unfairly created in order to meet this action, and frustrate the assignee, and so far as the affidavits filed in the plaintiff's behalf go to impugn the conduct of the defendant, he repels the imputations.

I cannot say a case of fraud is made out, and without it, I apprehend the authorities would not warrant the court interfering to suppress the plea. I must discharge the summons; costs to be costs in the cause. See 8 M. & W. 511; 15 M. & W. 304; 5 Bing. N. S. 688; 7 Scott, 848; 6 M. & W. 490; 11 M. & W. 84.

DOE EX DEM. LOUNT V. ROE.

Ejectment—time within which a memorandum [illegible] *served with declaration and notice, may appear and enter into consent rule, &c.—judgment book—entry of consent, plea, &c.*

A tenant, when served with a declaration of ejectment and notice to appear in the ensuing term, may, within the term, enter into the consent rule and plead—though no rule nisi for judgment against the casual ejector has been obtained.

It is not necessary to enter the consent rule, appearance, or plea, in the *ejectment book* at the Crown Office—leaving them with the Clerk of the Crown and Pleas is sufficient.

This was a summons calling upon the lessor of the plaintiff to shew cause why the judgment against the casual ejector, and all subsequent proceedings thereon, should not be set aside for irregularity with costs, on the ground that the judgment was entered against the casual ejector, after the tenant in possession had entered into the consent rule and filed an appearance and plea in pursuance of the notice served on him.

An affidavit of G. T. Denison, Esq., was put in by him, setting forth that the action was brought for the north-west quarter of Lot No. 18, in the 1st concession of Tecumseth, in the District of Simcoe—then in possession of William Tyrwhitt, as purchaser thereof: that a declaration was served on Tyrwhitt, with a notice to appear and plead in Michaelmas Term last: that in pursuance whereof deponent, as his attorney, did appear and plead to the said declaration on the 9th November, 1846, and also on same day entered into the usual consent rule in such cases: that judgment against the casual ejector was entered in this cause on the 19th February, 1847.

Cause was shewn by *Gorham*, plaintiff's attorney, who swore that he searched the Crown Office, and that neither appearance, nor consent, nor plea, were entered in the *ejectment book*: that in Michaelmas

Term or in Hilary Term last, he was told by Mr. Cexwell, clerk of the pleas in ejectment, that none had been entered therein.

He also objected, that even if the consent, appearance and plea were entered by the tenant, at the time stated in Mr. Denison's affidavit, they were prematurely entered; that the tenant could not regularly appear, plead, &c., before the lessors of the plaintiff had moved and entered the rule for judgment *nisi*.—See 3 Jurist, 460; 7 Scott, 701.

MACAULAY, J.—In the case of doe ex dem. Carr v. Roe, in C. P. 3 Jurist, 460; the tenant had appeared and pleaded, though no rule had been obtained for judgment against the casual ejector—and the officer objected to draw up the consent rule without it; wherefore a rule *nisi* was moved and obtained to shew cause why such consent should not be drawn up. The rule was made absolute.

This case, in effect, establishes the regularity of a consent, appearance and plea by the tenant, before the rule for judgment against the casual ejector has been obtained.

In doe ex dem. Emery v. Roe, 7 Scott, 769, the *landlord* appeared and obtained an order for particulars, though no rule for judgment had been moved. The lessors of the plaintiff did not join in the consent rule, or go on, but brought another ejectment, and the landlord moved to stay proceedings till the costs were paid; but *per cur.*—he was not called on to appear till the rule was obtained. He should have searched the book, and until he found

the rule there entered, he had no right to appear. Application was refused.

It is true he was not called on to appear, but that he had no right to appear, is inconsistent with the case of Doe on the demise of Kerr v. Roe, in the same court and the same term. Had the lessors of the plaintiff desired to join in the consent and go on, then according to that case he would be bound to obtain the rule for judgment nisi.

As respects the tenant, he is informed by the casual ejector in the notice annexed to and served with the declaration, that unless he appears in the ensuing term, and causes himself to be made defendant, he (the casual ejector) will suffer judgment by default. Now it does appear inconsistent to say to the tenant after such a call, that he cannot regularly appear unless the plaintiff obtains a rule for judgment against the casual ejector.

If the rule for judgment were to be against himself, he might waive it. [illegible] a judgment against another, I do not see why it should form a condition precedent to her appearing. I at first thought the argument, that technically speaking, there was no cause in court, nothing in possession of the court, until the declaration was filed and the rule moved against the casual ejector, contained much weight. But it is a fictitious proceeding, and the declaration served is founded on a supposed previous process against an appearance by the casual ejector; and, at all events, the tenant when he appears does voluntarily so appear to a new suit without process,

and undertakes to accept a declaration in ejectment, and plead thereto, &c. He does not appear to the suit against the casual ejector, but, through it, is forced into an apparently voluntary appearance upon which the plaintiff is supposed to proceed by declaring *de novo*; though, in fact, he may only substitute the name of the tenant as defendant, in the place of the casual ejector.

I am of opinion, therefore, that the consent, appearance and plea preceding the rule for judgment *nisi* against the casual ejector, were not nullities, and could not be treated as such by the lessor of the plaintiff as they have been, and that they were not even irregular.

It is to be observed, that though not found entered in the ejectment book, on a search made since this application, the defendant's attorney does not deny notice of the consent, appearance and plea being entered, as stated in Mr. Denison's affidavit, when he procured the rule for judgment last term, and when he entered up the judgment against the casual ejector; and if he had such notice, then unless these proceedings taken by the tenant were complete nullities, it was incumbent on him to have moved to set them aside as irregularities, if he had so conceived them to be.

By rule 5, Easter Term, 11 Geo. IV. (Cameron's Rules, p. 10), it is sufficient to leave the consent and plea in ejectment, at the office of the clerk of the crown and pleas, and no entry thereof need be made with a judge.

The affidavit states that Mr. Denison, as attorney for the tenant, did appear and plead to the declaration, on the 9th November, 1846, and on the same day entered into the usual consent rule in such cases. This was not regularly done unless such appearance, plea and consent had been left in the Home Office; and the contrary is not shewn.

The affidavit of Mr. Gorham merely shews that no such entries appear in the ejectment books; nor am I sure that they should.

The book alluded to is kept in pursuance of a rule of the Court of Queen's Bench, in England, Mich. 31 Geo. III, which requires the clerk to keep a book in which is to be entered all rules delivered out in ejectment.

The consent and appearance do not necessarily appear in this book. The consent should (according to the above rule) be left at the post-office, and the appearance for the tenant should be entered as in other cases—that is, the appearance paper or common bail piece be filed, and the appearance be entered in the appearance book. That this was so, there is not shewn, though it is shewn that no such proceedings appear in the ejectment book.

If the consent, appearance and plea were left at the office to be filed, it was the duty of the officer to make the regular entries in the books in his possession. The presumption is, that the attorney of the tenant did all that was incumbent upon him, and it does not appear that the officer did not do all that was proper on his part.

I look upon it, therefore, as established, that the eontent, appearance and plea were duly entered in the office at Toronto according to the established rules of practice of the court; more especially as the affidavit of search made by the plaintiff's attorney, does not, in general terms, deny the existence of any such proceedings in the office, but merely their non-appearance in the ejectment book—whether he searched for them or not—if he did, with what result, is not stated.

I therefore make the summons absolute, and set aside the judgment of *non pros.*

DOE EX DEM. CHANCELLOR, PRESIDENT, AND SCHOLARS OF KING'S COLLEGE, AT YORK, IN THE PROVINCE OF CANADA,

v. RICHARD ROE.

Judgment of non pros. against lessor of plaintiff in ejectment, where he has not signed the consent rule—Costs—Signing of summons to set aside non pros.—Defective plea in ejectment cured by plaintiff allowing non pros. to be signed—Affidavit of search by partner of plaintiff's attorney.

A defendant in ejectment upon filing his consent rule, appearance and plea, may demand a replication from the lessor of the plaintiff—and if not filed and served, may sign judgment of non pros, notwithstanding the lessor of the plaintiff may not have joined in the consent rule by signing it, and notwithstanding the consent rule may not have been drawn up or issued: Semble, however, that the defendant, whose the consent rule has not been signed, will not be entitled to costs from the lessor of the plaintiff.

In signing by summons to set aside a judgment of non pros, that object, the summons should be styled Doe ex dem. (lessor of plaintiff), v. Richard Roe.

No general practice is required in setting forth the names of a corporate body in the signing of the consent rule, &c.

Where defendant in signing the lessor of the plaintiff in the consent rule, appearance and plea, "The

Chancellor, President, and Scholars of King's College, at York, in the Province of Upper Canada," the words "in the Province of Upper Canada" were omitted—the omission was held not material; at all events if material, it was not a nullity, and might be cured by laches. *Held* also—that a plea in ejectment might be informal and open to demurrer, yet if the plaintiff allowed himself to be non pressed, the defect was cured by his own laches.

Where the petition of the lessor of plaintiff's attorney swore, that the lessor of the plaintiff had a good cause of action in this cause on the merits, it was held sufficient. *Semble*, it would be otherwise if made by *a clerk* in the attorney's office.

This was a summons on Ward, tenant in possession, to shew cause why all proceedings had or taken for and on his behalf, in *this* cause, should not be set aside for irregularity with costs, to be paid by him—on the ground that all such proceedings were improperly entitled in the style of the lessors of plaintiff; the words "in the Province of Upper Canada" being omitted. Or why the plea or judgment of non pros. should not be set aside with costs to be paid as aforesaid, the said plea being inappropriate to the action; and the demand of replication being improperly entitled as aforesaid. Or why the said judgment should not be set aside and the plaintiff have leave to reply on the merits, on reading copies of the declaration, consent rule, appearance, plea, demand of replication, and affidavits filed.

It appeared that by the charter, the name of the lessors' plaintiff was as above. That a declaration in ejectment for lot D, 9th concession, Sombra, Western District, in this cause and on the single demise of the above named lessors was served on Ward, as tenant in possession, during the vacation of last Trinity term.

That an appearance was entered for said Ward in a cause entitled "John Doe on the demise of the Chancellor, President, and Scholars of King's College, at York, v. Melanthon W. Ward, by Mr. P. Vidal, defendant's attorney.

That a consent entitled "Michaelmas term, 11th Victoria, John Doe on the demise, &c. (lessors as in the appearance paper) v. Richard Roe; for tenant to defend, was also signed by the said attorney and filed.

That a plea entitled Michaelmas term, 11th Vic., Melanthon W. Ward, at suit of Doe on the demise, same lessors as in consent and appearance, of not guilty of the said *grievances* above laid to his charge *or any or either of them*, in manner and form, &c. copy served 15th November, 1847.

That a demand of replication entitled in the same way—Doe on the demise of the Chancellor, President, and Scholars, of King's College, at York, v. Melanthon W. Ward, dated 15th November 1847—was served on plaintiff's attorney.

The affidavit stated that on the 24th November, 1847, judgment of non pros. was signed in *this* cause.

The affidavit was entitled according to the above summons. The affidavit was made the 30th November, 1847, by Eccles, a partner of the plaintiff's attorney, and stated that deponent *had* the conduct of this suit, and that lessor of plaintiff had a good cause of action on the merits.

On the 1st December cause was shown by Gildersleeve.

1st. That the affidavit of Mr. Eccles and also the summons were improperly entitled.

2nd. That the omission of the words "in the Province of Upper Canada" in the name of the letter of plaintiff, in the styling of the consent rule was not material.—3 Moore, 96.

3rd. That if because of the said omissions, in the styling of the consent rule, appearance, and plea, they were irregular, that such irregularities were cured by the plaintiff's laches. That he should have moved against them before the time expired for taking the next step.—*Child v. Marsh*, 3 *M. & W.* 483; *Hinton v. Stevens*, 4 *Dow.* 283; *Fletcher v. Wells*, 6 *Taunt*, 191; *Gaze v. Goodman*, 2 *Smith*, 291; *Routledge v. Giles*, 2 *C. & J.* 163; *Fynn v. Kemp*, 2 *Dow, P. C.* 620; *Gaves v. Weller & Wife*, 1 *Scott*, 310. That the omissions complained of were nothing more than irregularities, if even such. Dale qu. tam. *v.* Beer, 3 East, 333; *Anonymous*, 7 *D. & R.* 511; *also* 1 *B. & P.* 401; *Bro. abr. Misnomer*, 1 *Wilcox v. Arpal*, S. 445. That they were too trivial to be objected to.—Leaf *v.* Lees, 7 Dow, 189.

4th. That if plaintiff considered the demand of replication irregular, he should have given defendant notice of the irregularity. Rutty *v.* Arbor, 2 Dow. P. C. 36; Williams *v.* Williams, 2 C. & Jar, 55.

That the plea being the general issue in case, instead of trespass, could not be thus objected to; but should have been the subject of demurrer, within proper time, instead of the present application, the

rule for judgment only requiring that the tenant should appear and *plead to issue*, which he had done in this case.

5th. That the affidavit of merits was not sufficiently explicit—deponent not swearing that he had charge of the suit from its beginning; that the mere fact of being a partner of the plaintiff's attorney, did not cure this defect.

Hoales in support of the summons then contended:

That by reason of the misnomer of the lessors of plaintiff, who were a body corporate, the tenant's proceedings were all void; and that therefore the plaintiffs entitling the summons against Roe was correct.

That the tenant had proceeded as if the plaintiff had joined in the consent rule, and as if the declaration was against Ward as defendant, whereas the tenant could not non pros. the plaintiff, unless he had signed the consent rule, and thereby accepted the tenant as defendant.

That the plea was objectionable on summons and had.—Burrows, 257; 6 East, 549; 14 East, 179; 1 Str. 574; 2 Str. 1022. That at all events it was not too late to set aside the judgment of non pros. entered only five days since.

Gilbertdeve in reply: the plaintiff may be non prossed, even though he has not joined in the consent rule.—*Goodright ex. dem. Ward v. Baddile*; 2 *W. Black*, 763; 2 *Scott, N. R.* 430; 2 *M. & G.* 239; [illegible] ex dem. Lount v. Roe, before Mr. Justice Maule, in Chambers, 26th February, 1847. That

judgment should be set aside only on conditions of lessors' plaintiff paying costs of present application, and also the costs of judgment, which defendant was not otherwise entitled to recover, as the plaintiff had not joined in the consent rule.—7 Jur. 69; 12 Law Jour. N. S. 12; 2 Dow. N. S. 526.

MACAULAY, J.—With respect to the objection taken to the entitling of the summons, and also of the affidavits put in on the part of the plaintiff, I do not consider it a good one. The plaintiff denies the sufficiency of the steps taken by Ward to make himself defendant instead of the casual ejector, and it would therefore be a contradiction on the part of the plaintiff, were he to style or set forth Ward as the defendant instead of Roe.

The fact of the lessors of the plaintiff, in this action, being a body corporate, would not, I conceive, require greater particularity in setting forth their names than private individuals; and with reference to the consent rule, the case of Doe Spencer v. Reed, 3 Moore, 96, and several of the other cases referred to, appear in point. I am therefore of opinion that the omission of the words, "in the Province of Upper Canada" in the entitling of the consent rule in this suit is not material; and that even were it so, in the first instance, the defect is now cured by the plaintiff's laches, so also are the similar omissions in the appearance, plea, and demand of replication.

As to the ground contained in the summons, that the plea pleaded is inappropriate to the action, I

think that although the plea would have been open to demurrer, the plaintiff cannot now, after judgment of non pros. has been entered, come in and object to the plea, unless he can show that it is a complete nullity. But as I do not consider it to be a nullity, the judgment of non pros. is perfectly regular, as far as the plea is concerned.

Now, assuming that all the preceding objections to the judgment of non pros. have been removed, and treating the proceedings of the tenant in relation to the consent rule, appearance, plea, and demand of replication, as correct; or at least that all objections to them are waived by the plaintiff's laches, the case is reduced to this single point: Is it competent for him, or more generally speaking, is it competent to a tenant, having appeared after the plaintiff has moved and obtained the usual rule for judgment of nisi, which was the fact in this case, and having signed and filed the consent, appearance, and plea, according to the practice of the court, to demand a replication of the plaintiffs or the plaintiffs' lessors; and if not by them duly filed and served, to sign judgment of non pros. as in a suit against such tenant—although the plaintiffs' lessors have not joined in the consent rule by signing it, and though no consent rule may have been drawn up or issued.

The case of Goodright on the demise of Ward v. Badside, 2 W. B. 768, is quite in point to shew that he may. This case is referred to in the modern treatises on practice in ejectment, as establishing the rule on this head; and it is virtually confirmed by

the recent cases referred to by Mr. Gildersleeve, to which may be added 1 Q. B. 1 and 7 M. & W. 344.

But although the tenant may in such a case sign judgment of non pros., he is nevertheless not entitled to costs.—7 Jur. 69; 12 Law Jour. N. S. 12; 2 Dow. N. S. 526. But if the plaintiff's attorney had previously signed the consent, the tenant would then be enabled to recover his costs from the lessees of plaintiff.

It appears to me, therefore, that the judgment of non pros. is regular; but on the affidavit of merits the lessors of the plaintiff may have leave to set it aside on payment of costs. The affidavit alleging merits, is not quite in conformity with the usual practice; but as respects Mr. Eccles's acquaintance with the case, he is not a clerk but a partner of the plaintiff's attorney; and the case cited in support of this objection relates to clerks, not to partners; besides, the relief is sought on behalf of a plaintiff, not a defendant.

And considering the nature of the proceeding, and the doubt that existed heretofore relative to judgments of non pros. in ejectment, I think it proper to set aside the judgment on terms, without regard to the strict formality of the affidavit of merits. I am, however, disposed to think the affidavit sufficient: it is made by the partner of the plaintiff's attorney, who swears positively that the lessors of plaintiff have a good cause of action in this cause on the merits.

Per Cur.—Summons absolute, on payment of the costs of judgment, and of the present application.

THE QUEEN EX REL. LAWRENCE V. WOODRUFF AND FOUR OTHER COUNCILLORS FOR THE TOWNSHIP OF NIAGARA.

Summons in the nature of a quo warranto, under the 166th sec. of the 12th Vic. chap. 81—Right of sheriff to close poll under—Summons by one relator against the whole corporation.

Under the 166th section of the 12th Victoria, chapter 81, to entitle a returning officer to close the poll, two things must combine—First, that he should see that all the electors intending to vote, have had a fair opportunity of being polled; second, that a full hour at one time shall have elapsed, without the tender or giving of a vote by a qualified elector; and even though such full hour has elapsed without a vote being either tendered or given, the returning officer is not bound to close the poll—nor is he justified in so doing, should he perceive that electors have not had a fair opportunity of voting.

Semble, that it is no part of the design of the act 12 Victoria, chapter 81, to give any greater or more extensive right to parties suing out under it a writ of summons, than they before possessed at common law or under the British statute; and therefore, that a writ of summons issued by one relator against the *whole body of a corporation* must be discharged.

A writ of summons, in the nature of a quo warranto, was issued in this case against the whole five councillors for the township of Niagara, at the instance of a private relator, who appeared to have been a candidate at the same election.

The objection against the election relied upon, applied equally to all the five defendants, and was, that the returning officer closed the poll at the expiration of the term allowed for polling on the first day of the election, and returned the five defendants as elected, refusing to adjourn the poll until the following morning, although several votes were given within half an hour and less, before the hour of four

arrived, and though there were many voters remaining in the township unpolled.

The 188th section of the 12th Victoria, chap. 81, enacts, that each election shall commence at the hour of eleven in the forenoon of the day for which such election is appointed, and may be held until the hour of four in the afternoon of the same day, and may then be adjourned until ten in the afternoon of the next day, and continue until four in the afternoon of such second day, unless the returning officer shall see that all the electors intending to vote have had a fair opportunity of being polled, AND one full hour at one time shall have elapsed, and no qualified elector shall during such time give or tender his vote, five minutes being allowed to electors for such purpose, in which case he may close the election at four o'clock of the first day, or at any time before that hour on the second day.

DRAPER, J.—It appears to me quite clear, that to entitle a returning officer to close the poll, once opened, before the hour of four in the afternoon of the second day, two things must combine.—First, that he shall see that all the electors intending to vote have had a fair opportunity of being polled; and, second, that a full hour at one time shall have elapsed without the tender or giving of a vote by a qualified elector. Even though such full hour has elapsed without a vote being either tendered or given, the returning officer is not bound to close the poll; nor is he justified in so doing, should he perceive that electors have not a fair opportunity of voting—

as by interest, if there has been any disturbance, any difficulties thrown in voters' ways, so as to keep them from the polls, or any other peculiar circumstance which leads him honestly to the conclusion that by adjourning the poll from the first to the second day, a greater number of electors will come forward than have as yet presented themselves. And so, although he sees and knows of no impediments to voters coming forward, and, as far as he is aware, they have all had a fair opportunity to vote, the legislature have declared the lapse of a full hour necessary—without one vote being given or tendered—are the returning officer is permitted to exercise his judgment, and to decide that all the electors intending to vote have had a fair opportunity. The object of the legislature is clearly to afford ample opportunity for a full and free expression of opinion by the electors, without at the same time unnecessarily or vexatiously prolonging the election to the full time allowed by law; and the duty of the returning officer is to give effect to this object, using the power conferred by the legislature for this purpose only.

But though a careful perusal of the affidavits has rendered it proper, in my judgment, to express this view of the act, and of the duties of the returning officer, I am under the necessity of disposing of this case upon other grounds than the actual merits of the proceedings at the election.

This is a single writ of summons, issuing against five different parties, and though it may be considered for argument's sake that the evidence sufficiently

establishes (as indeed it appears to me to do) that the poll was improperly and prematurely closed—yet as the giving the judgment—which such a conclusion of fact and law would require—would vacate all the seats, and so in effect destroy the whole corporation, it becomes necessary to enquire whether such a writ can be sustained at the instance of a private relator.

Upon the best consideration I have been able to give this question, I am of opinion that the writ in this case is not in accordance with the intention of, or sanctioned by the words of the act. I am of opinion, that while the legislature designed to give to every relator, being a candidate or elector, a simple, speedy and inexpensive mode of obtaining a judicial decision on the right of parties claiming and exercising the rights and functions of persons duly elected in municipal corporations, to exercise and enjoy such rights and functions, it was no part of the design to give any greater or more extensive right to bring such matter in question than he before possessed at common law, or under the British statute. In other words, that the statute was designed to facilitate the remedy, not to enlarge the right; and that a private relator, suing out and prosecuting the writ of summons given by our statute, has no greater right to sue it out, or to judgment upon it, than he could have if applying in England for leave to file an information in the nature of a quo warranto.

The English decisions I think clearly establish, that a private relator cannot file an information

against the whole body of a corporation. In R. v. Corporation of Carmarthen, 2 Burr. 869, the court said, there was no instance of any information in the nature of a *quo warranto* being brought against any corporation, as a corporation, for an usurpation upon the crown, but by and in the name of the attorney-general on behalf of the crown, whereupon the counsel made their motions against the *several individuals*, to shew by what authority they *respectively* claimed to exercise their particular franchises, and the ordinary rules were granted.

In R. v. Ogden and four others, 10 B. & C. 230, a rule *nisi* had been obtained, calling upon the defendants to shew cause why an information in the nature of a *quo warranto* should not be filed against them for acting as a corporation. The case of R. v Carmarthen, was relied on as an answer to the rule, and the court upheld that case and discharged the rule *nisi*, though not moved on against a corporation, but against five individuals; Lord Tenterden observing, that if any number of individuals claim to be a corporation, without any right so to be, that is an usurpation of a franchise, and the information against them as a body must be in the name of the attorney-general.

In R. v. White, 5 A. & El. 613, the application was against one member of the corporation only, and it was objected, that although only one party was applied against, yet that it was in fact an application against the whole corporation, for the objection taken against the defendant's title applied equally to that

of every member, and amounted to this in effect, that no valid corporation existed.

The court distinguished this from R. v. Ogden, upholding the general doctrine that the whole corporation could not be attacked at the instance of a private relator, though an information might go against the members individually, and they made the rule absolute for an information against the only defendant applied against.

In Rex v. Parry, 6 A. & E. 810, the court upheld the doctrine that an information against an individual corporator, at the instance of a private relator, could not be refused, merely because the objection taken might if sustained have the effect of dissolving the whole corporation; and they further held, that even where a good objection to the title was shewn, they might and ought to take into consideration all the circumstances — among others, that no fraud was imputed, and no mischief appears to have been done; that the prosecution if successful would probably dissolve the corporation, and that the prosecutors appeared to have that intention, and in the exercise of their discretion they might grant or withhold leave to file an information.

These cases and a consideration of the statute, and also of the probable inconvenience of a different course of proceeding, have brought me to the conclusion that there cannot be a judgment against the defendants on this writ, but that they should be discharged and discharged therefrom, though the judgment will not preclude any question in favour of the

right to the office. And inasmuch as the question is now, and the relator proceeded with the apparent sanction of the judge to whom the application was made for the summons, and to whom no such objection was either suggested or occurred at the moment, I think it will be just not to give costs.

In truth, for all that appears, it might have been unjust to have given costs against the defendants if the relator had succeeded, for the objection to the relator arises on the conduct of the returning officer only, and no collusion is established between him and any other of the parties returned. The legislature has made no provision for making the returning officer responsible in the event of costs being occasioned to either party through his misconduct.

THE QUEEN EX RELATIONE GIBBONS *v.* MCLELLAN.

Summons in the nature of a quo warranto, under the 146th sec. of the 12 Vic. ch. 81—Power of judge under.

Where a summons in the nature of a *quo warranto* was issued against a defendant, under the 146th sec. of the 12 Vic. ch. 81, to shew cause wherefore he had usurped the office of councillor, &c.—*Held*, *per* DRAPER, J., that the authority of a judge in chambers upon this summons extended only to an adjudication of the validity of the *election complained of*, and that he could not further decide upon the validity of the relator's election.

Semble, that in case the judgment under this summons, quashing the defendant, has become final, the course for the relator to take will be to apply to the Municipal Corporation to hold a new, and, if they refuse, then to apply to the Court of Queen's Bench for a mandamus.

This summons in the nature of a *quo warranto* was issued against the defendant, to shew wherefore

he usurped the office of councillor for the Ward of St. Patrick, in the town of Goderich.

The defendant made default at the return of the summons, and in addition to regular proof of service of the summons, and the other necessary papers, a paper, the signature to which was proved by affidavit to be that of the defendant, was filed, in which he acknowledged that he was not duly elected and had no right to the office of councillor, and that he was ready to submit to pay costs.

The only question arising in the case was, as to the power of the judge, under the 146th section of the statute 12 Vic. ch. 81, to do more than hear and determine the validity of the election.

Gwynne for the relator, who was a candidate at the election, contended that the poll book, a sworn copy of which was produced, proved that the defendant ought not to have been returned, but that the relator should have been returned in his place; and that the judgment should decide that point, as well as that the defendant was not elected.

DRAPER, J.—It does not appear to me that the authority of the judge extends beyond an adjudication of the validity of the election complained against. The summons is to issue to try the validity of the election complained against. The grounds to be shewn by the relator for issuing such summons are—1st. That the election was not conducted according to law. 2ndly. That the party elected or returned was not duly or legally elected or returned. The whole question raised being as to the right of the party in

possession of the office, not involving the right of some other person to take it. The case of Rex v. McKay, 4 B. & C. 556, seems to shew that where a defendant is found guilty on an information for usurping an office, the course is after the judgment against him is signed, or a reasonable time for the prosecutor to sign it has elapsed, to issue a mandamus to proceed to a new election.—See also Rex v. Pindar, Lord Raym. 1447; Str. 582; Rex v. Clark, 2 East. 75; Rex v. Courtnay, 9 Ea. 246. The proceeding is "*in personam*," at the suit of the crown, and the judgment is of ouster only, as far as these cases shew. In Rex v. Morton, 4 Q. B. 146, the defendant, on the return of the rule, did very much what has been done by the defendant in this case; he did all in his power to resign the office, executing a deed poll to that effect, and swearing it was his intention at the first meeting of the corporation to effectually resign. In *arguendo*, his counsel observed: "The resignation gets rid of the difficulty; so that Bramley" (the candidate, who, as it appears, should have been declared elected instead of Morton) "may be admitted, or a mandamus may go for his admission." A special rule was drawn up granting the information, but the prosecutor not to file it unless legally necessary. Defendant to pay costs of the application. The information, if necessary, to be filed at prosecutor's expense; and the defendant undertaking to disclaim, at prosecutor's expense.

As soon as the judgment ousting McLellan becomes final, it will be competent for the relator to

apply to the municipal corporation of Goderich to admit him; and if they refuse, he may apply to this court for a mandamus. But it does not appear to me that his right is a matter to be adjudged upon by this writ of summons.

The evidence, showing that the relator had a majority of legal votes over the defendant, is relevant to the question of the validity of the defendant's election, and being sufficient to establish the affirmative, makes his return invalid and ousts him, but it does not make the right of the relator the matter to be adjudged. If it were, the consequence would be that the relator would get a judgment in his favor, in a case against which nothing may have been heard; and it surely cannot be contended that, if he were admitted, a summons in the nature of a "*quo warranto*" would not lie against him at the instance of a voter, or some other candidate, because he had obtained judgment of ouster against this defendant.

REID v. CLEAL.

Security for costs.

Where the plaintiff has placed all his property out of his hands, for the benefit of his creditors, and sues on their account, the defendant may demand security for costs.

Draper, J., granted a summons on plaintiff to shew cause why all proceedings should not be stayed until security be given for defendant's costs, on the ground that plaintiff had, before this action brought, assigned all his property and effects, including his debts, to Newland, as his trustee, for the benefit of his creditors, and that this action was brought in the name

of this plaintiff for the benefit of Newland and the other creditors.

Newland resided in Lower Canada, and it was sworn that the plaintiff was insolvent, and had no means of paying costs.

In opposition, an affidavit was filed of plaintiff's, that the assignment was made for the benefit of such creditors only as should become parties to the deed of trust by a certain day, now past; that a few only of the creditors had signed, whose debts in all amount to 1128*l.*, whereas the property assigned, *according to the plaintiff's shewing*, is worth 1935*l.*, and that according to the deed, any residue above the debts of those who should unite, is to be paid to the plaintiff.

The plaintiff's attorney also swore, that the plaintiff, as he is informed and believes, resides in Chinguacousy, in this province, and is receiving a salary of 100*l.* per annum.

ROBINSON, C. J.—The deed of trust is shewn; it divests the plaintiff of all property, for the purpose of paying the debts of those who shall execute the deed. Creditors to a large amount have executed it. We cannot abide by the plaintiff's own valuation of his property assigned, and assume that there will be certainly a residue left; and besides, the deed requires everything to be converted into money, and the debts to be collected by the trustee. It therefore leaves nothing tangible to satisfy any demand which this defendant may hereafter have for costs, if he should succeed in this action, which is brought for the benefit of others in the plaintiff's name.

The cases of Doyle v. Anderson, 2 Dowl. 595, and of Perkins v. Adcock, 14 M. & W. 808, support this application.

Order made for security.

Wood v. Bellisle et al.

Security for costs—at what stage may be demanded.

The defendant may under certain circumstances demand security for costs from plaintiff, with a stay of proceedings, even *after plea pleaded*. The general principle is, that the defendant must make his application as soon as he can reasonably do it after knowledge of the fact of the plaintiff's residence abroad.

On the 3rd of September, 1849, a summons was obtained to stay proceedings till security for costs was given; which was enlarged till the 14th of September, 1849.

On the 22nd of August, 1849, it was stated on affidavit by one of the defendants, that since the commencement of this suit, the plaintiff left Sandwich, where he resided, and went to the United States, where he then resided. That he was deputy treasurer of the district, and took district money with him, and was not likely to return.

This was filed on the 3rd of September.

On the 27th of August, security for costs was demanded.

On the 14th of September, cause was shown. On the 30th of August, plea was filed and served by the defendant's attorney. *Conveyance and abuse*, as by record, &c. Replication was filed and issue joined on the 1st of September. When the declaration was filed and served was not shown.

On the 25th of August, 1849, a summons to set aside proceedings was obtained, &c., returnable next day; which was enlarged till Saturday, 1st of September.

So that while the proceedings were stayed under the summons of 25th August, the plaintiff *may* have *declared*.

The *defendant* demanded security for costs, on the 27th of August.

The *defendant pleaded*, &c., on the 30th August.

Issue was joined before the application was made, viz., on the 1st of September.

It was contended that the defendant was not too late, though after plea — the plea being inadvertently filed and served at Sandwich, where the proceedings were, while other proceedings were pending here in Toronto.

See 6 M. & W. 131; 8 Dow. 165; 1 Dow. 95; 3 A. & E. 551; 5 N. & M. 351; 1 D. & R. 348 (n); 5 B. & A. 702; 2 Dow. N. S. 985; 3 D. & L. 142; (waiver of stay of proceedings) 2 C. M. & R. 740; 1 B. & A. 159; 2 Tyr. 166; 8 A. & E. 479 (n) (473); 3 Dow. 6; 1 M. & G. 565; 3 D. & L. 142; 10 Jurist, 875.

MACAULAY, J.—In both Duncan v. Stennett, 5 B. & A. 702, and 1 D. & R. 348, and Dubillois v. Westerpark, ib. (n), the applications were made after plea, although the plaintiffs were abroad when the actions were brought.

The usual practice with us is to require the application to be made before plea, unless the delay be satisfactorily accounted for.

Here a conflict of proceeding has arisen by reason of the cause being conducted in the district office at Sandwich, Western District, and particular steps necessarily taken here, without time to communicate. Measures appear to have been taken in due time and *bona fide* to apply for security for costs; but the state of the proceedings at Sandwich may have constrained the defendant to plead before the application was made; and Mr. Reid gives a good reason for its not being made earlier here.

It was made here on the 3rd September, by the agent of the defendant's attorney, without any knowledge of the plea or replication. The plea must have been pleaded and served then in ignorance of the state of the application here, at the peril probably of an interlocutory judgment. The replication or taking issue was very promptly added; and it is not suggested, on the affidavits filed on behalf of the plaintiff against the application, that the plea is in fact untrue or colorable only.

The defendant left the province after action brought, and, under all the circumstances, I think the best course is now to grant the order to stay further proceedings. The issue to the record cannot be found till next term; and, in the interim, I see no hardship on the plaintiff in requiring him to give security.

The case of Dubilois v. Waterpark sanctions this upon the old practice in England, on which the plaintiff's agent strongly relied. The court say the rule is not inexorable to stay proceedings for security for costs, after issue joined, if good special reason be assigned.—2 Ch. R. 151 and note, and Tidd's Pr.

That the application should be made as soon as the defendant can reasonably do it after knowledge of the fact of the plaintiff's residence abroad. And, governed by this rule, I think the present application not too late under the circumstances.

Rule absolute.

DON DEM. McLEOD v. JOHNSTON.

Staying proceedings on the second action of ejectment, when a prior one was brought and abandoned, for the costs land—costs.

Where the lessor of the plaintiff had commenced one action of ejectment, had then abandoned it, and afterwards commenced a second for the same land, he was ordered to stay proceedings on the second action, unless he paid the costs of the first. He might, it seems, under this order, elect to proceed with the first action, in which case the order would have no effect as to costs.

Summons to stay proceedings, till the costs of a former action between the same parties, for the same premises, were paid.

In 1843, this lessor of the plaintiff brought an ejectment for the same land, and served this defendant, who was then in possession, as owner. At the trial, defendant had a verdict; and plaintiff obtained a new trial without costs, but had not proceeded in the case since.

