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DIVISION COURTS.

OFFICERS AND SUITORS.

Clerks & Bailiffs.—*Execution returns by Bailiffs, and examination thereof by Clerks.*

We have been requested to direct our attention to the examination of these duties with a view to the information of officers.

It is important that Bailiffs should from time to time make such returns as will enable suitors to ascertain what is done under executions in which they have an interest. The 12th Rule accordingly provides that Bailiffs levying and receiving money under process shall, within three days after the receipt thereof, pay over, &c., the same to the proper officer—that is, to the Clerk who issues the Execution. And Bailiffs are required to deliver to the Clerk a return or statement on oath showing what has been done on Precepts given to them for execution. This Return is to be made according to Form 68 in the Schedule of Forms, and it is needless to add, for the Bailiff is required to swear to it, that great care should be taken to make it "full, true, and correct." The examination of this return forms a very important part of the Clerk's duty, and is directed by 7th Rule, which provides that it shall be the duty of the Clerk to examine such Returns, and if found correct and complete, within ten days after the receipt thereof, to endorse a certificate to that effect on the Return; if found incorrect or incomplete, it becomes the duty of the Clerk to notify the Judge thereof, who will call the Bailiff to account for the error or omission.

The duty we have said is an important one—it is so both to Suitors and Clerks—to Suitors, that their rights may have all the protection an Officer on the spot can best afford—and to Clerks because the examination being a part of their duties, suitors suffering loss in consequence of neglect, may be able to recover damages in an action against them.

The manifest object of Rule 7 is to secure the supervision of a resident officer, who has personal knowledge of the matters embraced in the return, or the means of readily obtaining such knowledge —one who will act as a proper check on the Bailiff and report him, if he fails to perform his duty.

Should the Bailiff omit to deliver returns at the proper times, the Clerk will of course report the omission to the Judge.

When the returns are before the Clerk, he has ten days within which to make the necessary examination.

The particulars respecting this examination, we shall notice in detail. In the first place the Clerk will see that the proper number and style of cause is inserted; that the nature of the process is correctly given; that the date when received—the amount to be made—the amount paid to the Clerk —and when paid, are correctly given. All these particulars the Clerk will be able to check by his books.

The "amount levied" the Clerk must of course take, as stated in the return, as also the time when levied. With respect to the "amount of Bailiff's" charges, this includes all the fees and disbursements the Bailiff has authority to exact.

The amount of these in ordinary cases, will vary very little, except in respect to mileage; and the travel the Clerk will in general know by the affidavit of service of the summons in the cause.—Should the charge under this head be very large and apparently in excess of the authorised charges, the Clerk may well require an explanation from the Bailiff; for he, the Clerk, is required to certify that he finds the return correct in every particular to the best of his knowledge and belief. It is the obvious duty of Clerks not to wink at any overcharge by a Bailiff, but to protect parties from imposition, so far as lies in his power.

Under the head of "Remarks," any necessary explanation may be inserted; and in case nothing can be made under an execution, the return "no good " should be set down: if the execution has been stayed by the plaintiff's orders, the fact should appear under this head, and the Clerk may require the Bailiff to produce the plaintiff's written order for "stay." When the property seized is claimed by a third party, it should be mentioned, and the name of the claimant given; and the same if all the defendant's available property be under seizure by the Sheriff, or by a Bailiff. When notes, &c., are seized, the same should be explained; in fact, the returns should disclose everything necessary to give full information to the plaintiff of what the Bailiff has been doing toward securing his claim.

These returns the Clerk must allow every one interested, that is, all parties having executions due, to examine without fee; and he must retain and file them in his office for future reference.

SUITORS.

Evidence—Sale of Goods.

Delivery to an agent.—A contract made by an agent as such is in law the contract of the principal; the agent is considered merely as the conduit: he is simply the medium by which the contract is effected. His assent is merely the assent of the principal; he need not therefore be competent to contract for himself; so that infants, married women, &c., may act as agents for other persons.

Where goods are delivered to an agent, the seller may in general sue the principal.

An agent is not liable on a contract, which he makes in his representative capacity, provided he do not personally contract or expressly pledge his own credit; and provided he do not so far exceed his powers as to render his principal irresponsible. If a person contract as an agent for a third party having in fact no authority to do so, he may be sued personallly—but then it must be shown that he acted without authority.

Delivery to a minor.—The father of an infant (a person under the age of twenty-one years) to whom goods are sold, is only liable when an actual authority from him to his child is proved, or circumstances appear from which such an authority can be implied; or there is a subsequent recognition of the claim. Even the father of an illegitimate child may be liable on an implied contract to pay for necessaries supplied for the child, if he adopted it by taking it home.

ON THE DUTIES OF MAGISTRATES.

SKETCHES BY A J. P.

(*Continued from page 202.*)

The Assertion of a Claim of Right.

In the course of the hearing it may appear that the act complained of has been committed in the *bonâ fide* assertion of a claim of right; and where this is the case, it may be laid down as a general rule that the jurisdiction of the Justices will be ousted, and they should dismiss the information, leaving the party complaining to such other remedies as the law may have provided. For a *bonâ fide* claim of right, by the principle of common law, and also by express enactment, usually inserted in modern statutes relating to the summary trial of offences, operates so as to disable Justices from proceeding.

In reference to the assertion of right, however, the Justices should not only consider whether the case is one in which, from its nature, a claim of right is admissible, or operates as a defence—but also, whether or not it is made *bonâ fide*, or is merely colourable; for if it be made in a case in which it clearly is not applicable, or does not amount, even if well founded, to a legal defence; or is merely colourable without any legal foundation, they should disregard it and proceed with the case.

The claim of right may be set up at any stage of the proceedings; when advanced as a defence, it will be the duty of the Justices to enter into the case so far only as to satisfy themselves whether the claim is either substantial or unfounded; and in this investigation their object will be alone to ascertain that the claim is a reasonable one, not that it is one capable of being ultimately successfully maintained.

It is no proof of a *bonâ fide* claim subsisting that several persons, other than the individual charged, had committed similar trespasses, using the same colour of right as that which he professed to rely on, and that the complainants had obtained injunctions from the Court of Chancery against such parties; nor in a case where a particular statute exempts from the penalty any person acting under a reasonable supposition of *right*, is it sufficient for the accused to *state merely* that he so acted.

The class of cases in which a claim of right can be set up are for the most part confined to informations for trespass and assault which sometimes involve a question of title to property. When such a question is involved, the Justices should at once abstain from further proceeding in the case, and leave the parties to some other course of proceeding, it being a maxim of invariable application as regards summary proceedings before Justices, that whenever the title to property is in question the right to adjudicate does not exist.[1]

[No portion of the "Manual on the Office and Duties of Bailiffs in the Division Courts," owing to the pressing engagements of the writer, will appear in this number. We will find room in the next number for a double portion.—Ed. U. C. L. J.]

U. C. REPORTS.

GENERAL AND MUNICIPAL LAW.

Clarke v. Easton.

(Easter Term, 19 Vic.)

(*Reported by C. Robinson, Esq., Barrister-at-Law.*)

Plea, that plaintiff's money seized in defendant's hands under execution from Division Court—13 & 14 Vic., cap. 53, sec. 89—Construction of.

Defendant had taken a conveyance from the plaintiff of certain timber under an agreement, by which he was authorised to sell it and receive the proceeds of such sale "in his own name, or otherwise, as he should think proper," and after making certain deductions allowed, he was to pay to the plaintiff any balance of the purchase money which should remain in his hands.

To an action by the plaintiff upon this agreement for monies alleged to be due him, defendant pleaded that after the sale of the timber, and before this suit, and while the monies mentioned in the declaration remained in defendant's hands, they were seized by a bailiff of a division court, under an execution issued from that court against the plaintiff, at the suit of one O.

Held on demurrer, plea bad, as it imported nothing more than that defendant *was indebted* to the plaintiff in a certain sum, and such a claim could not be seized under 13 & 14 Vic., cap. 53, sec. 89.

Quære, if defendant had set out the amount of plaintiff's money in his hands, and averred that this sum remained separate and apart from his own, for the plaintiff, when it was seized—whether that would have been a good defence.

[14 Q. B. R. 251.]

Declaration—That the plaintiff, by indenture, sold and conveyed to defendant all his elm timber on the river Moira, marked "C. K.": that it was agreed that defendant should advance a certain sum on the execution of said indenture, &c.; and also that the said defendant should have the uncontrollable and perfect right to sell the said timber to such person or person as he should think fit, and to take and receive the proceeds of such sale in his own name or otherwise, as he should think proper; also, that the said defendant should have the right, on

[1] See Paley on Convictions, foot note, 87; R. v. Wrotherley, 1 B. & Ad. 615; R. v. Dodson et al, 9 A. & E., 704; Dale v. Pollard, 10 Q. B., 501.

receipt of the said purchase money aforesaid, to take therefrom—First, all sums by him paid out or in any way expended for, or in respect of, or on account of the said timber, men's wages, or otherwise howsoever, or money advanced under the said indenture, or any debt or debts due or owing from the plaintiff to the said defendant, or by him entered against him; secondly, &c. (specifying other deductions which defendant might make): and the said defendant did covenant and agree to and with the plaintiff, that upon selling the said timber, after deducting, &c. (specifying the deductions) he would pay any balance of the said puchase money which should remain in his hands from the sale of the said timber to the said plaintiff. Nevertheless, the plaintiff in fact says that, although the said defendant did afterwards, on, &c., sell the said timber for a large price, and did receive the proceeds of such sale, being the price aforesaid, for a large sum—to wit, the sum of one thousand pounds; and although there was, after deducting, &c., a balance due the plaintiff amounting to a large sum of money—to wit, the sum of five hundred pounds—the defendant would not pay the same, or any part thereof, to the plaintiff, contrary to the defendant's covenant in that behalf. *Fifth plea*—That after the sale of the timber in the declaration mentioned, and before the commencement of this suit—to wit, on, &c.—and whilst the monies in the declaration mentioned remained and were in the hands of the defendant, one Dunham Ockerman, then a bailiff of the first division court of the county of Hastings, had in his hands for execution a certain precept of execution to him directed, issued out of the said first division court, for the sum of £14 9s. 8d. against the goods and chattels of the now plaintiff, at the suit of one Richard O'Reilly; and thereupon the said Dunham Ockerman, then being in the execution of the said process—to wit, on the day and year last aforesaid—by virtue of the said precept of execution, and before the return day thereof, and within the county of Hastings, did then seize and take in execution the monies in the declaration mentioned as and belonging to the said plaintiff, whereof the plaintiff then had notice: verification.

Demurrer.—That the said monies in the said plea mentioned to have been in the hands of the said defendant at the time in the said plea stated, were not liable in law to be seized or otherwise taken in execution, or subjected to the said lien in the said fifth plea alleged, under and by virtue of the said precept of execution, or execution, issuing out of the said division court, as in the said plea alleged, against the goods and chattels of the said plaintiff—or, in other words, that a debt or other chose in action cannot in law be seized or taken in execution under a writ of execution against goods and chattels issuing out of the division courts in Upper Canada, &c.

Fraser for the demurrer. *Wallbridge* contra.

ROBINSON, C. J., delivered the judgment of the court.

The statute 13 & 14 Vic., cap. 53, sec. 89, provides, that any bailiff of a division court, having an execution to levy upon goods and chattels, may by virtue thereof seize and take "any money or bank notes, and any cheques, bills of exchange, promissory notes, bonds, specialities, or securities for money, belonging to the person against whom the execution shall have issued."