This defendant, having in the mean time removed to a distance, leaving a tenant in, the lessor of plaintiff, abandoning as it seems the other action, brought a new action against the tenant and got possession in default—Johnson having, as he swore, no notice of it, till after judgment entered (3rd March), when he applied to be allowed to defend as landlord (14th

March), which he was allowed to do; and he, immediately after entering into the consent rule, made this application.

The defendant swore that he had had to pay his attorney about 18*l.* for costs of defence of the other action, which was about half the value of the land.

The plaintiff met the application only by filing an affidavit of his attorney, that he had never been instructed by McLeod to go on with the first action; and "that he verily believed the said action of ejectment had not been vexatiously brought by the said McLeod."

See Malloch on Costs, 44 Cr.; Str. 1152, 1105; 2 Bl. Rep. 1160; 4 Mod. 379; 6 Bing. 469; 2 Bl. Rep. 906, 1156; 1 T. R. 491; Com. Dig. Pleadings, 272.

ROBINSON, C. J.—The result of all the cases is, I think, that the order should be made as moved; and I do not see that it can be necessary or material to make it in the alternative, that the plaintiff should elect which action he will proceed in, or should either proceed in the first or pay the costs of it, because of course he has that option. This order does not bind him to pay costs, but only stays proceedings in the second action, unless he does so. Of course he can elect to proceed in the first action, if he prefers it; and then this order will have no effect upon him as to costs.

Order absolute.

McCARTHY v. LEONARD.

Exoneretur—Bail-piece—Limits—Final order of insolvent.

An exoneretur may be entered on the bail-piece (for the limits) where the defendant has been discharged by order of the judge of the Insolvent Court, and the debt in the action included in the schedule.

Durand moved to have an *exoneretur* entered on the bail-piece (for the limits), defendant being discharged by order of the judge of the Insolvent Court.

Order produced, dated 23rd April, 1850; also sheriff's certificate that defendant has been surrendered by the bail, 27th April, 1850.

The defendant had obtained his final order in the Insolvent Court, and the debt in this action was included in the schedule.

ROBINSON, C. J., ordered *exoneretur* to be entered on the bail-piece.

COATES v. HORNEY.

Setting aside service of process—Officer's affidavit.

Where service of process was denied by the defendant, but the officer swore positively to its service personally on the defendant, on application to set aside the service and all subsequent proceedings was discharged, but not with costs, as the affidavits were conflicting.

Summons, on reading affidavits and papers filed, to show cause "why the service of the ca. re. in this cause, and all subsequent proceedings, should not be set aside."

The defendant made affidavit on the 3rd of Dec., that on the 26th of November, a copy of declaration and demand of plea were left at his house, but "that

no copy of the process, or any other paper in the suit, was ever served on defendant."

W. Wilson swore, that on or about the 29th of October, 1849, the annexed copy of ca. re. (in this suit) was served on *him*, on the defendant's premises, by some person unknown to him.

This copy of writ was marked as issued 27th of October, 1849.

Alexander Keefer swore, that annexed to the writ in this case, in the crown office, was an affidavit of F. W. Jarvis, that service was made personally on the defendant, on *the twenty-* day of October (not stating in what year), and that common bail was entered by judgment for defendant, on 15th Nov.

On the plaintiff's part it was sworn,

1st, by F. W. Jarvis, on the 4th December, that he did personally serve the defendant with process in this cause; that such service was made by him on defendant, in his surgery (defendant being a surgeon); that he is acquainted with defendant's personal appearance, and could not be mistaken; and that he made the service on the 29th of October last.

Thirdly, Mr. Bell swore, that in last June, or a day or two before, in a conversation with defendant, it was admitted to him by defendant that a copy of the writ in this cause had been served on him, or had been served; and that in a subsequent conversation with him, the defendant admitted that he had full knowledge of the service of the writ immediately after the service, which defendant alleged then had been made on another person.

ROBINSON, C. J.—I discharge this summons, the officer who made the first affidavit of service having in the most positive terms re-affirmed the service on the defendant personally; and I must assume from the terms of the summons, that the want of service of process is all that is complained of.

I discharge it, not with costs, as the affidavits are conflicting; though I might be warranted in giving costs, on the ground that the defendant has not denied knowledge of the process.

Ordered that the costs of this application should be costs in the cause.

KIRBY V. MITCHELL ET AL.

A defendant on the limits recommitted for unsatisfactory answers to interrogatories.

On the 23rd of January, 1850, a summons issued to shew cause why Peter M. T. Mitchell should not be committed to close custody of the sheriff of Oxford, he being then on the limits, on a writ of ca. sa. in this cause, and having sufficient property under his control, real and personal, to discharge the debt or some portion thereof.

This was obtained, on an affidavit that the defendant had obtained judgment in the Division Court against various persons, which were in course of collection, and that he said he had other claims which he was about to sue; that in October, 1849, he told the deponent he had bought a valuable horse, by giving notes for it (of other people).

There was another affidavit of one Hall, that the

defendant had contracted to repair a certain portion of the Brantford and London turnpike, from 30th September, 1848, to 30th September, 1849; that he was paid for the same by the Board of Works, through the deponent, and that on 1st December, 1849, there was in deponent's hands, as superintendent, 120*l.*, a sum to be paid to this defendant on account of his contract, and at his disposal—50*l.* of which was afterwards paid to different persons, in presence of this defendant, by his directions, and the balance paid afterwards to other persons, by his order.

It seemed that early in December, this defendant had applied to be discharged from custody altogether, and that on similar affidavits to those filed in shewing cause against that application, this summons was obtained to commit him to close custody.

Barker made an affidavit, that in September, 1849, he sold this defendant a lot of land in the township of Brantford, of which defendant was then in possession, and had put up a building on it; that he had, about the 1st of December, 1849, seen defendant in possession of sundry claims and notes against various parties, payable to himself, which he offered to dispose of; that just before he had bought a valuable horse, and that deponent believed he had it in his power greatly to lessen his debts, if he chose.

Martin swore (12th January, 1850), that this defendant told him, in the latter part of December, 1849, that a new mill, which defendant was building there, was arranged in such a way, that the plain-

tiff can't touch it;" that it was not his intention to pay this plaintiff any more, and that any property he (defendant) had, was in such a way that plaintiff could not touch it.

Peetman swore (16th January, 1850), that defendant soon after his arrest told him, that plaintiff had now done all he could do; that he had plenty of property, nearly 3000*l.*, but that his property was so situated that plaintiff could not touch it.

Plaintiff made a strong affidavit (21st January, 1850) to shew, that by defendant's own admissions, he had abundant means, but was resolved to defraud plaintiff.

Defendant (21st January, 1850) made affidavit, that by an assignment he had fully conveyed all his estate, and interest of and to all estate, real and personal, which he had, or could or might in any wise have or claim, in any lands, goods, chattels, debts, claims or demands; that when he applied to be discharged, the estate assigned by this instrument was vested in James Mitchell, for a good consideration, but that since deponent's re-committal, the estate was *re-invested* in him, in order to enable him to obtain his discharge from arrest; that the first assignment to James Metcalf was fair and honest, and not made to defraud plaintiff.

The assignment to the plaintiff is made on the 21st of February, 1850; it recites that defendant had, by order of Mr. Justice Draper, been committed to close custody; it is to plaintiff, *executors, administrators and assigns*, and includes all the estate, right, title,

interest, of any kind whatever, of, in and to any lands, tenements, hereditaments and premises, which he is in any manner possessed of, or can have or claim, at the time of the taxation thereof; and all debts, demands, sums of money, &c. &c., a schedule of which is annexed, and all that may be omitted from the schedule, in trust to pay plaintiff's debts from the proceeds, and pay over any surplus to defendant; it contained also power of attorney to collect the debts.

The schedule of debts was to a considerable amount.

Upon this being filed, Macaulay, J., 1st March, 1850, issued a summons to shew cause why he should not be admitted to the limits.

On the 14th March, 1850, the plaintiff made affidavit that the debts he believes were worthless; that he offered defendant some weeks before that assignment was made, to accept an assignment of all his estate and interest in a certain steam saw mill, a certain village lot, on which a building is erected, a certain shop and lot, and a certain sum of money, then in the hands of Valentine Hall, an officer of the Board of Works, and a horse, but defendant declined.

On the 25th of March, 1850, answers of defendant were filed to interrogatories.

On the 11th of April, 1850, plaintiff filed affidavits, replying these answers.

Rosenvey, C. J.—Under the 5th cl. of 4 W. IV., ch. 10, I cannot say that I consider it reasonable, and just to allow the defendant the benefit of the limits, under all the circumstances of the case.

PETCH & MANNING v. DUGGAN.

Statute 4 Wm. IV. ch. 3, sec. 6—Plea in abatement—Affidavit—Place of residence of party not joined, how to be stated.

The affidavit verifying a plea in abatement ought to state, in the *body of it*, the place of residence of the party not joined. It might perhaps be sufficient in the affidavit to state, that the place of residence is that mentioned in the plea annexed.

On the 17th of August, 1850, the defendant pleaded in abatement, except as to 3*l.* 5*s.*, the non-joinder of Robert E. Burns, Esq., alleging that at the time of bringing this action he was and still is resident within the jurisdiction, &c., *to wit*, *in the township of York, in the county of York.*

Non-assumpsit as to 1*l.* 5*s.*, part of the 3*l.* 5*s.* computed; and as to the 2*l.*, residue, &c., that plaintiffs should not further maintain their action, because he pays it into court.

Annexed to these pleas was an affidavit of defendant, sworn on the same day, "that the plea in abatement thereto annexed was true in substance and fact."

The plaintiff had obtained a summons for setting aside *the pleas*, for *irregularity*, *with costs*, because the pleas were not correctly entitled in the cause, and because the affidavit verifying the plea in abatement was not correctly entitled.

Or why the plea in abatement should not be set aside for irregularity, because the affidavit verifying the same did not state the place of residence of Mr. Burns.

And why the 3rd plea should not be set aside for irregularity, because no judge's order for the payment

of the 2*l.* into court, was served on the plaintiff's attorney.

Or why the 1st and 3rd pleas should not be set aside, or why the pleas filed and served by defendant for irregularity, and plaintiffs have leave to sign interlocutory judgment as for want of a plea.

ROBINSON, C. J.—As to the plea in abatement, I consider that it is not well pleaded, for that the affidavit ought to state in the body of it the place of residence of the party not joined. If it had stated that the place of residence was that mentioned in the plea annexed, possibly that might have been done, but I cannot accept this as a compliance with the stat. 7 Wm. IV. ch. 3, sec. 6.; but as the point may not have been decided, I will allow the defendant to plead issuably within forty-eight hours to that part of the demand, otherwise judgment to be signed in respect to such part.

I do not find the alleged incorrect entitling sustained.

The objection of non-service of judge's order for paying the 2*l.* into court, if necessary, was not pressed.

McGUIN v. BENJAMIN.

Notice of assessment—Sufficiency of service of.

The serving a notice of assessment, by taking it to defendant's house, and throwing it over his fence into his door yard, telling his son who was present that it was a notice of assessment for his father, is insufficient service, where the son refused to have anything to do with it, and where the father, who was absent from home, knew nothing of it till after the sessions.

This rule from the Practice Court, to be disposed of (by consent) by judge in chambers, to show cause,

why the assessment of damages should not be set aside for want of notice of assessment; and why interlocutory judgment should not be set aside, and defendant allowed to plead, on affidavits filed.

On the affidavits, it appeared, that the notice of assessment was not personally served, and that defendant in fact never got it.

It was taken by the deputy sheriff to defendant's dwelling-house, and thrown over the fence into his door yard, telling defendant's son, who was present, that it was a notice of assessment for his father.

The son told him he would have nothing to do with it; that his father was in the township of Camden, seventeen miles off, where he had been in fact for some months, employed in a public work, coming home now and then occasionally; that it lay there till it was in some way destroyed, not having been read by any one, and its contents never made known, or the occurrence of such a circumstance to the defendant, till after the assizes. The same sheriff's officer had served defendant with the declaration in Camden.

The defendant's attorney gave notice to the plaintiff's attorney, at the assizes, that no notice of assessment had been served, and that the irregularity would be moved against.

Rowmow, C. J.—The assessment must be set aside,—the service has not been sufficient.—1 Dowl. 513.

MORRELL v. CAPRON ET AL.

Frivolous Demurrer.

Declaration in trespass for taking goods, omitting the usual words, "against the peace of our Lady the Queen," on account of which omission the defendant demurred; *Held*, demurrer frivolous.

The plaintiff declared in trespass for taking goods; for that defendant on, &c., with force and arms, &c., on, &c., committed the trespass mentioned, omitting the usual statement of *alia enormia*, and the words "*against the peace of our Lady the Queen*," on account of which omissions the defendant demurred.

The plaintiff moved to set the demurrer aside as frivolous.

Com. Dig. Pleader, 3 M. 31; Lord Raymond, 936; 2 Salk. 605; 4 Anne, ch. 16; 1 Ch. Pl. 402 (note c.); 3 T. R., 157; 2 N. R. 161; 3 Dowl. 2; 6 Dowl. 76; 1 Ld. Ray. 38.

ROBINSON, C. J.—I can conceive no demurrer frivolous if this is not. But it is difficult, as the works of practice admit, to shew precisely what the judges meant by the words frivolous demurrer in their rules. Objections that may hold on special demurrer, may yet be the most frivolous possible.

In applying the rule, the courts seem to have held generally, if not always, that if the demurrer will hold, though only on special grounds or for mere form, it cannot be set aside under the rule as frivolous, however trifling the objection; so also if there is even a doubt, so that there is really some point to be urged.

In this view, which is perhaps the only one that

can be satisfactorily carried into effect, though it does not entirely enter into the idea of what is meant by "frivolous," the only question is, whether the want of *contra pacem* is not fatal on special demurrer.

Mr. Chitty treats it as doubtful in a note, vol. 1, page 406, though he advises the insertion of the words. Lord Raymond, 936, would seem to determine the objection to be good on general demurrer, and I thought the 4 Anne, ch. 16, decisive on the point, where it says that the omission of *contra pacem* shall not hurt, *unless assigned specially* as a cause of demurrer, which would seem to imply that where so assigned, it must prevail; but 5 W. & M. ch. 12, abolishes the fine to the king for the trespass which had occasioned the *contra pacem* to be inserted, and I certainly think, that after that the averment should have been held to be unnecessary, either in form or substance, and so that the objection would stand on the same ground as in regard to "pledges to prosecute," which being now unnecessary, it has been held (3 T. R. 167), that the inserting it ceased to be matter of law, where the pledges themselves ceased to be matter of substance; then this being so, the argument from 4 Anne, ch. 16, fails, because that says equally of "pledges to prosecute" as of "*contra pacem*," that the omission shall be cured unless specially assigned in the demurrer. (See as to pledges to prosecute, 1 Ch. Pl. 437.)

On the whole, considering that there are some cases where the want of "*contra pacem*," even since the fine was abolished (5 Wm. IV. ch. 12),

has been held bad on special demurrer, though I cannot tell why, I have been inclined to say to the plaintiff in this case, that he might amend on paying 1s. costs, and discharge this demurrer without costs; but considering that 3 T. R. 157, is since any of those cases, and so also 2 H. B., 161—and considering that the *cestuy pecens* can now be no more necessary than pledges to prosecute, and that nothing can be more frivolous in fact than the objection, I came to the conclusion to set the demurrer aside.

See Lord Ray. 936; 2 Salk. 645; 4 Anne, ch. 16; 1 Ch. Pl. 402; 3 T. R. 157; 2 H. B. 161; 3 Dowl. 2; 6 Dowl. 76; 1 Lord Ray. 39.

ROBERTS ET AL. v. FOX ET AL., BAIL OF M'ALVERY.

Bail-piece—Exoneretur—Irregularity—Laches.

Where the plaintiff, after service of notice of application, allowed an exoneretur to be entered on the bail-piece without opposition, and then, six years afterwards, applied to rescind the order for the exoneretur for irregularity—the application was refused, on the ground that the plaintiff's acquiescence in the order for six years, must be considered as waving the irregularity and discharging the bail.

Motion, in Michaelmas Term, 13 Vic., to shew cause why the rule absolute, made in the cause of William Robertson v. William M'Alvery, in Hilary Term, 1843, ordering an exoneretur to be entered on the bail-piece, and the exoneretur thereon entered, should not be rescinded and set aside, on the grounds that the same were granted and entered respectively, after judgment recovered in this cause, and execution thereon issued and the money thereunder levied.

This motion, by consent of parties, was ordered to be argued before the judge in chambers, and *Hodges* moved rule absolute.

It appeared by the affidavits and papers filed, that the plaintiff arrested M'Alvery for a debt due to him; that Fox and Harris became bail to the sheriff, and afterwards became special bail; that in August, 1841, they surrendered M'Alvery to the sheriff of the Newcastle District; and that James Robertson, the attorney of plaintiff, was aware of such surrender.

No certificate of render was given by the sheriff, and it did not appear that any measures were taken to have an exoneretur entered on the bail-piece, and thus ensure an effectual discharge. Subsequently, Thomas M'Alvery and Henry M'Alvery became special bail for William M'Alvery; and notice having been given, they justified, and the defendant M'Alvery was discharged from close custody, by order of the late Mr. Justice Hagerman.

It was sworn that the plaintiff, on hearing that the M'Alverys had become bail, remarked, that either of them was good bail for the amount due him. Judgment being obtained against M'Alvery, and the *ca. sa.* returned *non est inventus*, the plaintiff proceeded by *scire facias* against the defendants, as if they were still the bail in the action; and two nihils being returned, a judgment was obtained against the defendants, without their being aware of their liability or any proceeding against them.

An execution was issued for the amount of debt and costs, and the whole amount levied from the

goods of the defendant Fox. Of the amount levied, the sheriff of Newcastle, by direction of plaintiff, applied 30*l*. to the payment of some demand in his hands against him, and a balance of 16*l*. 6*s*. 11*d*. still remained in the sheriff's hands.

In Michaelmas Term, 1843, after the levy, and while the above balance was in the sheriff's hands, the defendants applied to have an exoneretur entered on the bail-piece, and to stay all further proceedings thereon, on payment of costs. Proof being then adduced of the render by the defendants, and the application not being opposed on the part of plaintiff, as appears by the affidavit of James Robertson, his attorney, the plaintiff being advised "that the same was useless and inoperative as far as the claims of plaintiff were concerned in this cause," the rule to enter an exoneretur on the bail-piece was made absolute. Since that, the sheriff had paid over to Fox, from whom it was levied, the balance remaining in his hands, and an ineffectual attempt had been made to recover from the plaintiff the amount of the 30*l*. applied to his use.

The plaintiff, with a view to entitle himself to the balance of the execution, now, after a lapse of upwards of six years, moved to rescind the order to enter an exoneretur on the bail-piece.

McLEAN, J.—From all the circumstances, it is manifest that the present defendants ought, if they had applied promptly, to have been relieved against the judgment on *scire facias* obtained by plaintiff against them, when he was well aware, from the

notice of subsequent bail served upon him, that they had ceased in fact to be the bail to the action.

The plaintiff seems to have taken advantage of the omission to have an exoneretur entered on the bail-piece, and has proceeded to recover his debt against parties that he was aware were not liable for it; and when these parties applied in 1843, as they ought to have done long before, to have an exoneretur entered, he takes no notice of the application, though served with a rule to shew cause, and allows the exoneretur to be entered without opposition. He now comes forward, after having acquiesced for six years, and moves to rescind the order—or in other words, he now, after the rule has been absolute by his default, at the end of six years, comes into court, and expects to be allowed to shew cause against it! He is now too late, and must seek redress in some other mode.

Whether the order to enter an exoneretur should or should not have been made in 1843, cannot now be properly inquired into. It was made by the acquiescence of the plaintiff, or at all events without being opposed by him; and it is quite consistent with the ends of justice, if it has the effect of relieving the defendants from the payment of monies to which they ought not in equity or law to be liable.

Even if irregular, it does not follow that after so long an acquiescence it is incumbent on the court now to rescind it at the instance of a party who omitted at the time to make any opposition under the impression that it must be ineffectual in reference to

plaintiff's claim more especially, as the rescinding such order can only have the effect of working further injustice to the defendants who have paid a sum of 30*l.*, which they ought not to have been called upon to pay.

The rule must therefore be discharged, with costs.

Doe dem. Meyers v. Robertson.

Judgment as in case of a non-suit—Peremptory undertaking—Rule to discontinue—Costs.

The plaintiff having failed to proceed to trial upon a peremptory undertaking, the defendant moved to rescind the order for discharging the rule for judgment, &c., to make absolute the original motion for judgment, as in case of a non-suit. The plaintiff then obtained an order to discontinue on payment of costs, but did not take out an appointment to tax costs. The defendant gave notice of taxation, but not attending, the costs were not taxed. The plaintiff on this ground opposed the application for judgment, &c.; but *held*, by McLean, J., that it was the duty of the plaintiff to get the costs of the discontinuance taxed and paid, whether the defendant attended or not; and that, not having done so, the defendant was entitled to have his motion for judgment, as in case of a non-suit, made absolute.

The plaintiff not having brought his cause to trial, pursuant to notice, the defendant applied for and obtained a rule nisi for judgment, as in case of a non-suit, which was discharged on the peremptory undertaking.

Having failed at the next assizes to bring down the cause to trial, according to his undertaking, the defendant moved to rescind the former orders, and that the original motion for judgment, as in case of non-suit, might be made absolute.

The lessor of plaintiff then moved for leave to dis-

continue, on payment of costs, and obtained an order for that purpose.

It did not appear that any appointment was taken out for the purpose of taxing costs, or that there was any understanding between the parties on the subject.

The defendant's agent gave notice of taxation to plaintiff's agent, and it appeared that the parties attended, but that after several enlargements of the time, the taxation under that notice was abandoned, chiefly by the default of the agent of defendant's attorney in attending.

The lessor of plaintiff, under these circumstances, opposed the application for judgment, as in case of non-suit.

McLEAN, J.—It was for the lessor of the plaintiff to pay the costs, and, before payment, to get them taxed by the proper officer, which he could and ought to have done, whether the defendant's attorney or his agent attended or not; and as the plaintiff has delayed and wholly omitted to do what was necessary on his part, the defendant is not required to wait for a further period, and is entitled to have his rule made absolute for judgment, as in case of a non-suit.

If additional costs are caused to the lessor of plaintiff by this mode of proceeding, he has only to blame his own laches in not taking the proper and regular mode of proceeding, to discontinue on payment of costs.

Rule absolute.

KETCHUM v. RAPELJE, SHERIFF.

Declaration varying from process—What must be shown in defendant's affidavit to set aside declaration—Power of judge to give plaintiff leave to declare as he has done.

Where the declaration is in *debt*, and the process in *case*, the declaration will be set aside.

It need not be shown in the affidavit to set the declaration aside, that the *original* declaration varied from the process—or whether the defendant has appeared or not to the process served.

A judge in chambers will not allow the plaintiff to declare as he has done, notwithstanding the variance between the declaration and the process.

Motion to set aside declaration for irregularity, on grounds disclosed in affidavit—the declaration being in *debt*, and the process in *case*.

The declaration was in debt for an escape of a prisoner, arrested on a *ca. sa.*

The copy of the process served was "trespass on the case," generally.

The affidavit shewed the copy of the declaration served in the cause.

It was objected, that the defendant should have shewn that the *original* declaration varied from the process.

ROBINSON, C. J.—I think it will be assumed, unless the plaintiff shews the contrary, that his copy agrees with the original.

It was further objected, that it was not shewn whether the defendant had appeared or not to the process served.

ROBINSON, C. J.—The defendant swears that he was served with no other copy of process than the

one he produced, and it appeared to be in this cause; and as the plaintiff had declared in the cause, we must suppose the defendant has appeared, or plaintiff for him, or else his declaration would be irregular. —1 Ch. Pl. 269.

I am of opinion that the declaration must be set aside as irregular, there being no process to warrant it, and nothing being shown or pretended to be shewn to the contrary.

I am asked to allow leave to plaintiff to declare as he has done, notwithstanding this variance from the process; but I think I could not properly do that.—2 Dowl. 95.

HETHERINGTON, ADMINISTRATOR OF HETHERINGTON, V. WHELAN AND THOMPSON.

Arrest—Bailiffs—Service of a copy of the writ on defendant.

Where the warrant to arrest is addressed to two bailiffs, as if jointly, one may nevertheless arrest.

An informality in arresting one of two defendants, cannot be made a ground of objection by the other.

A party when arrested, if he refuses to receive a copy of the writ which is offered to *him*, will not be allowed afterwards to make it a ground for his discharge, that a copy of the writ was not left with him.

On the 4th May, 1850, a summons was granted to set aside the arrest of defendant Thompson, with costs: 1st. Because he was not, at the time of arrest, or at any time since, served with a copy of the writ, as required by the statute.

2adly. Because the sheriff's warrant was addressed to Hugh McMillan or John Thompson and Alexander Park, and was executed by Thompson alone.

3rdly. Or to set aside writ or arrest, because the

affidavit only authorised an arrest of one of the executors (Thompson) while the capias was issued against both, and the sheriff's warrant was against both; and there was no direction in the writ or otherwise to arrest only one defendant, and to serve the other with a copy.

The defendant Thompson swore, that on the 16th April, he was arrested by one John Thompson, under a *pretended* warrant from the sheriff to McMillan, John Thompson and Alexander Park, and is now a prisoner under arrest; and that neither at the time of the arrest, nor at any other time, was he served with a copy of the said writ of *ca. re.*, or with any other paper in this cause.

Thompson, the bailiff, swore that he did, on 16th April, by virtue of a sheriff's warrant issued by the sheriff, under the authority of the writ in this cause, arrest the defendant Thompson; that at the time of making the arrest he read over to the defendant Thompson the original writ of *capias* before mentioned, and that the said writ and the warning to the defendants and the other endorsements upon the said writ were by him read to the said defendant at the same time; that at the time of the arrest he offered to the said defendant a copy of the said writ of *ca. re.*, and that defendant refused to receive the said copy from him.

Robinson, C. J.—There is nothing, I think, in the second or third objections.

Any one of the bailiffs could make the arrest, notwithstanding the authority being given to two as if jointly.—2 Taunt. 160.

As to the third objection, if there were any informality as regards the defendant Whelan, it does not concern the other defendant, and he cannot make it the ground of objection. For all that appears on the face of the capias and the warrant, Whelan might and should have been arrested, but he was not, and I supposed in consequence of a direction given by the plaintiff's attorney to the sheriff, as the 24th clause of 12 Vic., ch. 63, contemplates. Whether this direction was given in the proper manner or not is of no consequence to this defendant.

The first objection is the only one pressed. I consider that if this were a case of a summons to be served on the defendant, or a declaration in ejectment, the service could not be recognized as sufficient, because, although the defendant rejected the copy, still it should not have been taken away by the bailiff, it should have been left on the ground, or on a table, or somewhere in view of the defendant, and he might have looked at it afterwards or not as he thought proper. That would have been all the bailiff could have done, and would have been held sufficient. When the bailiff, on the other hand, takes away with him the declaration in ejectment, or the copy of the summons which he meant to serve, he leaves the defendant without the means of knowing any particulars necessary to guide him in the steps he is to take.

But in the case of an arrest, the defendant, though without a copy of the writ, is still in as good a situation as he was in all cases of arrest before the

late act. That act (sec. 24), in order to give him an additional facility of protecting his interest, beyond what had always before been thought sufficient, provides that a copy of the writ and endorsement shall be given to the sheriff, and that he shall upon or forthwith after the execution of the process, cause a copy to be delivered to the defendant.

The question is, whether, when the defendant for whom this advantage is provided rejects it and refuses the copy, he shall be allowed to complain of it afterwards as an irregularity, that it was not left for him notwithstanding, and make that a ground of moving for his discharge, and of leaving other parties exposed to actions of trespass. I am not willing myself to support him in such a course. If it were a summons which had been so dealt with, it could not strictly be held to have been *served*, and so of a declaration in ejectment, or any other declaration indeed; but here the defendant has been arrested, the command of the writ has been complied with, and the additional advantage of leaving a copy of the process, if the bailiff's account be true, he has waived.—See Arch. Pr. 156, 221.

Discharged without costs.

SHAVER ET AL. v. BROWN ET AL.

Frivolous demurrer.

Declaration, debt on bond, conditioned for the defendants abiding by the decision of the Court of Queen's Bench on an appeal; condition set out on oyer; plea, general performance; replication, setting out the [illegible] breach of condition; demurrer, upon several grounds mentioned below. On an application to set aside the demurrer as frivolous, ROBINSON, C. J., discharged the application.

The defendants set out the condition on oyer, which recited that a cause was pending in the District Court, in which Brown and Curry were plaintiffs, and Shaver and Elmer defendants, and a verdict had been rendered therein in favour of plaintiffs; and that defendants were dissatisfied with the charge of the judge of the District Court, upon the law and facts submitted to the jury, and upon the ruling of the judge upon the trial of the said cause. And the condition was, that if the defendants should abide by the decision to be made in the Court of Queen's Bench, and pay all sums of money and costs, as well of the suit as of appeal, as should be taxed and accorded to the opposite party, then the bond to be void.

The defendants pleaded *non est factum*; 2nd, general performance.

The plaintiffs replied, setting out the pendency of the suit, a verdict rendered for plaintiffs for 21*l.*, &c., on the 5th April, 1849; that the defendants were dissatisfied with the charge, &c. (as stated in the bond), and desired to appeal, &c.; that the judge directed the bond now sued on to be given; that afterwards—viz., on the 12th June, 1849—the bond was produced to the judge, and required him to certify the proceedings; that the plaintiffs did thereupon, on the same day, certify to the Court of Queen's Bench the pleadings in the said suit, and all the motions, rules and orders that had been made, granted or refused therein—whereupon the same matter was then set down for argument, and prece-

duke to the practice of the court, by the defendants, at the next term of the said Court of Queen's Bench, to wit, in Easter Term, 1849; that the Court of Queen's Bench did afterwards, in Easter Term—viz., on the 29th June, 1849—upon hearing the said matter and appeal, order and direct that the said matter and appeal be dismissed, with costs, to be paid by the applicants to the respondents; that afterwards—to wit, on the 3rd July, 1849—the costs were taxed by the Clerk of the Court of Queen's Bench—to wit, Charles Coxwell Small, Esq.—at 6*l.* 1*s.* 4*d.*, and that he gave the allocatur of the same, &c.; that afterwards—to wit, on the 4th of September—the rule and allocatur were produced by the plaintiffs in this suit to the District Court of the District of Victoria, and judgment was thereupon entered in the said court for these plaintiffs for the verdict and the costs, including the costs of appeal, &c., taxed, &c., of which these defendants had notice; that these plaintiffs recovered judgment in the District Court against defendants, for 52*l.* 0*s.* 6½*d.*, as by the record, &c., of which these defendants had notice, and which judgment was still unsatisfied, and that defendants have not paid the said 52*l.*, &c., to plaintiffs, &c.

The defendants demurred specially, assigning for causes—that the declaration did not shew any good or effectual appeal, and shewed that an attempt was made to appeal against the charge of a judge, without first applying to the court in banc to grant a new trial; that the allegation that the judge certified *all*

rules, orders, &c., was too vague and indefinite; that it did not appear what, or whether any, matter, question or bond was made the subject of appeal, or set down for argument; that it did not appear that the Queen's Bench affirmed or reversed the decision of the judge, or disposed finally of the recital, or made any order what was to be done below—so that the subsequent entry of judgment and taxation of costs were unwarranted; that the appeal was stated to have been set down for argument in Easter Term, 1849, which was not the *next* term after the judge had certified the proceedings, as the statute required, but that the certificate appeared to have been given in the same term; that it was not shewn that the judgment entered up in the District Court was on the verdict, or matter which formed the subject of the appeal, or that the acts were the acts of the appeal, or of the action, or were taxed, or awarded to be paid to plaintiffs, nor how much the said costs contained in the recovery amounted to.

The plaintiffs moved to set aside the demurrer as frivolous.

ROBINSON, C. J.—As there is an issue in fact, and [illegible] will therefore not necessarily be delayed by this demurrer, I will not set it aside, but let it stand, though I think at present there will be found to be no good cause assigned.

Some of the points are new, and may bear an argument.

Doe dem. Mathews v. Roe.

Rule for landlord to defend—Hab. fac. pos. taken out afterwards, without leave of the court—Setting aside hab. fac.

Where a rule has been taken out and served for the landlord to defend, the leave of the plaintiff, though he may sign judgment against the casual ejector, has no right to take out a *hab. fac. pos.* without leave of the court.

A summons was obtained to shew cause why the *hab. fac. pos.* issued in this cause should not be set aside, with costs, for irregularity, on grounds disclosed in affidavits filed; or why proceedings on it should not be stayed, on the same grounds, on the consent, appearance and plea by Elizabeth Riddell being now filed.

In Hilary Term (7th February, 1850), Elizabeth Riddell obtained the usual order, on affidavit to the court, to defend as landlady with the tenant, and on the 8th of February served a copy of the rule, by putting it under the door of the plaintiff's attorney's office—the same being sent within office hours—together with a copy of the plea. *Mr. Bell* made affidavit, that on the day on which he moved the rule for Mrs. Riddell to defend, he left the consent rule, with appearance and plea, with the clerk, *in court*, to be filed; that the clerk omitted to mark them filed; that on the next morning the plaintiff's attorney was made aware of the intended defence, notwithstanding which he signed judgment, and had taken out execution, and placed it in the sheriff's hands; that defendant had a good defence on the merits; and he also annexed a copy of the rule nisi for judgment, taken out by plaintiff's attorney, which was irregular, being

to plead within the first "four" (omitting "days.") The rule to admit the landlady to defend was in the usual form, containing the condition, that the plaintiff should be at liberty, nevertheless, to sign judgment against the casual ejector; but that "execution thereon is stayed until the court shall further order."

The plaintiff's attorney made oath, that in March last he searched in the Crown office, and found no consent rule or appearance, and was told there was none—there was no entry in the ejectment books; and that on the 24th of April he searched again, and found nothing filed or entered; and on the 25th of April, he signed judgment, and took out writ of possession, which was in the sheriff's hands, but not executed.

He did not state that he did not receive the rule and plea left in his office on the 8th February, and did not shew that he had any leave of the court to take out the *hab. fac. pos.*

ROBINSON, C. J.—Under these facts, the plaintiff's attorney had, no doubt, a right to sign judgment against the casual ejector; and as to that, nothing wrong is done. But he should not have taken out a *hab. fac.* without leave of the court, and more especially when he seems to have received the copy of Mrs. Riddell's plea, and does not deny it, because that shewed him that the landlady meant to defend.

The defendant's attorney swears he believed the plaintiff's attorney was served with a copy of the rule. As to service of the rule and plea, by putting

them [illegible] cases, see 2 Dowl. 25; 1 Dowl. N. S. 778, 843; 2 Dowl. 396; 4 Ad. & El. 82; 7 Jurist, 795.

Ordered, that the *hab. fac.* be set aside as irregularly issued, for want of leave of the court—and with costs, unless the plaintiff's attorney will swear that he had no knowledge of the rule placed under the door of his office.

Hab fac. set aside, but not with costs.

WRIGHT v. IRWIN.

Setting aside common bail, and all subsequent proceedings to notice of assessment, without costs, because the defendant was not served with process—on affidavits shewing defendant's brother had been served with process, and that defendant never had knowledge of such service, and that the wife of the defendant had been served with the declaration and demand of plea.

A summons was obtained on the 4th October, 1849, to shew cause why the common bail entered by plaintiff for defendant, the declaration filed, and all subsequent proceedings, should not be set aside for irregularity, with costs, on the ground that the defendant was never served with process.

The defendant made affidavit, that he was served with notice of assessment on the 24th September; that he never was served with a copy of any writ or process in this cause—neither had any writ, or service of any writ in the cause, ever come to his knowledge; that he never had been served with a declaration or demand of plea in the cause, and that

such paper had not been left at his dwelling-house, or ever came to his knowledge; that he had been served with no other paper in the suit, nor had knowledge of the service of any paper at any time in this suit, except the notice of assessment.

The defendant swore, further, that the reason he did not move sooner was, that he considered that he could do nothing in the matter until the Assizes. It was on the first day of the Assizes that he made his application.

Christopher Irwin, a brother of the defendant, made oath, that on the 4th of August, 1849, he was served with a copy of a process in this cause, and told the plaintiff at the time that he was not the defendant; that the bailiff nevertheless insisted that he was the defendant, and would not take back the copy; and that he (the deponent) afterwards burnt it.

He swore, further, that he never communicated the service of the copy to this defendant, and that he believed the fact never came to his knowledge.

On the other hand, it was sworn by the [illegible] that he received a description of the defendant from the person who gave him the writ, and went to his place of abode and served the copy on a person who answered the description; but the person so served told him at the time that he was not the defendant, but would not tell his name.

He swore that he *believed* that person was the defendant, and that he served the defendant with a copy of process—by which he only meant to say that he *believed* he did serve the defendant.

Edward Hughes swore, that on the 27th of August, 1849, he served the defendant with a copy of a declaration and demand of plea in this cause, by leaving the same with his wife at his usual place of abode; that on the 26th of September, he served the defendant personally with a notice of assessment, when the defendant told him that his brother had received a copy of a writ, issued in the above cause, but would not shew it to him, and that he was displeased with it, as he wished to defend the action; and further, that when he gave the copy of declaration to defendant's wife, she stated that defendant's brother had been served with a copy of a writ in the cause, instead of her husband the defendant.

ROBINSON, C. J.—On these facts, as stated in the affidavits, I have no hesitation in making an order to set aside the proceedings, as it is positively sworn that the defendant has never been served with process, and that the process has never come to his hand, nor any knowledge of it obtained, before that judgment was signed. But I do not set it aside with costs; because it is sworn, and not denied, that the copy of declaration was served in August on the defendant's wife, on the premises, and personal service of declaration is not requisite.—12 M. & W. 503; 7 Bing. 327; 2 Dowl. P. C. 784; 1 M. & W. 574; 2 U. C. R. 270; 9 Jurist, 246.

ROBT. McKAY AND JAS. McKAY v. WM. McKAY.

Adverse claim to property seized in execution—Issue—Indemnity—Sheriff.

Where an adverse claim is made to property seized in execution, the judge in chambers will direct an issue, unless the execution creditors give the sheriff a sufficient indemnity.

A summons was obtained against the plaintiffs, to shew cause why they should not appear and maintain or relinquish their claim to the property taken in execution in this cause, and why the judge should not make such order in this cause as to him should seem fit, pursuant to the statutes 7 Vic. ch. 30, 9 Vic. ch. 56, secs. 4, 5, 6.

The sheriff swore that he had a *fi. fa.*, indorsed to levy 503*l.* 11*s.* 2*d.*, in this cause, and on the 8th of March went and seized defendant's goods and retained possession; that on the 10th of March, one Farish served him with a notice of claim, in writing, under an assignment made to him and Robert McKay, one of the plaintiffs, by this defendant, of all his goods, stock-in-trade, &c., forbidding the sale, and telling him that he would hold him responsible, &c. The sheriff further swore, that he apprehended an action by Farish and Robert McKay, if he proceeded to sell; and that he made this application in good faith, at his own expense, and for his indemnity only.

It seems to be conceded that the assignment was made before the *fi. fa.* was delivered to the sheriff, the evening of the day before—that is, it was executed then. The *fi. fa.* was delivered on next day (7th March); the sheriff seized on the 8th March.

Farish swore that he and his partners were credi-

tors of the defendant, to the amount of 700*l.*; that the goods were delivered to him when the deed was executed; and that he left them in defendant's possession, in Guelph, till Farish should see whether the creditors would agree to it: that on his return to Hamilton, he called on the plaintiff Robert McKay, who declined, and on some other creditors, who promised to execute, but did not; and with respect to some of them, he believed the reason was, because, as they said, their debts had been included in the confession taken by plaintiffs in this action, and they expected the assignment to be set aside. Whatever the reasons were, the assignment was not executed by any other creditor than Mr. Farish himself, who signed in the double capacity of trustee and creditor, and by a Mr. Young, as assignee of the estate of Farish, Sons & Co.

The consideration was stated to be the release by the creditors of the sums set opposite their names, and no sum is set opposite to the name of Farish, the only creditor who does sign.

The assignment was of all defendants' stock-in-trade, household goods, furniture, implements, debts, sums of money, books of account, and other things due and owing to the said William McKay, and all the personal estate and effects whatsoever of the said William McKay, to have, hold, &c., in trust, to sell, and, after retaining all expenses, to apply the residue of the moneys towards payment of the several debts due to the several persons *partners thereto, pari passu*, and without any preference or priority; and

after paying the whole of such debts, then to pay the surplus to William McKay.

Farish swore, after taking a delivery of the goods, &c., he left them in the possession of William McKay, till he should return to Hamilton, and see if the other creditors would assent. As they declined, it seems, and preferred letting the execution take its course—one of the trustees being among those who refused—and being himself a creditor and a plaintiff in this action, the result would be, if the assignment could hold, that Farish would have his debt in full, to the exclusion of every other creditor—even of those who had got execution—and the surplus, if any, would be paid over to William McKay, and the other creditors might get nothing.

Robert McKay admitted that the assignment was taken by him and James McKay, to save his own debt and the debts of other creditors. *When* it was taken, does not appear: it may have been on or about the 6th of March, and a race between Robert McKay and the others, against Farish, to get their debts paid.

There were affidavits of William McKay, tending to throw discredit on the assignment, by shewing that the delivery was not given, but expressly withheld, till it should be ascertained whether Robert McKay would act in the trust, and the other creditors would assent.

Robinson, C. J.—The bill of sale, when produced, and the statements undisputed, seem to shew a case in which the adverse claim cannot be supported,

and in which the sheriff could safely proceed; but, nevertheless, as the claimant is entitled to try that point, and it ought not to be tried at the expense of the sheriff, the proper course will be that taken in Allen et al. v. Evans, 3 Law Jour. N. S. Exch. 59—namely, to direct an issue, unless the execution creditors give a satisfactory indemnity to the sheriff.—13 M. & W. 816; 3 Law Jr. N. S. Exch. 29; 8 Scott, 804; 1 Dowl. 523; 3 Dowl. 640; 6 Dowl. 136.

PERRY v. LAWLESS.

Affidavit of merits—Sufficiency of.

Where a defendant sets out certain facts in his affidavit, and then swears, that *he is advised* (not that *he believes*) that he has a good defence to the said action on the merits; *Held*, *per* Robinson, C. J.—affidavit sufficient.

A motion was made in this case to set aside the interlocutory judgment on an affidavit of merits.

The defendant swore that he was sued as maker of a promissory note; that he believed he never made it, and that if he was got to touch the pen that made the mark as his, he was intoxicated, and did not know what he was doing; and that he did not then owe the plaintiff more than *11.* or *8l.*, if so much, and on this account he resisted payment, "as he was advised he had a good defence to the said action on the merits."

It was objected that the affidavit was not sufficient as to merits.—5 Dowl. 568.

ROBINSON, C. J.—I think the affidavit is sufficient. The objection is, that he does not swear he *believes* he has, &c., but only that he is *advised*. But this is

not a more general affidavit of merits. The defendant discloses his defence, which certainly, if true, must be a good defence. We know that if proved it would be a legal defence, but, not being a lawyer, he may not know that, but swears that he is advised the facts he states are a good defence on the merits, and clearly they would be.

I do not see why the plaintiff should not at once have received the plea which he shows the defendant tendered him, after judgment was signed, when he offered to pay the costs of signing judgment.—5 Dowl. 569.

Rule absolute.

GOING V. ELLIS AND WARING.

Setting aside demurrer for want of marginal note.

A demurrer served and filed without a marginal note of the exceptions intended to be taken on argument may be set aside, and delay in moving to do so will be no objection, so long as the other party has not joined in demurrer.

Declaration against Ellis as maker, and Waring as indorser of a promissory note in the common form.

On the 7th of September, 1849, the defendant filed a general demurrer.

On the 23th November, 1849, the plaintiff applied to set aside the demurrer, there being no marginal note of any ground of demurrer, either on the copy served or the demurrer filed.

The defendant, in showing cause, contended that this was a mere irregularity, and that plaintiff was too late in his application.—7 Dowl. 529.

ROBERTSON, C. J.—As the object is to compel the

party demurring to assign some ground for it, that the court and the opposite party may know what are the objections intended to be urged, I think it reasonable to hold, that delay in moving to set aside the demurrer ought to be no ground of objection so long as the other party has not joined in demurrer.

I will let the defendant now enter exceptions, if he have any, in the margin of the demurrer filed, since the plaintiff has so long delayed moving; but unless that is done, judgment may be signed.

The Gore Bank v. Gunn et al.

Executors—Costs—Judgment—Fi. fa.—Alias—Reducing amount of costs endorsed on alias fi. fa.

In taking out a writ of *fi. fa.* against executors for costs, the costs directed to be levied must follow the judgment; and where the sum endorsed on the *fi. fa.* is not warranted by the judgment, such endorsement will be referred to the Master, to tax the proper costs, and to reduce the endorsement accordingly.

A summons was obtained to set aside or amend the writ of *fi. fa.* (alias) with costs, the same being to levy of the defendant's proper goods more than the costs in the judgment, or to reduce the indorsement of fees on writs, or to refer it to the Master.

The costs taxed were 14*l.* 5*s.* 11*d.*, and so entered on the roll; verdict, 82*l.* 2*s.* 4*d.*; judgment, 96*l.* 8*s.* 3*d.*

The *alias fi. fa.* was, to levy of the defendant's goods 15*l.* 7*s.* 2*d.*, which, on cause shown, was admitted to include the fees on the *former* writ as the only means of recovering the same. It was indorsed for 96*l.* 8*s.* 3*d.* and interest; 3*l.* 2*s.* 11*d.* for this

former writ, sheriff's fees, postage, and his own fees.

It was objected—

1st, That the writ was irregular on the face of it, as to the amount of costs.

2nd, That the fees endorsed for writs—3*l.* 2*s.* 11*d.*—were excessive.

3rd, That the fees on registering the judgment were not allowable, but were included in the 3*l.* 2*s.* 11*d.*

The difference between 15*l.* 7*s.* 2*d.* and 14*l.* 5*s.* 11*d.*, is also included in the 3*l.* 2*s.* 11*d.*, as appeared by the indorsement for 96*l.* 8*s.* 3*d.* and interest, which excluded it.—1 C. M. & R. 831; 8 M. & W. 319; 1 Q. B. 914; 2 C. M. & R. 354; 11 L. J. 173, C. P.; ib. 183, Q. B.; ib. 297, C. P.; 2 Dow. 414, 360.

MACAULAY, J.—The writ should follow the judgment, and no authority has been cited for the course taken here, of adding to the amount of costs to be levied *de bonis propriis* in the plaintiff's discretion.

The plaintiff may, however, have leave to amend the *fi. fa.* on payment of costs of this application, and let it be referred to the Master to tax the fees indorsed for incidental expenses (2 Geo. IV. ch. 1, sec. 19) beyond the amount of costs as taxed and incorporated in the judgment, and let the indorsement be then reduced accordingly.

Rule absolute.

WARD V. STREET.

Demurrer set aside as frivolous—Promissory note payable to bearer—Marginal note to copy of demurrer served.

The rule requiring a marginal note of objections on demurrer, applies to the copies served, which may be set aside without such note. The application may be to set aside the service of the demurrer.

Demurrer to a declaration on a note payable to bearer—on the averments of time as to bringing of action and assignment of note to plaintiff—held frivolous.

On the 12th of December, 1849, a summons was obtained to set aside the demurrer as frivolous, or the service of the demurrer, the copy served wanting any marginal note, with costs.

The declaration was dated the 21st of November, 1849. In the second count the plaintiff declared as bearer of a promissory note made by the defendant on the 10th of April, 1847, for 37*l.* 10*s.*, payable to Griffin or bearer, on the 10th of February then next, to wit., the 10th of February, 1848; "and the said Griffin afterwards duly assigned and transferred the said note to the plaintiff, who thereby then became and was and still is bearer thereof," &c.

Special demurrer (without marginal note to the copy served), on the ground that it was not alleged that the time for payment of the said note had elapsed before the commencement of this suit.

It was contended for the defendant, that the rule of court requiring a marginal note did not apply to the copy served, the rule only speaking of the demurrer *filed* or *delivered*, which related to original demurrers, and not to mere copies—at all events, that the application should have been to set aside the

copy served, and not merely the service, which may be all right in the absence of proof that it varied from the original filed as respected the marginal reference.

MACAULAY, J.—I think the rule relates to copies of demurrers served—that they are comprehended under the word "delivered." The practice requires demurrers to be filed and served.

I also think the application sufficient to set aside the service. The plaintiff does not object to the original filed, which may be all right, and the service only objectionable. On this ground, therefore, the summons must be set aside.—2 M. & W. 240; 5 Dowl. 549.

2nd. As to the demurrer itself, if looked into in this state of the proceedings, it must be deemed frivolous, it having been held in our court, following decisions in England, that the court will not look out of the declaration, but will intend that it imports the time when the action was brought. The date of the note and period of its becoming due, compared with the date of the declaration, shew that it was due long before action brought. On this ground also the application should prevail.—3 Dowl. 732; 2 M. & P. 91; 1 C. B. 849; 3 D. & L. 199.

3rd. It was objected in argument, that no specific time was laid to the allegation of assignment—only "afterwards," which may be since action brought. There is reason for a question here, whether time is sufficiently laid to that material allegation, but it is only a ground of special demurrer, and it is not objected to in the special demurrer. Substantially,

the declaration imports an assignment before suit, i. e., before the date of the declaration. It says, that being afterwards assigned, the plaintiff then became, and was, and still is the bearer—"was" importing a former period.—2 C. M. & R. 687.

HALFPENNY v. KELLY.

Revision of taxation ordered—defendant's attorney not having been present at taxation, and the items being questionable. *Semble*, that if the defendant does not rule the plaintiff, or attend taxation, and applies afterwards to revise an ex parte taxation, he will only be allowed to do so on payment of the costs of the other application and of such revision.

On the 7th January, 1850, a summons was obtained to revise taxation. The costs were taxed and judgment entered at Kingston, Midland District.—See stat. 12 Vic. ch. 49; 8 Vic. ch. 26, sec. 3.

It was contended that the defendant should have sued out a rule for taxation before the master, before taxing on the judgment. It does not follow that taxation may not be revised in either case.—2 Dow. 689; 3 M. & W. 552; 3 A. & E. 605; 2 Dow. 49; 7 M. & G. 125.

Notice of taxation was denied, but affirmed by contra affidavit.

The principal items were costs and expenses of a commission to examine witnesses not used at the trial.

MACAULAY, J.—I think an order for the revision of taxation should be granted, as the defendant's attorney was not in point of fact present at the taxa-

tion, and some of the items allowed are questionable.

If parties do not rule the plaintiffs, or attend taxation, and object after notice to their attorney, or his agent, it will become proper that a revision, after an exparte taxation under such circumstances, should be only on payment of the costs of the other application and of such revision.

BROWN AND WIFE v. DAVLIN.

The summons to amend declaration need not specify the amendment required. It is sufficient if the grounds of amendment be mentioned in the notice of the intended application.

On the 10th of April, 1850, a summons was obtained to shew cause why, on reading the affidavit and papers filed, the declaration should not be amended.

Notice of the intended application was proved, and that the amendment required had reference more particularly to the allegation, or rather omission of it, in the declaration that the said Maria Lubert (girl seduced) was the servant of the plaintiffs, or one of them.

It was objected for the defendant, that the summons pointed out no amendment, and was uncertain, &c.: that the record had been passed, and was entered for trial: that the trial had been put off by the defendant, who undertook to pay the costs of the day at the last assizes, which the plaintiffs were seeking to enforce by attachment: and that these

costs should be waived as a condition of the amendment, or he made costs in the cause.

MACAULAY, J.—The ground of amendment is pointed out in the notice, and may be specified in the order, if necessary.

SHERWOOD v. MARCH.

Setting aside a plea as being tricky—meant for delay—and not tenable.

On the 15th of December, 1849, a summons was obtained to set aside the 3rd plea with costs, as being bad in law and tricky, meant for delay, and not tenable, &c.

The plaintiff declared as indorser of a promissory note made by one *Burgoyne*, payable to *Crocker*, and by him indorsed to one *McLean*, who indorsed to *defendant*, and who indorsed to the *plaintiff*.

The 1st plea was that Burgoyne did not make the note.

2nd. That the defendant did not indorse *modo et forma*.

3rd. That Burgoyne made the note for the accommodation of *Crocker*, and without value or consideration therefor, of which the *defendant*, at the time the note was indorsed and delivered to him, as in the declaration mentioned, had notice—verification.—7 Dow. 849; 8 Dow. 238, 511, 76; 1 Arch. Prac. (1847), 265; 10 L. J. 473; 3 Taunt. 339; 1 Dow. 643; 4 Bing. 663; 9 Dow. 537; 10 A. & E. 19; 10 A. & E. 17; 8 Law J. 204, 96, 206,; 9 Law. J., 7 Ex. 57, C. P.; 4 Dow. 591; 4 Dow. 642;

Cameron's Rules, 40 and [redacted] S. 153; 5 M. & W. 595.

MACAULAY, J.—The plea [redacted] in fact, is clearly bad in law, and may be [redacted] as equivalent to plea false in fact, though an answer to the declaration, or to an improper use of the privilege allowed to defendants, as pleading double, without reference to the court or judge.

A judge, if applied to in England, would not grant leave to add such a plea. It is a plea clearly frivolous on the face of it, and intended for delay, by postponing a final judgment till after a judgment on demurrer next term.

I think I best conform to the spirit of the cases above noted, when taken together, by granting this application.

Application granted.

MATTHIE v. CARLYLE ET AL.

Filing plea in wrong office.

A plea filed in the wrong office is a nullity, and the plaintiff, if not aware thereof, and there be no plea filed in the proper office, may sign judgment.

In this case, the question was as to the effect of filing a plea in a wrong office.

MACAULAY, J.—The filing a plea in a wrong office has been treated as a nullity. The plea is not filed in an office where the plaintiff was bound to search for it or notice it, and it does not appear that he had notice.

To constitute pleading a plea, it should be filed in

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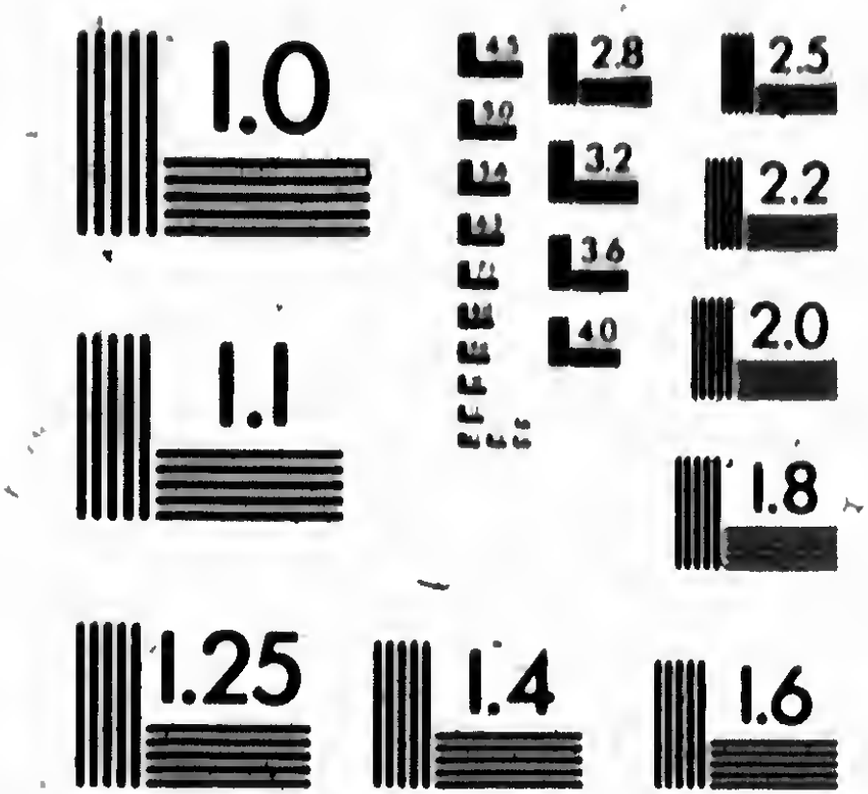

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the proper office, and a copy be served; both must combine to render it a good plea pleaded.

My decision, therefore, entitles a plaintiff to treat a plea filed in the wrong office as a nullity; at all events, to sign interlocutory judgment, if not aware thereof, and there be no plea filed in the proper office.

SUTHERLAND v. RUTHESTE.

Plaintiff refusing to give costs in detail to defendant on an offer to pay debt and costs—Who to pay costs of application for taxation—And on attending taxation.

Where the defendant asks the plaintiff for the amount of costs in order that he may settle, and the plaintiff merely gives the amount, and refuses a bill in detail, the defendant will not be allowed the costs of an application for taxation. *Semble*, it might be otherwise if the defendant paid the amount of costs into court. An order may be had, however, under these circumstances, to compel the plaintiff to refer his bill for taxation, and the plaintiff will not be allowed costs for attending such order. With respect to the costs of taxation the plaintiff will not be entitled thereto unless the amount claimed shall be reduced one-sixth.

This was a summons to stay proceedings on payment of debt and costs to be taxed, and that the plaintiff should pay the costs of this application, on the ground that the defendant offered to pay money, but that the plaintiff's attorney refused to give a bill of costs, merely stating costs to be 9*l.*, or so.

No affidavit was filed in answer.—See 3 D. & L. 513; 4 Bing. N. S. 306; 6 Dow. 335, 373, 432; 3 M. & W. 216; 2 B. & A. 776; 1 Chitty Rep. 441; 1 Dow. 701; 1 T. & G. 503; 8 Moore, 102; 1 C. M. & R. 676; 2 N. R. 473; 2 Dow. 218; 2 C. & M. 315, S. C.; 5 N. & M. 426; 4 Taunt.

227, 255; 2 Dow. 126; 2 Taunt. 203; 5 M. & W. 542; 1 Arch. N. P. 257, 293.

It seemed, that on the 10th inst., Mr. Justice Sullivan made an order by consent for staying proceedings on payment of debt and costs to be taxed by consent, and that the only question remaining was, whether the plaintiff should be charged with the costs of this application, the defendant in his affidavit stating that he offered to pay, and was now willing to pay, Mr. Daniells, but that he refused to give him a bill of costs other than a memorandum that they were 9*l.* 1*s.*, which he deemed an excessive sum.—See 6 Scott N. S. 627; 5 M. & G. 601; 2 Tyr. 455; 2 C. & J. 476; 3 Dow. 421; 1 Dow. N. S. 943; 12 L. Jl. 177; 9 M. & W. 32; 10 Jur. 240; 2 D. & L. 557; Cameron's Rules, p. 11, Title Process, No. 2; 10 M. & W. 83; 12 M. & W. 504; 1 D. & L. 593; 9 Law Jl. Ex. 17; 9 B. & C. 755, and stat. 2 Geo. II., ch. 23, sec 23; 2 Bing. N. S. 142; 1 Dow. 160.

MACAULAY, J.—If the defendant had paid the debt and costs claimed by indorsement on the process, he might have had the bill of costs taxed afterwards, and if more than one-sixth was struck off, the plaintiff's attorney would be liable to pay the costs of taxation. But he did not do this, but afterwards demanded a bill upon an alleged intention of paying the debt and costs. The amount was stated, but a bill in detail refused. Had he paid the amount thus claimed the case of 10 Jur. 248 seems to shew that he would not be entitled to have the bill taxed as under the rule on

that head. Here it is demanded that the plaintiff should pay the costs of this application, the effect of granting which would be to establish, that whenever a defendant, in any stage of the cause, goes to the plaintiff's attorney and says he is prepared to pay the debt and costs, he may demand a bill in detail, without coming under any obligation to fulfil his promise, and that if the attorney declines giving him more than the amount, he can then obtain an order for taxation of the bill at the expense of the plaintiff in the cause. I cannot find authority for this.

After the bill is taxed, the defendant seems to be under no obligation to pay it. Had he paid the amount of the debt and costs claimed to the plaintiff's attorney, or into court, it would have been a different thing in the event of the attorney having refused a bill of costs, or to tax it. But on the matter appearing in this case, I cannot satisfy myself the defendant is strictly entitled to more than an order on the plaintiff to refer his bill for taxation, and that on payment of debt and costs to be taxed all proceedings be stayed.

In such bill the costs of appearing or assenting to this application are not to be allowed to the plaintiff's attorney as costs in the cause, because the necessity for the application might have been prevented by furnishing a bill for taxation at once.

As respects the costs of taxation, the plaintiff will be entitled thereto unless the amount shall be reduced one-sixth below 9*l.* 1*s.* 10*d.*, in which event they should not be allowed, but the costs of taxation will

be allowed to the defendant, and deducted from the costs taxed to the plaintiff.

To grant the present application would be to place the defendant in a better situation than he would have been had he paid the debt and costs indorsed on the process within four days after service, and then applied for taxation of costs under the rule of court on that head.

Application refused.

WAKEFIELD V. LANE ET AL.

Summons to admit signature, when put in issue by the pleadings.

Though the making or endorsing a note may be *put in issue* by the pleadings, the plaintiff, to entitle himself to the costs of proof, must serve the defendant, under our rule of court, with a summons to admit.

On the 12th of December, 1849, a summons was obtained, calling on the plaintiff to admit, under the rule of court (Cameron's Rules, 32-33)—viz., a note made by Lane at three months, for 82*l.* 10*s.*, indorsed by the defendant Boys, dated 13th July, 1849, and declared on. To this application it was objected that the defendants in pleading deny the making and indorsing, and that cases in which an instrument is declared upon, as here, and the making or executing is denied by plea, are not within the rule, which relates only to documents not put in issue by the pleadings.

MACAULAY, J.—It is said the Chief Justice has held cases like the present not within the rule. Our rule is a transcript of the rule in England.—R. G. 2

Wm. IV. ch. 21, sec. 20. There was a previous rule there (R. G. 2, Wm. IV. ch. 7), expressly applicable to instruments stated in the pleadings. Both deprive the party producing written or printed documents in evidence of the costs of proving the same, unless the opposite party shall have been summoned to admit; and our rule seems comprehensively worded, so as to embrace all documents, written or printed, intended to be proved in evidence, whether stated in the pleadings or expressly traversed or put in issue or not.

A defendant might, after denying the making or endorsing of the note, readily admit his signature on seeing it. He may have forgotten having signed the same; and to entitle the plaintiff to costs of proof, it seems to me essential that the defendants should have been called upon to admit the signatures denied in the pleadings and put in issue.

Rule absolute.

BROWN & KETCHUM v. A. W. H. ROSE.

Summons to set aside an interlocutory judgment discharged, being wrongly entitled, and the irregularity in signing judgment having been cured by defendant's laches, &c.

On the 7th of January, 1850, a summons was issued to set aside the interlocutory judgment signed in this cause, for irregularity, on the ground that no copy of the declaration filed had been served on the defendant.

An affidavit of Mr. Wallbridge was put in, entitled as above, stating that a *ca. re.* issued against the

defendant by the name of W. R. Rose, and that the declaration was the same W. R. Rose; that common bail and declaration were filed on the 19th of June last, and interlocutory judgment signed on the 20th of September last, in the name of W. R. Rose.

An affidavit of Hurd was also put in, entitled as against W. H. Rose, stating that defendant's name is Alphonsus William Henry Rose; that he left copy of process served with deponent at the end of March, 1839, to appear, and act as his attorney, but he did not appear, as he was corresponding with the plaintiff about settling it, and understood a cognovit would be accepted; that he omitted to give the cognovit, but was always ready to give it; that he was ignorant that proceedings were going on, until the 7th of December, 1849; that damages were assessed at 79*l.* 17*s.* 2*d.*; that a draft for 20*l.* was accepted and paid, but not credited in the account; also a sum of 2*l.* 10*s.* was not credited.

The plaintiff's attorney, by letter dated 5th December, 1849, promised to deduct the amount paid by the defendant's attorney. The costs were 15*l.* 10*s.* 9*d.*

A *ca. re.* was issued on the 27th March, 1849, against W. *H.* Rose, not R.

On the 29th of December, 1849, an affidavit of the defendant was put in, entitled as against W. H. Rose, denying service of declaration, and stating that he often saw the plaintiff, and supposed proceedings had been suspended.

On the 15th January, 1850, cause was shewn—

1st. That the summons and affidavits were not entitled in the cause.

2nd. That the summons was too late, and that the irregularity had been cured by delay.

3rd. An affidavit of Logan was put in, stating that on the 21st of August, 1849, he served declaration and demand of plea on the defendant, by delivering and leaving the same with Henry P. Thompson, at the defendant's last place of residence known to deponent, not saying where, forty miles' travel; also that notice of assessment was served on the defendant on the 26th September, by delivering and leaving the same with Ann Thompson, wife of the present tenant of the house which was the said defendant's last place of residence known to deponent, not saying where, thirty miles' travel.

There was also an affidavit from George Brooke, the plaintiff's attorney, stating that damages were assessed at the last Home Assizes. He denied a knowledge of any one acting as attorney for the defendant, and no appearance was entered by him.

See Cam. Rules, 398; 8 Dow. 570; 3 Dow. 648; 9 M. & W. 67; 1 Dow. N. S. 865, 710; 1 D. & L. 204; 15 M. & W. 151; 3 D. & L. 491; 16 L. J. Ex. 23; 16 M. & W 94.

MACAULAY, J.—I think the summons should be discharged.

1st. It is in strictness wrongly entitled.

2nd. It is too late, even reckoned from the 7th December, 1849, when Mr. Hurd had notice.

3rd. But mainly on the ground of laches, the

absence of merits, the want of a defence, and the neglect to comply with the arrangement spoken of by Mr. Hurd.

But I reserve all exceptions as to costs or taxation, —whether the plaintiff shall be allowed mileage, the services of declaration and notices of assessment not being proved to be due services, or necessarily incurred.

Summons discharged, without costs.

THE GORE BANK V. CASE.

Variance in the name of defendant in writ, appearance and declaration—How to be taken advantage of?

Where the defendant *appears* in a different name from that in which he is sued in the writ, and the plaintiff declares against the defendant by the name *in the writ*, the defendant cannot set aside the declaration—he can only compel the plaintiff to amend the declaration in the mismomer under the new rules.

Process (*ca. re.* not bailable) issued against the defendant by the name of William Ira *A.* Case.

The defendant appeared by attorney in the name of William Ira *Allan* Case; and the plaintiff declared against him by the name William Ira *A.* Case, as in the writ.

A summons was obtained by defendant to set aside the declaration, &c., for irregularity, on the ground of variance from the appearance entered, or because there was no appearance in the suit.

The affidavits on which he applied and summonsed were entitled the plaintiffs *v.* William Ira Allan Case. The affidavits filed on behalf of the plaintiffs in reply were as against William Ira A. Case.

For the plaintiffs it was contended, that the declaration following the writ, the only course open to the plaintiffs, if there was a misnomer, was to move to compel the plaintiffs to correct the declaration therein on an affidavit of the fact.

MACAULAY, J.—The question rests upon the mere point, whether a plaintiff is bound to declare against a defendant in whatever name he appears, though varying from the writ.

The cases and books of practice, I think, shew, that if the defendant was formerly sued by a wrong name and appeared, the plaintiff might declare against him in the name he appeared in, he being estopped by his appearance, so that if he appeared in the name of the writ, he was concluded—if in another, the plaintiff might adopt it; and that the way to object a misnomer by plea in abatement, was to refrain from appearing, when the plaintiff could only appear for him in the name mentioned in the writ, and could not cure the misnomer.

Now, a misnomer cannot be pleaded; if it could, the present declaration is open to it, adhering as it does to the name in the writ, instead of the appearance of the defendant; and the course substituted by the new rule (Cam. 113) should be followed.

See 3 T. R. 611; 3 M. & S. 450; 11 East. 225; 2 N. R. 132, 453; 3 Dow. 678; 5 Tyr. 774; 5 M. & W. 522; 4 M. & W. 586; 7 Dow. 199; 8 Dow. 601; 3 Bing. N. S. 777; 1 H. & W. 521; 4 Dow. 283; 1 Ch. Pl. 249; 1 Saund. 318.

Summons discharged, with costs.

BANK OF B. N. AMERICA V. AINLEY ET AL.

Revision of Taxation—Verdict—Demurrer—Amendment—Costs of the day.

The plaintiff has a verdict on *all the issues*, subject to a demurrer—the demurrer is decided in favour of the defendant—the plaintiff has leave to amend, on payment of costs. *Held*, *per Cur.*, that the defendant is not entitled to the costs of the day at Nisi Prius, not having succeeded on any of the issues; and that those costs should be struck out on revision.

On the 13th of December, 1849, a summons was issued to revise taxation. There were three separate suits—the same plaintiff against different defendants, parties in different capacities, severally as maker and indorser. There were several pleas in each. Replications—issues were joined on some, other replications were demurred to. Before argument, the plaintiff tried the issue and obtained verdicts, and assessed contingent damages. Afterwards the three demurrers were entered for argument, and argued together; the defendant's counsel being one and the same, and supporting all three at the same time.

The court being in favour of the demurrers, the plaintiff obtained leave to amend, on payment of costs, in August last. On the 26th or 27th of September, costs were taxed at 9*l.* 6*s.* in each suit, and paid under protest.

On the 13th December, a summons was taken out to revise taxation, (this was a joint summons, entitled in the three suits,) and for an order on the plaintiff's attorney to refund the amount struck off.

On the 20th September, 1849, there was a judge's order, granting leave to the plaintiffs to amend their

replication, *on payment of costs*, entitled in all three suits.

The pleas, replication and demurrer, were the same in effect in each.

The summons to amend was joint in all three suits. There was one argument only thereon, the three suits involving only one point. The taxing officer allowed 2*l.* 10*s.* counsel fee on each, at Nisi Prius, though all the issues were found for the plaintiff; also 2*l.* 10*s.* in each on the demurrers; also 10*s.* in each, fee for opposing summons to amend, though there was only one summons, one counsel, and one argument. All were objected to on taxation; all the issues were found for the plaintiff, which issues enabled the plaintiff to go down to trial. The Master expressed a wish to tax the allowance, subject to review, which was not assented to. Costs were paid, to enable the plaintiff to go to trial again at last Newcastle assizes, and a receipt taken by the defendant's attorney of 9*l.* 6*s.* in each suit, as paid under protest, and insisting on the right to revision of costs therein.

The defendants contended that the costs of the amendment included costs of the day at Nisi Prius, and that they were entitled to full fees in each at Nisi Prius, in argument of the demurrer, and in chambers, there being several suits against separate parties, all of whom were severally liable to the plaintiff in full costs if he had succeeded, and therefore the costs could not be apportioned or restricted; they also objected to the summons on the ground

of laches, the costs having been paid so long ago, and no application having been made till this date.