The defendant in this case had been authorised to sell certain timber on account of the plaintiff, and to take and receive the proceeds of such sale "*in his own name or otherwise*, as he shall think proper"; and after making certain specified deductions and charges, which he was by agreement to be allowed to make, he was "*to pay any balance of the purchase money which should remain in his hands from the sale of the timber* to the said plaintiff."

When sued in this action for *a balance of money* alleged by the plaintiff *to be due to him*, and which, it is complained, he refuses to pay to the plaintiff, he sets up as his defence, that after the sale, and before this suit, and while the monies in the declaration mentioned remained in the hands of the defendant, a bailiff of the division court, having an execution in his hands against the goods of this plaintiff, at the suit of a third party, one O'Reilly, by virtue of the execution, and while it was in force, seized and took in execution the monies in the declaration mentioned as belonging to the plaintiff, whereof the plaintiff had notice.

The plaintiff denies that this is any defence, and he relies upon *Harrison v. Paynter*, (6 M. & W. 387) and other decisions in England upon an enactment similar to that which we have cited from our statute, which have determined that mere debts or claims cannot be seized in execution under such a provision. That, we think, is a point so clear upon the words of the statute, as to require no authority to support what the plaintiff contends for; but if the defendant had still in his hands, apart from his private funds, the very money which he had received from the sale of the timber, or rather the balance of it which remained after the deductions he was authorised to make, that, it might be contended, was the plaintiff's identical money in the defendant's hands, and if so it would be liable to seizure. But we do not think that it results from the nature of the transaction that the defendant was bound to keep by itself the identical money which he received from the timber. The provision that he might receive the proceeds *in his own name*, or otherwise, as he should think proper, would seem rather to signify that any balance remaining would become mere matter of account between him and the plaintiff; and certainly we could not hold, that whenever an action for money had and received would lie by A. against B., a bailiff having an execution from a division court against A. could seize B.'s money to satisfy the debt.

The facts in this case may have been such as to enable the defendant to make out such a defence; but I think this plea does not necessarily import anything more than that the defendant was accountable to the plaintiff for a certain balance. The defendant ought, we think, to have set out what amount he had received for the plaintiff, what amount he had taken from it under the agreement, and how much of the plaintiff's money remained in his hands; and should then have averred, if the facts were so, that this money of the plaintiff—separate and apart from his own money—was remaining in his hands, to be delivered to the plaintiff within a reasonable time, which had not elapsed, and that while it was so remaining the bailiff seized it. We do not imagine that the defendant could have pleaded such a plea with truth, for it would be contrary to the common course of business; but if he could, we think he ought to have done it, and that, as it stands, the plea is insufficient. And I would add, that I am not satisfied at present that even under the circumstances that I have supposed the defence would be good, since the defendant was under no obligation to keep the proceeds of the timber in money by him, but, according to the course of business, should pay it into a bank—and would the plaintiff's claim upon him be extinguished by the identical money being stolen or lost?

Judgment for plaintiff on demurrer.

SNOOK ET AL. V. THE TOWN COUNCIL OF BRANTFORD.

(Easter Term, 19 Vic.)

(*Reported by C. Robinson, Esq., Barrister-at-Law.*)

Municipal Corporation—Liability for injury caused in repairing roads.

Defendants, a Municipal Corporation, were repairing a road which crossed plaintiff's raceway by a culvert, and while the work was going on the stones and other materials collected for it about the culvert were carried into the raceway by a violent storm, and suffered to remain there.
Held, that the defendants were not liable.

[14 Q. B. R. 246.]

First count—For wrongfully throwing earth, stones and rubbish, into a raceway which leads off the water from the plaintiffs' mill, thereby obstructing the flow of water, and impeding the working of the mill.

Second count—That defendants, owning and having the control of a road which led over a culvert built across plaintiffs'

raceway, and such road being out of repair, the defendants, while repairing it, did the same so negligently and improperly that earth, stones and rubbish were wrongfully and improperly permitted by them to fall through a hole in the bridge or culvert into the raceway, and to be washed into the same from each side of the street or road; and complaining that though a reasonable time had elapsed defendants did not remove the same, but allowed it to continue obstructing the flow of water.

Pleas: 1st, Not guilty, by statute; 2nd, Traversing plaintiffs' alleged right to have the water flow through the race.

It appeared at the trial, at Brantford, before *Burns, J.*, that the defendants had not put any stones or rubbish in the raceway, as stated in the first count, but that a violent storm and freshet came last spring and carried away part of the road across and near the culvert, and that the defendants employed persons to repair the breach, and while they were doing it, and had stones and other materials collected on or about the culvert for the purpose, another storm came, which carried the loose materials, or some of them, into the raceway, where they were suffered to remain till this action was brought. It was contended by the defendants' counsel that the injury complained of did not arise from the cause or in the manner stated; that the evidence showed that the defendants did not place the stones, &c., in the raceway, but that the elements occasioned the mischief, doing damage to the defendants as well as to the plaintiffs; and that there was no duty by law incumbent upon the defendants to remove from the plaintiff's raceway the stones or rubbish which the freshets had carried there. The learned judge thought the action could not be maintained, but declined nevertheless to direct a nonsuit, and left it to the jury to say from the evidence whether the plaintiff had sustained such an injury as he complained of, by anything wrongfully done or committed by the defendants.

The jury found for the defendants.

J. Duggan moved for a new trial on the law and evidence, and for misdirection. He cited *Henly v. Mayor of Lyme*, (5 Bing. C. 91.) *Cur. adv. vult.*

Robinson, C. J., delivered the judment of the court.

We cannot say the verdict was wrong. What damage the plaintiff sustained seems to have arisen from natural causes, for which the defendants are not liable.

It should reasonably have been regarded as an accident; and instead of allowing his mill-race to continue obstructed, under the idea that he could hold the defendants responsible for the mischief occasioned by the elements, the plaintiff would have acted more wisely and reasonably if he had set himself to work to remove the rubbish.

Rule refused.

Foster v. Geddes.

(Hilary Term, 19 Vic.)

(*Reported by C. Robinson, Esq., Barrister-at-Law.*)

Acceptance by treasurer of a company—Liability—Seal.

Defendant accepted a bill drawn upon him as treasurer of the Wolfe Island Railway and Canal Co., thus: "Accepted. W. A. Geddes, Treas. W. I. R. W. & C. Co." adding the company's seal. *Held*, that he was personally liable.

Semble, that an impression upon the paper, without wax or any extraneous substance, is a sufficient seal.

[14 Q. B. R. 239.]

This was an action brought by the payee against the drawer and acceptor of the following bill of exchange:—

"£32 8s. 10d. "Kingston, 8th January, 1855.

"Ninety days after date, pay to the order of Alexander Foster, at the office of the Bank of Upper Canada in Kingston, the sum of thirty-two pounds eight and ten-pence, currency, and charge the same to account of your obedient servant,

"Wm. R. Allen."

"W. A. Geddes, Esq., Treasurer of the Wolfe Island Canal Company, Kingston."

The acceptance was thus—"Accepted. W. A. Geddes, Trea. W. I. R. W. & C. Co." with an impression of a seal made on the paper.

At the trial at Kingston, before *Draper, C. J.*, it was proved that the impression on the bill of exchange was the representation of the seal of the Wolfe Island Railway & Canal Co.; and it was contended that it was the acceptance of the company, and not the individual acceptance of the defendant Geddes, and that he could show this under his plea that he did not accept. The objection was overruled, leave being reserved to move for a non-suit, and the plaintiff had a verdict.

Helliwell moved for a non-suit on the leave reserved.

Burns, J., delivered the judgment of the court.

With the exception of adding a seal, the case is quite undistinguishable from The Bank of Montreal v. DeLatre, (5 U.C.R. 362) in which the court held the defendant to be personally liable upon an acceptance similar to the present. Since the decision of that case one very similar has been decided in England in like manner—Owen v. VanUster (10 C. B. 318.) With respect to the point whether the impression of the company's seal upon the paper, without wax or a wafer, or some substance adhering to the paper, is to be treated as a seal, the case of The Queen v. The Inhabitants of St. Paul (7 Q. B. 232) would establish that it should be treated as a seal. The addition of the seal of the company, however, does not the less make the acceptance of the defendant his own individual acceptance. It might, perhaps, have had that effect, if the bill had been accepted on behalf of the company *per procuration*, but it is not so accepted. There should therefore be no rule.

Rule refused.

Barclay v. The Municipality of the Township of Darlington.

(Hilary Term, 19 Vic.)

Municipal Council—Notice to—By-law.

A Municipal Council of a township is entitled to one month's notice of action, under the statute 14 & 15 Vic., cap. 54, sec. 2, and 12 Vic., cap. 10, sec. 6.

If a by-law be not void on the face of it without being quashed, all proceedings duly had under it while it remained in force may be justified under it.

[5 C. P. R., [illegible].]

Writ issued July 29, 1854. Declaration, Sept. 15, 1854.

Trespass, *quare clausc et domum fregit*, being on lot No. 19, 7th concession of Darlington, and taking the plaintiff's goods, and converting them, &c.

Plea—Not guilty, by statute.

It appeared in evidence that the trespass complained of consisted of the seizure and sale of goods of the plaintiff, in November, 1853, under two distress warrants issued by the reeve of the township, to enforce two convictions of the plaintiff in certain penalties for selling spirituous liquors by retail without a license, and contrary to the by-laws of the municipality—meaning a by-law passed the 7th of February, 1853, prohibiting the keeping open a house for the sale of spirituous liquors, &c., by retail, &c., or to be drank therein after the 1st of March then next, under certain penalties therein declared; that in Michaelmas Term (November, 1853) a rule was issued by the Court of Queen's Bench, calling on the defendants to show cause why said by-law should not be quashed. After which—that is, in December, 1853—the defendants repealed such by-law before the rule *Nisi* was answered, and afterwards showed such repeal as cause against the said rule being made absolute; and on the 2nd of February, 1855, the rule was discharged on that ground, but with costs to be paid by the defendants.

The by-law is to prohibit the opening of any houses for the retail of wines or spirituous liquors, ale, cider or intoxicating beer, in the township of Darlington, and for other purposes therein mentioned; passed 7th February, 1853. It recited the expediency of prohibiting the licensing or opening of any

houses of public entertainment for the sale of wines or spirituous liquors, ale, cider or intoxicating beer, within the limits of the said township; and enacted, that if any person should open or continue to keep open a house for the sale of wines or spirituous liquors, ale, cider or intoxicating beer, by retail, or to be drank therein, within the limits of the said municipality after the 1st March next, he or they should, upon conviction thereof before the town reeve, or any or more justices of the peace having jurisdiction in the said municipality, upon the oath of one or more witnesses, or upon confession of the party charged, forfeit and pay a sum not less than £2, nor more than £5 for each and every offence, &c., with costs of prosecution.

Second. That all penalties and costs, or both, imposed by that by-law, should be levied and collected as provided by the 6 Wm. IV, cap. 4; and in case no distress sufficient to satisfy the amount of penalty or costs, or both, should be found, it should and might be lawful for the town reeve or justice before whom the complaint should be made, to commit the offender to the county gaol for any time not exceeding twenty days, unless the penalty and costs should be sooner paid; which penalties, when received, should be paid as the law directed.

Third. Is to punish in like manner evasive indirect sales.

Fourth. Repealed by-law No. 16, for limiting the number of houses of public entertainment in the said township, &c., and other by-laws inconsistent with this by-law.

On the 24th Sept., 1853, Mr. Jones, township reeve, issued two summonses to plaintiff to answer for selling spirituous liquors by retail without being licensed so to do, and contrary to the by-law of the municipality; one summons charging him with having done so on or about the 8th or 9th of September, the other on or about the 8th, 13th and 31st of August, 1853, at Darlington, &c.