See 5 Bing. N. S. 116; 2 Scott, 535, 40, 5; 5 Dow. 183; 7 M. & W. 570; 2 Dow. 226; 3 Dow. 804; 8 D. & R. 220; 5 B. & C. 458, S. C.; 2 Dow. 738; 2 Dow. 163, 656, 734, 76, 457, 333; 3 Dow. 213, 692; 1 Chy. 541; 3 Dow. 120, 687; 6 Dow. 177; 8 L. J. 148, C. P.; 9 M. & W. 1; 11 M. & W. 455; 7 M. & W. 570; 5 M. & W. 87; 11 M. & W. 545; 2 C. M & R. 232; 2 D. & L. 622; 15 L. J. Ex. 333; 10 Jur. 716; 2 Burr. 753 (overruled by 2 T. R. 394); 1 Dow. 533; 2 B. & P. 465;—Breakenridge v. King, T. T. 5 & 6 Will. IV.; Davis v. Davis, H. T. Will. IV.; Sheldon v. Hamilton, M. T. 3 Vic. (in our court);—Hullock on Costs, 342; 12 Jur. 119; 5 D. & L. 307; 17 Jur. 44; 16 Jur. 716; 4 Q. B. 642; 3 G. & D. 607; 7 Jur. 969; 4 M. & G. 243; 9 M. & W. 842; 1 Ex. Rep. 770; 7 M. & G. 1003; 8 Scott, 84.

MACAULAY, J.—I have no doubt that the defendants were not entitled to the costs of the day at Nisi Prius, not having succeeded on any of the issues; and that the allowance thereof should be struck out on a revision of taxation.

With respect to the counsel fees on the argument of the demurrer, and the fees for opposing the application in chambers to amend, I think they ought to be reduced.

These were not cases in which three several suits were defended independently by different attorneys, or in which, though defended by the same attorney,

three several briefs were *bonâ fide* delivered, and three separate counsel fees *bonâ fide* paid to different or even to the same counsel; but cases in which, being defended by the same attorney in the country, his professional agent here was instructed to attend to the demurrers, and in which such professional agent did, as counsel for the defendants, support all the three demurrers at the same time, or only argued one, the other two being understood to abide the event, and the amendment was on a joint application on one summons to which cause was shewn as one proceeding.

Under such circumstances, triple fees not having been positively exacted and paid, I think the costs of the amendment should be only those necessarily incurred. If demurrer books were made up and delivered by the defendants in each case, they should be allowed, but I think only one brief and fee to counsel, and that the excess should be deducted on a revision of taxation.

Pegg v. Pegg.

Judgment as in case of a non-suit—Notice of countermand—Costs of a commission not used.

Notice of trial was given by the plaintiff, and duly countermanded. The defendant obtained judgment, as in case of non-suit, for not proceeding to trial according to the practice of the court, and claimed allowance in his bill of costs for a commission to examine witnesses in the United States: he also claimed a counsel fee to defendant's attorney and counsel. There had been no actual disbursement of such fee; but *held, per* Macaulay, J., that neither of these charges could be allowed. (P. S. This case came up afterwards in term, and it was decided that, under the circumstances, the defendant should be allowed the costs of executing the commission.)

In this case the demandant, on the 11th of August, 1849, obtained judgment as in case of a non-suit, the plaintiff not having proceeded to trial according to the practice of the court, and in his bill of costs claimed allowance for a commission of interrogatories executed in the United States.

The commission was dated the 15th September, 1848, and was addressed to Messrs. Bacon, Galt and Ewart, jointly or separately, or to any two or one of them. Mr. Bacon made affidavit that he went with the commission to a town in the state of New York, when Galt declined acting, and that he alone examined the witnesses at several towns, being absent six days, and having travelled seven or eight hundred miles; that for expenses he was paid 9*l.* 5*s.*, and 2*l.* 10*s.* a-day for services, or 15*l.*, being altogether 24*l.* 5*s.*

The plaintiff objected to this charge, because the commission was not closed and transmitted to the Crown Office, or used in the cause.

The defendant replied, that the commission could have been closed at any time or period by the commissioner himself in court, had a trial taken place; that the answers were shewn to the plaintiff's attorney, who in consequence abandoned the suit.

Notice of trial was given, pending the execution of that commission, but countermanded in due time; after which the defendant obtained judgment of non-suit, as before mentioned. The commission, interrogatories and answers (open) were produced.

The plaintiff also objected to a charge of counsel

fee to the defendant's attorney and counsel, not actually paid. It was claimed because notice of trial was given, and the rule of the Crown Office was said to be not to allow a counsel fee as costs of the day to the plaintiff's attorney, when also a barrister, unless the Nisi Prius record was actually entered.

MACAULAY, J.—The notice of trial having been countermanded, and no special circumstances shewn to take this case out of the general rule, I think the Master right in refusing a counsel fee, no services for which it should be allowed having been rendered, and no such disbursement actually made.

And, as to the costs of the commission see—7 M. & G. 525; 8 Scott, N. R. 12; 13 L. J., C. P. 137, 169; 10 Jur. 392, 818; 3 C. B. 827; 2 D & L. 307, S. C.; 3 B. & P. 556; 1 Dow & C. 422; 2 East. 259; 8 East. 393; 1 Ch. R. 86; Bullock, 459.

The rule of court ordering the commission is produced, and is silent as to costs. Then it is a commission issued and executed on behalf of the tenant (defendant), virtually *de bene esse*; and not having been used at a trial the costs thereof are not taxable against the demandant, unless they are costs in the cause as of course, although the commission was not used.

Formerly in England they were not costs in the cause unless specially ordered, but then a commission could only be had by consent, here it may be had though opposed—that is the difference—but in this case it issued by consent, and no provision is specially made as to costs.

I can find no express decision in our court on the point, and think, that according to the wording of our statute 2 Geo. IV., ch. 1, compared with the cases and statutes in England, the tenant is not entitled to tax the costs of this commission against the demandant. And I look upon it as a commission executed *de bene esse* on the tenant's behalf, thinking he might be prepared to meet a trial, but no trial has been had; the tenant has moved for and obtained judgment of nonsuit.

However, as the sum is large, it would be more satisfactory were the question decided by the court in term.

I cannot say I think it is a sufficient ground for ordering the costs to be allowed (if not costs in the cause as of course), that Mr. Bacon shewed the answers to Mr. Ewart which induced the abandonment of the cause.

SMITH v. RUSSELL—SMITH v. J. L. REID—SMITH v. G. REID.

Signing and sealing of the writ of summons.

Semble, that a writ of summons under the late act 12 Vic. ch. 63, is irregular, if not sealed.

A writ of summons marked in the margin, as issued by "W. H. Ponter, D. C.," is sufficiently signed.

On the 18th of January 1850, a summons was obtained to set aside the summons and services for irregularity, with costs—the writs not being sealed or signed by the clerk of the crown.

Copies were produced, and it was sworn that the originals were not sealed or signed.

In the margin was written—"Issued by W. H. Ponter, D. C."

See stat. 12 Vict., ch. 63, sec. 24.

MACAULAY J.—A *writ* imports an instrument under seal, generally speaking.—Com. Dig., process A. 3.

At all events, it has always been used in this court, and though the late act is silent on the subject of sealing, it calls the summons a *writ*, and former acts evidently shew that *sealing* has been always contemplated.

I think therefore the summonses irregular, and that they should be set aside.

If so advised, of course the plaintiff may have this decision reviewed by appeal to the court next term.

So far as *signing* is material, the summonses seem to be signed by the officer who issued them; and I yesterday expressed my opinion that I do not find authority in the act, or otherwise, requiring more.

HINDS v. DENISON.

Jurisdiction of the county court—costs.

The plaintiff sued the defendant upon a count, stating that he the plaintiff, had delivered certain cattle to the defendant to be pastured &c., and to be redelivered on request—with a breach that through the negligence &c., of the defendant the cattle were lost. The plaintiff had a verdict for £9; and no certificate having been granted, the master only allowed county court costs. *Held*, per Burns J., upon an application for Queen's Bench costs—that the action might have been brought in the county court, and that the master's taxation was therefore correct.

The plaintiff in the first count of his declaration, upon which the verdict was rendered, stated that he

delivered certain cattle to the defendant to be agisted and depastured for reward, and to be redelivered again on request; and the breach laid was, that the defendant so carelessly behaved and conducted himself in respect of the cattle, and took such bad care thereof, that through his carelessness, negligence and improper conduct, the cattle were wholly lost to the plaintiff.

The amount of the verdict was £9; no certificate was granted, and the master had allowed in taxation of costs to the plaintiff, only the scale allowed in the county court. The plaintiff complained of the taxation, contending that the case disclosed a cause of action not within the jurisdiction of the county court, and relied upon Bell v. Jarvis, 6 U. C. Rep., 423; as establishing a principle which governed the present case.

BURNS J.—I fully concur in the opinion that Bell v. Jarvis, was not within the jurisdiction of the county court, if that case is to be considered as decided upon the clause relating to torts; because the words *in all matters of tort relating to personal chattels* must, I think, receive a construction similar to that which must be given to the words relating to the action of debt, covenant and contract; and that is—as the action of debt, covenant or contract, must be upon something due to or made with the plaintiff, so the personal chattel respecting which the action is brought must belong to the plaintiff.

In Bell v. Jarvis, the false return complained of was, that the sheriff did not make the plaintiff's debt

out of the goods of his debtor, and that not levying the debt was an injury to the plaintiff. The only injury to any chattel of the plaintiff was respecting the debt due to him, and which was not destroyed or lessened in amount by the conduct of the sheriff.

For the reason I shall presently give, I do not think the words *personal chattels* were meant by the Legislature to embrace matters which are ordinarily denominated *choses in action*; but are rather to be confined to *choses in possession*—that is, moveable property, as distinguished from the other class.

Although I agree in the decision of Bell v. Jarvis, yet the present case, I think, wholly differs from it; for here the action does relate to the personal chattels of the plaintiff *in possession* or *right to the possession*, which is treated as the same thing. The only similarity is, that both cases set forth a duty in the defendant; the one by reason of what is cast upon him by law, which is implied—the other arising from express contract.

The conclusion I have arrived at is, that the present case might have been sustained in the county court. I do not see that the form of action, whether it be trespass, trover or case, makes any difference; nor whether the injury be direct or consequential, arising from nonfeasance or misfeasance, but that the true test is, whether it related to the personal chattels of the plaintiff in possession, or to which he has the right of possession. This view may be said to be so wide as to be somewhat at variance with not extending the words *personal chattels* to embrace debts,

and choses in action, but I do not think so; and therefore I will state what my view is of the jurisdiction clause of the 8 Vict., ch. 13.

The Legislature has given no jurisdiction in matters relating to the person, or to real property, but has confined the county courts to matters relating to personal property, though the jurisdiction over *all* personal property has not been conferred. If the latter had been intended, we should probably have found the words to be simply these—*in all matters relating to personal property*. The words *personal chattels*, in their widest signification, embrace choses in action as well as in possession, but the words *debt, covenant and contract*, exclusively apply to choses in action, and when personal chattels are spoken of, it is an action of tort relating to them which is mentioned. By a division of personal property, as mentioned in the claim, into matters relating to debt, covenant and contract, and matters of tort relating to personal chattels, it was intended to mean something distinct from each other, and that there should be no clashing. The words *debt, covenant and contract*, to be read in the popular sense, as was in my opinion intended, mean *actions ex contractu*, relating to choses in action; the words *tort in all matters relating to personal chattels*, to be also read in the popular sense, mean *actions ex delicto*, relate to choses in possession.

This construction appears to me to render the whole clause consistent, and there is no clashing and viewing it in this light, clearly defines the class of

actions which may be brought in the county court, and those which would be excluded. The form of action appears to me quite immaterial—that must be suited to the particular circumstances of each case. When speaking of an action of debt, covenant or contract, the words are, not that the extent of damages to be recovered shall not exceed £25, but in such actions the jurisdiction shall be to the amount of £25; and in cases of contract or debt, where the amount is ascertained by the signature to the amount of £50—thus seeming to mean actions relating to money demands, certainly so as respects amounts between £25 and £50,—but the words as respects personal chattels, are where the damages shall not exceed £20, meaning an indefinite amount, and in the discretion of a jury, as they may estimate one party entitled to receive from the other, according to circumstances.

Summons discharged.

THE QUEEN EX REL. DUNDAS v. NILES, COUNCILLOR FOR WARD NO. 1, OF THE TOWNSHIP OF DORCHESTER.

Duty of Returning Officer under 12th Vict., ch. 81.

Duty of the returning officer respecting the votes received and recorded. Costs.

The complaint made by the relator was, that he being a candidate at the last election under the Municipal Act, for ward No. 1, of the township of Dorchester, and the defendant being also a candidate, the returning officer William P. Webb, received during the first day 51 votes for the relator, and 32

votes for the defendant; that on the second day no more votes were polled, and yet the returning officer declared the two candidates equal in number, and gave the casting vote in favour of the defendant, and returned him as the councillor for the ward.

The defendant defended the seat, and produced the affidavit of the returning officer, swearing that he conceived it to be his duty after the close of the poll on the first day, to review the votes, and that he should have admitted on either side or for either candidate, the votes of such persons only who were regularly entered on the copy of the assessment roll which had been given him, who were landholders or householders, inhabitants of the ward; that he did review and compare the poll-book with the assessment roll, and found that the votes of many persons, both for the relator and the defendant, of persons whose names did not appear on the assessment roll, had been received and entered upon the poll-book, and therefore he struck them off, and did not reckon them for either candidate as votes given at the said election; that many persons were entitled to vote whose names were not upon the assessment roll, who would have voted for each of the candidates, which were lost to them in consequence; and that he verily believed the legal votes on both sides were equal, and that he decided the election by giving his casting vote for the defendant.

Other affidavits were filed by the defendant as to the votes.

Burns J.—It is hardly possible to conceive a more

disgraceful proceeding or a more shameless act, than has been avowed by the returning officer under the semblance of duty. It is true the law requires the returning officer should be furnished with a copy of the assessment roll; and it is obvious for what purpose he is required to be furnished with it, viz.,—that all persons interested in the election may have a check at hand at the time of the polling of votes; but how the returning officer could have thought that after the poll was closed on the first day, and before being opened on the second, in the absence of the candidates, behind the back of the voter, after the vote had been received and recorded without objection, that it was his duty to review the poll book and compare it with the assessment roll, and upon his own view of the matter strike off votes, is to me inconceivable. He does not tell us the names of those persons he so struck off on either side, so that it might be ascertained whether he acted upon a *bona fide* conviction of what was his duty; nor does he tell us the number thus reduced upon either side, or the whole number he considered bad, but he contents himself with stating that he made the two candidates equal in numbers. It seems to have been a nice and precise calculation, but how it has been arrived at we do not know; the returning officer only condescends to tell us that he verily believed the legal votes on each side were equal. If he imagined that such his belief would be credited by others, because he thought it his duty to correct the poll-book in the absence of those interested in his doing so, he must

either be possessed of great simplicity of character, or of boundless assurance, either of which proves him unfit for the office with which he has been intrusted.

These remarks are severe, it may be said, but I think they are called for, when we find a returning officer unblushingly telling us that he reduced the votes to an equality, and then gave his casting vote in favour of one of the candidates, and this done on his own mere will and pleasure. The election, or rather the return of the defendant must be declared void; and if I had the power, it would be but justice to the inhabitants of his township to compel the returning officer to pay the expenses.

The defendant has reaped the fruit of the improper conduct of the returning officer, and ought he on that account to pay the costs? If he were not instrumental in producing the result, but was only the passive object of the other's conduct, I might think it right to excuse him the costs. If the returning officer and the defendant, or his agents had conspired together to strike off the votes, it is not likely they would have let any one into their secrets who was in the opposite interests, and therefore the facts and circumstances stated in affidavits, which is an *ex parte* mode of taking and receiving evidence, must be the more closely looked at and considered.

The relator has sworn that he was informed the returning officer struck off the votes, because he was advised by William Niles, the father of the defendant, that they were bad. This statement is not met

or explained by the returning officer, nor by William Niles who makes an affidavit. The father states a fact very significant however—namely, that his son the defendant was absent the second day at court at London, and that he attended the election for him, looking after his interests. A person of the name of Armstrong, swears that he attended the election as scrutineer for the defendant, and he says that the returning officer did not in all cases, when the votes were tendered, refer to the copy of the assessment roll, and in consequence the names of many voters were entered and taken as good for both candidates. Armstrong further states, that he believes there were not any votes erased which were of persons entitled to vote at the said election. He does not state when he became the defendant's scrutineer, but if he were so upon the first day, how was it he [illegible] such votes to be recorded for the relator? [illegible] to state what he has stated, he must have had the information of the names erased, and when and how did he acquire it?

The defendant or his agents, I think, from their own showing, were privy to, if not instigating the returning officer to his illegal course, and therefore I must visit the defendant with the costs.

Summons made absolute with costs.

THE QUEEN EX REL. MITCHELL V. ADAMS, A COUNCILLOR FOR THE TOWNSHIP OF VAUGHAN.

Qualification of relator under the 12th Vic. ch. 81—Acquiescence of relator in irregularity complained of.

It is not necessary that a relator, who is a candidate, should shew in his application to oust the defendant, that he himself is qualified for the office.

Acquiescence of a candidate in an irregular election, how far it disqualifies him from after becoming a relator.

At the last municipal election for the township of Vaughan, the defendant was returned as one of the councillors, and his return was complained against by the relator, who was a candidate, on the ground that the returning officer closed the poll at 4 o'clock the first day, though a voter had voted only a quarter of an hour before that time, and there were many other voters in the township who had not voted.

It was not contended the election could be sustained on the ground taken to set aside the return; for it was clear that before the returning officer could by law close the poll, one hour must have elapsed from the taking of the last vote before he could exercise a discretion, and as that was not allowed on the first day, he should have opened the poll on the second day. The defendant appeared to the summons, not for the purpose so much of retaining the seat, as to save himself from being compelled to pay the expenses, and therefore he raised two objections to the relator's proceeding upon this summons. 1st. That it was not shewn on the part of the relator, being a candidate, that if he were elected he was duly qualified by law for the office. 2ndly. That if it was unnecessary to shew qualification, yet that

the relator had acquiesced in the election being closed upon the first day, and thereby had disqualified himself from being a competent relator.

BURNS J.—The persons competent to become relators to question an election are declared by the statute to be either candidates or voters. It is undoubtedly true that a mere stranger to a corporation cannot in general be permitted to impeach the title of a corporation; but is a person who becomes a candidate, though he be not qualified by a law, a stranger?

In this case the relator has not sworn that he was qualified for the office, nor do I think the statute intended he should do so. It appears he was proposed at the election, received as a candidate, and votes polled for him throughout the day. If he had been elected and were disqualified, then he might have been complained against, and if the defendant's return be set aside, and the council should admit the relator, he would be liable to be ousted if disqualified.

If it be a necessary allegation on the part of the relator that he is clearly qualified, it would seem to follow that the fact would be traversable, and thus lead to the trial of double issues—that is, the trial of issues as raised against the defendant, and issues raised against the relator. If there were any reason to doubt the fact of the candidate being a *bona fide* candidate, then there might be an argument raised whether he was not a stranger in interest, but if he is received as a candidate, then that fact gives him an interest in the election, and having an interest

then as respects the defendant, the question is whether he has usurped the office.

In Rex v. Brown, 8 T. R., 574; (note) the objection made to defendant's title was, that they had not received the sacrament within twelve months previous to their election, under 13 Car. II. stat. 2, sect. 1; and they made objection that the party applying had no connection with the corporation. Ashurst J. said—"Where the application is made merely to disturb the local peace of corporations, it is right to inquire into the motives of the party, to see how far he is connected with the corporation. But the ground on which this application is made is to enforce a general act of parliament, which interests all the corporations in the kingdom, and therefore it is no objection that the party applying is not a member of the corporation."

As to the second objection there is abundance of authority to shew that a party who has acquiesced and concurred in an election which has been conducted not strictly legal in all respects, thereby disqualifies himself from afterwards becoming a relator to dispute that which he himself has concurred in.

The ground of the acquiescence here is, that the returning officer thought by law he had a right to close the poll on the first day at four o'clock; and he proclaimed in the hearing of the relator and others that he should do so, and no objection was made by any one.

It is true that no objection was made till after the returning officer had closed the poll and declared the

defendant duly elected; but it is admitted on all sides that upon the election being declared, the relator did object. I cannot hold, that because no objection was made by the relator or any other person who was present when the returning officer proclaimed he was going to do that which was illegal, and which he had no right to do, that they acquiesced in and consented to his irregularity, and precluded themselves from questioning the legality of his return.

It appears to me what the returning officer should have done, notwithstanding his declaration that he would close the poll at four o'clock, upon the relator's protest against the election, was to adjourn until the next day. The returning officer had committed an error, but it was not too late for him to rectify it upon the relator's protest; I see nothing in the silence of the relator as to what the returning officer intended to do, which would preclude him from having the advantage which his protest gave him, and therefore he is not disqualified from making this application.

The closing of the poll, and the refusal to proceed, is entirely the act of the returning officer; he seems to have acted from a mistaken idea of his powers and authority, and the defendant does not appear to have been instrumental in, or accessory to producing the result which is complained of, and therefore I do not think it a case for giving costs against the defendant.

HILTON ET AL. V. MACDONELL ET AL.

Rule upon sheriff to return writ—When returnable—Original rule must be shewn to sheriff—Original summons for attachment need not—Naming of sheriff in the summons.

The rule upon the sheriff to return a writ of *fi. fa.*, should be a *six*-day rule.

In order to attach the sheriff for contempt in not obeying the rule, it must appear that the *original* rule was shewn to him.

Semble, that a personal service on the sheriff of a copy of the summons for an attachment, for not returning a writ, without shewing him the original, is sufficient.

The summons for the attachment should strictly name the sheriff who is in default, and not merely call upon the officer—he may be changed.

In this case the Chief Justice issued a summons, calling on the sheriff of the Eastern district to shew cause, on the fifth day after service, why an attachment should not issue against him for not returning the writ of *ven. ex.* issued in this cause.

The service of this summons was proved by the affidavit of Richard Corbett, who swore that on the 14th January 1850, he *personally* served D. E. Macdonell, sheriff of the Eastern district, with a true copy of the said summons. It was granted on production of a rule on the sheriff of the Eastern district, to return the writ of *ven. ex.* within four days after notice of that rule. It was dated on the 14th December, and signed by C. Wood, D. C. C. The service was proved by affidavit of Patrick Macdonald, who swore that on the 15th December 1849, he personally served Archibald Roderick Macdonell, the deputy sheriff of the united counties of Stormont, Dundas and Glengary, with a true copy of the said rule.

On the 18th January 1850, cause was shewn, and it was objected—

1. That the summons called on the sheriff of the *Eastern* district, instead of the *united counties*, and called on the officer instead of the individual by name who was in default.

2. That the rule to return the original should be a six-day rule, and not a four-day rule only.

3. That the same was not well served to bring the sheriff into contempt—the original not having been shown to him.

4. That the rule should be signed by the principal officer, and not his deputy only.

MACAULAY J.—It does not appear that either the original rule to return the writ or the summons were shewn to the parties served with the copies. The rule is sworn to have been served on the deputy sheriff of the united counties, at a time when it was the Eastern district, and the summons is sworn to have been served on the sheriff of the Eastern district at a time when he was sheriff of the united counties.

The rule should have been a six-day rule, but perhaps it is too late now for the sheriff to object—he should have moved to set it aside instead of disobeying it. But it was not well served to bring him into contempt. The original should have been shewn, for the contempt is in not returning the *ca. sa.* pursuant thereto.

The summons should strictly name the sheriff who is in default, and not merely call upon the officer

who may have been charged; then it does not even call upon the officer properly.

Perhaps a personal service of a copy of the summons was sufficient without shewing the original, but the proceedings are defective in other respects, and the summons must be discharged. See 5 Dowl. 21; 2 Mar. 251; 2 N. R., 121.

Summons discharged with costs.

CONGER v. MCKECHNIE.

Revision of costs—consequences to party applying for revision of costs not attending on notice of taxation—Rule as to objectionable items amounting to 40s.

Where a party does not appear before the master on receiving notice of taxation—he may, perhaps, be precluded from objecting to the amount of items taxable in the discretion of the master—but he is not precluded from objecting to items *in toto*, upon the allowance of which the master has no authority at all.

The objectionable items may be sufficiently shown by taking the bill of costs and affidavit together.

There is no rule here requiring the party applying for a revision of costs to show that the items allowed and objected to, amount to more than 40s.

The defendant in this case was entitled to judgment, and gave notice of the taxation of costs before the deputy clerk at Peterboro', but no one on the part of the plaintiff attended, and the costs were taxed *ex parte*.

The plaintiff complained that there had been allowed many items in the bill not taxable, and that other items were overcharged.

The defendant resisted the revision on three grounds:—1. That it was too late to revise costs generally after notice of taxation had been given,

because it was the duty of the party to attend before the taxing officer, and there make his objections.

2. That the objections should have been more specifically pointed out, and

3. That it should have been shown in the application for revision, that the objectionable items allowed amounted to more than 40s.

BURNS, J.—As to the first—if the objection had been to the discretion exercised by the officer, as regards amount, there may be something in the circumstance of not appearing before the officer after notice; but the objection is not to the discretion. It is because of the allowance of the items in *toto*, the officer having no authority to allow them.

Upon examination of the bill, it appears the officer has allowed items not authorized by the tariff of fees, and also has allowed items which the defendant must bear the expense of himself. For instance, he has allowed 15s. more for revising pleadings than the tariff warrants; also he has allowed 5s. as a fee upon a judge's summons, not a taxable item; and he has allowed to the defendant the expenses of a summons and order to amend the pleadings which had been granted to the defendant on payment of costs.

I think the objections sufficiently pointed out by the affidavit and bill of costs, when taken together; for the affidavit refers to the bill, and points out the items objected to as marked in red ink. There are a great many of these items, and to have mentioned each in the affidavit, and to have narrated the par-

ticular objections to each, would have swelled the affidavit to a great length, and have been of little service after all, for the bill itself would have been looked at.

As to the third objection, I am not aware that any such principle as contended for has been established in this country, and I shall not make a precedent for it.

HUTCHINSON V. MUNRO.

Application by plaintiff to amend, by withdrawing demurrer to pleas., after argument and after trial of issues in fact—refused.

This was an application to amend by withdrawing demurrer to pleas, after argument and after trial of issues in fact.

The facts of this case were set forth in the third plea of the defendant, upon which judgment was pronounced in Trinity Term, as they are now disclosed by the plaintiff's affidavit, except that the plaintiff swore he had no notice that the note now made by the defendant was an accommodation note.

There were issues in fact, on the record, and issues in law, upon the second and third pleas, and the plaintiff, upon the determination of the issues in law, carried down the cause and tried it at the last assizes.

The plaintiff did not acquire title to the note in question in the ordinary way of endorsement for value, but he became bail for McLeod, who was the payee and endorser, and, by reason of being such,

bail was forced to pay the amount to the latter. The principle intended to be established by the plea was, that the plaintiff being bail, could not, by reason of having paid the amount, stand in any better position than McLeod himself did, or could; and the ground of the judgment upon demurrer established that principle.

This being the case, it mattered not whether the plaintiff was or not aware of its being an accommodation note; but the question was, whether it were in truth an accommodation note. The defendant, in allusion to the present application, swore it was made by him solely for the accommodation of McLeod, and that McLeod frequently promised to pay it.

It was not stated by the plaintiff in any way, except by belief, that the defendant's statement was untrue, but the plaintiff seemed to rest more upon his want of knowledge of the facts, a matter of little consequence if he could acquire no greater right than McLeod.

Burns, J.,—As it now appears, the defendant's plea (the 3rd) was true, except as to the plaintiff's knowledge of the fact of the note being an accommodation note; and there seems to be no good or valid reason why the plaintiff should not have gone to trial upon it. When one party offers an issue fairly upon the facts of a case, the court discourages as much as possible any other than a trial upon the merits of the case. I think it would be unjust to the defendant to subject him to a trial upon a point which he now swears

to be true, as stated in his plea, and which is not contradicted by the plaintiff; and which there was no reason, seeing that all other facts of the plea are true, why the plaintiff should not have traversed and gone to trial upon, rather than have put himself upon the judgment of the court.

It was objected in this case that no amendment could be had after verdict; but without expressing any opinion upon this point in the abstract, I do not think the facts of this case justify me in subjecting the defendant to a second peril.

Application to amend refused.

SUTHERLAND V. TISDALE.

Revision of costs—Queen's Bench costs—Where action within the jurisdiction of the County Court, but no judge appointed to County Court at the time of commencement of suit.

The plaintiff brought an action in the Queen's Bench, which was within the jurisdiction of the County Court, and applied to the judge in chambers to tax Queen's Bench costs, upon the ground that on the day he commenced his suit, no judge of the County Court had been appointed by the government to fill up the vacancy that had occurred; but *Held*, *per* BURNS, J., that under the circumstances Queen's Bench costs could not be allowed.

This was an application made for full costs, upon an affidavit stating the suit to have commenced on the 9th October, 1849; and that at the time the action was commenced, there was no judge appointed to preside in the then District Court of the District of London; and that the cause could not then be brought in any court except in the Court of Queen's Bench.

BURNS, J.—The defendant has suffered judgment

by default, otherwise the application for costs must have been made to the judge who tried the cause; but I understand the reasons for any judge granting an order for costs to be analogous to the principle upon which the judge acts who tries the cause—viz., that the cause was a fit cause to be withdrawn from the District Court, and to be commenced in the Queen's Bench.

I am referred to the case of Jennings v. Dingman, T. T. 4 & 4 Vic., before the Chief Justice of the Common Pleas, then in the Practice Court, as supporting the present application. I have not seen the judgment at length in that case, but it appears to have been a bailable case, and there may have been peculiar reasons why the arrest of the defendant should not have been delayed.

In the same term, Wilson v. Meriton, non-bailable case, was decided in the same way; but the facts do not appear, and there may have been sufficient reasons why the case should be withdrawn from the inferior jurisdiction.

In the present case, I do not think the affidavit shows any sufficient reason for granting the order. It is simply stated that because on the 9th October there was no judge appointed, therefore on that day the suit was commenced in the Queen's Bench. That is proceeding on the mere fact of there being no judge at the precise moment when the plaintiff chooses to commence an action. I do not recognise such a principle. I think there must be some ingredient interposed to show that the cause is a proper

cause to be withdrawn from the inferior jurisdiction—as, for instance, where it was necessary to arrest the defendant, or where delay might perhaps take place in filling up an appointment of judge, which would operate prejudicially to the defendant. Some time must be allowed to the executive government to make appointments—they cannot be made immediately; and I apprehend it could never be supposed that in the interval between the occurrence of a vacancy and the filling up of the situation, that every party was at liberty to bring his suit in the Supreme Court. If the principle be good as applicable to cases in amount within the jurisdiction of the District Court, it ought also to apply to all cases within the jurisdiction of the Division Courts.

I think each case must depend upon its own facts, whether it be proper to be withdrawn from the inferior jurisdiction; and that what is contended for now upon the principle that the plaintiff may elect to sue in the Superior Court ought not to be sanctioned. For all that appears in this case, the appointment of a judge may have been made before the term of the District Court following the 9th of October; in which case the delay was much greater to the plaintiff, in selecting the Supreme Court, than waiting to proceed in the District Court. The appointment of a judge may have been made without delay; it is not shown how the fact is.

Rule discharged.

WILT v. LAI AND ANOTHER.

Revision of Costs—Term fee after judgment—Endorsing on writ of fi. fa. charges for registering judgments.

No term fee is allowed after judgment.
A charge for registering the judgment cannot be endorsed on the writ of fi. fa.

This was an application to reduce the amount indorsed upon *fi. fa's.* issued into different counties.

The plaintiff, upon entering judgment against the defendants, issued writs of *fi. fa.* into the united counties of Wentworth and Halton, and into the county of Waterloo; and upon each of these writs the plaintiff's attorney had charged 5*s.* as a term fee, in addition to the fee on the writ and other charges.

The plaintiff caused the judgment to be registered, by certificate thereof, in each of the said counties, the expense of which amounted to 12*s.* 6*d.* in each county, and he had indorsed the same to be levied upon the writs of execution.

The defendant applied to the plaintiff's attorney to reduce the indorsement on the writs by deducting the 10*s.* for term fees, and the 25*s.* for the registration, but the plaintiff's attorney refused, contending he had a right to endorse the *fi. fa.'s* for these fees.

BURNS, J.—With respect to the term fees, it is the first time I ever heard of such a charge. No term fee is allowed after judgment, but supposing it could be thought right to charge it, surely one ought to suffice. The attorney is allowed a fee on the writ, but clearly no term fee beyond that.

The second charge, which is for the registration, I think equally clear not allowable. It is no part of the expenses of the *fi. fa.*, but quite independent of it. A plaintiff has no right to indorse any direction upon the writ as respects costs, charges, or expenses to be made which have not been taxed, beyond the expenses of and fees upon the writ and incidental to it. The expenses of registering the judgment form no part of such charges.

The order must be made for reducing the amount to be levied, by deducting 10s. and 25s., in all 1*l.* 15s., and the plaintiff must pay the costs of this application.

Order absolute for reduction of costs.

BEATTIE V. ROBINSON.

Supersedeas refused to defendant, because charged in execution in the county where the bail had surrendered him.

The plaintiff is not compelled to charge the defendant in execution in the county where the bail have surrendered him—he may be charged in execution in the county where the venue is laid.

The facts upon which this application was made were these:

The suit was commenced against the defendant by ballable process, on the 3rd December, 1849; the venue was laid in the county of Oxford, and the defendant was arrested in the united counties of Wentworth and Halton, and committed to gaol there. On the 2nd January he was admitted to bail, and by his bail surrendered on the 5th April to the custody of the sheriff of the united counties of Wentworth and Halton.

The cause was tried in the county of Oxford, and judgment entered on the 12th June, and a *ca. sa.* sued out to the sheriff of Oxford returnable on the last day of Easter Term. The writ was lodged with the sheriff of Oxford on the same day, and had since been returned *non est*.

The defendant applied for a writ of supersedeas, on the ground that he should have been charged in execution in the county where he had been surrendered within two terms.

BURNS, J.,—I am of opinion that the defendant is not entitled to his discharge on this application. The statute of 1822, 2 Geo. IV, ch. 1, sec. 11, provides that the recognizance of bail shall be that the defendant shall render himself to the custody of the sheriff of the district in which the action shall be brought, that is, the district to which the original writ issued, and where the venue would be laid if the proceedings were regular.

If the defendant were rendered in discharge of his bail, or rendered himself, it could only be done to the sheriff of the district where the venue would be properly laid, and the plaintiff was not bound to notice that the defendant was in custody; if he were so in any other district his proceedings were quite correct, and regular to be followed in the county where the venue was laid. If the defendant were in custody in some other district, so that he could not render himself, or that the bail could not render him, I apprehend the correct course

would have been to obtain a *habeas corpus* for the purpose of being rendered in discharge of bail, or to compel plaintiff to charge in execution.

The statute 4 Wm. IV. ch. 5, was made as is expressed in the act in favour of bail, and enabled the bail to surrender the principal in any district where he might be resident or found. It is by virtue of this act the defendant has been rendered to the custody of the sheriff of the united counties of Wentworth and Halton, and the question is whether the plaintiff is compelled to charge the defendant in execution in the custody where he remains.

The plaintiff may charge the defendant in execution in the custody where he is, and he is not compelled to sue out a *habeas corpus ad satisfaciendum*, in order to charge him in execution where the venue is laid, and indeed the plaintiff would be refused the writ if he applied for it, because it is a needless expense.—Williams v. Jones, 2 C. & J., 611.