On the 3rd of October, 1853, the said reeve issued two warrants to Coleman, constable of the township, reciting plaintiff's conviction on the foregoing charge. One alleged, on or about the 31st of August, 1853, and the other on the 9th of September, 1853, contrary to the by-laws of said township; whereby he had forfeited £5 over and above costs and charges (in each case); such costs being £3 7s. 3d. and £2 7s. 9d. respectively, making together £8 7s. 3d. and £7 7s. 9d; and the constable was commanded forthwith to levy the same of the goods of the plaintiff, and sell the same in eight days, if the amount and costs of distress were not paid, &c.

In November, 1853, the goods were seized, and afterwards sold, &c.

In December, 1853, the by-law was repealed.

On the 28th February, 1853, a rule *Nisi* to quash the said by-law, granted in Michaelmas Term, 1855, was discharged, on payment of costs of the application.

The jury found a verdict for plaintiff.

This is a rule upon the plaintiff to show cause why such verdict should not be set aside as against law and evidence, and for misdirection and excessive damages, or to enter a verdict for defendants pursuant to leave reserved.

Robinson, C., showed cause.

Vankoughnet, P., Q.C., supported the rule.

The points made at the argument were—First. Whether trespass will lie against defendants for the act complained of, the by-law not being quashed—*In* Re Barclay and The Municipal Council of Darlington, 11 U. C. Q. B. R. 470.

Second. Whether defendants were not entitled to notice of action, and whether it is not too late—Ba. Ab. Trespass, E. 2; Kerrison v. Cole, 8 East. 230, Com. Dig.

Whether the by-law, until repealed, did not protect all acting under it.

Whether the damages were not excessive, the goods having been bought in for plaintiff.

The court at liberty to refer to the report of the case of Barclay v. Municipal Council of Darlington, 11 U.C.Q.B.R. 470, as respects both fact and law in its application to this case.

Macaulay, C.J., delivered the judgment of the court.

The 12 Vic., cap. 81, sec. 185, provided for quashing by-laws in the whole or in part illegal, and enacted that no action should be sustained for or by reason of anything legally authorized to be done under such by-laws, unless such by-law, or the part thereof under which the same should be done, should be quashed (in manner therein provided) one calendar month previously to the bringing such action; and if such corporation, or any person sued for acting under such by-law, should cause amends to be tendered to the plaintiff or his attorney, and upon such tender being pleaded, no more than the amends tendered should be recovered, the court should award no costs to plaintiff, but to award costs to the defendant, to be deducted out of the amount of the verdict.

The 14 & 15 Vic. cap. 109, sec. 35, enacted that whenever any by-law, order and resolution shall be or has been adopted by any municipality whatever, and such by-law, order or resolution has been or shall be quashed, or declared illegal or void by any court having competent jurisdiction therein, the municipality by which such by-law, order or resolution has been or shall be passed, shall alone be responsible in damages for any act or acts done or committed under such by-law, order or resolution; and any clerk, constable or other officer acting thereunder shall be freed and discharged from any action or cause of action which shall accrue or may have accrued to any person or persons by reason of said by-law being illegal and void, or having been quashed; and such municipality shall pay all costs and expenses attending the quashing of any such by-law, &c. Section A, of the same Act, number twenty-one, substituted a clause in lieu of sec. 155 of 12 Vic., cap. 81, providing for the quashing of by-laws illegal wholly or in part, and enacted that no action should be sustained for or by reason of anything required to be done under any such by-law, unless such by-law or the part thereof under which the same shall be done, shall be quashed in manner aforesaid one calendar month at least previous to the bringing such action; and if such corporation, or any person sued for acting under such by-law, shall cause amends to be tendered to the plaintiff or his attorney, and upon such tender being pleaded, no more than the amends tendered shall be recovered, it shall be lawful for the court to award no costs in favour of the plaintiff, and to award costs in favour of the defendant, and to adjudge the same to be deducted out of the amount of the verdict, &c.

The 12 Vic., cap. 81, sec. 185, provided for recovering penalties, &c., for the punishment of persons offending against by-laws.

The 6 Wm. IV, cap. 3, sec. 4, provided for enforcing penalties against persons selling spirituous liquors without a license. The 12 Vic., cap. 81, sec. 31, No. 14, and the 13 & 14 Vic., cap. 65, amended the laws relative to tavern licenses. The 14 & 15 Vic., cap. 120, amended the last mentioned act, and declared the 7th and 8th sections of 6 Wm. IV, cap. 4, continued and in force.

The 14 & 15 Vic., cap. 54, amended the laws affording protection to magistrates and others in the performance of public duties; and enacted, sec. two, that no writ should be sued out against any justice of the peace, or other officer or person fulfilling any public duty, for anything by him done in the performance of such public duty, whether such duty arises out of the common law or is imposed by act of parliament, imperial or provincial, unless notice in writing be given, &c., at least one calendar month before suing out the writ, &c. Section 3 provided for the tender of amends within

one calendar month after service of such notice; and if not accepted, that such tender may be pleaded in bar, together with not guilty, or any other plea; and if the jury find such tender sufficient, they shall find for defendant, but if insufficient or no tender made, and the other pleas be found for plaintiff, the jury shall give damages and the plaintiff recover the same, with costs. Section 5 authorizes the general issue to be pleaded, and the special matter to be given in evidence under it. Section 6 authorizes the payment of money into court to be specially pleaded, &c. Section 8 limits actions for anything done, &c., to six months after the act committed. Section 9 limits the act to justices, officers and other persons acting as aforesaid only; and so acting *bona fide* in the exercise of their duty, though they should exceed their powers or jurisdiction, and have acted clearly contrary to law.—See 16 Vic., cap. 178, sec. 26, and cap. 180, secs. 8, 9, 10.

12 Vic., cap. 10, sec. 5, No. 8, enacted that the word *person* should include any body corporate or politic, and to whom the context can apply, &c., and see 7 Wm. IV, cap. 14, sec. 2—Brown v. The Municipality of Sarnia, 11 U. C. Q. B. R. 215: Barclay v. The Municipal Council of Darlington, 11 U. C. Q. B. R. 470, and 16 Vic., cap. 181, (14th June, 1853) further defined the powers of municipal councils to make by-laws. Section three, No. 2, for regulating the sale of intoxicating liquors by retail. Section four is for prohibiting the sale thereof under 13 & 14 Vic., cap. 65, and requiring a public vote to authorize such prohibition.

This is not a case in which the by-law has been quashed under the statutes, nor is the action brought against the clerk, constable or other officer having acted thereunder. The question therefore does not arise whether the reeve or any other justice of the peace convicting and enforcing penalties under such by-law, is liable to or exempt from responsibility in damages therefor, if illegal. But the action rests upon the ground that the by-law is illegal and void on the face of it, and may be so adjudged in a collateral proceeding of this kind, though not quashed, and cannot be set up in justification of the acts complained of, and upon the ground that being illegal and void, the municipality may be sued in trespass for the acts of the reeve, or any other magistrate, in convicting the plaintiff and levying the penalties by distress and sale of his goods under its authority, although not quashed. The by-law not only imposes a penalty, but provides for the levying the same by distress and sale of the offender's goods, or in default thereof, subjected him to imprisonment; and being the authority under which the plaintiff's goods were seized and sold, the action was done by the implicit direction and order of the defendants, though not imperatively enjoined thereby. And if the Municipality alone is responsible in damages for any act done or committed under it, I am not prepared to say the proceedings complained of were not acts done or committed under the by-law, or that the defendants are not liable as principals therein. I do not regard the repeal of the by-law as taking their defence from under them, if it legalized and justified the acts done and committed (as they were) while it subsisted and continued in force. If therefore the by-law is not void without being quashed, all proceedings had under it while it remained in force may be justified under it—Stevenson v. Oliver, 8 M. & W. 241; Simpson v. Ready, 11 M. & W. 346; Surtees v. Ellison, 8 Ex. R. 133.

But whether the by-law be illegal and void in itself, I do not deem it necessary at present to determine; because, assuming it to be so, as the Court of Queen's Bench seem to have considered in Barclay v. The Municipal Council of Darlington, 11 U. C. Q. B. R. 470, I still think the action fails for want of notice, according to the opinion expressed by this court in Reid v. The City of Hamilton, ante 269. The strongest objection I have felt to that view has arisen from the peculiar wording of 12 Vic., cap. 81, sec. 155, and afterwards of 14 & 15 Vic., cap. 109, sec. A. No. 21, suspending actions for one calendar month after by-laws are quashed, and authorizing the tender of amends in the meantime and the effect of such tender at the trial, as compared with the 14 & 15 Vic., cap. 54, sec. 3, passed the same day; and which last act contains a provision similar in substance, but varying as to the pleading, &c., from the act of the same session, cap. 109.

It is however to be observed that No. 21 of schedule A. is adopted from the 12 Vic., cap. 81, sec. 155, which was previous to the cap. 54 above mentioned, and at which time no such provisions as those contained in the 14 & 15 Vic., cap. 54, applicable to corporations, existed; and this may tend to explain the want of perfect consistency between the 54th cap. and the 109th, schedule A. No. 21, in relation to notice of action, tendering and pleading tender of amends. Under the last it might be said notice was unnecessary, because the Municipality being a necessary party to the vote quashing the by-law, is privy to it, and has notice, or is bound to notice the result, after which the same period of time, without notice of action, is afforded to tender amends that is allowed under the 54th cap. after notice. It may also be said that if the right of action is barred in six months after an act committed, the time of limitation may expire before the by-law can be quashed. But it does not follow that notice of action may not be given previous to its being quashed, and the writ issued if necessary, to save the time and the delay in making absolute the rule to quash, is with the court, and not the party aggrieved. However, neither the case of Reid v. The City of Hamilton nor this case are actions brought after by-laws quashed, and the provisions in that act do not therefore necessarily apply.

The defendants have pleaded the several issues per statute, and given the subject matter in evidence under it; a privilege to which they are only entitled under the 54th cap., and no tender is pleaded as made under either act. The cause of action arises out of the *bona fide* performance of the public duty of defendants acting under the municipal acts of parliament, however their powers may have been exceeded, or the act or by-laws may have been contrary to law. And for the reason expressed in Reid v. The City of Hamilton, it still appears to me that the facts permit a case being brought against the defendants within the spirit and meaning of the 54th cap., and that the argument is cogent and prevailing, and that they are entitled to the protection afforded thereby. If so, the action is too late, and the delay was the plaintiff's own delay; and if not, a month's notice of action ought to have been given. I may further remark in relation to the merits, that admitting the illegality of the by-law, that did not authorize the plaintiff to sell spirituous liquors by retail without a license. A by-law illegally prohibiting the sale at all could not warrant the sale without a license, if in the absence of such by-law a license would be necessary—6 Wm. IV, cap. 4, sec. 2, and previous acts, including the imperial statute 14 Geo. III, cap. 88, and the provincial statute 33 Geo. III, cap. 15, and 12 Vic., cap. 81, sec. 31, No. 14; 13 & 14 Vic., cap. 65, sec. 4, and proviso at the end thereof.

It does not appear that a previous valid by-law under the last mentioned act and section did not exist; if not, it did not follow that the previous statutes had ceased to operate. As to the power to issue licenses, see secs. 5 and 9, and 16 Vic., cap. 181, sec. 5.

The plaintiff was convicted for selling spirituous liquors without license; and for all that appears, he might have been rightly so convicted; in which event the conviction and warrants would be only exceptionable as wanting in due form of law, and perhaps as being for too small penalties. But in that event the plaintiff's remedy would be against the convicting magistrate, for acting under the statutes without duly conforming to the requirements thereof. And if so, he would be clearly entitled to notice, and the action is too late under the 14 & 16 Vic., cap. 55. So that in any point of view it appears to me the rule should be made absolute for a new trial, without costs.