The plaintiff here has pursued the regular course of practice, and the only ground for any change from that would be, whether the act made in case and favour of bail imposes upon the plaintiff the obligation of charging the defendant in execution in the county where the bail have surrendered him. The proviso in the first section of the latter act answers this question. It is: "*that nothing in this act contained shall be taken to compel the plaintiffs in any such action or suit to change the venue, or to conduct his suit in any manner different from that in which he would have been compelled, had the*

verdict been made in the district in which the defendant had been arrested."

Supersedeas refused.

CONGER v. MCKECHNIE.

Taxation of costs of exemplification of judgment—Notice to admit, &c.

Before a party will be allowed to tax the costs of obtaining an exemplification of judgment he must serve the other side with a notice to admit, &c, under the rule of court, 28, Easter Term, 1842. The master, however, though he cannot allow the costs of exemplification without notice, &c., may allow the costs of procuring a copy of the roll.

The defendant obtained judgment of nonsuit against the plaintiff, and in taxing costs claimed the expenses of an exemplification of a judgment produced in evidence at the trial. There had been no notice to admit the judgment served on the plaintiff, nor any summons taken out calling upon him to do so.

The plaintiff contended that he was not liable to pay any part of the expenses of obtaining the exemplification, unless served with a notice to admit, as if he had been so served he might have admitted it, and thus saved all expenses; that the rule of court, 28, of Easter term, 1842, would embrace a judgment as well as documents in the possession of the parties, and that either of the parties might be called upon to admit documents in the possession of third persons.

BURNS, J.—The plaintiff carries the position he contends for quite too far. He argues that all that is required is, that he should be called upon by notice, stating the judgment by the number of the roll and the year in which entered, with the parties' names,

to say whether he will admit it. It is evident that will not do, for if the judgment is to be used as evidence at the trial, the judge and jury must know the contents of the roll, and for this purpose a copy must be had of it.

The rule of court will certainly embrace judgments as well as other documents, and according to Spencer v. Barough, 9 M. & W., 425, a party, in order to entitle himself to the costs of proving a document, even though it be put in issue by the pleading, is bound to call upon the opposite party to say whether he will admit or not. A copy of the judgment, as a piece of evidence being required, as I assume at present, for if it were unnecessary, the master is the proper person to exercise his judgment in the first instance as to that, the defendant is entitled to the expense of making a copy or whatever he may have paid for procuring it to be made by the officer in whose custody the same was. Before going to the expense of exemplifying it, the defendant should have called upon the plaintiff to admit it, and if he refused or neglected, then he should have applied for the requisite order, compelling the plaintiff to pay the expense, and then have had the copy exemplified, in order that proof of it would be complete, so as to be received at Nisi Prius.

The master should allow the expense of the copy of the roll, but should disallow the expenses of exemplifying it.

It is argued that the expense of serving notice to admit and obtain a summons and order is much

greater than an exemplification in the first instance. It may be so in many instances, but the object of the rule of court was, that costs in general should be lessened; and though in particular instances it may not have that effect, yet I cannot vary from the rule for such reason.

MANEILLY v. HAYS.

Security for costs—What must be stated in defendant's affidavit —Effect of plaintiff having entered common bail for defendant.

The defendant in applying for security for costs, need only state in his affidavit the non residence of the plaintiff. He need not further shew the state of the proceedings. This must come from the plaintiff in answer.

Where common bail has been entered for the defendant, he is sufficiently before the court to apply for security for costs.

In this case the defendant made the ordinary affidavit of non residence of the plaintiff, without shewing the state of the proceedings.

At the return of the summons the plaintiff objected that defendant's affidavit did not shew the state of the proceedings, and that if it did state the proceedings of the cause truly, it would be seen that defendant was not entitled to ask for security for costs.

[BURNS, J.—I had occasion to examine the point in another case within a few days, and after considering the effect of all the authorities, I have arrived at the conclusion that nothing more is required from the defendant than the ordinary affidavit, and he makes his motion upon that at his peril. If he is not entitled to the security he asks for, the plaintiff must shew it in reply to the application.

An examination of the cases where applications of this nature are opposed, shews that the plaintiff discloses the facts and state of the proceedings which disentitles the defendant to the security.]

The plaintiff afterwards filed an affidavit, shewing that the defendant had not himself entered an appearance, but that plaintiff had filed common bail for him—the declaration however was served upon the attorney, who accepted service. The plaintiff contended that defendant could not apply for security for costs, without he himself entered an appearance.

BURNS J.—I think, after the plaintiff has entered common bail for defendant, the defendant is sufficiently before the court to enable him to make this application without a second appearance being entered by himself. It seems to have been thought at one time, that the common bail entered by plaintiff for defendant prevented the defendant from moving against any irregularity in the writ or service. *Vide* Tidd, 161. The defendant may adopt the appearance thus entered for him, though not compelled to do so. The security for costs must therefore be ordered.

HUTCHISON v. HART.

Misnomer by defendant in his plea of the plaintiff, calling him Hutchinson instead of Hutchison—and signing of judgment as if plea a nullity.

The plaintiff declared by the name of Hutchison—the defendant in his plea spelt the plaintiff's name Hutchinson—the plaintiff treated the plea as a nullity, and signed judgment, and took out execution; the defendant moved to set the proceedings aside.

Burns, J. made an order staying proceedings till the next term, in order that the plaintiff might apply to set the judgment aside, and this he said he thought the defendant entitled to.

The action was debt upon bond.—The defendant had not appeared to the summons, but after service of the declaration, a plea was filed and served in proper time by an attorney.

In the title of the plea filed and served, the plaintiff's name was spelt Hutchinson, and in the plaintiff's declaration and other proceedings it was Hutchison.

The plaintiff treated the plea as a nullity, as not being in the cause, and signed final judgment, and execution was issued thereon against the defendant's goods and chattels, and levy made by the sheriff.

The defendant moved to set the proceedings aside as being irregular. In the title to the affidavits filed, and also in the summons, the defendant had still spelt the plaintiff's name with an "N," not having discovered the reason for the signing of the judgment.

The plaintiff relied upon the mistake in the spelling of his name, both for the purpose of discharging the summons and the maintaining of his judgment.

BURNS, J.—In Hodgkinson v. Hodgkinson, 1 Ad. & E. 533—a writ directed to the sheriff of Middesex instead of Middlesex, was held bad; but this declaration was overruled in Cobeton v. Berens, 1 C. M. & R. 833. In ——— v. Rennells, 1 Ch. Rep. 659, n, the variance complained of was between the affidavit to hold to bail, and the writ; the defendant was called Reanol instead of Rennells, but the variance was held immaterial.

I think the case of Hodgkinson v. Hodgkinson is considered by the judges of the same court in which it was decided as not now to be followed. In Macdonald v. Mortlock, 2 Dow. & L. 963, the writ described the defendant as Mortlock, but the copy served upon the defendant described him as Mortlake, and Mr. Justice Coleridge held the variance immaterial. The variance in the present case is not so apparent, and the different ways of the plaintiff's spelling, and that of the defendant is almost, if not entirely so with many persons, *idem sonans*.

Final judgment having been signed and execution issued thereon, I can do no more than stay the proceedings until term, so as to afford the defendant an opportunity to apply to the court to set aside the judgment, and this I think the defendant is entitled to.

PEEL v. KINGSMILL.

Application to amend pleas by adding a plea of usury—refused, after several applications to amend, by adding other pleas, had been before that refused.

This action was commenced in the month of October, 1848; and among other defences, the defendant pleaded that the bill of exchange and promissory note, upon which the plaintiff sought to recover were paid, and that the same had been discharged by means of a certain bond which the defendant executed and delivered to the plaintiff, and thereby the bill and note were cancelled.

The plaintiff took issue upon the plea of payment and demurred to the plea, setting up the bond in satisfaction.

The cause went down to trial at the Spring Assizes for the Home district in 1849, and a verdict was rendered for the defendant on the plea of payment, in consequence of the bill and note being produced with the defendant's name erased therefrom, and no explanation offered to shew why the bill or note was in that state,—the presumption afforded being, that the defendant was no longer liable upon them.

A new trial was granted upon affidavits, shewing that the erasure of the defendant's name took place at an attempted settlement between the parties. It had been agreed that the defendant should give a bond and warrant of attorney for the debt, and that the bill and note should be cancelled. The defendant partly executed the bond and warrant, and the plaintiff erased the defendant's name. Before the arrangement was completed a dispute arose between them, and the bond and warrant were never delivered by the defendant, and the settlement never took place.

The demurrer was argued and judgment given for the plaintiff.

On the 5th March 1850, the defendant obtained a judge's summons for leave to add a plea or pleas, putting in issue the fact of the cancellation of the indorsements of the defendant on the bill and note, which summons was afterwards discharged upon hearing the parties.

On the 19th September, 1850, the defendant obtained another summons, calling upon the plaintiff to shew cause why he should not have leave to

add a plea or pleas to those already filed, or why he should not have leave to amend the pleas demurred to and add other pleas, or plead *de novo*, as he might be advised. This second summons was discharged upon hearing the parties.

On the 28th September, 1850, the defendant obtained a third summons, calling upon the plaintiff to shew cause why he should not have leave to add a plea or pleas to those already pleaded, or to plead *de novo*, as he might be advised, and this was also discharged upon hearing the parties.

The defendant now asked to be allowed to plead usury on the bill and note declared upon, in order to defeat the plaintiff's recovery; and in the affidavit filed in support of the application, it was stated that the plaintiff had filed a bill in equity, for a discovery from defendant, to which bill the defendant pleaded the usury, but the plea was overruled, on the ground, as was stated, that no plea at law set up such a defence.

BURNS J.—I suppose it must have been considered it was no answer to the plaintiff's bill seeking a discovery to say there was a defence of usury, when that defence had not been insisted upon at law, —and besides, the doctrine of equity is not to lend its assistance to a party to relieve himself from an instrument he has signed, unless he offer to do equity by paying the just amount due. Without considering however what effect may be produced by what another court may do, either upon the same state of facts, or upon pleadings and facts there, which I can

only speculate upon, I must confine the case to the matters in our own court.

I do not think the cases cited by the plaintiff are exactly in point. McDowall v. Lyster, 2 M. & W. 52, and 5 Dow. 293, do not shew that the defence sought to be set up might not perhaps have been allowed if the defendant had asked to put in the proper plea. It was sought to add a special plea of the facts; but if the facts were as stated, the proper plea was, that the defendant did not make the note, because if the note, though signed by him, was in contravention of the provisions of an act of parliament, it was no note.

The case of Foot v. Baker, 7 Jur. 131, is a strong case to shew that an amendment might perhaps have been allowed, if asked at the proper time, and the state of the pleadings would justify it. The defence now intended must have been known to the defendant from the commencement of the suit; and either of the summonses, I have already mentioned, would have been sufficient to have allowed such a defence, if it had been suggested. Then why was it not? No excuse is shewn, but that the defendant did not instruct his attorney to plead the usury until after the bill in equity had been filed, owing, as the attorney swears, to the fact, as he believed, that he could not prove the truth of it, except as the defendant says by his own oath, or that of the plaintiff.

Again, when I look at the pleadings and the affidavits, I see that the defendant had all but effected a settlement of the debt, and had in fact executed the

instrument which was to satisfy it, and that he set up such defence to defeat the plaintiff's remedy, knowing that the arrangement had not been completed, because an altercation had arisen between them. At the trial the defendant claimed the presumption in his favour that he was not liable on the note and bill, because his name was erased therefrom, knowing that the circumstances under which the name was so erased, did not entitle him to raise such a presumption. Under all these circumstances, and considering the defences the defendant has chosen to rely upon, I do not feel I ought to permit him to change his ground. As is said in McDowall v. Lyster, "the court will not interpose to assist the defendant in defeating an instrument which he had knowingly executed in an illegal manner."

RYAN V. CULLEN.

In this case the answers of defendant to interrogatories were simply "yes or no"—they were objected to as unsatisfactory on this account, and

BURNS, J., said:

The answers to the interrogatories are very inartificially framed, and if it did not appear from some how the matters stand, the answers to some of the questions would be deemed unsatisfactory.

Many of the questions embrace several inquiries, and yet the answer is no.

A simple answer of yes or no to a written interrogatory is not the proper way to answer. It may

to open a wide examination, but clearly is not the technical way to reply to written questions.

On the whole, however, I do not see that anything is stated from which it can or should be inferred that the defendant has the means of either satisfying the debt or any part thereof.

The defendant should, I think, be discharged.

THE QUEEN v. THE SHERIFF OF THE COUNTY OF HASTINGS.

Extent of sheriff's liability—where in an action for seduction against a defendant who was ordered to be held to bail for 50l., the defendant did not put in special bail, and the sheriff was attached for not having the body.

The plaintiff obtained an order to hold the defendant to bail in an action for seduction for 50l.—the defendant did not put in special bail, and the sheriff was ruled to bring in the body, and an attachment issued against him—the sheriff applied on affidavit to be relieved on payment of the 50l. and costs, and held *per Burns, J.*, that the application of the sheriff must fail: 1st—because he had not negatived in his affidavit collusion between himself and the defendant, and 2nd—because he only offered to pay the 50l. and costs, whereas his liability might extend, in the discretion of the jury, to the penalty of the bail bond and the costs of the attachment.

Semble—that the plaintiff, though the defendant will not put in bail, may go on with his action against him, and be pursuing his remedy against the sheriff at the same time.

The plaintiff obtained, on the 9th August 1850, a judge's order to hold the defendant to bail in an action of seduction for 50l., and shortly after the defendant was arrested and gave bail bond to the sheriff. The defendant did not put in special bail at the return of the writ, nor did the sheriff, but after the rule to bring in the body an attachment issued against the sheriff on the 7th September, which was executed shortly before the present application was made.

The sheriff applied to be relieved against this attachment on payment of 50*l.*, the amount indorsed upon the writ for which he was to take bail, and costs; and he made an affidavit in support of his application, stating that he took good and sufficient bail in a penalty of 100*l.*—that the plaintiff refused to take an assignment of the bond—that the defendant would not put in bail, but was determined to leave the plaintiff to his remedy against the sheriff—that the sheriff was willing to pay the 50*l.*, or to assign the bond—and that if the sheriff were to put in special bail and endeavour to surrender the defendant, he the defendant would avoid being arrested, and probably would abscond, and the sheriff would not be able to deliver him, and then, having put in bail, he the sheriff would lose his remedy on the bond.

The sheriff relied upon the case of The Queen v. the Sheriff of Middlesex—15 M. & W. 146, to shew that no more could be exacted from him than the amount indorsed on the writ and costs, which he was willing to pay.

The plaintiff resisted the application on the ground that he had lost one assize, and was unable to prosecute his suit for want of the defendant having put in bail.

He contended further, that the sheriff's liability was not restricted to the sum indorsed on the writ, but might be for whatever sum the plaintiff might recover if he were enabled to proceed with his suit; and he also contended it was necessary that the affi-

davit of the sheriff should shew that no collusion existed between him and the defendant. The cases relied on were The King v. the Sheriff of Middlesex, 3 East. 604, and The King v. the Sheriff of London, 9 East. 316.

BURNS, J.—With respect to the objection made to the sheriff's affidavit, that it does not negative collusion, I must say between him and the defendant I think it a good objection.

When applications of this nature are made, it should appear on the part of the sheriff—first, that the application is really and truly made on his part, at his own expense, and for his indemnity only—and secondly, that no collusion exists with the original defendant.

Independent of this objection, I do not think the present application entitled to succeed, because the sheriff only offers to pay the 50*l.* and costs. The case in 15 M. & W., 146, does not in my opinion support the present application. There the deputy sheriff had paid the whole penalty of his bond and costs, and the application to refund was made because the debt was only 61*l.* 1*s.*, as established by the judgment obtained against the defendant. The defendant himself was liable for no more; neither were his bail. In the present case, however, it does not yet appear what the debt may be, for that depends upon what a jury may give the plaintiff.

The liability of the sheriff extends clearly to the amount of the penalty of the bail bond, and may be beyond that sum, so far as respects the costs of the

attachment.—Rex v. the late Sheriff of Devon, 1 B. & Ad. 159; Jaconsden v. Nash, 2 Dow. 767.

The statute 12 Geo. I, c. 29, s. 2, enacts that "*the sum or sums specified in the affidavit of debt shall be indorsed on the back of the writ or process, and that the sheriff or other officer to whom the writ or process is directed shall take bail for no more than the sum indorsed on the back of such writ.*" This statute is held to be only directory, and the constant practice is to take the bond in a penalty of double the sum indorsed on the writ; and if a greater sum were introduced, the court, on motion, would order it to be reduced.—Evans v. Bidgood, 4 Bing. 63; Wilcox v. Nightingale, 10 B. & C. 202, and Snow v. Stevens, 2 Dow. 664; also per Tindal in Wingran v. Godmond, 6 C. & P. 66.

I do not see that the plaintiff is prevented from pursuing his action because the defendant will not put in bail, and therefore such objection cannot operate against the sheriff obtaining relief. The case in 15 M. & W. shews that the plaintiff pursued his remedy to final judgment against the defendant, and was pursuing his process against the sheriff at the same time. The case of Neudorn v. Cooper, 10 B. & C. 614, shews that in a bailable case the plaintiff may deliver his declaration conditionally any time before the bail are perfected, and thus get on with his action.

I have no objection to make an order to set aside the attachment against the sheriff, on payment of the penalty of the bail bond, together with the costs of

the attachment and costs of this application, otherwise the summons must be discharged with costs. The sheriff to elect within ten days whether he will take such an order; if not, at the end of the ten days the summons will stand discharged with costs.

PATERSON v. SQUIRES ET AL.

Held per Sullivan, J.—That the styling a cognovit thus—"Thomas Paterson, plaintiff, v. Philemn Squires and William Squires, defendants, leaving out the letter o, and omitting part of the letter m, was not an irregularity (there being no doubt as to the identity of the parties)—upon which a judgment and execution entered and issued upon the cognovit could be set aside.

Semble—That the rule of court requiring the intervention of a practising attorney in the taking of a cognovit, is sufficiently complied with by the cognovit being prepared by an attorney, and his name being endorsed thereon at the time of the execution; it is not necessary that the attorney should be present at the time of the execution.

A case held per Sullivan, J., in this case, upon the affidavits as detailed below, that a sufficient case was not made out, upon which the execution issued upon the cognovit could be set aside, either on the ground of the insanity of the defendant, or of fraud on the part of the plaintiff, at the time of execution of the cognovit.

In the course of Michaelmas term last, Mr. Justice Draper, sitting in the Practice Court, granted a rule, calling upon the plaintiff to shew cause why the judgment and execution in this cause should not be set aside, on the ground that the confession of judgment whereon the same purports to be entered is not styled in this cause, and that there is no affidavit filed in the style of the cause whereon the said confession was given, of the execution of the said confession, or why the said confession, judgment and execution should not be set aside as against Philemon

William Squires, on the ground that the said confession was obtained from him by fraud, and on the ground that the said Philemon William Squires was not competent to execute a cognovit; that the said confession was obtained without the intervention of an attorney of the court, but was drawn up and the taking thereof superintended by a person who was not an attorney or a clerk of an attorney, or connected with the attorney; and on grounds in the affidavits and papers filed. And why such proceedings should not be set aside with costs, and in the meantime be stayed.

This rule was returnable on the last day of term, and was by consent of parties enlarged and made returnable before the Judge in chambers, and accordingly came on to be argued before Mr. Justice Sullivan in chambers on Friday the 6th of December, instant, when *Mr. John Duggan* showed cause against the rule, and *Mr. MacNab* was heard in reply. Mr. Justice Sullivan took time to consider the cause, and now gave judgment.

SULLIVAN, J.—The proceedings in this case are impeached on the ground of irregularities; and secondly, on grounds affecting the merits. The first irregularity complained of is in the style of the confession of judgment, which on examination I find to be thus:—"Thomas Paterson, plaintiff v. Philemn William Squires & Willian Squires, defendants." It appears that a summons had been issued previously to the taking the cognovit, in which the names of the parties were properly spelt; and the deficiency in the

style of the cognovit consists in the leaving out the letter e in the name Philemon, and in the omission of part of the letter m in the name William. There is no question of the identity of the parties who signed the confession, and no doubt but if the judgment had been entered in the names as written in the cognovit, the judgment would have been regular, even if the misnomer had been much more serious and defective than in the present case. In the case of Parker, Dunbar and Company v. Roberts, 3 U. C. Q. B. Reports, 114, it was held that even the adoption of the name of a trading firm in a cognovit could not be objected to by the defendants. In the present case, the judgment is entered in the true names of the parties; but, in the first place, I conceive the deficiency in spelling is not such as to alter the sounds of the words misspelt, so as to mislead any one as to the true names; and moreover, it seems to me clear that even if the names had been more contracted in the spelling—for example, if W. or Wm. had been put in the place of William, or Phil^n. for Philemon, the defendants could not be heard to object, in the face of their own undertaking not to bring any writ of error, or do anything to prevent or delay the plaintiff's judgment and execution.

The next objection is as to the want of intervention of an attorney in the taking of the cognovit. The affidavits on the part of the defendant show that not only was no attorney present, but that the deponents, including the defendants, were not aware of the intervention of any attorney when the confes-

plea was signed. The affidavits filed by the plaintiff show that *Mr. Duggan* was retained to commence a suit against the defendants; that a writ of summons was actually sued out, but not served; and that it was upon his advice the proceeding was taken; and that he, at the request of the plaintiff, actually filled up the cognovit with his name printed on the back; and that a cognovit was executed, endorsed with his name. To this it is replied, that the cognovit actually executed was, as appears by the handwriting, actually filled up by George Darby, the plaintiff's clerk, and this I understand not to be denied in the argument, *Mr. Duggan* saying that he supposed two blank cognovits had been taken from his office, and that the one actually signed was copied from the other. I should have liked to have this matter more satisfactorily explained; but the objection as to handwriting not having arisen till the argument, I could not found any judgment on the want of an explanation, which, if an opportunity had been given, might have perhaps been satisfactorily afforded, particularly as I had no evidence of the identity of the handwriting.

In the case of Thompson v. Zwich, 1 U. C. R. 338, my brother McLean, sitting in the Practice Court, held, that when after action brought a confession of judgment was prepared by the plaintiff's attorney and sent to the plaintiff, at his request, with a blank for the sum for which the confession was to be given, and the sum was filled up by the plaintiff, and the confession executed by the defendant without the attorney or any of his clerks being present, that the

rule of Easter term, requiring the intervention of a practising attorney, was sufficiently complied with.

Again, in Clarkson v. Mills, 2 U. C. R. 96, it was held by the late Mr. Justice Jones, that if a cognovit be prepared by an attorney, and his name endorsed at the time of the execution, it is a sufficient compliance with the rule, although the cognovit is afterwards executed in the plaintiff's country house when the attorney is not present.

These cases have, I believe, been accepted as law ever since, and I am unable to distinguish them from the present case; though if I had to decide the point in the first instance, I should have hesitated before I came to the same conclusion.

It has been a reproach to the English law that, with the exception of the statute Merchant, no instrument, however solemn or unquestioned, is sufficient to prevent the necessity of a suit at law. In this country the cognovit in the first instance has been made in a multitude of cases to supply that deficiency; at the same time it certainly places great powers of oppression and fraud in the hands of the plaintiffs—to prevent which, nothing short of acknowledgment before a judge could be more effectual than the requiring the presence of an officer of the court, or of some person for whom he is accountable, when the cognovit comes to be executed—which officer or attorney would be liable to the displeasure of the court, should the transaction to his knowledge be founded in fraud of creditors, or in oppression or imposition of or upon the debtor. I cannot myself look upon a cognovit as a

still instrument in the hands of interested persons, but thus accountable; neither can I understand how an attorney can be made answerable for fraud or oppression by a plaintiff, committed in his, the attorney's, absence, merely because his name is endorsed on the cognovit. The rule, according to the received construction of it, seems of no practical use, except securing certain costs to attorneys, but I cannot say that the plaintiff's attorney has not complied with the rule; the present case, however, of alleged insanity in one of the defendants, and of imputed fraud and imposition and intimidation on the part of the plaintiff, affords an admirable illustration of the propriety of a practice, that attorneys should always be present when cognovits endorsed with their names are executed; indeed, on the part of the plaintiff in this case, a blank cognovit endorsed with the name of a practising attorney, in writing, is produced, coming from the possession of the defendant, and said to be referred to by him on the occasion of signing the cognovit in the present case, as a test of the correctness of the instrument he was about to sign—which circumstance, without explanation, would lead me to suppose that the very reprehensible practice of entrusting blank cognovits, endorsed by attorneys, for the purpose of their being used as advantage or occasion should offer, was not altogether discontinued. I think, however, that in the present case, led by the permitted laxity of practice, the plaintiff's attorney has complied with the rule of court, as understood, and that the defendant cannot prevail on this ground of objection.

Then, as to the merits of this case, the defendant, Philemon William Squires, deposes that he has no recollection of having signed the cognovit, and that he did not become aware of having signed it until seizure by the sheriff under the execution; and that there was never any settlement of accounts between the plaintiff and him (the defendant); and that he does not believe that he owes the plaintiff a sum exceeding 25*l.*; and that the plaintiff took advantage of his unfortunate situation and state of mind, for the purpose of defrauding him. Then his wife, Charlotte Squires, swears, that the plaintiff came to their house on the 6th of November, the day before the confession was signed, and informed her that her husband owed a large amount of money to his creditors in Toronto, who would cause her husband's goods to be seized, and that she would be thrown into the street; but that if her husband would sign an article in favour of him (the plaintiff), he would get the creditors to give time: that her husband was at the time *quite insane*, and incapable of transacting business; but that the plaintiff requested her to persuade her husband to sign the article; and that she was persuaded to advise her husband to sign the article; and that plaintiff left a Mr. Wyllie, his brother-in-law, in the house till the next day, for the purpose of procuring her husband's signature. And she says further, that since the seizure of the goods, George Darby, who witnessed the cognovit, confessed to her that he knew that her husband was not in his right mind when it was signed. Then Alexander McNab, George Samuel Hewick

(surgeon), Samuel Wm. Farrell, Margaret Donaghue, and Daniel Moore (who describes himself as a medical student), severally depose to the effect, but not all speaking of the same identical days, that about and at the time of signing the cognovit, and for some time before and afterwards, the defendant, Philemon William Squires, was insane—not in his right mind, and was incapable of transacting business. William Squires, the other defendant, who signed the cognovit, and whose affidavit is produced by the defendant's attorney, says not a word as to the alleged insanity; and it is to be remembered, that not one of these deponents states any cause or symptom of insanity, or accounts in any way for the alleged insane person being permitted ostensibly to carry on business, or hint at what was stated in the argument—that the defendant Philemon was or was merely addicted to drinking, or that what they mean to allege is or is not incapacity for business, arising from excessive drinking.

The plaintiff himself, after showing, though unsatisfactorily, the nature of his business transactions with the defendants, swears, that although Philemon William Squires has, within the last six months sometimes used intoxicating liquors, that he has been and is of a perfectly sane mind, and quite competent to transact business; in proof of which, he annexes to his affidavit two letters from the defendant, dated October 10th. 1850, which shew that at that time Philemon Squires was conducting his business with perfect sanity of mind and understanding. He also

produces a letter from the deponent Daniel Moore, dated November 28, 1850, which requests him (the defendant) not to permit a horse of his (Moore's) in Squire's possession to be seized under the execution, referring to Squires himself for information, and shewing—as argued by the plaintiff's counsel—no belief in Squires's insanity.

William Squires, the co-defendant of Philemon before mentioned, after explaining the nature of the transactions upon which the debt arose, swears positively to the perfect sanity of Philemon before and at and after the time of signing the cognovit, and to the perfect understanding of Philemon as to the nature of the instrument and its consequences; and he denies having intended to swear as in his affidavit produced by the defendant, as to the balance owing to the plaintiff: he says he there meant to swear that if the plaintiff had got all the goods—as was intended in a former arrangement—that there would still be a balance coming to him of about 30*l*.

George Darby, the witness to the cognovit, swears to its execution—to its having been read over and explained to the defendants—to the perfect *sobriety and sanity* of Philemon Squires at the time and afterwards. He also, in another affidavit, denies most positively having confessed to Charlotte Squires, or any other person, that he was aware of any insanity or incapacity for business on the part of Philemon Squires, and, on the contrary, he reasserts his fitness for business.

William Wyllie, another witness to the cognovit,

deposes, that at the time of signing the cognovit Philemon Squires conversed with him about it, heard it read, and had a full and perfect knowledge of its contents; and that he was quite sober since, and capable of transacting business; and that on the 6th and 7th of November he saw him transacting business with several persons—receiving money and giving orders and receipts; and that when speaking of the cognovit, and before he signed it, he produced a blank cognovit, attached to the affidavit, endorsed by Mr. McNab as plaintiff's attorney, and compared the form of the blank with the one he was about to sign, and throughout the transaction acted with every care and precaution.

Then Daniel Moore, the medical student, who, on the part of the defendant, swore that he saw Philemon Squires on the 6th day of November, and that he was not in his opinion in possession of a sufficient amount of reason to enable him to transact any business, afterwards, when called on by the plaintiff, swears that he saw Philemon Squires on the morning of the 7th day of November, and that he was then perfectly sane and fit for and capable of transacting any kind of business.

I observe, in the first of these affidavits, the words "and seventh" cancelled; and before seeing the second affidavit of Moore, I supposed they were so struck out because the deponent had not seen Squires on the *seventh*, the day of signing the cognovit. The two affidavits, taken together, have all the appearance of a disingenuous suppression of important

evidence on the part of the defendant's attorney. I cannot forbear remarking on it, for it surely cannot be the duty of an attorney to produce or procure an affidavit deposing that a client was incapable of transacting business on one day, for the purpose of founding an inference therefrom that he was therefore incapable on the succeeding day, when the witness himself knew the fact—apparently to the knowledge of the attorney—that the inference would be false. It is painful to a judge to be watching for negatives pregnant in affidavits—and imagining a *suppressio veri* where the looseness of language admits of it. We are perhaps too ready to excuse the want of precision in this kind of testimony on the ground of carelessness or ignorance, and therefore when one sees an apparent attempt to impose on him in this manner, it is thought of with more severity than if it were a thing to be looked for or guarded against. I hope that in this case the defendant's attorney, when he struck out the words "and seventh" from the affidavit of Moore, overlooked what the witness could have proved or was willing to swear to, if he should speak of the 7th at all; for if I were to take all the affidavits produced in this case as drawn up in the spirit which might be supposed to enter into the drafting of this one, I do not know what reliance to place upon any of the affidavits produced; almost every witness may know that to be false, which a person reading the affidavits might infer as a true or probable consequence from the facts stated. Besides these affidavits, the plaintiff further produces one

from Hiram Bedford, swearing to Philemon Squires's sanity on the 7th of November; [illegible] Cooke's affidavit to the like effect; Geo[illegible] to the same purpose; and Daniel Webster, [illegible] Hyde, Mary Ann Squires, Adolphus Pollard and William Knott, all swearing to the sanity of the same party before, after and about the time of signing the cognovit, and all shewing intimate acquaintance with him, and opportunity of knowing the facts.

I have now to remark upon what I should rather pass by without notice—namely, certain allegations in an affidavit produced by the defendant, sworn by a commissioner of the Court of Queen's Bench (Mr. Richard Isney). Concerning an affidavit made before him on this cause, of Hiram Bedford, the commissioner swears, that at the time Bedford was sworn he was, as the commissioner verily believes, under the influence of liquor; and that had it not been for a statement of Mr. Burns, the clerk of Mr. J. Duggan, to the effect that he was obliged to swear all persons offering to depose to affidavits, that he would not have sworn Bedford; and that he (the commissioner) verily believes that the said Bedford did not understand the contents of the affidavit. If it be true that Mr. Burns ever made such a statement, it is difficult to conceive that any man who could procure the recommendations necessary to cause his appointment as a commissioner for taking affidavits, could be so strangely ignorant of his duty, and of the respect due to the solemnity of an oath, as to think, upon the representation of an attorney's clerk, that he was obliged to

go through the profanation of hearing a man call God to witness the truth of what the deponent was incapacitated by intoxication from understanding. Mr. Burns denies the intoxication of the witness, and the representation he is alleged to have made. It is not of much consequence to the case which of them is speaking truth, but there can be no doubt of the impropriety of the commissioner's proceeding, even upon his own statement.

As regards this alleged ground of insanity of the defendant Philemon Squires, I take it that the witnesses on his part must be understood as deposing to the existence of what is commonly understood by the term "insanity." These depositions would be very unsatisfactory, even if they stood uncontradicted. If the defendant wishes to set aside the proceedings on the ground of intoxication, whether continued or occasional, and existing at the time of signing the cognovit, such is not the case made out by his witnesses; they do not say he was intoxicated, or labouring under derangement from the effects of intoxication. It strikes me that there is a studied evasion of the question as to the cause and nature of the alleged insanity, which disentitles the defendant's case to credit. It is not shown when or how he became insane; when or how, or if he left off transacting business, or when or how he recovered; and I cannot but think that they have exaggerated occasional inebriation into insanity, and that this has been done from a consciousness that the incapacity arising from the former would have to be distinctly

shown to refer to the time of signing the cognovit; and from a further consciousness that this could not be made out in evidence.

The numerous affidavits produced by the plaintiff depose not only to the sanity of mind of the defendant Philemon Squires, but they disclose the pretence for a contrary supposition, in his habits of intoxication; and they further displace the notion that he was intoxicated at the time of signing the cognovit, by deposing to his sobriety and sanity of mind then. If the defendant's case were strongly and consistently made out, I should have declined passing judgment on such a question; for then there would simply be a conflict of testimony, and I should have prayed the court to relieve me from a duty which does not belong to me as a Judge in chambers, unless through the consent of parties; but in my apprehension, the case of the defendant is weakly and evasively sustained—and on this ground it is met by evidence comparatively irresistible.

As regards the ground alleged of fraud and imposition, I find the defendant Philemon Squires swearing that there was never any settlement of accounts come to between the plaintiff and *himself*, Philemon, and that he verily believes he is not indebted to the plaintiff in a sum exceeding twenty-five pounds; he says further that the plaintiff took advantage of him, for the express purpose of causing him to make himself liable for an individual debt of deponent's son (William Squires) to the other defendant in this cause.

The debt confessed in the cognovit is 75*l*.

Charlotte Squires, the wife of Philemon Squires, says that she was induced to persuade her husband to sign the article, on the plaintiff's statement that her husband's other creditors would seize the goods, and upon his promise that he would get time from the other creditors, and go security to them.

Charles Brown swears that William Squires, one of the defendants, purchased from Topping & Brown goods, with which he commenced business on his own account, in the spring of 1850; that the plaintiff is an endorser on his notes, which have not become due; that the plaintiff is an endorser for said defendant, for the goods obtained as aforesaid, to the amount of 170*l.* and upwards.

William Squires says that he and the other defendant carried on business as general merchants, in partnership, from 1846 until the spring of 1850—and that during all that time they had dealings with the plaintiff; that there never has been a settlement; that in the spring of 1850 the partnership was dissolved, and deponent commenced business on his own account, and plaintiff endorsed some of the notes given by deponent for the goods with which he so commenced business—which business continued only for two months—when deponent again, on the advice of plaintiff, entered into partnership with his father; that the plaintiff applied to deponent for security against his liabilities as endorser for deponent, and for a sufficient amount to cover what might be found due between defendant and plaintiff; that the plaintiff stated that the matter could be ar-

ranged without expense, by deponent signing a paper confessing that he owed plaintiff an amount sufficient to cover said plaintiff's claim against the partnership, and also his endorsations for deponent; that he signed the confession after his father; that upon a settlement he verily believes that the *defendants* would not be found indebted to plaintiff in a sum *exceeding thirty pounds*.