Per Cur.—Rule absolute.

CHAMBER REPORTS.

(Reported for the Law Journal and Harrison's Common Law Procedure Act, by T. Moore Benson, Esquire.)

Chard v. Lout.

The tariff of costs under the C. L. P. Act does not apply to the County Courts.

[Oct. 4, 1856.]

In this case the Master required information respecting the taxation of costs, an appeal having been made from the taxation in the county of Hastings, where costs were taxed upon the scale of the Superior Courts, in an action of "inferior jurisdiction," because it was supposed that the County Court Tariff had been done away with by the 18th sec. of cap. 90, 19 Vic.

Burns, J.—I cannot imagine how it could be supposed that the tariff of fees of the Courts of Queen's Bench and Common Pleas could govern the County Courts. The 18th section of 19 & 20 Vic., cap. 90, says, "Until otherwise ordered by rule of the Court made in pursuance of the 'Common Law Procedure Act, 1856,' the costs of writs issued under the authority of this Act and of all other proceedings under the same, shall be and remain, as nearly as the nature thereof will allow, the same as heretofore, but in no case greater than those already established." Whether these words might be construed impliedly to give power to the Judges of the Superior Courts to make a tariff of fees for the County Courts, is not the question—but the question now is, whether the tariff they have made for the Superior Courts is in force in the County Courts, considering that the County Courts have no tariff of costs. The C. L. P. Act nowhere gives the Judges of the Superior Courts power to make a tariff of fees for the County Courts, though they might have authority to make one for Inferior Jurisdiction cases. It is under the 313th section of that Act that the Judges have power to make a tariff of costs for the Courts of Queen's Bench and Common Pleas, but that section is not introduced into the County Courts Act along with the other sections enumerated in the 2nd section of the County Courts Act. It is introduced under the 3rd section, so far as the Rules provide for the governance of the offices of the Clerks. The 19th section of the County Courts Act makes the practice and proceeding of the Superior Courts to be the practice of the County Courts in all cases not expressly provided for by law; and under that section the Rules adopted by the Judges for the Superior Courts must govern the practice in the County Courts. It is obvious, however, that this section cannot be strained to introduce a tariff of costs while the Judges of the Superior Courts were careful to say in the 170th Rule that the schedule of costs, marked B., to the rules annexed should be the tariff of costs in all civil actions in the Courts of Queen's Bench and Common Pleas. There really, however, appears no difficulty about the matter when we look at the words of the 18th section of the County Courts Act; this says, that the costs of the County Courts shall be and remain as nearly as the nature thereof will allow the same as heretofore, but in no case greater than those already established. The 75th section of 8 Vic. cap. 13, enacts that the costs in the schedule annexed to that Act shall be the fees to be demanded and received. That section is not repealed by the new Act, but continues in force, and, as it appears to me, must govern wherever it can. If the Judges, by virtue of the 18th section of the County Courts Act, could be said impliedly to have authority to make a tariff of fees for those Courts, yet it is doubtful whether they would have authority to exceed the sums provided in the tariff annexed to 8 Vic., cap. 13, so far as the items there are specified. How it is possible then to construe the words of the 18th section to mean that the rule of the Judges 170, which establishes the tariff of fees for the Superior Courts, can have the effect of establishing a tariff for the County Courts, I cannot imagine; for if it is so, then the act of the Judges must have the effect of repealing the 75th sec. of 8 Vic., cap. 13; but that was in force when the rules of the Judges were made, and the last act says that the costs shall in no case be greater than already established. It is quite a mistake to suppose that there is no tariff in force for the County Courts irrespective of the tariff of costs established by the Superior Courts, for the 75th section of 18 Vic., cap. 13, remains still in force; and it is really a mistake to suppose that the Common Law Procedure Act gave the Judges power to make a tariff for the County Courts. The meaning of the 18th section of the County Courts Act is very obscure as to any, and if any, what power the Judges may have with regard to regulating County Court costs; but it is very clear to me that what has been done in respect to the costs of the Superior Courts cannot by reason of anything the Legislature has said in the County Courts Act be considered as regulating the costs of those Courts, or of repealing the 75th sec. of 8 Vic., cap. 13; of course there may be a difficulty in taxing the costs of various proceedings which may be carried on in the County Courts analogous to those in the Superior Courts, but that difficulty I cannot help. Because it is so, it will not relax the proper construction of this Act; for if it should, then a grievance would be introduced of greater magnitude. The 44th sec. of the C. L. P. Act contemplates costs upon attachment cases to be on a different scale in the "Inferior Jurisdiction" cases, and the 155th rule of Court would be totally inoperative if the tariff is to be the guide in the County Courts. The 59th sec. of 8 Vic., cap. 13, would also be a dead letter.

Rosse et al. v. Cummings.

Pleas of payment "did not endorse," and "want of notice," may be pleaded together by the endorser of a promissory note, without leave of a Judge.

[Oct. 4, 1856.]

Declaration against the endorser of a promissory note.

Pleas: 1st. Denying that the endorsement was defendant's endorsement; 2nd. Payment; 3rd. That the defendant did not receive notice that he would be required to pay the note.

This was an action on a promissory note, on which the plaintiff had signed interlocutory judgment, the action having been commenced under the old law, but the declaration filed and delivered since the C. L. P. Act came into operation, the plaintiffs considering that the defendant should have obtained leave to plead the second of the three pleas before doing so. The plaintiff then obtained a summons under the 143rd section of the C. L. P. Act, calling on the defendant to show cause why it should not be referred to the Master to ascertain the amount due to the plaintiffs. In answer to his application the defendant applied for leave to plead the three pleas mentioned

on an affidavit stating that there are grounds for the defences sought to be set up, but at the same time contends that under the 133rd section the plea of payment may be pleaded with the pleas denying the endorsement and notice, and that they are allowable without leave.

McDonald for plaintiff; *J. B. Reid* for defendant.

Burns, J.—On the first consideration of this case I was much inclined to think the 125th section of the Act warranted the defendant in traversing all the material allegations of the declaration by any number of pleas, which were merely negative, and that the rule that the defendant should apply for leave to plead more than one plea, only applied when the defendant pleaded affirmative matter on his side to destroy the cause of action. I find that, in considering the effect of the 81st section of the English Act, corresponding to the 130th section of our Act, the obligation to apply for leave to plead double applies as well to negative as to affirmative pleas. An instance of many pleas traversing various allegations of the declaration, all of a negative character, appears in *Platt v. Else*, 8 Exch. 364. The plaintiffs are right, therefore, in supposing that as a general rule the defendant should ask for leave to plead double, even in traversing the different allegations in the declaration; but it remains to be considered, whether in this particular case the defendant was not at liberty to plead, that he did not endorse, and that he had notice of non-payment without asking for permission to join those two pleas, the pleas of payment and that he did not endorse being expressly authorised by the 133rd section of the Act. Our Rules of 1842 did not prohibit more pleas than one as the English Rules did, but in actions on Bills of Exchange and Promissory Notes, the plea of *non-assumpsit* was made inadmissible; and the defendant, in a case like the present, was then obliged to plead two pleas, in order to deny the allegations of the declaration—and he had no occasion to ask permission from the court to do so. The Rules of 1842 will remain in force until next Easter Term. The second of the Rules respecting pleading recently made, says, that several pleas founded on the ground of answers or defence shall not be allowed, but this will not be in force until next Easter time. In *Archer v. Garrard*, 3 M. & W., 63, it was determined that several pleas, which only make one answer to the declaration, do not require to obtain leave to be pleaded together. Now, testing this case by that rule, it appears to me the defendant was at liberty to plead the two pleas without asking permission to do so. The contract of the endorser of a promissory note is, that he will pay if the maker do not, provided he, the endorser, receives notice of non-payment by the maker. The giving of notice of non-payment is part of the contract.—The 133rd section of the C. L. P. Act allows the defendant to deny the contract, together with a plea of payment. Here in this case the defendant by his first plea says that he did not endorse; that puts in issue his signature merely—but that is only part of his contract: and if the defendant does not deny this notice, he must be taken to admit it. The second plea denies the other part of the contract, that is, that he had not the notice he contracted he should have in order to render him liable. In order to deny this contract *in toto* the two pleas are, therefore, necessary. The 135th section is doubtful as to the manner in which the defendant may deny the contract, but I apprehend that any number of pleas may be used which may in consequence of the peculiarity of the contract become necessary for that purpose. It is the peculiarity of the contract of endorser of a note which renders it necessary to use two pleas in order fully to deny it. The mere denial of the endorsement would admit the notice, and the denial of having received notice would admit the endorsement.

It is very true if the defendant succeeds on either plea it affords an answer to the action, but the contract is of a two-fold character, and the two pleas do not cover the same ground of defence, but are distinct, applying to the two different parts of the contract. *Non-assumpsit* would have traversed both, but the Rules of 1842 compelled the defendant in a case like this to traverse the contract severally by distinct answers. Taking the 125th section with the 133rd section, and construing them with the Rules of 1842, I think the endorser of a note may deny his endorsement and want of notice without asking permission to do so, and that they are not inconsistent pleas. The 135th section authorises the plaintiff to sign judgment, if the defendant pleads several pleas with the leave of the Court or a Judge, except in cases specially provided for, but the 133rd section provides for the defendant denying the contract alleged in the declaration without leave of the Court, and the Rules of 1842 obliged the defendant in an action of this kind to do so in two pleas instead of one.

The plaintiff must, I think, proceed to issue on the pleas already pleaded, and the present summons must be discharged, but it will be without costs.

Metropolitan Building Society v. McPherson.

221st section—Practice.

[Oct. 3 & 4.]

J. Hamilton obtained a summons to set aside a writ of summons in ejectment on the ground that it did not issue from the office of the Deputy Clerk of the Crown of the county within which the premises lay—sec. 221 C. L. P. Act.

On the summons being moved absolute, it was objected for the plaintiffs, that the plaintiffs were described as "*the*" Metropolitan Building Society—the word "the" being superfluous and an error in the naming of the plaintiffs. In the case of *M'Kenna v. The Western Assurance Company*, a summons had been set aside by *Richards, J.*, where the word "the" was left out. Besides, the writ was a nullity, not having been issued from the proper office, and the defendant therefore should not have made this application, but have taken no notice of the writ whatever.

Burns, J., overruled both objections to the summons. The case cited before, *Richards, J.*, had this difference, that there the word "the" was left out, here it was superfluous, and the mistake could be rectified by inverted commas placed on each side of the words "Metropolitan Building Society." It would, however, be altogether out of the usual course of practice to set aside a summons for want of certain points or stops. As to the other objection, if the defendants were obliged to treat it as a nullity without noticing it, they might afterwards be put to inconvenience, if the plaintiff went on to judgment and execution

on the defective writ. The writ must therefore be set aside with costs, and the summons made absolute.

McLeod v. Buchanan.

A prisoner applying to be discharged from custody, under the 300th section of the C. L. P. Act 1856, should show, in addition to the other requirements of that section, that he has been in close custody for three successive calendar months.

[Oct. 8, 1856.]

On the 8th October, 1856, defendant obtained a summons calling on plaintiff to show cause why defendant should not be altogether discharged from custody.

The affidavit of the defendant was that required by the 300th section of the C. L. P. Act 1856, "that he is not worth five pounds, &c."; but it did not disclose the nature or duration of his custody.

J. B. Reid showed cause, and submitted that it should be shown by defendant that he had been confined in close custody in execution for three successive calendar months.

McMichael in reply.

Burns, J.—I think the prisoner's having been confined in close custody in execution for three successive calendar months, is a condition precedent to his applying for relief under the 300th section. I must, therefore, discharge this summons.

Summons discharged accordingly.

Lanark & Drummond Plank Road Co. v. Bothwell.

Where it was shown that before signing judgment under the 62nd section of the C. L. P. Act 1856, the plaintiff's attorney had seen the entry of the appearance in the proper book, and the appearance paper itself: Held, *that the notice of appearance was sufficient.*

[Oct. 11, 1856.]

The writ of summons, specially endorsed, was served on the 30th of August, 1856.

On the 9th Sept. an appearance was entered for defendant; but no notice thereof was given to plaintiff's attorney, as required by the 62nd sec. of the C. L. P. Act, 1856.

On same day plaintiff's attorney signed judgment as in case of non-appearance.

Phillpotts, for defendant, obtained a summons on 26th of Sept. to set aside the judgment as irregularly signed; and contended that the plaintiff's attorney having seen the entry of the appearance in the proper book at the office of the Deputy Clerk of the Crown, and having also seen the appearance itself, before signing his judgment, had sufficient notice of such appearance.

C. J. Patterson showed cause on the 11th October, and cited the 181st of the Rules of Court of Trinity Term, 1856, which requires *all* notices to be in writing.

Mr. Justice Burns held, that the knowledge of the plaintiff that appearance was entered, though it was entered on morning of the day after it should have been, according to the time of the service of the writ of summons, was sufficient to dispense with a written notice by the defendant that he had appeared. Besides the plaintiff did not give time for such notice to be given, for the appearance was entered at the opening of the office in the morning, and the plaintiff came at the same time with papers prepared to sign judgment, and did immediately sign the judgment, seeing the appearance duly entered.

Summons made absolute without costs, because it appeared that the Deputy Clerk of the Crown had received the appearance the day before with instructions to keep it and file the first thing next morning.

Leclaire et al. v. Prudhomme.

A plea of want of consideration for a promissory note cannot be pleaded in conjunction with a plea of non fecit, without leave.

[Oct. 13, 1856.]

Declaration on promissory note made by defendant, payable to plaintiff, and averring presentment.

Pleas:—1st, *Non Fecit.*

2nd, Denying presentment.

3rd, That some time previous to the day on which the said promissory note bears date, there being an unsettled account between plaintiffs and defendant, the said note was given by defendant to plaintiffs upon the understanding that if at the day of its date it should be found, upon settlement, that there was a balance due from defendant to the plaintiffs, then plaintiffs should be at liberty to use the said note, but not otherwise; that before the day of the date of said note plaintiffs and defendants had a settlement of accounts, and at the day of the date of said note, there was no balance due from defendant to plaintiffs; that there never was any other consideration for said note, and that the plaintiffs hold the same without any consideration.

Plaintiff signed judgment under the 135th sec. of C. L. P. Act, 1856.

On 26th Sept. 1856, defendant obtained a summons to set aside the judgment, on the ground that it was irregularly signed.

Jackson showed cause on the 13th October.

Mr. Justice Burns held, that as the 1st and 3rd pleas were inconsistent, and set up two distinct defences to the same cause of action, the defendant should not have pleaded them without having first obtained leave under the 130th section of the C. L. P. Act, 1856; and that judgment was therefore rightly signed by the plaintiff.

The judgment was, however, set aside upon the merits, and the defendant admitted to plead, upon terms.

Shae v O'Neil.

After a cause has been entered for trial, it is no longer within the provisions of the 84th section of the C. L. P. Act, 1856.

[Oct. 14, 1856.]

S. Richards, on behalf of plaintiff obtained a summons on the 14th October, 1856, from Mr. Justice *Burns*, calling upon the defendant to show cause why this suit should not be referred to arbitration under the 84th section of the C. L. P. Act, 1856.

C. S. Patterson showed cause, and objected that the suit having been entered for trial on the 13th October, it was no longer within the provisions of the 84th section.

His Lordship, Mr. Justice Burns, said that, had he known at the time this summons was applied for, that the cause had

already been entered for trial, he would not have granted it. The 135th section gives power to the Judge at *Nisi Prius* to deal with the case, and though the words of the 84th section are not restricted as to the time the application may be made, yet if the application can be made to a Judge in Chambers after the cause is entered for trial, it may lead to great confusion in practice. Taking, therefore, the two sections together, the most reasonable construction to put upon them is, that the Legislature intended that the Judge who had possession of the Record at *Nisi Prius* was the Judge to deal with it.

Summons discharged.

Wilkes v. The Buffalo, Brantford and Goderich Railway Company.

A special endorsement on the writ of summons that the plaintiff claims a stated sum as the amount of an account rendered, is not sufficient particulars of demand.

[Oct. 14, 1856.]

The writ of summons was specially endorsed under the 41st section of the C. L. P. Act, 1856, stating the plaintiff's claim to be "£107 11s. 9d. amount of account rendered on 19th February, 1856, for printing and advertising for the defendants at their request."

On the 14th October, 1856, a summons was obtained from Mr. Justice *Burns*, by defendants, calling on plaintiff to show cause why he should not deliver further and better particulars.

Summons absolute.

Thom v. Huddy.

A plea that the person whom defendant debauched was not plaintiff's wife, will not be allowed with a plea of "not guilty."—A plea that at the time of the criminal intercourse, plaintiff had renounced the society of his wife and was living apart from her, is bad in substance, and will not be allowed.

[Oct. 14, 1856.]

Declaration—That the defendant debauched and carnally knew the plaintiff's wife.

J. B. Read, for defendant, obtained a summons under the 10th section of the C. L. P. Act, 1856, for leave to plead:

1st, Not guilty.

2nd, That the person whom defendant debauched was not the plaintiff's wife.

3rd, Leave and license of plaintiff.

4th, That before and at the time of the committing of the grievance complained of, plaintiff had relinquished and renounced the society, comfort and assistance of his wife, and had separated himself from, and was living apart from her, and has never since returned to her.

Summons signed on the 14th October, 1856.

Burns, J., disallowed the 2nd plea, as being included in the 1st, and therefore unnecessary; and also disallowed the 4th plea, as affording no answer to the declaration, and therefore bad in substance.

James S. Robins v. Canella Porter.

A writ of injunction will be granted in the first instance upon an ex parte application under the 286th section of the C. L. P. Act, 1856, in an action of ejectment to restrain the defendant from cutting and carrying away timber and hay from off the land which is the subject of the action.

[Oct. 15, 1856.]

The plaintiff applied *ex parte* on the 15th October, 1856, to Mr. Justice *Burns* for a writ of injunction, under the 286th section of the C. L. P. Act, 1856, to restrain the defendant and one Fraser from cutting timber upon, and carrying away wood and hay from off the land for which the action was brought.

The affidavit of the plaintiff, upon which the application made, stated:—

"That this is an action of ejectment, brought to recover possession of a certain lot of land now in the possession and occupation of the defendant.

"That deponent has obtained the Government Patent for said land; and that he believes defendant holds possession of the same without any good or valid defence to this action.

"That one Fraser, for whom and at whose instigation this action is defended, hath hitherto cut down and carried away large quantities of timber from off said land; and deponent is apprehensive of his again doing so unless restrained.

"That there is a large quantity of wood and hay, cut therefrom, now piled and stacked upon said land; and deponent is desirous of having said defendant or Fraser, their servants and agents, restrained from removing the same.

"That the defence is set up solely for the purpose of delay, and that there is no real and substantial defence to deponent's title to said land."

Writ of Injunction granted in first instance, without terms, because the cutting down and removal of the timber may be an irreparable injury and cannot be compensated for.(a)

Mellish et al (Judgment Creditors) v. The B. B. & G. Railway Company (Judgment Debtors.) Zimmerman, Garnishee.

On an application for an order for Garnishee to pay over to judgment creditor the amount of an acceptance due by him to judgment debtor, it should be shown that at the date of the order (if made) the acceptance is in the hands or under the control of the judgment debtor, and not in the hands of some innocent third party.

[Oct. 16, 1856.]

Burns, J., granted an order, under the 194th section of the C. L. P. Act, 1856, that the above named Garnishee do show cause, at the time and place therein stated, why he should not pay the judgment creditors the debt due from him to the judgment debtors, or so much thereof as may be sufficient to satisfy the said judgment debt.

Garnishee showed cause.

The debt due from Garnishee to judgment debtors is on two acceptances in their favour by Garnishee; one of them is now past due—the other is not yet due. He only wishes to be protected from paying the debt twice, and the judgment creditors should show that the acceptances are still in the hands of the judgment debtors or under their control.

Jackson in reply.

Hagarty, J.—It should certainly be shown by the judgment creditors that the acceptances are, at the date of my order, requiring the Garnishee to pay the amount of them to the judgment creditors, in the hands or under the control of the judgment debtors. It would not be safe to make any order on the present affidavit, as it is quite possible the acceptances in question may be in the hands of *bona fide* holders for value, prior

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(a) *Gittins v. Symes*, 15 Com. L. [illegible], a rule *Nisi*, *only*, for a writ of injunction to restrain the infringement of a Patent Right, was granted in the first instance.

to the date of the order on the Garnishee to pay them over to the judgment creditors.

The difficulty in carrying out the Garnishee clause of our C. L. P. Act with respect to Bills and Notes, and other floating securities for money, arises from the non-existence of any enactment in this country similar to the 1 & 2 Vic, cap. 110, sec. 12, by which the Sheriff can seize Bills and Notes under a *Fi. Fa.* I see it laid down in *Holmes v. Tutton*, Q. B. 35, L. T. Rep. (June, 1855) 177, that in England an order under the garnishee clause has the same effect as the delivery of the writ to the Sheriff under 1 & 2 Vic. I would prefer that this matter should be enlarged into Term, in order that the opinion of the Court may be had on the point in question here, as it is one of such serious importance.

Summons enlarged into Term.

Bullen v. Lingham et al.

An affidavit on which to ground an application for an order to attach debts under the 194th section of the C. L. P. Act, should show that a judgment has been recovered, and to what amount it is still unsatisfied; that a person is indebted to defendant, and is within the jurisdiction of the Court, and that the action is not against defendant as an absconding debtor.

[Oct. 16, 1856.]

On the 16th October, an *ex parte* application was made to Mr. Justice *Burns*, by plaintiff for an order to attach debts due by Garnishee to defendants.

The affidavit upon which the application was made was that of the plaintiff, and stated:—

That on the 24th November, 1854, he recovered a judgment in this honourable Court against defendants for £109 11s. 5d. damages, and £14 3s. 7d. costs;

That said judgment is still wholly unsatisfied;

That one Dafoe, of Sidney, yeoman, is indebted to defendants in £62 10s.;

That said Dafoe is within the jurisdiction of this honorable Court;

That this action was not commenced or carried on against defendants as absconding debtors.

Order granted in first instance.

Clark v. McIntosh, an absconding debtor.

Upon affidavits that endeavours have been made in vain to effect personal service of a writ of attachment against an absconding debtor, that after diligent enquiry, no information can be obtained as to the place defendant had fled to, and that special bail has not been put in for him, the plaintiff will be allowed to proceed as if defendant had appeared, and to serve papers by leaving them at defendant's last known residence in this province.

[Oct. 17, 1856.]

On the 27th October, 1856, plaintiff applied, under the 54th section of the C. L. P. Act, 1856, for an order "for leave to proceed as if defendant had appeared, and that the declaration and subsequent papers and proceedings might be served, and shall be deemed well served, by leaving the same at the last residence of the defendant in this Province, known to the plaintiff."