The plaintiff, to meet these statements, produces the following affidavits.

1st. The plaintiff's own affidavit: that the defendants, in 1846, entered into partnership and carried on business, first at Streetsville, afterwards at Norval, continuing in partnership as before; that plaintiff supplied them with goods, and became their security for large amounts; that there is now due and owing from *them*, for such goods, and for securities, which plaintiff must pay, the full amount of the cognovit; he denies collusion with William Squires, and swears that previously to the signing the confession he met the defendants, and totted over with them the amount due.

William Wylie swears that he is well acquainted with the state of the books of the plaintiff, as he had the full management thereof for the greater part of the time during which the account between the plaintiff and defendants was running, and is well aware that a large sum of money, and as he believes the amount for which the cognovit was given, and which was agreed upon between the parties previously, is justly due.

Jacob Bishop swears that he has frequently conversed with defendants since the goods have been taken in execution, and that *William* Squires told him that the amount for which the confession was taken was justly due from defendants to plaintiff.

John Hyde swears that in September last Philemon Squires applied to him for an advance to the defendants of 50*l*., and afterwards of 12*l*. 10*s*. 0*d*., which he did upon the security of the plaintiff—who said he became security hoping to induce the defendants to give him security for a large amount for which they were indebted to him.

William Squires swears that he and the other defendant, Philemon Squires, were well aware of what they were doing when they signed the confession of judgment; that the amount for which it was taken had been spoken of for some time previous to the signing, and settled on between all the above parties, and perfectly understood by Philemon Squires, that the plaintiff had mainly supported the defendants in business since they commenced in Streetsville, where they continued partners for some years; that said confession was taken not only for the amount due by defendants to plaintiffs, but also for the amount for which the plaintiff had become liable to pay for defendants, as endorsed on their paper, and as security for them, and that the cognovit is taken for no more; he further swears that he never intended to swear that but 30*l*. was due to the plaintiff, but only that if plaintiff got all the goods, as was before intended, there would be 30*l*. due him.

Now, as to [illegible]lemon Squires' affidavit, I cannot say what he means when he says there was no settlement of accounts between the plaintiff and himself, the deponent—or when he says that he believes he is not indebted to the plaintiff in more than 25*l*. The question is not of a settlement between the plaintiff and the deponent, or of a debt due by him alone—but of a debt due by both; Charles Brown's affidavit shows a debt, solely incurred by William Squires, to the amount of 170*l*., in the spring of 1850; and William Squires, in the affidavit put in by him at that time, so far as he can be at all depended upon, shows that he did, for two months, carry on business alone, and that he was applied to for security to cover the plaintiff's liabilities, and that the *defendants*, I suppose meaning them jointly, did not owe the plaintiff more than 30*l*. Here we have the two defendants impeaching the amount of the debt in their own affidavits—the first one strictly meaning nothing to affect this case, and the second contradicted by the deponent's own affidavit, put in afterwards, and neither inconsistent with the whole sum being due between the defendants, or with their forming in a cognovit to secure what was due by both and by each. Supposing a sole debt of William Squires' to have been incurred in the procurement of goods during the short time in the spring of 1850, when he, the defendant William Squires, says he carried on business on his own account, the remains of which goods, or the proceeds of them, naturally would go into the partnership business of the two de-

fendants when they recommenced [illegible] joint business [illegible] case, there was no [illegible] conduct should not secure the [illegible] goods and effects; indeed, con- [illegible] in which the defendants stood [illegible] supposing the father to be in his sound mind), there would be no reason to impeach the transaction, if the greater part of the debt was the sole debt of either; but besides this, as I before observed, William Squires contradicts himself in his affidavits produced on either side, so as to leave his evidence of no weight; and the affidavit of Philemon Squires may be altogether coercive.

The plaintiff has not, as he should have done, produced an account, and shown an exact balance; but as I think the defendants knowingly and advisedly signed the cognovit, I do not see there is any evidence of imposition upon them or either of them, to prevent of either being allowed to set aside their joint confession. They may have had it in their mind to defeat or delay other creditors, but the present question is not between the other creditors and [illegible] tiff, but between him and the defendants [illegible] ves; and feeling convinced that from [illegible] as the partic[illegible] have laid before me, [illegible] that there is not sufficient to show insanity [illegible] capacity to transact business in the elder defend[illegible] cannot but look upon the cognovit as a transac[illegible] tered into for either honest purposes or the [illegible] by the defendants, by which in either case they are bound, and cannot be relieved, because one of them since appears to have repented of it.

If the plaintiff should not hereafter answer the liabilities incurred for the defendants, or either of them, or if it can be shown with any certainty that the sum for which the confession was taken was intended to be reduced, upon a regular accounting between the parties, I do not by any means wish to express an opinion against the success of an application for relief, on either ground.

The rule for setting aside the proceedings must be discharged with costs.

NOTE.—Mr. MacNab, the defendant's attorney, was not present when judgment was delivered; but afterwards, he left with the clerk in chambers an affidavit of his own, explaining the transaction of taking Daniel Moore's affidavit, swearing that the affidavit was partly drawn up on the information of Charlotte Squires before seeing Moore, and that Moore denied having seen Philemon Squires on the *seventh*, and that on its being stated that Charlotte Squires said that he had seen him, he Moore said that it must have been for so short a time as not to enable him to form an opinion of Squire's sanity or insanity of mind.

IN RE JOHN WESLEY KERMOTT, PARTY COMMITTED UNDER THE EXTRADITION TREATY WITH THE UNITED STATES.

Right of prisoner committed by magistrate under the Extradition Treaty, to a writ of Habeas Corpus and certiorari, returnable before a Judge in Chambers—and if commitment found to have been ordered on insufficient grounds, to have Ale discharge granted by judge.

Held per SULLIVAN, J.—That upon the facts of this case (as fully set forth in the judgment)—it appeared to him from the return to the writs of *certiorari* and *Habeas Corpus*, that the prisoner, who had been committed by the Mayor of Toronto upon an alleged crime of forgery, for the purpose of surrender under the Extradition Treaty with the United States, and the Provincial Act of 1860—had been committed upon insufficient evidence, and must therefore be discharged.

Quære?—Can a [illegible] magistrate detain a prisoner upon evidence [illegible] only to a ground of suspicion, for the purpose of other evidence being imported into the case, so as to bring it within the treaty?

In this case SULLIVAN, J., remarked at some length upon the treaty, and upon the statute of the Province, and the law of the United States, passed for the purpose of enabling the magistracy to act in the arrest and detention of parties accused of committing crimes of a certain class, enumerated in the treaty, within the territories of one of the contracting parties, and flying from justice into the other. That when an accused person was brought before a judge or justice of the peace, in the manner pointed out in the provincial statute of 1849, the magistrate was to decide upon the evidence, and whether it was sufficient to sustain the charge, supposing the offence had been committed in Canada; and if he judged the testimony sufficient, the fugitive was then liable to be detained till claimed by the foreign government.

The learned judge then stated that the prisoner here was charged with forgery committed in the State of New York. The mayor of Toronto, before whom he was brought, had considered the evidence sufficient, and had so reported to the provincial government. Mr. Dempsey, his counsel, conceiving the mayor not to have arrived at a correct conclusion, applied for a writ of *habeas corpus*, to bring up the prisoner, and for a writ of *certiorari* to remove the proceedings into the Court of Common Pleas. These writs were granted by himself (Mr. Justice Sullivan) after some hesitation, but he considered that there was nothing in the treaty, or in the provincial statute, to weaken the right of any party detained in the custody to the writ of

habeas corpus, or to have the judgment of a judge of one of the superior courts as to the sufficiency of the cause of his imprisonment; from which premises followed a right of the prisoner to have the opinion of the same judge, in revision of that of the committing magistrate, upon the sufficiency of the evidence.

In the present case the legal testimony fit to be submitted to a jury, was, that the prisoner being accused of a crime—namely, the obtaining goods under false pretences (to which the Extradition Treaty was not applicable), being pursued by the present prosecutor, by way of compounding for that offence, took from his pocket the note which he was accused of having forged, and passed it to the prosecutor, representing that the maker, Abraham Williams, resided at a certain place, and was a man of substance, that the prisoner was therefore set at liberty; that the prosecutor went to the neighbourhood pointed out to look for Abraham Williams, but could not find him there, but that he did find a man named Abraham Williams, who lived within 18 miles of the place, who denied having signed the note: The remaining part of the testimony was not legal evidence, for the prosecutor's opinion upon a comparison of hand writing, could not be submitted to a jury; and after all it would only shew that the body of the note was drawn up in the hand-writing of the prisoner who, was the payee, which fact would have been perfectly consistent with the genuineness of the note. There was no evidence

to show the signature to be in the prisoner's hand writing, and none from any person acquainted with the neighbourhood to show that no Abraham Williams resided there, or that the signature was not actually in the hand-writing of Abraham Williams, who denied the signature to be his—a denial very natural on his part if it afforded him the opportunity of escaping liability on the note. The prisoner representing a poor man to be a rich man, would not be forgery, though it may be fraud.

There are suspicions which may arise from the comparison of writing, which probably induced the mayor to commit the prisoner, but the evidence in the whole was not such as I could properly submit to a jury, with a charge, that if they believed the testimony, the offence was made out. It is the duty of all judges and magistrates, to be always ready to maintain the public faith with a foreign country; but the citizens of that country, when they come amongst us, are entitled to precisely the same measure of justice as our own people. Neither the treaty nor the statute contemplates the surrender of an accused party upon mere suspicion; and it is well that they do not, for there are so many inducements to procure extradition of individuals upon pretence of crime falling within the treaty, so as to restore them to the foreign jurisdiction for other purposes; that a treaty less guarded than the one under consideration, might well lead to great oppression. As regarded the application made by the counsel for the prosecution, to have the prisoner detained until more perfect evi-

decree could be obtained against him from the United States, the learned judge said, that without deciding the question whether the committing magistrate might properly detain upon evidence amounting only to a ground for suspicion, for the purpose of other testimony being imported into the case, so as to bring it within the treaty, he was convinced it would not be right for him to make any such order from the return of the writ of *certiorari* and *habeas corpus*; it appeared to him that the prisoner was fully committed for the purpose of surrender upon insufficient evidence, and therefore that he was entitled to be discharged. Prisoner discharged accordingly.

HAMILTON V. BROWN ET AL.

Necessity of attorneys in Toronto appointing agents in the outer counties.

A defendant who had been sued in the county of Wentworth, but who lived in the county of York, employed an attorney in Toronto to defend him. This attorney instructed another attorney in Hamilton to enter an appearance. A declaration was then delivered to the attorney in Hamilton, and declined, on the ground that he had only been appointed agent to enter an appearance. Interlocutory judgment was afterwards signed, and damages assessed. Application was made by the defendant to set these proceedings aside for irregularity, on the ground that neither the defendant's attorney nor his agent had been served with the declaration. This application did not negative the fact that a copy of the declaration had not been served by affixing a copy in the county office; and *Held*, *per Macaulay, J.*, that upon this omission, and for other reasons, the motion must be discharged.

On the 21st of January, 1850, a summons was obtained to set aside the interlocutory judgment and all subsequent proceedings had thereon, writ of

enquiry and assessment, with costs—no declaration being served on the defendant's attorney or agent.

The affidavit filed represented that Mr. Hawke, the defendant's attorney, who resided in Toronto, had no agent at Hamilton, where the proceedings were carried on in the county office. But on the 1st of November last, an appearance for the defendant was filed in that office by Mr. Logie, residing at Hamilton, on behalf of Mr. Hawke—that on or about the 5th of December, 1849, a copy of the declaration was offered to Mr. Logie as agent of the said Hawke, but declined, he being agent merely to enter an appearance; that the clerk of the plaintiff's attorney, however, left the copy at his office, but on the following day took it away. Both Mr. Hawke and Logie denied that the latter was the agent of the former, except to enter an appearance; that on searching the Crown Office here, it was found that a writ of enquiry had been executed before the judge of the *District Court* of the *Gore District*, and damages assessed in the city of Hamilton, on Tuesday, the 1st of January, 1850; and that the same was filed with the Clerk of the Crown.

On the 27th January, cause was shewn by *Mr. Cameron*, who objected—

1st, That there was no proof that the judgment had been signed.—3 Dow. 184.

2nd, That there was no district of Gore on the 1st of January, and that so the designation of the judge and place was incorrect.

3rd, That appearance being filed in the office at

Hamilton (counties of Wentworth and Halton), and the defendant's attorney having no agent therein, the declaration might be served by offering a copy in the county office, and that it was not denied that such service was made.—5 U.C. Rep. 2; 5 U.C. Rep. 458.

4th, That there was no notice served under the County Court Act within six days after the execution of the writ of enquiry.—8 Vic. ch. 13, sec. 54 & 55.

5th, That there was delay and laches, as judgment, if any, must have been signed in December last.—5 Dow. 419.

MACAULAY, J.—It appears to me the summons must be discharged. It is not clear that any judgment is signed; but if it is not, the assessment of damages must be irregular; and that part of the summons which seeks to set aside the writ of assessment should be granted—if it is, as I think it must be, intended as the only inference from the subsequent proceedings, which must be presumed to be regular, then it is not shewn to be irregular, for the declaration, &c., may have been duly served under the Rule of Court.—Cameron's Rules, p. 1, Agency 1.

The objection of delay seems also sufficient; for though the defendant's attorney was personally ignorant of the proceedings after the appearance was entered, yet, the copy of the declaration having been offered to Mr. Logie, who was his agent in entering such appearance, it behooved him to watch the proceedings, inasmuch as the subsequent services might be made by affixing the papers in the office at Hamilton.

The defendant's attorney should have appointed an agent to represent him there, and with whom he might communicate. Had he done so, he would have been duly apprized of the proceedings.

Summons discharged. Costs to be costs in the cause, unless the defendant hereafter obtain leave to plead on payment of costs; in which event the costs of opposing this application are to form a portion of the costs to be so paid.

COMMERCIAL BANK v. VANKOUGHNET, REED AND OSBORNE.

Refused (by Macaulay, J.) to control the plaintiff, or his attorney, or the sheriff, so as to require them to proceed upon the writ of execution against the goods of several defendants in succession—first exhausting the goods of one, and then levying on another.

On the 1st of January, 1850, the defendant Reed applied for an order on the plaintiff's attorney to direct the sheriff of the Wentworth and Halton districts to make the amount endorsed on the *fi. fa.* against the defendants' goods, out of the effects of the first-named defendant, until exhausted in the first place; then to take recourse against Reed, and lastly against Osborne.

This application was made on an affidavit of special circumstances, shewing that Reed was attorney for Osborne to collect a debt from Sir A. N. McNab; that the first defendant was McNab's attorney to collect moneys for him, and proposed to give the note on which the judgment against the defendants was obtained should be given, and be discounted by the

plaintiff to raise the money in the interim—the first defendant assuring Reed that when due, funds would be forthcoming.

The question in short was, whether a judge in chambers could control either the sheriff or plaintiff so as to require them to proceed against the goods of the defendants in succession, or must he leave them to their discretion.

MACAULAY, J.—No authority for such an interference is cited; and I am under the impression that a similar application has been heretofore refused.

In the absence of any precedent, I do not feel authorized to interfere in this way with the execution of the writ, either by exercising a control over the plaintiff or his attorney, or the sheriff.

Application refused.

LEAVENS V. OSTROM.

Recommitment of defendant out on bail to the limits.—4 Wm. IV. ch. 10, sec. 4.

A recommitment of party arrested on a *ca. sa.*, and out on bail to the limits, upon interrogatories put by plaintiff. The answer of defendant and affidavit of the plaintiff by way of reply to the defendant's answer.

In this case a summons was obtained, dated 15th January, 1850, to commit the defendant, out on bail to the limits, to the close custody of the sheriff of Hastings, under the statute 4 Wm. IV. ch. 10, s. 4; and see 11 Geo. IV., ch. 3, s. 10; 4 Wm. IV. c. 10, s. 7. This was a four-day rule, served on the defendant on the 17th January instant.

On the 19th December, 1849, interrogatories were

filed. A copy was served on the 20th December, with notice of intention to apply for the defendant's re-committal at the end of twenty days.

The sixth interrogatory inquired what the defendant had done with his lands, or with the land on which he formerly lived in Sidney; to whom he had conveyed, and when; upon what consideration; was the deed executed the day of its date, and who were the witnesses thereto; and was the grantee related to the defendant?

To which he answered, on the 11th January, 1850, that long before his arrest, being old, he conveyed all his property to his sons and other members of his family, assigning as a reason for this his having witnessed many causes of annoyance and litigation from mistakes in wills, upon which he determined to convey his property by deed "*inter vivos*," and therefore did convey all his estate and interest in all his property both real and personal that he was possessed of, to his family—they supporting him during his life. He declared he could not name the witnesses to the conveyances, nor the exact time when so conveyed; but it was to his sons and immediate members of his family, and not to defeat the plaintiff's judgment or any other: nor did he at the time know or believe in the existence of this debt, being convinced that it had been settled; and that he gave up all possession of the property to those to whom it was conveyed.

Several other answers to other questions respecting the same property were equally unsatisfactory.

On the 11th January, 1850, the plaintiff made a long affidavit, stating that at the Belleville fall assizes for 1848 he obtained a verdict against the defendant for 58*l.* 5*s.* 1*d.*, and afterwards judgment, and a *fi. fa.* to the sheriff of the Victoria district returned "no goods," and then a *ca. sa.*; that defendant was arrested and on the limits; that the defendant was twenty-five years a resident in that district, a farmer and innkeeper, and during all the time occupied and still occupies a farm in Sidney, in the 1st concession on the Dundas road, worth 1500*l.*; that his sons were brought up thereon, occupying portions thereof; that the defendant offered to pay the plaintiff, if he would abate 15*l.*, which plaintiff declined; that the defendant's sons worked on the farm as before, and that their right was a pretended one, to defeat the plaintiff; that the defendant was an uncle of the plaintiff, and the debt originally was due to a sister of the defendant; that the defendant was well able to pay, and the resistance was owing to a family feud; that the defendant's furniture was worth 300*l.*; that the defendant's wife occupied the house as head of the family; that the defendant had money lent out at interest, but could not find out to whom. The plaintiff imputed obstinacy to the defendant, and collusion with his sons, to defeat the demand, &c.

This affidavit was not answered.

MACAULAY, J.—Under these circumstances, it appears to me the defendant has the means at his disposal, or within his control, of satisfying the debt, and that therefore I must make an order upon the

sheriff directing him to apprehend the defendant and keep him in custody within the walls of the gaol of his county, according to the statute 4 Wm. IV. ch. 10, sec. 4.

Order to re-commit to gaol.

LEACH v. JARVIS, SHERIFF, &c.

Right to move to set aside service for defect in copy of writ of summons.—As to necessity of Mr. Small, or other principal officer, signing writ of summons under 12 Vic. ch. 63—also as to the right of persons, other than the sheriff, to serve the writ of summons issued under this act.

Where the copy of the writ of summons is wrong in itself, the defendant may move to set aside *the service* of the writ of summons, leaving the original untouched.

Where the copy of the writ of summons, issued under the recent act 12 Vic. ch. 63, was marked, issued by Robert Pearson, with "L.S.," but was *not signed* by *Mr. Small* the principal officer in the court, from whence the writ issued—*Held per Macaulay, J.*, that the copy of the writ not containing the name of the signer of the writ at the bottom, was not an irregularity as the practice now stood, upon which the service could be set aside.

Held also per Macaulay, J.—that in the absence of any explanatory rule on the subject, under the late act 12 Vic. ch. 63, he could not deem the service of a writ of summons to have been irregularly made—because the summons had been served by a person other than the sheriff—his deputy or sheriff.

Quære—As to the right to tax fees upon such services?

On the 17th of January, 1850, two summonses were issued on behalf of the defendants, calling on the plaintiff to shew cause why the service of the writ of summons should not be set aside for irregularity, with costs—on the grounds, in relation to the first two defendants,

1st. That the copies of process served were not true copies of the original.

2. Because it did not appear from the said copies that the office of the Clerk of the Crown was the office from which the summons issued, or that any one by his authority had signed the said writ of summons.

3. Because there was no copy of any signature of the said Clerk of the Crown upon the said copies served.

4. Because the defendants were not served by a coroner, sheriff, or any one by their authority.

The summons, in relation to the said last named defendant, was limited to three objections, on grounds disclosed in affidavits and papers filed.

It appeared the summons issued out of the principal office of the Queen's Bench, in Toronto, on the 7th January, 1850, and copies were served on the three defendants above named, on the 10th and 11th January, 1850. The three copies were all similar, they contained no signature of the Clerk of the Crown, or any one else, at the bottom, after the teste. In the margin was marked, "*Issued by Robert Pearson*," with [*L.S.*]

Mr. Eccles shewed cause for the plaintiff on the 17th January, 1850, and contended, 1st. that there was no proof that the copies served were not true copies of the original; and if so, the objection, if any, was to the original and not the service.

2nd. That if the original was not signed, it was no objection to the service, but to the writ itself.

3rd. That it should be shewn whether the original was signed or not.

4th. It was not shewn to have been irregularly served.

5th. That the original need not be signed, and that therefore the copy was regular. He cited 1 H. B. 120; 1 Sellon Pr. 83; 2 Tyr. 276; 2 C. & J. 213; 1 L. J. Ex. 1; 2 Dow. 182; 2 Dow. 747.

Mr. Jarvis, for the defendant, cited 1 Dow. 654; 3 Tyr. 391; 1 C. & M. 408; S. C. 2 L. J. Ex. 166, S. C.; 8 Dow. 837; 2 Dow. N. S. 465; 1 Scott. N. R. 415; 1 M. & G. 426; 1 C. & M. 458. Reference was also made to the statutes 2 Geo. IV. ch. 8, and 2 Geo. IV. ch. 1, and 12 Vic. ch. 63 sec. 22.

For the defendants, it was contended by Mr. Jarvis & Mr. Brooke, that they had not access to the original, and might assume it to be right, and object only to the service: that the plaintiff being in possession of it might produce it, and shew how it was: that writs must be signed by the officer who issued them, and that Mr. Pearson was not a known officer who could be recognized by the court.

MACAULAY, J.—In the absence of the original, my impression of the present course of practice is, that the defendant may move against the service, if the copy be wrong in itself, even though he might treat it as evidence against the plaintiff, that the original is similar, and move against the writ also. The case in 1 Dow. 654, decided that when the vice appeared to be in the original, it should be moved against; but it certainly is usual to except to the service only, which leaves the original untouched.

Consequently the application is reduced to two questions: 1st. Whether the writ should be signed by the officer of the court, and if so, whether it is signed sufficiently.

2nd. Whether it can be served by any person, not a sheriff, coroner, or bailiff of a sheriff or coroner.

As to the first, it certainly has always been the practice here to sign the writs. The process under the Q. B. Act 34 Geo. III. ch. 2, sec. 5, was *ca. re.* with the declaration annexed; but nothing is said of the signing thereof in that section, but section 7 required that the clerks of the peace should be supplied with writs of *ca. re. signed by the proper officer of the court*, to be issued in certain bailable cases therein provided for. In the table of fees is an allowance to the clerk for sealing, entering, and filing every writ or process, 2s.

By statute 37 Geo. III. ch. 4, the Clerk of the Crown and Pleas was required to have a deputy in every district, and to supply them with blank writs of the said court, *properly signed* and sealed, &c. By sec. 4, the first or original process was to be by writ of summons in the form given. No indication of the officer's signature is given at the bottom or in the margin thereof, and it is directed to the sheriff.

The 2 Geo. IV. ch. 1, sec. 4, restored the *ca. re.* as first process—no form was given. Sec. 9 requires commissioners for taking affidavits, and the Deputy Clerk of the Crown to be supplied with bailable writs of *ca. re.*, *signed by the proper officers of the court.*

The 4 Wm. IV. ch. 7, sec. 19, gives a form of

writ in replevin; there is nothing said in it as to the officer's signature.

The statute 12 Vic. ch. 63, sec. 50, gives a form of summons with no signature—but in the margin is contained, issued by (L. M.) officer's name. Sec. 22 prescribes the summons as process.

By statute 12 Vic. ch. 68, certain writs were to be supplied to deputies in the same manner as other writs are now supplied to them from the chief officers at Toronto, and see 8 Vic. ch. 36. In Easter Term 11 Geo. IV., a tariff of fees was settled for the Clerk of Crown and Pleas, in which was mentioned fees on writs not special, 3s.; signing, sealing and filing process when special and prepared by attorney, 1s. 3d.; signing and sealing subpœna, 2s. See in Cameron's Rules 5, a form of writ against a corporation, with no signature; ib. 10, a form of writ in Dower, with no signature; ib. 11, practice of court of K. B., in England, established E. M. T. 4 Geo. IV.; 12 Vic. ch. 63, sec. 12, and secs. 8, 9; 1 Arch. (old pr.) 12; 1 Arch. (new pr.) 106; statute 3 & 4 Wm. IV. ch. 67; statute 3 Wm. IV. ch. 39.

My own opinion is, that according to the uniform practice of the Court of Queen's Bench here, all writs should be signed by the principal officer of the office whence it issues; but until a rule to that effect shall be made under the act 12 Vic. ch. 63, I do not feel satisfied in treating the present service as irregular. The original may be signed and is not attacked; if it is, the cases cited by *Mr. Eccles*

seem to shew, that the copy served is not irregular by omitting it; if not, still the summons conforms strictly to the act, and is signed by the officer who issued it. I do not intend or take notice that Mr. Pearson is not the proper officer. It may be a part of his duty to issue all summonses, and if so, the writ is *signed* by the officer. I find no case in which a service has been set aside because the copy did not contain the name of the signer of the writ at the bottom. The copy imports that the writ was sealed and signed by the officer who issued the same, and in the present state of the practice, I do not feel warranted in treating it as irregular on this ground.

By statute 34 Geo. III. ch. 2, sec. 8, the process (*ca re.*) was to be served by some literate person. By statute 37 Geo. III. ch. 4, sec. 5, the summons &c. was to be served by some literate person. It is directed to the sheriff commanding him to summon, &c.

By 3 Geo. IV. ch. 7, no person, other than the sheriffs and persons employed under them, are to be entitled to mileage, or other compensation, on the service of any process required by law to be directed to the sheriff.

The 2 Geo. IV. ch. 1, sec. 4, requires the process to be served by the sheriff, to whom the process shall be directed, or by his lawful [illegible] or bailiff, being a literate person.

By 12 Vic. ch. 63, sec. 22, a writ of summons *may* be served in the manner heretofore used.—See Draper's Reports 210; Cameron's Rules 78, [illegible] (s.)

This is not an ordinary case, but the sheriff of the county is a party defendant; and admitting that as a general rule, the service of the summons should still be by the sheriff, his deputy or bailiff, it does not follow that a coroner must act in such a case as the present. In the absence of any explanatory rule on the subject under the late act, I am not disposed to deem the services irregularly made; whether any fees can be taxed for such services, is another question.

On the whole I shall discharge the summonses: costs to be costs in the cause.

Summonses discharged.

THE QUEEN EX RELATIONE WM. HELLIWELL V. GEO. STEPHENSON.

Municipal Council Act.—Right of party to vote whose name is on the Collector's Roll, though not on the copy of such roll furnished by collector to returning officer.—Right also of party to vote, whose name is on the copy of the roll, though not on the Collector's Roll.—As to statement in relator's affidavit that defendant has accepted or acted in the office alleged to have been usurped.

Held per DUNNE, J.—(And subsequently confirmed on appeal by the Court of Queen's Bench)—that under the recent Municipal Council Act, those persons whose names, on enquiry made by the returning officer, are found to be on the *Collector's Roll*, though omitted accidently or otherwise from the verified *copy of the roll* required to be furnished by the collector to the returning officer at the opening of the election—are legally entitled to vote. *Held* also, that persons whose names are inserted in the copy of the roll, but not on the collector's roll, are not legally entitled to vote.

In an application by a relator against the return of a municipal councillor—under the amended municipal council act—it is not necessary to state in the affidavits sustaining the relator's case, that the defendant has either accepted or acted in the office it is alleged he has usurped.

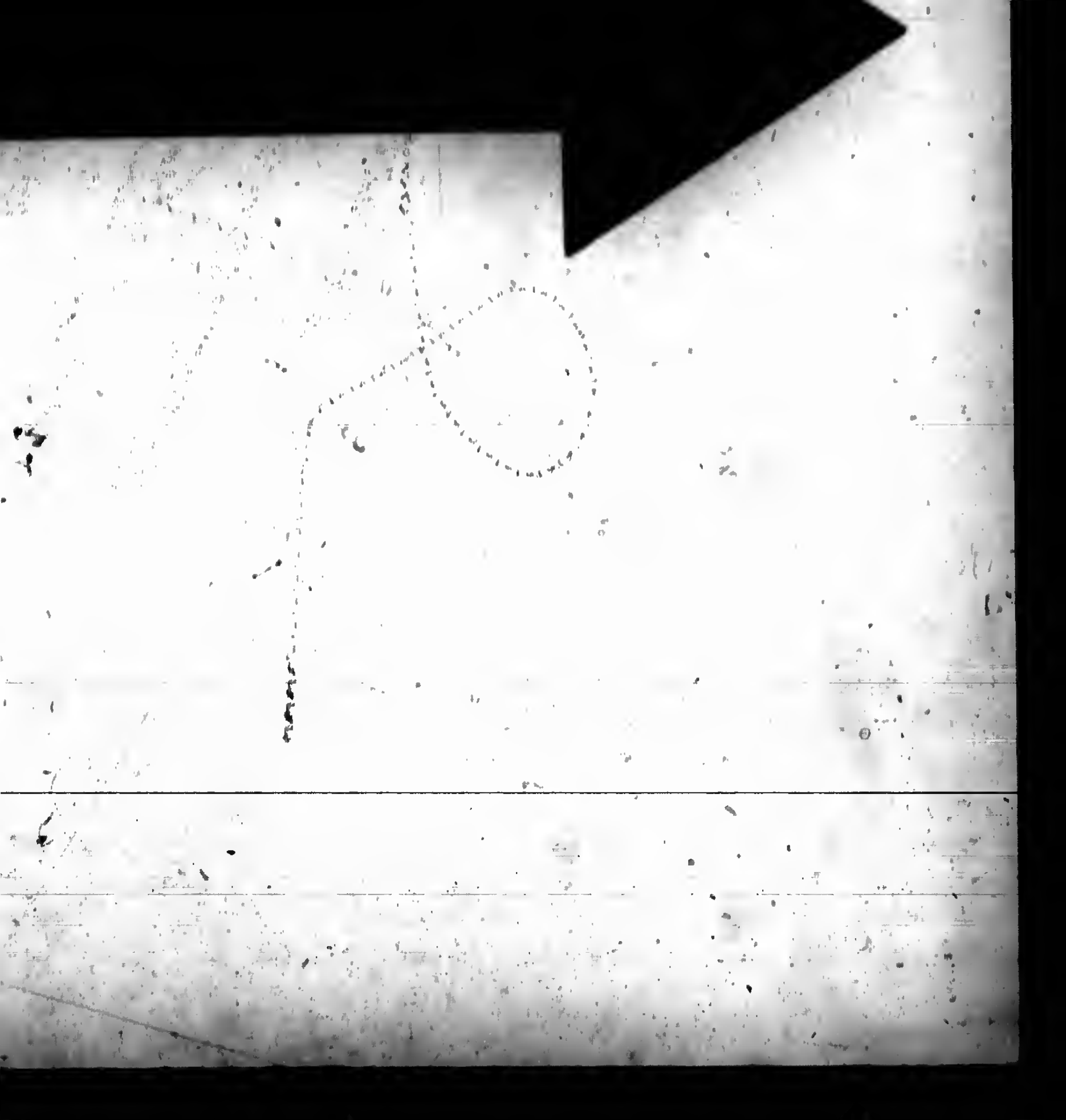
This was an application to avoid the [illegible] defendant George Stephenson as councillor for the 2nd ward of the Township of Scarboro', and that the relator should be returned, having the majority of legal votes.

A preliminary objection was taken to the application because it was not shewn in the affidavits sustaining the relator's case, that the defendant had accepted or acted in the office to which he was elected, and the affidavits filed in answer distinctly stated that the defendant had not been sworn in, nor had he acted in the office.

It was contended that the defendant was not subject to be called upon to shew cause why he usurped an office, which it was not shewn that he had either accepted or acted in.

BURNS, J.—Whatever weight such an objection was entitled to, under the statute as it stood before being amended—considering this a case where the person declared elected had come forward as a candidate at the election, and sought the office, instead of its being forced upon him, I am of opinion it can no longer prevail since the statute has been amended.

As the law now stands the application is to be made within six weeks after the election, or within one month after the person elected shall have accepted the office; and any person who has been served with a summons in the nature of a *quo warranto*, may, within a week after the service, transmit a disclaimer to the court, and no costs shall be chargeable against him.



MICROCOPY RESOLUTION TEST CHART

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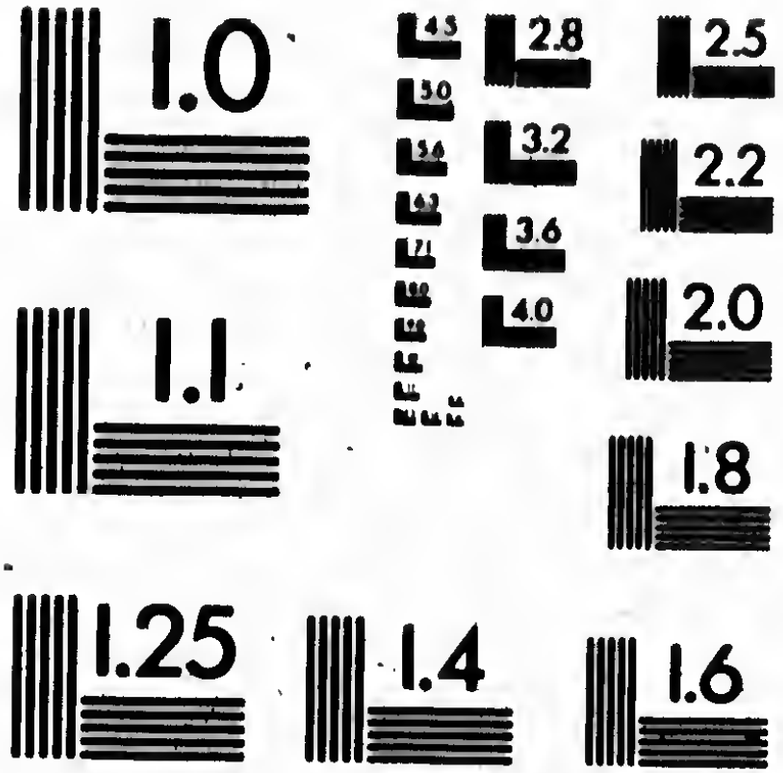

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This provision of disclaimer is followed however by another, which provides, that though the party does disclaim, yet he shall not be excused costs if he were a consenting party to be put nomination as a candidate at the election. This seems to argue, the legislature contemplated that a person so consenting might be subject to the writ without having formally accepted or acted in the office, for he is subject to the costs of it, though he should disclaim the office. The amendment, however, which provides for the defeated candidate claiming the seat, and that if he had the majority of votes he should have been returned instead of the other, and that he may be seated if upon a scrutiny it turns out that he is entitled to the office, in my opinion settles the question.