The affidavits in support of the application were:

1st. That of the Sheriff's Bailiff, "that he had endeavored to effect personal service of a copy of the writ of Attachment on defendant; that after diligent enquiry he could obtain no information as to the place defendant had fled to, and that he was unable to effect such service; and that he verily believed defendant had absconded."

2nd. That of plaintiff, "that he had made diligent enquiry at the last place of residence of defendant, and of his friends, in order to discover to what place defendant hath fled, but could obtain no information; that after diligent enquiry he could obtain no information so as to give him or any other person an opportunity of effecting personal service."

3rd. That of plaintiff's attorney, "that he had made enquiries of persons acquainted with defendant, but could not discover where defendant had fled to; that he had searched in the proper office, and found that special bail had not been put in for defendant.

Burns, J., granted the order in the first instance in the terms applied for, that service of the writ might be effected, and subsequent papers might be served at the defendant's last place of abode, and it should be deemed good service.(a)

Uhlborn v. Chapman.

A writ of summons will not be set aside on account of the mis-statement of the place and county of the residence of the defendant, as required by 16th section of the C. L. P. Act, provided plaintiff had reasonable grounds for supposing such place and county to be the residence of defendant.

[Oct. 21st, 1856.]

The writ of summons was directed to "George M. Chapman, of the township of Nottawasaga, in the county of Simcoe," and was served upon defendant at Collingwood in said township, by the Sheriff of the county of Simcoe.

On the 20th October, 1856, defendant obtained a summons to set aside the writ, on the ground that the place and county of his residence were wrongly described—he having for 18 months previous to the service of said writ resided, and being at the time of such service resident at the city of Toronto, and being a householder therein.

Leys showed cause on 21st October, and produced a letter dated at Collingwood, Nov. 13, 1855, written by defendant to plaintiff, enclosing the promissory note on which this action was brought, also an affidavit verifying the letter, and stating that defendant spent the greater part of his time within the county of Simcoe, he being an employee of the Ontario, Simcoe and Huron Railway Company.

Burns, J., held that the facts shown by plaintiff were sufficient grounds within the provisions of the 16th section of the C. L. P. Act, 1856, for his supposition that the residence of defendant was as stated in the writ of summons.

Summons discharged with costs.(b)

O'Keefe v. O'Brien et al.

The time for plaintiff to bring the issue joined on to trial will be extended under the 151st section of the C. L. P. Act, 1856, upon an affidavit that plaintiff cannot procure the attendance of a witness without whose testimony he cannot safely proceed to trial.

[Oct. 20, 1856.]

On the 6th Sept., 1856, defendant gave notice to plaintiff to bring the issue joined in this cause on to be tried at the then next assizes for the county of Carleton, pursuant to the 131st section of the C. L. P. Act, 1856.

(a) See Harrison's C. L. P. Act, 29, notes K. C.
(b) See Harrison's C. L. P. Act, 29, note E.

Jackson, for plaintiff, obtained a summons on 6th October, from Mr. Justice *Burns*, for further time to bring the cause down to trial, and to try the same, and to extend the time for bringing the same to trial until the next Spring Assizes for the county of Carleton, on such terms as the said Judge should order."

The affidavit on which the summons was obtained, was that of plaintiff, and stated that he had given notice of trial for the then ensuing Fall Assizes, and fully intended to proceed to trial at the same; that on consulting with his attorney with regard to the witnesses necessary to sustain his action, he was informed by said attorney and believes that one Welsh is a necessary and important witness for deponent on the trial; that immediately on ascertaining that he could not safely proceed to trial without the testimony of said Welsh, deponent proceeded to find out his whereabouts, and learned that said Welsh resides in the county of Oxford; that deponent cannot procure the attendance of said Welsh at the Fall Assizes aforesaid, but will endeavour to procure his attendance at the next Spring Assizes; that this is an action of ejectment, and that defendants are in possession of the premises in dispute, and that said Welsh is an attesting witness to the execution of one of deponents title deeds, and that the other attesting witness to the same is dead.

Summons absolute.—Costs to be paid by plaintiff to defendant.

WILKINS v. BLACKLOCK.

A general plea of "not guilty" cannot be pleaded with separate pleas traversing the different allegations of the same count of the declaration without leave: and if such pleas be pleaded plaintiff may sign judgment under 135th sec. of the C. L. P. Act, 1856.

[Oct. 22, 1856.]

The declaration contained but one count for a malicious arrest.

The defendant, without having obtained leave under the 130th section of the C. L. P. Act, 1856, pleaded:

1st. Not guilty.

2nd. That he did not maliciously cause the plaintiff to be arrested and detained in the custody of the Sheriff of the united counties of Frontenac, Lennox and Addington, as alleged.

3rd. That he, defendant, had reason to believe that plaintiff had parted with his property, or made some secret or fraudulent conveyance thereof, in order to prevent its being taken in execution.

Plaintiff signed judgment under the 135th section of the C. L. P. Act, 1856.

Jackson, for defendant, on 13th October, 1856, obtained a summons to set aside the judgment, with costs, on the ground that it had been signed after pleas had been filed and served, and was consequently irregular.

M. R. Vankoughnet showed cause.

BURNS, J., held that the pleas should not have been pleaded without leave, and that therefore the judgment was rightly signed.

The judgment was, however, set aside on other grounds, and the defendant admitted to plead upon terms.

CONNOR v. MCBRIDE.

An ex parte order to attach debts due to judgment debtor will be granted in first instance, upon affidavit that judgment has been recovered, and is still wholly unsatisfied; that defendant has not sufficient goods to satisfy same; that third parties are indebted to defendant, and are within the jurisdiction. But query whether such affidavit is sufficient.

[Oct. 22, 1856.]

On the 22nd October, 1856, plaintiff applied *ex parte* to Mr. Justice BURNS for an order to attach debts due by Garnishee to defendant, under the 194th section of the C. L. P. Act, 1856.

The affidavit of plaintiff stated that on the 26th September last deponent recovered a judgment against defendant; that said judgment is still wholly unsatisfied; that there are only sufficient goods of defendant to satisfy a small portion of said judgment; that one Burn, of, &c., is indebted to defendant in &c., and one Kane, of, &c., in &c.; that said Burn and Kane are within the jurisdiction of the court.(a)

Order granted in the first instance.

TODD v. CAIN ET AL.

Defendant will be allowed, in the notice required by 224th section of C. L. P. Act, 1856, to set up a paper title, and also title by possession, upon affidavit that he can establish both titles; that he wishes to establish his paper title; but lest he should fail in doing so from being unable to procure the necessary witnesses, he desires also to set up title by possession. Leave will be granted *ex parte* in first instance.

[Oct. 23, 1856.]

On the 23rd October, 1856, one of the defendants, Kelly, applied *ex parte* to Mr. Justice *Burns* for an order giving him leave, "in the notice of his title required by the 224th section of the C. L. P. Act, 1856, to be filed with his appearance to their action, to state not only a paper title from the Crown through various parties to himself, but also a possessory title, or title by length of possession in himself and others through whom he claims; and to set up in his defence both of said modes of title."

The affidavit of Kelly, on which the order was obtained, stated that he can establish a good possessory title for over twenty years to that portion of the lands claimed by plaintiff, for which deponent defends, through the person from whom deponent purchased; that he can also establish a good paper title to same land from the Crown, through various persons to himself; that it would tend to the accomplishment of justice that deponent should be allowed to state, in the notice required to be filed with his appearance, both the said modes of title, he being desirous of establishing his paper title, lest he should fail in his defence from being unable to procure the witnesses necessary to prove all such paper title, he desires to set up also his title by possession.

Order granted in the first instance.

REILLY v. CLARK.

289th section not confined in its operation to actions of replevin.

[Oct. 6 & 7, 1856.]

Plaintiff sought to file a replication "on equitable grounds," under the 289th section.

Paterson showed cause. The 289th section only applied to actions of replevin, which the present was not.

(a) *Query*, should not affidavit further state that the action was not commenced or carried on against defendant as an absconding debtor? (*Bullen v. Lingham et al*, Chambers, 18th October, 1856.—Burns, J.)

BURNS, J.—I will grant the order; although perhaps if the strict letter of the 287th section were adhered to, it might be contended that the statute gave no power to plead equitable defences, except in actions of replevin, because that section is prefaced with an expression "and as to the action of replevin. The words inserted in the clause *"in any cause,"* would seem to have a wider signification than merely actions of replevin. The 289th section would apply to any cause, whether replevin or not, if the words prefacing the 287th section were omitted. The spirit and meaning of the Act, I think, gives the privilege to reply, and to reply on equitable grounds, where necessary to the plaintiff in any action. The forms given in the schedule shows that rep...cations are not confined to replevin. In the wording of the 287th and 289th sections there is evidently an omission in copying from the English Act, the corresponding sections of which speak of "the plaintiff in any action, or the defendant in replevin" in the one instance, and "the defendant in any action, or the plaintiff in replevin," in the other.

CORCORAN V. TAYLOR.

A debtor in custody on *mesne* process will not be discharged under 295th section of C. L. P. Act, 1856, for default in payment of weekly allowance, until he has answered interrogatories filed under 296th sec., even after such default made..

[Nov. 8, 1856.]

On the 9th October, 1856, defendant, being in custody on *mesne* process, obtained an order from BURNS, J., under the 295th section of the C. L. P. Act, 1856, for the payment of the weekly allowance. *J. Paterson*, for defendant, obtained a summons from HAGARTY, J., under the same section, calling on plaintiff to show cause why the defendant should not be altogether discharged from custody.

Plaintiff showed cause, and contended that as interrogatories had been filed and served pursuant to the 296th section, on 30th October, (being previous to defendant's application for discharge) defendant must answer them before any order can be made for his discharge.

J. Paterson in reply.

HAGARTY, J.—Under the 296th sec. defendant must answer the interrogatories before an order can be made for his discharge. The cases of *Elwood v. Monk* and *Butler v. Thomas*, as stated in Rob. & Har. Dig. 240, are clearly in point, and I do not consider that the C. L. P. Act, 1856, is any more indulgent to prisoners in this point than the former practice. I must discharge this summons, but as the circumstances of this case seem to warrant indulgence to the defendant, I will do so without costs. Summons discharged accordingly.

GARRETT ET AL V. COTTON.

Defendant will be allowed to plead, under 130th section of C. L. P. Act, 1856, to a declaration on a Bill of Exchange, that said bill was accepted by defendant for the accommodation either of the drawer singly, or of the plaintiffs and the drawer jointly, and that such acceptance was without value or consideration; upon affidavit of the truth of the pleas, and that they are both material to a proper defence to plaintiffs' action.

[Nov. 8, 1856.]

Declaration on Bill of Exchange, drawn by one Jones, directed to defendant, requiring him to pay to the order of said Jones £750, sixty days after date; that defendant accepted said Bill of Exchange; and that said Jones endorsed same to plaintiffs.

Defendant obtained a summons from HAGARTY, J., for leave under the 130th section of the C. L. P. Act, 1856, to plead that the Bill of Exchange in the declaration mentioned was accepted by defendants for the accommodation of plaintiffs and one Jones in declaration mentioned, without any value or consideration for such acceptance—and also, that said Bill of Exchange was accepted by defendant for the accommodation of said Jones without any value or consideration for such last mentioned acceptance, and endorsed by said Jones to plaintiff, without any value or consideration for such endorsement.

The affidavit of defendant, upon which the summons was allowed, stated that the Bill of Exchange in the declaration mentioned was accepted by deponent without any value or consideration received by deponent for said acceptance or the payment thereof by him, and was as deponent believes for the accommodation of plaintiffs and one Jones, the drawer thereof, to take up certain Bills accepted by plaintiffs, drawn by said Jones; that deponent is advised and believes that it is material for his defence to this action that he should plead that his said acceptance was either for the accommodation of plaintiffs and Jones jointly or of said Jones only, and was without any value received by deponent.

Summons absolute, no cause being shown.

SLADDEN V. SMITH.

An *ex parte* order under R. 31, T. T., 1856, will be granted in first instance, for a subpœna to issue to a Registrar of the Surrogate Court, for the production of an original will, upon affidavit that said will is necessary to establish the case of the party applying, and that no notice has been given of his intention to use the Probate or Letters of Administration *cum test. annex.* of same, and showing good reason for not having given, or giving, such notice.

[Nov. 20, 1856.]

HAGARTY, J., granted an *ex parte* order in the first instance, under R. 31, T. T., 1856, for a subpœna to issue to the Registrar of the Surrogate Court of the united counties of York and Peel, for the production of the original Last Will and Testament of one Robert Scott, deceased, upon affidavit that this is an action of ejectment; that the Issue Book has been delivered and notice of that given; and that the *Nisi Prius* record has been entered for trial at the Assizes now being held in the city of Toronto; that plaintiff relies for the proof of his title to the land in question in this cause upon the last will and testament of of one Robert Scott, deceased; that said will is filed in the office of the Surrogate Court of the united counties of York and Peel; and that no notice has been given (as required by 16 Vic., cap. 19, sec. 7,) of the plaintiff's intention to use the probate of said will, or the letters of adminsistration, with the will annexed; and that deponent is not aware who has the custody of such probate or letters:—and it sufficiently appearing that the original will would be necessary at trial.

CARRUTHERS V. DICKEY.

Application to plead different pleas—Time for making.

[Sept. 16, 1856.]

In this case defendant moved the summons absolute to plead three pleas. Plaintiff urged no objection to the pleas in substance, but submitted that defendant had lapsed his time, as the order would be filed before time for pleading elapsed, which it had in the present instance—*Glen v. Lewis*, 8 Ex. 132.

Defendant answered that there had on this case been a summons to change the venue, which was enlarged at the request of the plaintiff. This, it was contended, operated as a stay of proceedings, and extended the time to plead.

RICHARDS, J., on this latter ground, viz., that the enlargement of the summons operated as a stay of proceedings, granted the order to plead as required, and the summons was accordingly made absolute.

MOBERLY V. BAINES.

Pleading—Surplusage.

[Sept. 18, 1856.]

In this case a summons had been obtained, calling on the plaintiff "to show cause why the following statements should "not be struck out of the first count of the declaration:

"The statement of the time of G. M. Chapman's indebtedness to the plaintiff.

"The statement that the said debt was a large sum of money, to wit.

"The statement of the consideration for such indebtedness.

"The statement of the indebtedness of the said Chapman to the defendants, and the consideration therefor.

"The statement of the time of performing the condition precedent.

"The statement of the notice to the defendants of such performance.

"And of request of performance on defendant's part."

"On the ground that the said statements are unnecessary, "and cannot be proved.

"And why the averment of performance of the condition "precedent should not be struck out of said first count, and a "general statement of such performance substituted, on the "ground that the statement thereof in the said first count is "unnecessary and prolix.

"And why the following statements should not be struck out "of the second count of the declaration, namely:

"The statement of the time of G. M. Chapman's indebted-"ness to the plaintiff and the consideration therefor.

"The statement of defendant's indebtedness to said Chap-"man, and of the consideration therefor.

"The statement that defendant's promise was to pay the "plaintiff by accepting a bill of exchange, instead of stating "the promise as a promise to accept a bill of exchange.

"The statement of plaintiff's confidence in defendant's pro-"mise.

"The averment of request, and the statement of the time in "the breach."

On the ground that the said statements are unnecessary and need not be proved.

And why the averments of the performance and occurrence of the conditions precedent should not be struck out of the second and third counts, and general averments substituted; on the ground that said averments are unnecessary and prolix.

And why the said third count should not be struck out on the ground that it sets out a different promise laid in the second count, founded on one and the same consideration.

Or why the second and third counts should not be struck out, on the ground that said counts obviously attempt to set up the same promise as that laid in the first count, only varied in the unnecessary statement, and are therefore prolix and unnecessary.

Or why the plaintiff should "not be required to elect which "one of the said three counts he will retain, and why the other "two counts should not be struck out.

"On the grounds that the said other counts obviously refer to "one and the same subject matter, varied only in the manner "of stating the same, and are prolix."

The first count of the declaration set forth, that "heretofore "and before the promise of the defendant's hereinafter men-"tioned," one Chapman was indebted to the plaintiff "in a "large sum of money, to wit, the sum of £212 10s. 6d." It then went on to state the consideration for the debt contracted by Chapman with the plaintiff, and went on to state that the defendants were "then also heretofore and before the said promises hereinafter mentioned, indebted to the said Chapman in a like sum of money, to wit, the said sum of £212 10s. 6d." for, &c., going on to state the consideration. It then set forth that in consideration of the plaintiff discharging Chapman from his debt, the defendants promised to satisfy plaintiff's claim upon him, and that "afterwards and before the commencement of this suit," the plaintiff "in consideration of the promises of the said defendants," discharged Chapman of "all liability of and from" the said debt "due by him as aforesaid to the said plaintiff, and the same thereby became and was wholly extinguished," of which the defendants had notice; yet the defendants, "although often requested to do so," have not paid, &c.

The second count was the same as the first, both in matter and form; except that it stated the mode in which defendants promised to discharge Chapman's debt to the plaintiff, was by accepting a bill of exchange therefor, to be drawn by the plaintiff on defendants ten days after sight, upon the return to the port of Collingwood of a vessel called the *Caroline Marsh*, which they subsequently refused to do. It also stated that "plaintiff, confiding in defendant's promise," discharged Chapman.

The third count was the same as the second, except that it stated the consideration to defendant's promise to be that the plaintiffs would give time to and forbear to sue the said Chapman.

The summons had been obtained under the 98th and 101st sections.

A. Crooks showed cause.—The proceedings had been commenced and the writ issued before the Common Law Procedure Act came into force; and although the declaration had been served since the Act came into force, the last sentence of the 318th section saved the rights of parties who had begun proceedings previously to proceed according to the old practice. But even if it is held that where the new forms and rules ought to apply to the continuance of proceedings under the old practice, wherever it is possible; still, as regards that part of the summons which refers to there being several counts, and calls on the plaintiff to elect on which he shall proceed; there is nothing in the Common Law Procedure Act to justify or support. The first of the new rules of pleading, *exceptis excipiendis*, prohibited more than one count in a declaration, where there was only one cause of action; but it would not

operate until next Easter Term, and without it there was nothing in the Common Law Procedure Act or the new rules as they at present stood, to prohibit several counts on the same cause of action. Generally it had been decided under the old practice that special assumpsit was maintainable on such a guarantee as that given in the present case, and it was no objection that there were several counts in the declaration.—*Tyrrell v. Annis*, 1 U. C. R. 299. The test was not whether there was but one cause of action disclosed in the declaration, but whether each plea within itself and on the face of it showed the same cause of action.—*Ramsden v. Grey*, per Maule, J., 7 C. B. 961; *Calwon v. Burford*, 13 M. & W. 136; *Gilbert v. Hules*, 2 D. & L., 227; *Bulwer v. Bonsfield*, 9 Q. B., 986; *Simpson v. Raud*. 1st Exch. 688. As to the statement of the time of Chapman's indebtedness to the plaintiffs it was not mere surplusage, but might be traversed—*Nash v. Brown*, 6 C. B. 584. The statement that the debt was a large sum of money, was not objectionable, as it was true; and at all events, it could do the defendants no harm. The consideration should be stated specially—*Wilson v. Braddyl*, 23rd L. J., N.S. Exch. 227. So should the conditions precedent, as was the practice in England.—*Phelps v. Prothesoe*, 15 C. B. 370; *Bamberger et al v. The Commercial Credit Assurance Company*, 24 L.J., N. S., C. P., 115.

C. Paterson in reply. The 1st and 2nd counts manifestly are for the same cause of action—therefore one of them should be struck out. The third count also presents strong features to show that it is for the same cause of action, but as it grounded the consideration on a promise to forbear instead of a discharge of Chapman, perhaps it might on the face of it be taken as a separate cause of action. In the case of *Tyrrell v. Annis*, the question of the permissability of the several counts was not before the Court. All the other statements required to be struck out were entirely unnecessary and prolix, and should be struck out under the 98th and 101st sections. The 140th section too, in permitting departures from the forms given in schedule B., specially provided against prolixity.

RICHARDS, J.—In this case I shall not strike out the counts required, and compel the plaintiff to proceed on one which he may elect. The rule prohibiting several counts will not come into force until Easter; even before the enactment of the English Common Law Procedure Act, it was provided by the Judges in that country that each count of a declaration should disclose a separate cause of action.—(Reg. Gen. H. T., 4 Wm. IV, c. 5.) The old rule in Canada, which should govern cases until Easter Term, was however different, and treated excess in a declaration merely as a question of costs.—(34 E. T., 5 Vic., Drap. Rules, p. 93.) Therefore in the present case the three counts must remain, but under the Common Law Procedure Act all unnecessary matter must be struck out of them. The 98th section is compulsory on such matter; it leaves no option, but says it "shall be omitted." The words "large sum of money," should be struck out, or else the statement that the amount was £211; either averment might remain, but both would be surplusage. So must the statements—of the time of Chapman's indebtedness to plaintiff—of the consideration for such debt—of the consideration of defendant's indebtedness to Chapman—of the time of performing the condition precedent—of the request of performance made by plaintiff of defendant—and of the plaintiff's confidence in defendant's promise. On the other matters stated I think it better to make no order, but to leave the parties to determine upon such amendment as they may think fit. Defendant to have the costs of this motion.

[On a subsequent application a certificate was granted to tax costs for counsel, under the 160th rule.]

SWAN V. CLELAND.

In an application by married woman to revise judgment under 203rd sec. C. L. P. Act, 1856, her husband must be joined.

[Sept. 20, 1856.]

In this case a summons had been granted for an entry on the roll of a suggestion to revise a judgment under the 203rd sec.

Crooks now showed cause. The application was made by the widow and administratrix of the deceased Conusee. There were two objections of form to the affidavits, on which the summons had been granted. In the first place, the widow was now married, and she did not state in her affidavit that her husband joined with her in the application. Nor did the husband make any affidavit: and in fact there was nothing to show that he did join, as was required by law. The second objection was, that there was no evidence in any of the affidavits of the marriage at all. The widow did not state so in her affidavit, and the only statement to that effect was in the affidavit of the attorney's clerk, who merely said that he was "so informed," which was no legal evidence of the fact.

McMichael contra. The summons was taken out in the name of both husband and wife, and the application made by the attorney specially on behalf of both joined. This being the case, if as a general rule the application of the officers of the Court are to be taken as *bona fide*, there was no necessity for an affidavit either of coverture or that the husband joined in the application. This is an answer to both objections.

RICHARDS, J.—There is no doubt that the husband must be joined--2 Saunders, K. There is certainly no affidavit of the fact here; but I must hold Mr. McMichael's answer a sufficient reply to the objections of the defendant. I must take the applications made to this court to be on the part of the parties stated, unless evidence is shown to the contrary. An affidavit might as well be required in an action commenced by man and wife against a third party, to the effect that they were married and joined in the action. The summons must be made absolute.

DIVISION COURT.