I cannot think the legislature ever intended the application to avoid an election of one person, and claiming that another should have been returned, was to be delayed till it could be shewn that the person returned had accepted or acted in the office; but on the contrary, if the party elected were a non-consenting party, then he might rid himself of all trouble and investigation simply by disclaiming: if otherwise, then that the application should be made within six weeks, or at furthest, one month after the person elected had accepted of his office. In this case no disclaimer is filed, and it may fairly be urged that of itself constitutes such an acquiescent acceptance of the office as renders the defendant subject to the application.

In discussing the main question, however, it is necessary to define certain things and positions under the act, before we can apply the facts existing on either side to determine which of the candidates properly had the majority of legal votes.

The 122nd section declares that the voters at Municipal Elections shall be each and every person whose name shall appear upon the collector's roll, a copy thereof is, in the act before, required to be procured for the purpose of the election.

The 22nd section provides, that it shall be the duty of the collector to produce at the opening of the election a fair copy of the collector's roll made up next before such election, which copy is to be verified by the affidavit of the collector; and then the section declares that the persons entitled to vote at such election shall be those whose names are upon the said copy of such roll thus verified, and who at the time of the election shall be resident in the township or ward.

Now, can persons whose names are accidently, or otherwise, omitted from the copy so furnished, but whose names are on the collector's roll, be admitted to vote at the election, or must they be excluded; and can persons whose names are put upon the copy, but who are not on the collector's roll, be permitted to vote; and if admitted, are they liable to be struck off upon a scrutiny?

The collector's roll here referred to, is the roll of the collector made up for the township next before such election, and to determine the matters between

the parties correctly, we must see what this roll is, and what the collector has to do with it.

By statute 1 Vic. ch. 21, sec. 17, every collector for a township must make application to the clerk of the peace for the certified copy of the assessment roll for the township, which copy, after being duly examined and certified by the clerk of the peace, shall be to the collector sufficient authority for collecting the same, and to demand and receive of and from the inhabitants of the township all such rates and assessments as may be due and payable on such assessment list. It is the collector's duty to procure this roll, and [redacted] it up on or before the quarter sessions next after the 1st July in each year; and by section 18, he must collect all the rates set forth in the assessment, and pay over the same to the treasurer on or before the third Tuesday in December, in each year.

Thus we see that the collector's roll is a roll delivered to him by the clerk of the peace duly examined and certified, and his duty was simply to collect the rates therein mentioned, he had no authority to detract from or to add to it in any way whatever, either in name of persons, rates, or otherwise. It is a copy of this roll, verified by his affidavit, that the collector must furnish to the returning officer.

I should say the returning officer would be protected against any consequences as respects himself, by his adhering to such copy so furnished to him either in the reception or rejection of persons at the election.

But the first question is, the returning officer having been satisfied that names which were on the collector's roll were omitted from the copy, and such persons being entitled to vote, he admitted them; whether in so admitting them he did wrong, and whether their names should now be struck from the poll book?

I do not think the returning officer erred in being satisfied that the copy so verified to him was wrong as respects such persons. There surely could never have been any intention in the legislature to make the copy thus furnished to be of more force than the original, the object was to make it if possible of equal force, because it is provided that it shall be a fair copy, and verified by affidavit, thereby intending that it should be an exact copy to serve in place of the original. To hold otherwise would leave it in the power of the collector to disfranchise a person whenever he saw fit, or a person might, as in the case before us (it being so sworn), be left off accidently, and thus be disfranchised.

The copy of the roll is only required to be furnished at the opening of the election, and no voter can possibly know whether the collector has either wilfully or accidently left his name off until he presents himself to vote. The name may also be misspelled, and thus apparently it may be supposed some other person.

Again: the 150th section provides upon a contest arising, that the judge should have power to call for the collector's roll, which there would be no occasion

for, if the copy was conclusive. There could be little use in having the roll if the voter has been received merely for the purpose of avoiding the election because the name was not on the copy. The object was, as I think, to determine the validity of the votes by that test. If that be not the object, then it must follow that in every case where a collector accidently omits a name, the election must be declared void, and a new election held.

The proper view to take of the 22nd section, when compared with the others, is, that the copy so furnished is to be considered by the returning officer as *prima facie* sufficient, and as his guide in receiving or rejecting votes; but if voters are received whose names are not on such copy, then the question here is not whether there be a discrepancy between the original and copy, but whether the voters are legally entitled to vote at the election.

I am of opinion that those persons whose names are upon the collectors roll, though omitted from the copy, were legally entitled to vote, and were not by being omitted from the verified copy thereby disfranchised, and having been admitted to vote by the returning officer, I think their names should remain on the poll book.

The second question is, whether persons whose names are inserted in the copy, but are not upon the collector's roll, are entitled to vote; and having been received by the returning officer and recorded, whether they should now be struck out?

Strange as such a question may appear, neverthe-

less in this case it is to be answered. How the collector could say he had given a correct copy of the roll, as it had been certified to him by the clerk of the peace, is more than I can imagine. Though it may be said that in the case of an omission of a name, the copy is a copy so far as it goes, only it does not go far enough; yet what is to be said when one name is confessedly substituted for another?

To sustain the position, that persons whose names are upon what professes to be a copy, though not on the collector's roll, are entitled to vote, it must be put on the broad ground that the legislature intended to make what professed to be a copy of more validity than the original, or, in effect, to place a power of creating votes in the hands of the collector, if he were disposed to use it.

The proposition requires no other answer than to say the legislature intended to make a copy of equal validity with the original; but it is absurd to suppose that a false and pretended copy was intended to have more force than the original document would have. It was never intended that the collector should be indicted for malpractices before an election was to be determined upon.

As respects the questions put and answered, the relator and the defendant stand in the same position. They both have voters similarly situated.

The first two voters objected to by the relator are Alex. Neilson and Wm Ferguson. It is shewn they were upon the collector's roll, though not on the copy furnished to the returning officer. They voted,

and I think they should remain on the poll book. Jonathan Gates was a non-resident of the ward; his vote must be struck off from the votes for defendant. This reduces the defendant's number to 54.

Wallis Statts is a voter for the relator. His name is entered on the poll book, and the usual mark made as having voted for the relator is inserted, but a mark put through it; and it is not corrected with the votes. This voter is placed the same as Neilson and Ferguson, his name being accidentally omitted from the copy.

The allegation on the part of the relator respecting this vote, is that Statts's vote was received and recorded for the relator by the returning officer, who afterwards, of his own accord, and without the consent of the relator or any one acting for him, struck out the name of Statts from the poll book, and thereby disfranchised Statts and deprived the relator of his vote. This allegation is met in this way by defendant: he says that the returning officer declared that the name of Statts was not on his list of voters; the returning officer told him he would not receive his vote until he produced an affidavit, certified or verified by the collector, to the effect that the name of Statts was actually on the collector's roll; that Statts would not produce any such affidavit, but merely a receipt for his taxes, and the returning officer refused to allow his vote. Neither party has given any information as to how long after the recording of the vote before it was again struck out, nor whether what took place might be considered a continuous act or not. On looking at the poll book, I find Statts's

name as numbered 95, and the next voter is numbered as 95; shewing that the returning officer considered his case was disposed of before going on with the other; as neither party have procured any statement from the returning officer, it is not fair to presume anything against him, and his book would rather shew that what he had done was all done at once; and as I before said, his list or copy justified him.

James Hewitt, a voter of the defendant, is objected to. It appears that he was not at all assessed, but why does not appear, nor is necessary to be shewn. He swears he had assessable property, and he *paid* the taxes. His name was appended to the roll the collector returned to the treasurer by the collector. It is evident, however, it formed no part of what forms the collector's roll; for that is, as I have before mentioned, certified by the clerk of the peace; and the appending the name with the amount, as returned to the treasurer, could only be as a guide for the treasurer, it could be none for any one else. He has paid the taxes, but it is clear he was not bound to do so. His name must be taken from the poll book. This reduces the defendant's number to 53.

James Collingwood is objected to, having voted for defendant; Charles was the person who was assessed for the property upon which Collingwood voted. The collector states that Charles left the province, Collingwood purchased the place and paid the taxes, and he substituted Collingwood's name. This he clearly had no right to do. He had a right to adopt such means for enforcing the payment of the taxes

as the law gave him, but he had no right to alter the names on the certified roll furnished to him by the clerk of the peace; Collingwood's name must therefore be struck off; and this reduces the defendant's number to 52.

Thomas Marshall is objected to, having voted for defendant, he is not on the collector's roll. He says he paid his taxes, but the collector is silent respecting him, and if his statement be true, the collector must have pocketed it, for he has not returned it as in Hewitt's case. His name must be removed; and that reduces the defendant's number to 51.

Then comes the votes objected to as given for the relator. That of John Sewell is like Gates, he is a non-resident and must be struck off. This reduces the relator's number to 53.

Thomas Scott is objected to. His position is the same as Hewitt's, and therefore must be taken off; and this reduces his number to 52.

Bylow is objected to, and his position is like that of Collingwood—only that the collector does not say he inserted Bylow's name instead of Baxter's. This reduces the relator's number to 51.

There being an equality of votes, we cannot speculate on what people might have done in such an event, consequently there must be a writ for a new election.

I give no costs to either party.

Writ for a new election ordered, with costs to neither party.

NOTE.—This judgment of Mr. Justice Burns in Chambers, was appealed from to the Court of Queen's Bench, and confirmed by that Court in Hilary Term, 1851.

KELLY V. KELLY.

Right of plaintiff under act 12 *Vic. ch.* 63, *to issue a bailable writ after suit commenced by summons. Is the act of* 1822 *now in force?*

Held per BURNS, *J.*—That under the statute of 1849, 12 Vic. ch. 63, a bailable writ of *capias* given in the form to that act, cannot issue to hold the defendant to trial in a suit already commenced by writ of summons.

Quære.—Are the provisions of the statute of 1822, with respect to the issuing of bailable writs, now in force to *any* extent?

The facts upon which the application to set aside the bailable writ of *capias* was made, were these:—The plaintiff on the 4th January last commenced a suit against the defendant by writ of summons, to which summons the defendant appeared on the 27th January.

On the 6th February the declaration was filed and delivered, and pleas thereto filed on the 18th of February.

On the 13th February a bailable process was issued upon an affidavit entitled in the cause, and stating that Mary Kelly, as the plaintiff in this cause, made oath that Thomas Kelly, the defendant in the cause before and at the time of the commencement of the suit, was and still is indebted, &c. This writ was in the form prescribed by No. 3 of the schedule to the act 12 Vic. ch. 63, and indorsed as required by that act. On the 18th February the defendant was arrested under the writ, and being in custody he moved to set aside the writ on the arrest under it as irregular, on the grounds that no bailable writ could issue in the suit after it had been commenced by writ of summons, or if it could, then this writ was not

regular according to the practice under the statute of 1822.

BURNS, J.—The question presented for decision would seem at first sight to be more important than in truth it really is: that is, upon the construction of the statute, though it certainly involves an important right, when it may be viewed as either leaving a right in plaintiffs to arrest during the progress of a suit untouched, or as virtually having taken away that right.

The 2nd Geo. IV. ch. 1, sec. 14, gave the right to plaintiffs to arrest in suits previously commenced, and enacted that it should be done by suing out upon the affidavit an *alias* writ of *capias ad respondendum*, and to cause the defendant thereupon to be arrested and holden to bail, which bail, if the said writ shall have been sued out after common bail being filed, shall be bail to the action.

By the act 12 Vic. ch. 63, the writ of *capias ad respondendum* is done away, and a writ of *capias merely* substituted in place of it; the two writs are quite distinct in form.

It is plain, in this case, that the proceeding has not taken place under the statute of 1822; and indeed in the argument it was conceded that the arrest and the writ could not, under that statute, be sustained. I do not therefore feel myself called upon to express any opinion whether the provisions of the statute of 1822, either as respects the spirit of it, or the words of it, remain so far in force as that it can be carried out in any way. The simple question is, whether a

bailable writ under the statute of 1849 given in the form to that act, can issue to hold the defendant to bail in a suit already commenced by writ of summons.

The 22nd clause of this act provides that the process in all actions commenced in the Courts of Queen's Bench and Common Pleas, in cases where it is not intended to hold the defendant to special bail, shall be by the writ mentioned in No. 1 of the schedule, which is the summons; and section 24 is, that in all such actions, that is, such actions commenced in the said Courts of Queen's Bench and Common Pleas, wherein it shall be intended to arrest and hold any person to special bail, the process shall be by writ of capias.

The 34th clause enacts, that from the time when the act shall commence and take effect, the writs hereinbefore authorized shall be the only writs for the commencement of personal actions in the courts aforesaid. The question may be said to resolve itself into this, can a plaintiff have the writs of summons and capias successively in the same cause? If he can, the proceedings of the plaintiff in entitling the affidavit are regular, and the other proceedings are regular; but if the one writ cannot issue after the other while the suit is in progress, then the writ of capias and proceedings under it must be set aside.

I am of opinion that the case of arresting a defendant after the commencement of proceedings by writ of summons, is not provided for in any way under the statute of 1849, and the process given by that statute cannot be used for such purpose.

The two sections before mentioned (23 and 24) provide for the commencement of suits in the two lines of process specified, that is, summons or writ of capias; as it is, I can see nothing in the act which evinces an intention that both lines of process may or can be used in the same cause.

The case of Pontifex v. De Maltzoff, 1 Ex. 436, is no authority for the plaintiff. In the English Act 1 & 2 Vic. ch. 110, authority is given to issue process of capias to hold a defendant to bail in a suit already commenced, and it is done by a judge's order. The practice upon these orders is, to admit the trying upon affidavit whether the defendant should or not be arrested, as shewn by Pegler v. Hislop, 1 Ex. 437.

Whether the old practice under the statute of 1822 remains in force or not, as before stated, I do not feel called upon to determine; all I mean to be understood to say is, that the process, as provided for under the statute of 1849, cannot be otherwise used than as the commencement of the suit.

The summons for setting aside the writ and arrest must therefore be made absolute.

Rule to set aside writ and arrest made absolute.

MITCHELL v. NOBLE & HUNTER.

Bail—under what circumstances they can apply summarily to a judge in chambers for relief.—How far bail bound by the act of their principal's attorney.

When bail rely upon their having performed their undertaking, then that being a legal defence, they must plead such matter in their discharge—they cannot apply to the court for its summary interference.

Semble, that bail are not bound by what the attorney for their principal may choose to do, as being the attorney for the principal.

The facts out of which these applications were made appeared to be these:—The present plaintiff in the month of December, 1849, commenced a bailable action against one Donald McDuffie, and in February after Hiram Goodwin Bernard and the defendant Hunter, became special bail for McDuffie. Judgment was obtained against McDuffie, and a *ca. sa.* was issued and placed in the hands of the sheriff. In the month of May last, while the *ca. sa.* was in the hands of the sheriff, one of the bail, Bernard, was desirous of surrending McDuffie, and he McDuffie, was desirous of justifiing new bail; but with a view to avoid the expense of a surrender, and the inconvenience to McDuffie of going into custody, his attorney applied to the plaintiff's attorney for a consent, and a paper in the following words was signed by the plaintiff's attorney: "I consent that good and sufficient bail be substituted in this cause for the bail already put in, one of the present bail desiring to be relieved, by the substitution of other good and sufficient bail in their stead. Dated 18th May, 1850."

A new bail-piece was framed, and the defendant Noble with Hunter became special bail; but instead of undertaking to surrender according to what would be required of them to do, having entered bail after final judgment obtained, they entered into a recognizance in the ordinary form, that the defendant should pay the condemnation money or surrender himself

to the custody *of* the sheriff, or they would do so for him.

On the 22nd of June application was made to enter an *exoneretur* upon the bail-piece entered into by Bernard and Hunter, the new bail having justified on the 20th May, and an allowance thereof ordered. An *exoneretur* was ordered to be entered.

In the mean time the *ca. sa.*, which was current while this change of the bail took place, remained in the sheriff's office, and at the return day, was returned *non est inventus*. On this return the plaintiff commenced an action against the defendant, and in the month of September the defendants surrendered McDuffie. On the 7th September McDuffie applied to be discharged on the ground of an illegal surrender, because of the error which had been committed in the condition of the recognizance, which application was discharged.

The present defendants appeared to the action against them by a different attorney than McDuffie's, and to the declaration on the recognizance the defendant Noble pleaded several pleas: 1st. No record of the recognizance. 2nd. No action pending against principal. 3rd. No record of recovery. 4th. No *ca. ca.* against principal. 5th. That recognizance had been entered into after recovery of final judgment. 6th. Setting out that judgment had been recovered on the 6th May, and that recognizance had been entered into on the 17th May.

The plaintiff applied upon an affidavit of the plaintiff's attorney, in which he swore that upon giving

his consent to change the bail he was assured that no advantage whatever should be taken or sought for, in consequence of the attorney agreeing that the new bail should be put in so as not in any way to prejudice the plaintiff's right to proceed against them in the event of their not surrendering the principal in due course; that he agreed to the change in the full and confident belief that the attorney would, under the circumstances, take care that in the entry of substituting bail no irregularity should be committed, and that the attorney agreed to see that the bail was properly put in.

The application of the plaintiff was, to strike out the 2nd, 3rd, 4th, 5th and 6th pleas as being pleaded against good faith, and therefore fraudulent; and it was sought to support such application on the ground that the acts of McDuffie's attorney must bind the bail, and he was to be treated as their attorney.

In answer to the application, McDuffie's attorney swore, that he, as attorney for McDuffie and not for the defendants, asked the plaintiff's attorney to consent to the change of the bail, and that nothing was said at the time about the matter being regular; and that the agent of the plaintiff's attorney attended when application was made for allowance of bail, and upon other applications in the cause.

The defendants also made a cross application to stay all proceedings in the action, on the ground that the defendant was surrendered by the bail within proper time, so far as they were concerned.

This was opposed on the ground that the defen-

dant's were to be considered and treated as standing in the same situation as the first bail, whom the plaintiffs contended would have been fixed. The surrender took place on the 29th of August, within four days of the first term after summons sued out against the defendants.

Burns, J.—The recognizance which the bail have entered into is a legal undertaking, whereby they have bound themselves to render their principal or pay the debt and costs. If the plaintiff has done anything which amounts to a discharge of this undertaking of which the bail are ignorant, or with which they have nothing to do, then they may apply to the equitable jurisdiction of the court by motion for relief, but where they claim to have performed their undertaking, I can find no authority for a summary interference.

If bail have duly by law surrendered their principal, their course is to move to enter an *exoneretur* on the bail-piece, and to plead the render in their discharge in an action brought against them; and if they are not in a situation to comply with their undertaking for any reason which the court would hold as sufficient for interference, their course is to move to enlarge the time of surrender.

Whenever the bail rely upon having performed their undertaking, then, that being a legal defence, it should, I think, not be disposed of in this summary manner, but they should plead the render in their discharge. For this reason I must discharge the defendant's summons to stay proceedings; and, as it

depends upon the legal right to recover, and the legal right or not to make this application, I think the consequences, as respects costs, must follow. The summons is discharged with costs.

With respect to the plaintiff's application to strike out the pleas, it depends much upon the same principle as the other case. The undertaking of the bail is a legal undertaking, and the plaintiff having done nothing himself to waive his legal rights, has a right to enforce the contract against the bail according to its legal effect; and the defendants have a right to resist and place themselves upon the legal effect of the undertaking entered into. Each party are dealing with each other at arms length, as it were. Whether there be anything wrong in this bail-piece or not, or whether the plaintiff can recover upon it, or whether the defendants can successfully defend themselves, is not the question at present. The plaintiff desires to restrain the defendants from setting up certain defences, on the ground that they are doing so against good faith. The plaintiff's attorney trusted to the attorney of the defendants in the original action to put in bail regularly, and he now claims that no advantage should be taken, if it be done irregularly; and he claims this because the attorney should be treated as the attorney of the defendants as bail, as well as attorney of the original defendant.

This is not the case of bail to the sheriff, who, in the absence of their principal, put in bail, having employed an attorney for that purpose in order to

protect themselves; but where one of the bail desired to be relieved, and the original defendant complies with his desire, and by consent of the plaintiff's attorney substitutes new bail. The bail, so far as I can see, do not employ an attorney; and I can see no principle why they should be bound by what the attorney for their principal may choose to do as being attorney for the principal. As I before said, their undertaking is a purely legal one, and there is nothing in their entering into that, for the favour and advantage of their principal, which should confer a right upon the attorney of that principal in any way by any collateral agreement to bind them.

The plaintiff's summons must therefore be discharged with costs.

Summonses discharged with costs.

REPORTS OF POINTS OF PRACTICE,

AS DETERMINED IN CHAMBERS BY THE JUDGES OF THE COURTS OF QUEEN'S BENCH AND COMMON PLEAS.

ABATEMENT.

1. *Affidavit of truth of plea, in*]—Petch and Manning v. Duggan, 141.

ACTION ON CASE.

See "Demurrer," 2.

ADDING COUNTS.

1. *Adding a count to a declaration in ejectment refused.*] Application to add to a declaration in ejectment a demise by A. B. after issue joined, refused under the circumstances of the case.—Doe Nichols v. Heron et al., 99.

ADVERSE CLAIM.

1. *To property seized in execution. Issue. Indemnity. Sheriff.*] Where an adverse claim is made to property seized in execution, the Judge in Chambers will direct an issue, unless the execution creditors give the sheriff a sufficient indemnity.—Robt. McKay & Jas. McKay v. Wm. McKay, 165.

AFFIDAVIT.

1. *Interlocutory judgment. Affidavit of merits.*] Setting aside interlocutory judgment—wording of affidavit of merits—must assert that plaintiff hath a *good defence to this action on the merits*.—McGill et al. v. McLean, one, &c. 6.

2. *Stat. 4 Wm. IV. ch. 3, sec. 6. Plea in abatement. Place of residence of party not joined, how to be stated.*] The affidavit verifying a plea in abatement ought to state, *in the body of it*, the place of residence of the party not joined—it might perhaps be sufficient in the affidavit to state that the place of residence is that mentioned in the plea annexed.—Petch & Manning v. Duggan, 141.

3. *What must be shown in defendant's affidavit to set aside declaration.*] It need not be shown in the affidavit to set aside

the declaration that the *original* declaration varied from the process—or whether the defendant has appeared or not to the process served.—Ketcham v. Rapelje, sheriff, 152.

4. *As to statement in relator's affidavit, that defendant has accepted or acted in the office alleged to have been usurped.*] In an application by a relator against the return of a municipal councillor, under the amended Municipal Council Act, it is not necessary to state in the affidavits sustaining the relator's case, that the defendant has either accepted or acted in the office it is alleged he has usurped.—The Queen ex rel. Hellihwell v. Stephenson, 270.

AFFIDAVIT OF MERITS.

1. *Affidavits of merits by partners of plaintiff's attorney.*] Where the partner of the lessor of plaintiff's attorney swore that the lessor of plaintiff had a good cause of action in this cause on the merits, it was held sufficient. *Semble*, it would be otherwise if made by a clerk in the attorney's office.—Doe ex dem. Chancellor, President and Scholars of King's College v. Richard Roe, 111.

2. *Sufficiency of.*] Where a defendant sets out certain facts in his affidavit, and then swears that *he is advised* (not that *he believes*) that he has a good defence to the said action on the merits—*Held per* Robinson, C. J., affidavit sufficient.—Perry v. Lawless, 168.

AFFIDAVIT TO HOLD TO BAIL.

1. *Sufficiency of, in not following the words of the act, "hath good reason to believe."*] An affidavit to hold to bail, stating that the plaintiff "had reason to believe," and not "had good reason to believe (as required by the statute), is bad, and an arrest made under it must be set aside.—Meyers v. Campbell, 21.

AGENT.

1. *Necessity of attorneys in Toronto appointing agents in the outer counties.*] A defendant, who had been sued in the county of Wentworth, but who lived in the county of York, employed an attorney in Toronto to defend him; this attorney instructed another attorney in Hamilton to enter an appearance; a declaration was then offered to the attorney in Hamilton, and declined on the ground that he had only been appointed agent to enter an appearance; interlocutory judgment was afterwards signed, and damages assessed; application was made by the defendant to set these proceedings aside for irregularity, on the ground that neither the defendant's attorney nor his agent had been served with the declaration. This application did not

negative the fact that a copy of the declaration had not been served by affixing a copy in the county office; and *held per* MACAULAY, J., that upon this omission, and for other reasons, the summons must be discharged.—Hamilton v. Browne et al. 207.

AMENDMENT.

See "Pleading," 7; "Venue," 1; "Summons," 5.

1. *Leave allowed. Doubt as to time.*] Leave to amend allowed, but there was a doubt as to whether the defendant was to amend 10 or 14 days after judgment given.—Perrin v. Bowes & Strachan, 102.

2. *Application to. Refused.*] Application by plaintiff to amend, by withdrawing demurrer to pleas, after argument and after trial of issues in fact, refused.—Hutchinson v. Monro, 211.

3. *Application to amend refused.*] Application to amend pleas, by adding a plea of usury, refused—after several applications to amend, by adding other pleas, had been before that refused.—Peel v. Kingsmill, 225.

APPEARANCE.

1. *Process and affidavit of service. Filing of appearance per statute.*] The entry of an appearance per stat. before the process and affidavit of service thereof is filed, is an irregularity, not a nullity.—Johnston qui tam v. Wisbrooke, 24.

ARREST.

1. *Ca. Sa., arrest under.*] A defendant cannot be arrested under a *ca. sa.* where a *fi. fa.* has been taken out and acted upon but not returned.—Ross et al. v. Cameron et al., 21.

2. *Ca. Re., setting aside service of. Teste.*] The writ of *ca. re.* if tested a day *out of term*, will be set aside.—McIntosh v. Cummings, 69.

3. *Original Ca. Re. Copy.*] The original *ca. re.* must be presumed to correspond with the copy till the contrary be shewn.—*Ib.*

4. *Arrest under ca. sa. of executor for sum under 10l.—Capias.*] A summons to set aside *ca. sa.* on the ground that the defendant had been arrested for a sum under 10*l.*, exclusive of costs, discharged on the facts stated in the case.—Baker v. McKay, 98.

5. *Execution of Warrant—addressed to two bailiffs.*] Where the warrant to arrest is addressed to two bailiffs, as if jointly, one may nevertheless arrest.—Hetherington, administrator of Hetherington, v. Whelan & Thompson, 153.

6. *Informality in arresting one of two defendants.*] An informality in arresting one of two defendants cannot be made a ground of objection by the other.—*Ib.*

ATTACHMENT.

See "Sheriff," 3.

ATTORNEY.

See "Agent," 1.

AWARD.

1. *Award. Umpire. Time for making an award by umpire.*] An award of umpirage is valid, though made before the time limited for the award of the arbitrators, if they disagree and do not make an award afterwards.—Ray v. Durand, 27.

BAIL.

See "Pleading," 16.

1. *Semble*—That the plaintiff, though the defendant will not put in bail, may go on with his action against him, and be pursuing his remedy against the sheriff at the same time.—The Queen v Sheriff of County of Hastings, 226.

2. *How far bound by the act of their principal's attorney.*] *Semble*—That bail are not bound by what the attorney for their principal may choose to do, as being the attorney for the principal.—Mitchell v. Noble & Hunter, 284.

BILLS OF EXCHANGE AND PROMISSORY NOTES.

See "Demurrer," 3, 4, 6.

BAILIFF.

See "Arrest," 5.

CA. RE.

See "Arrest," 2, 3.

1. *Right to issue bailable writ, after suit commenced by summons. Held per* BURNS, J., that under the stat. of 1849, 12 Vic., ch. 63, a bailable writ of capias given in the form to that act, cannot issue to hold the defendant to bail in a suit already commenced by writ of summons.

Quære—Are the provisions of the statute of 1832, with respect to the issuing of bailable writs, now in force to any extent.—Kelly v. Kelly, 294.

CA. SA.

See "Arrest," 1, 4.

CHARGE—(*for registering judgments*).

See "Fieri Facias," 2.

COGNOVIT.

See "Insanity," 1; "Misnomer," 2.

1. *Intervention of attorney in taking of.*] *Semble*, That the rule of court requiring the intervention of a practising attorney in the taking a cognovit, is sufficiently complied with by the cognovit being prepared by an attorney, and his name being endorsed thereon at the time of the execution—it is not necessary that the attorney should be present at the time of the execution.—Paterson v. Squires et al., 264.

COMMISSION TO EXAMINE WITNESSES.

See "Costs," 15.

CONSENT RULE.

See "Ejectment," 2, 3.

COSTS.

See "Judgment as in case of nonsuit," 1; "Time" *for replying*, 1.

1. *Security for costs granted.*] Security for costs granted, where the application was made by the plaintiff's attorney, in the name of the plaintiff, for costs, before issue joined and the delay accounted for.—O'Beirne v. Gowin, 16.

2. *Security for costs refused.*] Security for costs refused where the defendant had appeared and pleaded, and made his application after notice of trial, without accounting for his delay.—McDade ex dem. O'Connors v. Dafoe, 18.

3. *Costs of former action.*] When the second action appears to be vexatious, the court will stay the proceedings till the costs of the first action be paid.—Bays v. Ruttan, *Sheriff of* Newcastle, 20.

4. *Costs to a defendant who has been struck out of the declaration on amendment.*] Dowding v. John Eastwood et al. 66.

5. *Costs of former trials.*] Except in cases of remanets, when made such by the court for want of time, if a case goes down for trial a second time, the party succeeding will not be entitled to the costs of the former one.—McLellan v. London, 86.

See "Irregularity," 2; "Fi. Fa." 1.

6. *Security for—when it may be demanded.*] When the plaintiff has placed all his property out of his hands for the benefit of his creditors, and sues on their account, the defendant may demand security for costs.—Reid v. Cleal, 128.

7. *Security for costs, at what stage may be demanded.*] The defendant may, under certain circumstances, demand security

the costs from plaintiff, with a stay of proceedings, even after plea pleaded. The general principle [illegible] the defendant must make his application as soon as he can reasonably do it after knowledge of the fact of the plaintiff's residence abroad.—Wood v. Bottisle et al., 130.

8. *Ejectment.* 1st action abandoned. 2nd action commenced. Costs of first.] Doe dem. McLeod v. Johnston, 133.

9. Costs of application to set aside service of process when affidavits were conflicting.] Coates v. Hornby, 135.

10. Judgment as in case of non-suit. Peremptory undertaking. Rule to discontinue. Costs.] The plaintiff having failed to proceed to trial upon a peremptory undertaking, the defendant moved to rescind the order for discharging the rule for judgment, &c., to make absolute the original motion for judgment as in case of non-suit. The plaintiff then obtained an order to discontinue on payment of costs, but did not take out an appointment to tax costs. The defendant gave notice of taxation, but not attending, the costs were not taxed.

The plaintiff on this ground opposed the application for judgment, &c., but *Held* by McLEAN, J., that it was the duty of the plaintiff to get the costs of the discontinuance taxed and paid, whether the defendant attended or not; and that not having done so, the defendant was entitled to have his motion for judgment as in case of nonsuit made absolute.—Doe Meyers v. Robertson, 140.

11. Costs of [illegible].]—[illegible] v. Kelly, 174.

12. Costs of [illegible].]—Sutherland v. Rutherto, 178.

13. Costs of proof of written document.]—Wakefield v. Lane et al., 181.

14. Revision of taxation. Verdict. Demurrer. Amendment. Costs of the day.] The plaintiff has a verdict on all the issues, subject to a demurrer—the demurrer is decided in favor of the defendant—the plaintiff has leave to amend on payment of costs. *Held per Cur.*, that the defendant is not entitled to the costs of the day of "Nisi Prius," not having succeeded on any of the issues; and that those costs should be struck out on revision.—Bank of B. N. America v. Ainsley et al., 187.

15. Judgment as in case of a nonsuit. Notice of Countermand. Costs of a commission not used.] Notice of trial was given by plaintiff, and duly countermanded. The defendant obtained judgment as in case of nonsuit, for not proceeding to trial according to the practice of the court, and claimed allowance in his bill of costs for a commission to examine witnesses in the United States: he also claimed a counsel fee to defendant's attorney and counsel. There had been no actual dis-

increment of such fee; but *Held per* MACAULAY, J., that neither of these charges could be allowed.

(F. B.—This case came up afterwards in term, and it was decided that, under the circumstances, the defendant should be allowed the costs of executing the commission.)—Pegg v. Pegg, 190.

16. *Jurisdiction of County Court. Costs.*] The plaintiff sued the defendant upon a count, stating that he, the plaintiff, had delivered certain cattle to the defendant to be pastured, &c., and to be re-delivered on request—with a breach, that through the negligence, &c. of the defendant the cattle were lost. The plaintiff had a verdict for 9*l.*; and no certificate having been granted, the Master only allowed County Court costs. *Held per* BURNS, J., upon an application for Q. B. costs, that the action might have been brought in the County Court, and that the Master's taxation was therefore correct.—Hinds v. Denison, 194.

17. *Taxation of. Consequences to party applying for revision of costs not attending on notice of taxation.*] Where a party does not appear before the Master on receiving notice of taxation, he may, perhaps, be precluded from objecting to the amount of items taxable in the discretion of the Master, but he is not precluded from objecting to items *in toto*, upon the allowance of which the Master has no discretion at all.—Conger v. MacKechnie, 209.

18. *How objectionable items may be shewn.*] The objectionable items may be sufficiently shewn by taking the bill of costs and items together.—*Ib.*

19. *Revision of rule as to objectionable items amounting to 40s.*]—*Ib.*

20. *Revision of costs. Q. B. costs. Where action within the jurisdiction of County Court, but no Judge appointed to County Court at the time of commencement of suit.*] The plaintiff brought an action in the Q. B. which was within the jurisdiction of the County Court, and applied to the Judge in Chambers to tax Q. B. costs, on the ground that on the day he commenced his suit no Judge of the County Court had been appointed by the Government to fill up the vacancy that had occurred; but *Held per* BURNS, J., that under the circumstances Q. B. costs could not be allowed.—Sutherland v. Tisdale, 213.

21. *Term fee.*] No term fee is allowed after judgment.—Will v. Lai et al. 216.

22. *Taxation of costs of consolidation of judgment. Notice to attend.*] Before a party will be allowed to tax the costs

of obtaining an exemplification of judgment, he must serve the other side with notice to admit, &c., under the rules of court, 23 Easter Term, 1842. The Master, however, though he cannot allow the costs of exemplification without notice, &c., may allow the costs of procuring a copy of the roll.—Conger v. McKechnie, 220.

22. *Security for costs. What must be stated in defendant's affidavit.*] The defendant in applying for security for costs, need only state in his affidavit the non-residence of the plaintiff. He need not further shew the state of the proceedings. This must come from the plaintiff in answer.—Manelly v. Hays, 262.

24. *Effect of plaintiff having entered common bail for defendant.*] Where common bail has been entered for the defendant, he is sufficiently before the court to apply for security for costs.—*Ib.*

CONSENT RULE.

See "Ejectment," 1, 3.

1. *Entry of, in Ejectment Book.*]—Doe dem. Lount v. Roe, 105.

See "Corporation," 1.

CORPORATION.

1. *Particularity in setting forth names of. What not a nullity.*] No greater particularity is required in setting forth the names of a corporate body in the styling of the consent rule, &c. than of individuals; where, therefore, in styling the lessors of the plaintiff in the consent rule, appearance and plea, "The Chancellor, President and Scholars of King's College at York, in the Province of Upper Canada," the words "in the Province of Upper Canada" were omitted, the omission was held not material—at all events, if material it was not a nullity, and might be cured by laches.—King's College v. Richard Roe, 111.

COUNSEL'S FEE.

See "Master," 1; "Costs," 15.

1. *What it should be.*] The counsel's fee should be exclusively as for fee with brief at the trial.—Doe ex dem. Boulton v. Switzer, 33.

COUNTY COURT.

See "Costs," 16.

DAMAGES.

Contingent on Demurrer.] See "Writ of Enquiry," 2.

DATE.

See "Irregularity," 1; "Demurrer," 9.

DEMURRER.

1. *Demurrer. Plea.*] Demurrer set aside on the ground that it was wrongly dated, and leave given to amend plea. Time for moving to set aside demurrer.—Day v. Holland, 8.

2. *Frivolous Demurrer.*] Mooney v. Jackson, 29.

3. *Frivolous demurrer to a declaration on a promissory note.*] Commercial Bank v. Dunwoodie and Howcutt, 32.

4. *Frivolous demurrer to declaration on promissory note, and in trespass.*] Bank of Montreal v. Down et al., 37.

5. *Summons to set aside demurrer as frivolous.*] Armstrong v. Hamilton, 38.

6. *Frivolous demurrer to declaration on promissory note.*] *Held*, "that it was not alleged in the declaration or breach that the monies sought to have been recovered had not been paid by one of the defendants—only that the defendants *jointly* had not paid," is a frivolous demurrer and should be set aside.—Milburn v. Smith & Bird, 54.

7. *Summons to set aside a demurrer as frivolous, to a declaration in trespass, qu. cl. fr., discharged.*] A demurrer to a declaration "because it did not set forth the *premises* in the declaration mentioned by *metes* and *bounds*, or abuttals, or in any other way pursuant to the rule of court," is not frivolous.—Loring v. Clement, 58.

8. *Special agreement. Demurrer.*] Summons to set aside demurrer as frivolous to a declaration upon a special agreement, "because request was not averred between, &c.," discharged.—Braden et al. v. Lisle, 60.

9. *Variance between date of demurrer and date of filing.*] Demurrer set aside, because the date of the demurrer did not agree with the date of its filing.—E.

10. *Trespass. Omission of words "against the peace of our Lady the Queen." Frivolous Demurrer.*] Shaver et al. v. Brown et al., 166.

12. *Setting aside demurrer for want of marginal note.*] A demurrer served and filed without a marginal note of the exceptions intended to be taken on argument, may be set aside, and delay in moving to do so will be no objection, so long as the other party has not joined in demurrer.—Going v. Ellis & Waring, 169.

13. *Marginal note to copy of demurrer served.*] The rule requiring a marginal note of objections on demurrer applies to

the copies served, which may be set aside without such note—the application may be to set aside the service of the demurrer.—Ward v. Street, 172.

14. *Promissory note payable to bearer. Demurrer set aside as frivolous.*] Demurrer to a declaration on a note payable to bearer, on the averments of *fieri as* to bringing of action and assignment of note to plaintiff, held frivolous.—*Ib.*

DEPUTY CLERK OF CROWN.

1. *Filing of papers by.*] A deputy clerk of the crown should not file papers at his private residence, apart from his office, and out of office hours.—Fralick v. Huffman, 80.

2. *Receipt of papers out of office—as in the street—not a filing.*] The delivery of a paper to him in the street is not "filing or entering it."—*Ib.*

3. *Office of. Attorneys for plaintiff and defendant present. Precedence.*] Where the defendant's attorney is present at the opening of the office in the morning to file a joinder in demurrer, and the plaintiff's attorney is also present to sign judgment, the defendant's attorney is entitled to precedence.—*Ib.*

DISBURSEMENTS.

See "Master," 1.

DISCONTINUE (RULE TO).

See "Costs," 10.

DISTRICT COURT.

See "Writ of Trial," 1.

EJECTMENT.

See "Adding Counts," 1.

1. *Ejectment. Those within which a tenant, when served with declaration and notice, may appear and enter into consent rule.*] A tenant, when served with a declaration of ejectment and notice to appear in the ensuing term, may, within the term, enter into the consent rule and plead, though no rule nisi for judgment against the casual ejector has been obtained.—Doe ex dem. Lount v. Roe, 165.

2. *Ejectment Book. Entry of consent. Plea to, &c.*] It is not necessary to enter the consent rule, appearance or plea in the ejectment book at the Crown office; leaving them with the clerk of the crown and pleas is sufficient.—*Ib.*

3. *Judgment of non pros. against lessee of plaintiff in ejectment, where he has not signed the consent rule. Costs.*] A defendant in ejectment upon filing his consent rule, appearance

and plea, may demand a replication from the lessor of the plaintiff—and if not filed and served, may sign judgment of non pros., *notwithstanding* the lessor of the plaintiff may not have *joined in the consent rule by signing it*, and notwithstanding the consent rule may not have been drawn up or issued. *Semble*, however, that the defendant when the consent rule has not been signed will not be entitled to *costs* from the lessor of the plaintiff.—Doe ex dem. Chancellor, President and Scholars of King's College v. Richard Roe, 111.

EJECTMENT BOOK (In Crown Office).

See "Ejectment," 2.

ELECTIONS (Municipal).

See "Judge in Chambers," 3.

1. *Right of returning officer to close the poll.*] Under the 156th section of the 12th Vic. chap. 81, to entitle a returning officer to close the poll, two things must combine—first, that he should see that all the electors intending to vote have had a fair opportunity of being polled; second, that a full hour at one time shall have elapsed without the tender or giving of a vote by a qualified elector—and even though such full hour has elapsed without a vote being either tendered or given, the returning officer is not bound to close the poll, nor is he justified in so doing should he perceive that electors have not had a fair opportunity of voting.—The Queen ex rel. Lawrence v. Woodruff and four other councillors for the township of Niagara, 119.

ENQUIRY.

See "Writ of."

EXECUTOR AND ADMINISTRATOR.

See "Arrest," 4.

EXECUTION.

See "Arrest," 1; "Adverse Claim," 1.

1. *Supersedeas refused to defendant, because charged in execution in the county where the bail had surrendered him.*] The plaintiff is not compelled to charge the defendant in execution in the county where the bail have surrendered him—he may be charged in execution in the county where the venue is laid.—Beattie v. Robinson, 217.

EXEMPLIFICATION OF JUDGMENT.

See "Costs," 22.

EXONERETUR TO DISCHARGE BAIL.

See "Waiver," 1.

1. *Exoneretur. Bail-piece. Limits. Final order of insolvent.*] An "exoneretur" may be entered on the bail-piece (*Sic* the Limits), where the defendant has been discharged by order of the judge of the Insolvent Court, and the debt in the action included in the schedule.—McCarthy v. Leonard, 135.

EXTRADITION TREATY WITH UNITED STATES.

1. *Right of prisoner committed under this treaty to a writ of habeas corpus and certiorari, returnable before a Judge in Chambers—and if committment found to have been ordered on insufficient grounds, to have his discharge granted by Judge.*] Held per SULLIVAN, J., that upon the facts (set forth in judgment) it appeared to him from the return to the writs of *certiorari* and *habeas corpus*, that the prisoner, who had been committed by the Mayor of Toronto upon an alleged crime of forgery, for the purpose of surrender under the Extradition Treaty with the United States and our Provincial Act of 1849, had been committed upon insufficient evidence, and must therefore be discharged.

Quære—Can a committing magistrate detain a prisoner upon evidence amounting only to a ground of suspicion, for the purpose of other evidence being imported into the case so as to bring it within the treaty?—In re. John Wesley Kennett, committed under Extradition Treaty with the United States, 256.

FILING PLEA.

See "Pleading," 15.

FIERI FACIAS.

See "Appeal," 1.

1. *Costs to be levied on writ of, must follow judgment. Endorsing amount of costs endorsed on al. fi. fa.*] In taking out a writ of *fi. fa.* against executors for costs, the costs directed to be levied must follow the judgment; and where the sum endorsed on the *fi. fa.* is not warranted by the judgment, such endorsement will be referred to the Master, to tax the proper costs, and to reduce the endorsement accordingly.—The Gore Bank v. Gunn et al., 170.

2. *Endorsing on writs of fi. fa. charges for registering judgments.*] A charge for registering the judgment cannot be endorsed on a writ of *fi. fa.*—Wilt v. Lai et al., 216.

FRAUD.

See "Pleading," 11.

4. *Held* per SULLIVAN, J. in this case, upon the affidavits as detailed therein, that a sufficient case was not made out, upon which the execution issued upon the cognovit could be set aside, either on the ground of the insanity of the defendant, or of fraud on the part of the plaintiff at the time of the execution of the cognovit.—Paterson v. Squires et al., 234.

HAB. FAC. POSS.

1. *Rule for landlord to defend. Hab. fac. poss. taken out afterwards without leave of court. Setting aside hab. fac. poss.*] Where a rule has been taken out and served for the landlord to defend, the issuer of the plaintiff, though he may sign judgment against the casual ejectis, has no right to take out a hab. fac. poss. without leave of court.—Doe Mathews v. Roe, 190.

INSANITY.

1. *Setting aside cognovit on ground of insanity.*] *Held* per SULLIVAN, J., that upon the affidavits as detailed in the case, a sufficient case was not made out upon which the execution issued upon the cognovit could be set aside, either on the ground of insanity of the defendant, or of fraud of the plaintiff, at the time of the execution of the cognovit.—Paterson v. Squires et al. 234.

INTERROGATORIES.

See "Prisoner," 1; "Re-committal," 1.

1. *Prisoner. Interrogatories. When to be filed.*] On the 14th of August an application was made by a debtor in execution for his discharge, under the 10th & 11th Vic. ch. 15, sec. 3; on the 20th of August the plaintiff filed interrogatories. *Held* per *Judicem*, that the plaintiff had all Monday, the 30th, to fill his interrogatories. *Semble* also, that they must be filed before the expiration of the fifteen days limited by the act.—Bulkley et al. v. Griggs, 50.

2. *Time of filing answers to interrogatories, where prisoner is confined in one district and executor are filed in another.*] Answers to interrogatories were filed and served at Toronto, on Friday the 20th of August; the weekly allowance was not paid at Barrie on Monday the 23rd of August. *Held* per *Judicem*, upon a summons to discharge the prisoner for the non-payment of the weekly allowance, that a reasonable time had not elapsed between the filing of the answers and the non-payment of the allowance, and that the summons must be discharged.—The Queen v. Hastings, 52.

3. *"Yes" or "no" sufficient answers to interrogatories.*] A simple answer of "yes" or "no" to a written interroga-

very is not the proper way to answer. It may do on a *viva voce* examination, but clearly is not the way to reply to written questions.—Ryan v. Cullen, 289.

4. *A defendant on the limits re-committed for unsatisfactory answers to interrogatories.*] Kirby v. Mitchell et al. 187.

INTERLOCUTORY JUDGMENT.

See "Affidavit of Merits," 1; "Pleading," 8, 15.

IRREGULAR ELECTION.

See "Relator," 1.

IRREGULARITY.

See "Judgment," 1; "Appearance," 1; "Arrest," 6; "Local Action," 1; "Pleading," 6; "Waiver," 1.

1. *Wrong date in declaration served.*] The copy of the declaration served being wrongly dated is an irregularity, not a nullity.—Commercial Bank v. G. S. Boulton, 15.

2. *Common Bail and subsequent proceedings set aside for.*] Common Bail and all subsequent proceedings to motion of discontinue, were set aside without costs, because the defendant was not served with process—an affidavit shewing defendant's brother had been served with process, and that the wife of defendant had been served with the declaration and demand of plea.—Wright v. Irwin, 162.

3. *Irregularity cured by defendant's laches.*] Brown & Kotchum v. Rose, 182.

JUDGE IN CHAMBERS.

1. *Mesne process. Final process. Weekly allowance.*] A Judge in Chambers has no power to order the weekly allowance for prisoners charged in execution on final process.—Low v. Melvin, 25.

2. *His power to order a revision of taxation of costs.*] Doe ex dem. Hamilton v. Switzer, 82.

3. *Summons in the nature of a quo warranto, under the 146th section of the 12th Victoria, ch. 81. Power of Judge under.*] Where a summons in the nature of a quo warranto, was issued against a defendant, under the 146th section of the 12th Vic. ch. 81, to show cause wherefore he had usurped the office of councillor, &c.—*Held per* DRAPER, J., that the authority of a judge in chambers upon this summons extended only to an adjudication of the validity of the election complained of, and that he could not further decide upon the validity of the relator's election.—The Queen ex rel. Gibbons v. McLellan, 188.

4. *Power of Judge to give plaintiff leave to declare as he has done.*] A Judge in Chambers will not allow the plaintiff to declare as he has done, notwithstanding the variance between the declaration and the process.—Ketchum v. Sagwlo, Sharpe, 180.

JUDGMENT.

See "Fi. Fa.," 1.

1. *Non Pros. Irregularity.*] Judgment of non pros. set aside for an irregularity in the service of the demand of replication. Replying after non pros. signed, a waiver of irregularity in serving the demand of replication.—Williams v. Smith, 12.

2. *Against casual ejector.*] Doe Lount v. Roe, 105.

JUDGMENT AS IN CASE OF NONSUIT.

See "Costs," 10, 15.

1. *Peremptory undertaking. Non-payment of costs.*] Semble, that upon a rule for judgment as in case of a nonsuit, being discharged upon the peremptory undertaking and payment of costs, if the costs are not paid before the evening upon the original rule nisi will be made absolute, though the rule for the peremptory undertaking has not been taken out by either party, or any bill of costs taxed, or allocatur served by the defendant.—Prentice v. Hallen, 22.

JURAT.

1. *Sufficiency of.*] Held, that a *jurat* in these words, "sworn before me at Belleville," (not saying in what district,) was sufficient.—Ridley v. Wilkins, 26.

LACHES.

1. *Summons discharged on ground of.*] Brown & Ketchum v. Rose, 162.

LOCAL ACTION.

See "Venue," 2.

MANDAMUS.

1. *To Municipal Corporation, to admit relator.*] Semble, that as soon as the judgment under this summons, quoting the defendant, has become final, the course for the relator to take will be to apply to the municipal corporation to admit him, and if they refuse, then to apply to the Court of Queen's Bench for a mandamus.—The Queen on rel. Gibbons v. McLellan, 185.

MASTER.

1. *Power of.*] The Master may examine into the truth of an affidavit of disbursements for witnesses' expenses, &c., of counsel's receipt for fees.—Doe ex dem. Boulton v. Switzer, 88.

2. *Decision. Dissatisfaction. Appeal.*] If party is dissatisfied with the Master's ultimate decision, he should move by way of appeal.—*Ib.*

MISNOMER.

1. *Variance in the name of defendant in writ, appearance and declaration. How to be taken advantage of.*] Where the defendant appears in a different name from that in which he is sued in the writ, and the plaintiff declares against the defendant by the name in the writ, the defendant cannot set aside the declaration; he can only compel the plaintiff to amend the declaration in the misnomer, under the New Rules.—Gore Bank v. Case, 185.

2. *Misnomer by defendant in his plea of the plaintiff, calling him Hutchison instead of Hutchison, and signing of judgment as of plea a nullity.*] The plaintiff declared by the name of Hutchison. The defendant in his plea spelt the plaintiff's name Hutchinson. The plaintiff treated the plea as a nullity, and signed judgment, and took out execution; the defendant moved to set the proceedings aside. Burns, J., made an order staying proceedings till the next term, in order that the plaintiff might apply to set the judgment aside, and this he said he thought the defendant entitled to.—Hutchison v. Hart, 223.

3. *Omission of a letter in a cognovit.*] *Held per* Sullivan, J., that the styling of a cognovit thus—"Thomas Peterson, plaintiff, v. Phineas Squires and William Squires, defendants," leaving out the letter o, and omitting part of the letter w, was not an irregularity, (there being no doubt as to the identity of the parties,) upon which a judgment and execution entered and issued upon the cognovit, could be set aside.—Pattison v. Squires et al., 224.

MISTAKE.

See "Pleading," 8.

MUNICIPAL COUNCIL ACT.

See "Voters."

NON PROS.

See "Discontinuance," 2; "Judgment," 1.

1. *Effect of, where plea defective.*] Doe dem. Chancellor, President and Scholars of King's College v. Richard Roe, 111.

2. *Non pros.*] Judgment of non pros. set aside for an irregularity in the service of the demand of replication. Replying

after new pros. signed, a waiver of irregularity in serving the demand of replication.—Williams v. Smith, 12.

NOTICE TO ADMIT.

See "Costs," 22.

NOTICE OF ASSESSMENT.

See "Service," 2.

NULLITY.

See "Corporation," 1; "Appearance," 1.

PARTICULARS.

1. *Disturbing a ferry.*] Particulars ordered in an action on the case for disturbing a ferry, as to the number of passengers, goods, &c. conveyed.—Ives v. Calvin, 8.

PAYMENT OF MONEY INTO COURT.

1. A summons may be taken out to pay money into court before declaration, but it must be afterwards pleaded to the declaration.—Molson v. Monro, 97.

PEREMPTORY UNDERTAKINGS.

See "Judgment as in case of Non-suit," 1; "Costs," 10.

PLEADING.

1. *Issuable Plea.*] When a defendant is under terms to plead issuably, and pleads several pleas, and one not an issuable plea, all the pleas may be treated as non-issuable, and the plaintiff may sign judgment.—Wallace v. Grover et al.

2. *Similiter.*] A similiter need not be dated, whether pleaded by the party who ought to add it, or by the opposite party for him.—Bigg v. Toronto Gas Company, 7.

3. *Time to plead de novo to an amended declaration.*] *Semble*, that to an amended declaration, either in term or in vacation, the defendant is not entitled to more than *four* days to plead *de novo*.—Commercial Bank v. G. S. Boulton, 15.

4. *Attorney. Demand of plea. When to be served. Time to plead after service.*] *Semble*, that a demand of plea upon an attorney, under the 10th new rule, must be served in term time; and that the attorney has eight days after service to plead.—See Dunnett v. Garrick, 46; Henderson v. Boulton, 222, &c., 22. (Altered under late Act.)

5. *Attorney. Time to plead after service of demand of plea. Term. Vacation.*] An attorney must be served with a demand of plea in term time—and has *eight* days after service to plead,

full four of which must be in term time, the remaining four may be in vacation.—Bennett v. Bennett, 46. (Altered under late Act.)

5. *Declaration—Date of.*] A declaration dated "A. D." instead of "in the year of our Lord," may be set aside for irregularity.—Merrill v. Cooper et al., 56.

7. *Amendment of declaration after verdict set aside. Costs. Right of defendant to plead "de novo."*] The plaintiff proceeded to trial against two defendants as partners, and had a verdict; the verdict was set aside on the ground that the partnership was not proved. The plaintiff then applied to amend his declaration, by striking out the name of one of the defendants. *Held* per Jackson, that the amendment might be made, with costs to the defendant struck out, as upon a "nolle prosequi."

Held also, that the defendant might plead *de novo*, without covering to his defence, within two days after the amendment and payment of costs.—Dowding v. John Eastwood and John Eastwood, Jun., 68.

8. *Mistake in entitling a plea. Interlocutory judgment.*] Where a plea is filed in due time, but there is a mistake in the entitling of the cause, the mistake should be moved against for irregularity; it will not warrant the plaintiff in treating the plea as a nullity.—Carruthers v. Sword, 79.

9. *Issuable plea.*] The pleading a non-delivery of a bill of goods is not an issuable plea; a plea denying the retainer is.—Rankin v. Johnson, 98.

10. *Adding new counts to meet a set off.*] A plaintiff will be allowed to add a new count to meet the defendant's set-off, provided it be for a cause of action already embraced in the declaration, the defendant having leave to plead *de novo*.—House v. Ivey, 98.

See "Payment of money into Court," 1; "Ejectment," 1.

11. *Setting aside Plea.*] The court will not set aside a plea, unless a clear case of fraud is made out.—Watt v. Buell, 168.

12. *Defective plea in ejectment cured by plaintiff electing to non pros.*] to be signed.] *Held* also, that a plea in ejectment might be informal and open to demurrer, yet if the plaintiff allowed himself to be non pressed the defect was cured by his own laches.—Doe ex dem. Chancellor, President and Scholars of King's College v. Richard Rea, 115.

13. *Affidavit verifying plea to discovery.*—Patch & Manning v. Duggan, 141.

14. *Setting aside a plea as being trivial—remedy for delay, and not trouble.*] Sherwood v. March, 176.

15. *Filing Plea in wrong office.*] A plea filed in the wrong office is a nullity; and the plaintiff, if not aware thereof, and there be no plea filed in the proper office, may sign interlocutory judgment.—Matthie v. Carlyle et al. 177.

16. *Bail—must plead performance of undertaking.*] Where bail rely upon their having performed their undertaking, then that being a legal defence, they must plead such matter in their discharge—they cannot apply to the court for its summary interference.—Mitchell v. Noble & Hunter, 284.

PRECEDENCE

Of Attorneys in Master's Office.

See "Deputy Clerk of Crown," 2.

PRISONER.

Discharge of.] See "Interrogatories," 1, 2; "Execution," 1; "Extradition Treaty," 1.

1. *Answer of. Plaintiff not allowed to controvert.*] The plaintiff will not be allowed to controvert the answers of a prisoner in custody for debt under a *ca. sa.* (under the statute 10 & 11 Vic. ch. 15, sec. 8) if the answers in themselves are full and satisfactory.—Campbell v. Anderson, 91.

RE-COMMITMENT.

1. *Re-commitment of defendant out on bail to the limits.*] A re-commitment of party arrested on *ca. sa.* and out on bail to the limits, upon interrogatories put by plaintiff. The answers of defendant, and affidavit of the plaintiff by way of reply to the defendant's answer.—Leavens v. Ostrom, 261.

RELATOR.

See "Affidavit," 4; "Mandamus," 1; "Summons," 4.

1. *Acquiescence of relator in irregularity complained of.*] Acquiescence of a candidate in an irregular election, how far it disqualifies him from after becoming a relator.—The Queen ex rel. Mitchell v. Adams, 208.

Qualification, under 12 Vic. ch. 81.] It is not necessary that a relator, who is a candidate, should shew in his application to oust the defendant that he himself is qualified for the office.—The Queen ex rel. Mitchell v. Adams, 208.

REPLICATION.

1. *Time for.*] Croil v. Allen, 70.

RESIDENCE ABROAD.

1. *Sufficiency of statement of.*] O'Beirne v. Gowin, 16.

RETURNING OFFICER.

1. *Duty of, under 12 Vic. ch. 81.*] Duty of the returning officer respecting the votes received and recorded. Ontario—The Queen ex rel. Dundas v. Wilson, 198.

RULES OF COURT.

Easter Term, 5 Vic., ... New Rules, 58, page 151.
Easter Term, 1842, ... ditto do. 259.

SERVICE.

See "Irregularity," 8; "Summons," 12.

1. *Setting aside service of process. Officer's affidavit.*] Where service of process was denied by the defendant, but the officer swore positively to its service personally on the defendant, an application to set aside the service and all subsequent proceedings was discharged, but not with costs, as the affidavits were conflicting.—Coates v. Hornby, 185.

2. *Notice of Assessment. Sufficiency of service of.*] The serving a notice of assessment, by taking it to defendant's house and throwing it over his fence into his yard door, telling his son who was present that it was a notice of assessment for his father, is an insufficient service, where the son refused to have anything to do with it, and where the father who was absent from home knew nothing of it till after the sessions.—McGinn v. Benjamin, 440.

3. *Service of a copy of the writ on defendant.*] A party when arrested, if he refuses to receive a copy of the writ which is offered to him, will not be allowed afterwards to make it a ground for his discharge that a copy of the writ was not left with him.—Rotherington, *Administrator, &c.* v. Whelan et al. 183.

4. *Service on Sheriff of summons for an attachment.*] Elliott et al. v. Macdonell et al. 197.

5. *Right to move to set aside service for defect in copy of writ of summons.*] Where the copy of the writ of summons is wrong in itself, the defendant may move to set aside the service of the writ of summons, leaving the original untouched.—Leach v. Jarvis, sheriff, 204.

6. *Right of persons other than the Sheriff to serve writ of summons, under 12 Vic. ch. 63.*] Held per MACAULAY, J., that in the absence of any explanatory rule on the subject, under the late act 12 Vic. ch. 63, he could not deem the service of a writ of summons to have been irregularly made, because the summons had been served by a person other than the sheriff, or his deputy sheriff.—*Ib.*

Quære—As to the right to tax fees on such service?—*ib.*

SET-OFF.

See "Pleading," 10.

SHERIFF.

See "Summons," 18; "Service," 6.

1. *Rule to, in case of adverse claims.*] Robt. McKay et al. v. McKay, 185.

2. *Rule upon Sheriff to return writ. When returnable.*] The rule upon a sheriff to return a writ of *fi. fa.* should be a day-day rule.—Hilton et al. v. Macdonell et al., 207.

3. *Original rule must be shown to Sheriff.*] In order to attach the sheriff for contempt in not obeying the rule, it must appear that the original rule was shown to him.—*Ib.*

4. *Extent of Sheriff's liability, where in an action for seduction against a defendant, who was ordered to be held to bail for 50l., the defendant did not put in special bail, and the Sheriff was attached for not having the body.*] The plaintiff obtained an order to hold the defendant to bail in an action for seduction, for 100l. The defendant did not put in special bail, and the Sheriff was ruled to bring in the body, and an attachment issued against him. The sheriff applied on affidavit to be relieved on payment of the 50l. and costs, and held per Burns, J., that the application of the sheriff must fail—1st, because he had not negatived in his affidavit collusion between himself and the defendant; and lastly, because he only offered to pay the 50l. and costs, whereas his liability might exceed it, in the discretion of the jury, to the penalty of the bail bond and the costs of the attachment.—The Queen v. the Sheriff of the County of Hastings, 200.

Semble, that the plaintiff, though the defendant will not put in bail, may go on with his action against him, and be pursuing his remedy against the sheriff at the same time.—*Ib.*

SIMILITER.

See "Pleading," 2.

STATUTES—CONSTRUCTION OF.

See "Evidence," 1.

8 Vic., ch. 13, (District Courts,) 54.

8 Vic., ch. 38, (Taxation Act,) 76.

10 & 11 Vic., ch. 15, sec. 2, (Imprisonment for Debt,) 50, 91

See "Elections," 1.

12 Vic., ch. 81, (Municipal Corporation Act,) 119.

12 Vic., ch. 81, sec. 102, (Do.) 125.

4 Wm. IV., ch 3, sec. 6, (Abatement,) 141.
7 Wm. IV., ch. 3, sec. 8, (Misnomer,) 160.
12 Vic., ch. 63, (Writ of Summons,) 193.
12 Vic., ch. 81, (Municipal Corporation Act,) 196.
12 Vic., ch. 81, (Do.) 203.
4 Wm. IV., ch. 10, sec. 4 (Abatement).
11 Geo, IV., ch. 3, sec. 10 (Prisoner's ca. sa.,).
4 Wm. IV., ch. 10, secs. 4 & 7, (Prisoner's ca. sa.,) 261.
12 Vic., ch. 63, (Writ of Summons,) 264, 281.
2 Geo. IV., ch. 1, sec. 14, 281.

STAY OF PROCEEDINGS.

1. *Filing warrant to prosecute.*] Upon the application of the defendant in the suit, proceedings will be stayed till the plaintiff's attorney files his warrant to prosecute.—Robe v. Reid, 26.

2. *Staying proceedings on the second action of ejectment, when a prior one was brought and abandoned for the same land. Costs.*] Where the lessor of the plaintiff had commenced one action of ejectment, had then abandoned it, and afterwards commenced a second for the same land, he was ordered to stay proceedings on the second action unless he paid the costs of the first. He might, it seems, under this order, elect to proceed with the first action, in which case the order would have no effect as to the costs.—Doe dem. McLeod v. Johnson, 132.

SUMMONS.

See "Writ of Enquiry," 2, 3; (service 6,) Leakes.

1. A Summons is no stay of proceedings (unless so expressed) until returnable.—Sovereign v. Empolie, 11.

2. *Setting aside copy of amended plea.*] Summons to set aside the copy of amended plea, and the service thereof, held good. There were several objections to the wording of the summons taken, and overruled.—Edmondson v. Scott, 33.

3. *Styling of summons to set aside nunc pro.*] In applying by summons to set aside a judgment of nunc pro tunc signed, the summons should be styled, Doe ex dem. (lessee of plaintiff) v. Richard Roe.—Doe dem. Chamberlain, &c., King's Coll. v. Richard Roe, 111.

4. *By one abates against the whole corporation.*] Semble, that it is no part of the design of the act 12 Victoria, chapter 81, to give any greater or more extensive right to parties suing out under it a writ of summons, than they before possessed at common law or under the British statute; and therefore, that

a writ of summons issued by one relator against the *whole body of a corporation* must be discharged.—The Queen ex rel. Lawrence v. Woodruff and four other councillors for the Township of Niagara, 119.

5. *To amend declaration—what it should specify.*] The summons to amend declaration need not specify the amendment required. It is sufficient if the grounds of amendment be mentioned in the notice of the intended application.—Brown et ux v. Devlin, 175.

6. *Summons to admit signature, when put in issue by the pleadings.*] Though the making or endorsing a note may be *put in issue* by the pleadings, the plaintiff, to entitle himself to the costs of proof, must serve the defendant, under our rule of court, with a summons to admit.—Wakefield v. Lane et al., 181.

7. *Summons wrongly entitled. Laches.*] A summons to set aside an interlocutory judgment was discharged, being wrongly entitled, and the irregularity in signing judgment having been cured by defendant's laches &c.—Brown & Ketchum v. A. W. H. Rose, 182.

8. *Signing and sealing writ of.*] *Semble*, that a writ of summons under the late act 12 Vic., ch. 63, is irregular, if not sealed.—Smith v. Russel et al., 193.

9. A writ of summons marked in the margin as issued by "W. H. Ponter, D. C.," is sufficiently signed.—Ib.

10. *Original summons for attachment need not be shown to sheriff.*] *Semble*, that a personal service on the sheriff of the copy of a summons for an attachment for not returning a writ, without shewing him the original, is sufficient.—Hilton et al. v. Macdonell et al., 207.

11. *Naming of sheriff in summons for attachment.*] The summons for the attachment should strictly *name* the sheriff who is in default, and not merely call upon the officer—*he* may be changed.—Hilton et al. v. Macdonell et al., 207.

12. *Necessity of Mr. Small or other principal officer signing writ of summons under 12 Vic., ch. 63.*] Where the copy of the writ of summons, issued under the recent act 12 Vic., ch. 63, was marked issued by R. Pearson, with L. S., but was *not signed by Mr. Small*, the principal officer in the court, from whence the writ issued—*Held per* MACAULAY J., that the copy of the writ not containing the name of the signer of the writ at the bottom was not an irregularity, as the practice now stood, upon which the service could be set aside.—Leach v. Jarvis, Sheriff, 206.

SUPERSEDEAS.

See "Execution," 1.

TAXATION OF COSTS.

1. *Revision of. Costs of revision, &c.*] A revision of taxation was granted, as defendant's attorney was not present at the taxation, and some of the items were questionable.

Semble, that if the defendant does not rule the plaintiff, or attend taxation, and applies afterwards to revise an ex parte taxation, he will only be allowed to do so on payment of the costs of the other application, and of such revision.—Halfpenny v. Kelly, 174.

2. *Plaintiff refusing to give costs in detail to defendant, on an offer to pay debt and costs. Who to pay costs of application for taxation, and on attending taxation.*] Where the defendant asks the plaintiff for the amount of costs in order that he may settle, and the plaintiff merely gives the amount, and refuses a bill in detail, the defendant will not be allowed the costs of an application for taxation.

Semble, it might be otherwise if the defendant paid the amount of costs into court. An order may be had, however, under these circumstances, to compel the plaintiff to refer his bill for taxation, and the plaintiff will not be allowed costs for attending such order. With respect to the costs of taxation, the plaintiff will be entitled thereto, unless the amount claimed be reduced one-ninth.—Sutherland v. Rathbone, 178.

TENANT.

See "Ejectment," 1.

TESTE.

Of Writ of Ca. Re.] McIntosh v. Cummings, 93.

TIME.

1. *Time given to reply, but only under the circumstances, on payment of costs.*] Cronk v. Alleyn, 70.

TRESPASS.

See "Demurrer," 5, 7.

UMPIRE.

See "Award," 1.

1. *How he may be appointed.*] An umpire need not be appointed in writing, if the rule of reference does not in terms require it.—Ray v. Durand, 27.

VARIANCE.

See "Mistake," 1.

1. *Declaration varying from process.*] Where the declaration is in debt, and the process in case, the declaration will be set aside.—Ketchum v. Rapelje, [illegible], 186.

VENUE.

1. *Change of.*] A venue once changed will seldom be changed back again, without a peremptory undertaking on the part of the plaintiff.—Carrall et al. v. Tyson et ux., 48.

2. *Amendment of declaration in the.*] The plaintiff commencing a local action in a wrong district—that is, neither in the district in which the cause of action arose, nor in the Home District—cannot afterwards, under 8 Vic. ch. 96, be allowed to amend his declaration by changing the venue to the proper district. The irregularity is in the issue of the original process, and incurable.—Vaughan v. Hobbs et al., 76.

VOTES,

Under the late Municipal Act.

Right of party to vote whose name is on collector's roll, though not on the copy of such roll furnished by collector to returning officer. Right of party to vote whose name is on the copy of the roll, though not on the collector's roll.] *Held per* BURNS, J., that under the recent Municipal Council Act, those persons whose names, on enquiry made by the returning officer, are found to be on the *collector's roll*, though omitted accidentally or otherwise from the verified *copy of the roll* required to be furnished by the collector to the returning officer at the opening of the election, are legally entitled to vote. *Held* also, that persons whose names are inserted in the copy of the roll, though not on the collector's roll, are not entitled to vote.—The Queen ex rel. W. Helliwell v. Geo. Stephenson, 270.

WAIVER.

See "Judgment," 1.

1. *Bail-piece. Exoneretur. Irregularity. Laches.*] Where the plaintiff, after service of notice of application, allowed an *exoneretur* to be entered on the bail-piece without opposition, and then, six years afterwards, applied to rescind the order for the *exoneretur* for irregularity, the application was refused, on the ground that the plaintiff's acquiescence in the order for six years must be considered as waiving the irregularity and discharging the bail.—Roberts et al. v. Fox et al., bail of McAlvery.

WARRANT.

See "Arrest," 5.

WARRANT OF ATTORNEY.

See "Stay of Proceedings," 1.

WEEKLY ALLOWANCE.

See "Judge in Chambers," 1.

WITNESS.

1. *Expenses for.*] See "Master," 1.

WRIT OF ENQUIRY.

1. *When it may issue from Q. B. to District Court, and for what.*] Under 8 Vic., ch. 13, a writ of enquiry may issue from the Queen's Bench to the District Court, not only to try the issues of the country, but also to assess contingent damages upon demurrer.—King's Coll. v. Gamble and Boulton, Executors of D'Arcy Boulton, 54.

2. *Summons for, how it need be entitled.*] The summons for the issue of the writ of enquiry need not be entitled "Plaintiff" and "Defendant."—Ib.

3. *What summons for writ must show.*] The summons must show the venue; also the amount endorsed on the original process; and the nature of the action.—Ib.

WRIT OF TRIAL.

1. *Writ of Trial to District Court. Nolle prosequi as to all the counts but one.*] A writ of trial may go to the District Court in a suit where there are three counts in the declaration, upon the plaintiff entering a *nolle prosequi* as to all the counts but one.—Moffatt v. McNab, 96.