(In the First Division Court of Essex,—A. CHEWITT, Judge.)

WALLACE (claimant) v. BELLOWS (execution creditor.)

Interpleader.

Richie, the execution debtor, had bought 120,000 feet of lumber of claimant and had it on his premises. Judgments of creditors had before a re-sale of lumber to claimant, who had a bill of same, but it remained on R.'s premises at a planing machine. On the 2nd August last parties stood on the lumber, R. saying he delivered a plank in the name of the whole, clear of all but rent of the premises, which he (R.) would pay. McEwan acted as witness and agent for claimant; but he did not, nor did any one for him, or his assignee Dougall, remain in possession. On the 4th August, Bartlet, Dougall's agent, took

away a scow load *before* seizure on same day of 14,000 feet of it on R.'s premises. Bailiff kept a person in possession, claimant having previously insured and sold it to Dougall. McEwan gave Bartlet an order on R. for lumber: the order being lost, Bartlet asked McEwan for another, who refused, saying, "go get lumber of R." or words of like import. Another load was taken on the 7th August. McEwan thought no fraud was intended, and R. said claimant had the best right, as he was not paid for it. All which led to the conclusion that when McEwan, claimant's agent, went away from R.'s premises, on which lumber was still piled, leaving no person in possession for claimant that R. was still in possession, having the care of it. Dougall had possession only of that which Bartlet carried off in scow.

It was argued that what Dougall carried off as assignee, being a commencement towards removing the whole, made a sort of constructive *actual* and *continued* possession of all the lumber in claimant's assignee.

It was thought that it was only so as far as what was actually removed before seizure, as such a separation is recognized in 10 U. C. R., 450.

It was urged that the equity as between claimant and R. was stronger than the other creditor's legal claim: I cannot see it in that light, even if effect could be given to it if it was, though these equities *may* be *equal*.

But the statute was made thus stringent to prevent the very doubts and difficulties, which did arise from just such a state of things before the Act—as to who was the real owner of chattels in anothers possession, which constantly resisted creditors and officers with executions.

The *relaxing* the strict wording and spirit of the statute, under the idea that the Division Courts have in such cases some equitable *powers* not in the Superior Courts, would lead to the same difficulties which the statute was made to prevent.

This was no more than a Race of *creditors*, (only R. intended to favour a particular one) and to complete that intention and secure himself, claimant should have filed a bill of sale, or have left a person in actual and continued possession to remove the presumption of R. being still in possession; and in the absence of such registry or possession, the statute is the only guide.

It is said that it is impossible to keep possession of such cumbrous chattels, which cannot be readily removed or stored. There would be some force in this if the registry of a bill of sale did not provide for this difficulty at a small loss of time and expense—if there be no fraud in transaction. The claimants not being paid for this lumber, seized by judgment creditors, may look hard; but the very prosperous look which the possession of 120,000 feet of lumber at the machine gives, though unpaid for, may have induced persons to give credit to R. before the re-sale.

It is considered that though there might have been a re-sale and a delivery, as between R. and claimant, it was not followed by such an *actual* and *continued* change of possession, as is contemplated by the statute, and is therefore absolutely void as against the creditors of Richie, who interposed a seizure, then execution, before the actual removal of the lumber by claimant, or his assignee or agents.

TO CORRESPONDENTS.

COMMUNICATION.

QUERY 1.—Can a Bailiff from one county come into a Division in another county to serve summons for his own court, especially within two three miles of the other Division Court office?

QUERY 2.—Is a Bailiff entitled to mileage where he goes a distance, say ten or twelve miles to serve a summons, and then finds the defendant has moved out of the county?

QUERY 3.—Is a Bailiff entitled to mileage on an execution which he returns to the Clerk's office, no goods?

Answers to three foregoing questions will oblige a subscriber.

ANSWERS.

No. 1.—Such a service will be valid in Law, but the practice is objectionable, leads to improper charges, and should be discouraged: in such a service the Bailiff would only be entitled to mileage to the county line. Under no circumstances should the Clerk allow more mileage than the defendant would have had to have paid, had the summons been transmitted to his own Division and been served by the Bailiff of the court therein according to the authorised practice.

No. 2.—He is not.

No. 3.—Clearly not entitled. Unless goods have been actually levied on, there can be no pretence for making the charge.

We would observe generally, that a Bailiff is appointed to do the work of and in his own Division. If he runs about to other Divisions, he may be away when he is required to do the work of his own. This would be detrimental to the interests of suitors, and is contrary to the policy of the Division Court Law.

TO READERS AND CORRESPONDENTS.

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Barrie, U. C.

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Matters for publication should be in the Editors' hands three weeks prior to the publication of the number for which they are intended.

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THE UPPER CANADA LAW JOURNAL is published at the *Barrie Herald* Office, Dunlop-Street, Barrie.

THE LAW JOURNAL.

DECEMBER, 1856.

DEFECT IN THE LAW OF EVIDENCE.

We give a prominent place to the following letter, agreeing as we do with the views of the writer:

To the Editor of the U. C. Law Journal.

DEAR SIR,—The power given under the statute to parties to summon their opponents needs, I think, some restriction. It is very rare that an opponent is put in the box, but it is by no means uncommon to hear a verdict claimed by reason of his non-attendance. I am aware that the Judges are very careful that no injustice shall be done, and have known instances where a party has been compelled to prove his case, notice or no notice. But the point I wish to draw your attention to is, that this notice is now served as a matter of course, and where a party lives at a distance, it is frequently a matter of great inconvenience and loss to be compelled to attend Court; and when he does attend he is not put in the box: the only object having been to take advantage of him had he absented himself. Now, this is wrong, and is using the power conferred by the statute to very bad purpose.

I suggest as a remedy, that whenever any one is summoned under a notice to be examined at the trial of a cause to which he is a party and attends, and is not examined under the notice that on taxation such party be allowed ten shillings for each day's attendance besides mileage to and from, and the proof for the master shall be the production of the copy of the notice, and an affidavit of the party's having attended upon such notice the number of days charged for, and the distance travelled.

I think also, that no verdict *pro confesso* for non-attendance should be allowed, unless it were shown that the party summoned really could give evidence in the case; for in many cases a party to a suit, plaintiff as well defendant, knows nothing of the matters in difference of his own knowledge, and would consequently be of no use as a witness.

I am yours, &c., SYNTAX.

In those cases in which, as *Syntax* suggests, the notice is served only for the purpose of taking advantage of a party really ignorant of the matters in difference, and who cannot attend without serious loss to himself, it would be advisable to be prepared with an affidavit from him to that effect, to be submitted at the trial; and, where the nature of the case would admit of it, fortifying such affidavit by other evidence.

Considering how easily the provision of the statute may be abused for dishonest purposes, we have no doubt that a statement of the kind referred to would induce the presiding Judge to require the plaintiff to prove his case in the usual way.

The only *effectual* remedy would be something of the kind suggested by *Syntax;* and a provision that the costs of a party so notified, &c., to appear, not exceeding 10s. per day and travelling expenses, should be allowed in the discretion of the presiding Judge, whatever might be the result of the suit; and in case of a verdict in favour of the other party that these costs should be deducted from the costs taxed, would, we think, correct the evil.

At present it seems to us that a party notified to appear can recover by action for his loss of time and expenses, accordin^ to the scale of allowance to ordinary witnesses; and we happen to know that the Judge of the county of Simcoe has allowed a party to recover in the Division Courts in such an action on proof of the service of the notice to appear, and of attendance in obedience thereto.

GRAND JURIES.

We subjoin the substance of a short Act of the Imperial Parliament, passed in July last, for facilitating the despatch of business before Grand Juries.

The propriety of applying a similar provision to Canada is worthy of consideration, as suggested by an esteemed correspondent. Yet it must not be be lost sight of, that Grand Juries in England and in Upper Canada are very differently constituted. In England Grand Juries can scarcely be said to be changing bodies; at all events, on every Jury there are to be found several gentlemen, who have had the experience of years in the business usually coming before the Courts, and in any case they are men selected by a responsible officer on account of their standing, intelligence and experience. With us, Grand Juries are essentially a changing body; and though we may occasionally see a person of experience in the discharge of the duty, it happens by sheer good luck—almost literally by a throw of the die—and as to the primary selection, the duty is divided among so many that responsibility exists but in name.

Such being the case, it would perhaps be scarcely advisable to confer additional powers upon our Grand Juries, without at the same time providing for the appointment of a competent person to marshall the evidence and conduct the investigation before them. Under the present practice, those only who are named on the back of the Indictment as witnesses and sworn in Court, can be examined. We fear that with an altered practice the Grand Jury-room would be a place of *trial* rather than *enquiry*.

(19 & 20 Vic., cap. 54,)

"Recites, that it would expedite and improve the administration of criminal justice, if persons attending to give evidence before Grand Juries were sworn in the presence of the jurors who are to act upon such testimony; and enacts as follows:

1\. *Witnesses examined before Grand Juries to be sworn in the presence of the Jurors, &c.*—From and after the passing of this Act it shall be lawful for the foreman of every grand jury empanelled in England and Wales, and he is hereby authorized and required to administer an oath to all persons whomsoever, who shall appear before such grand jury, to give evidence in support of any bill of indictment; and all such persons attending before any grand jury to give evidence may be sworn and examined upon oath by such grand jury touching the matters in question; and every person taking any oath or affirmation in support of any bill of indictment who shall wilfully swear or affirm falsely shall be deemed guilty of perjury: and the name of every witness examined, or intended to be so examined, shall be endorsed on such bill of indictment; and the foreman of such grand jury shall write his initials against the name of each witness so sworn and examined touching such bill of indictment. Provided, however, that nothing in this Act contained shall affect any fees by law payable to any officer of any court for swearing witnesses, but such fees shall remain payable as if this Act had not passed.

2\. *Not necessary for witnesses to be sworn in open Court.*—From and after the passing of this Act it shall not be necessary

for any person to take an oath in open court to qualify such person to give evidence before any grand jury.

3. *Interpretation of Terms.*—The word "foreman" shall include any member of such grand jury, who may for the time being act in behalf of such foreman in the examination of witnesses in support of any bill of indictment: and the word "oath" shall include affirmation, where by law such affirmation is required or allowed to be taken in lieu of oath.

THE COUNTY COURTS PROCEDURE ACT.

The recent Act, for the improvement of procedure in the Superior Courts as might be expected, has given rise to numerous questions requiring decisions of the Courts and Judges to settle. The County Courts Procedure Act being in the main drawn from the C. L. P. Act, nearly every case on the latter has served the purpose of an exposition of the former statute; but hitherto there has been but one case of importance specially relating to the County Courts, (*Chard v. Lout*, *ante* page 227, on the subject of Costs.) A judgment on the same point from the county of Simcoe appeared in the November number; it will be seen that in the main question considered, the judgment of the County Judge is supported by the decision of Mr. Justice Burns in *Chard v. Lout.*

We would feel obliged if country practitioners would send us copies of written decisions in the local courts on the construction of the Act, and we would willingly insert communications tending to elucidate its provisions.

We understand that in several counties, the Rule of the Superior Courts as to time for pleading, &c., is considered to be in force and acted on in County Courts—and that issue books are delivered and records *entered* merely, without being sealed or passed, in the same way as in the court of Q. B. and C. P. under the new practice.

It is certainly most desirable that the practice in all the courts of Record should be assimilated as closely as possible, and the very broad range which the 19th section of the County Court Procedure Act takes must tend to such a result.

THE COMMON LAW PROCEDURE ACT.

Our space would scarcely permit the insertion of all the cases from month to month decided in Chambers upon points arising out of this Act, even if we could procure them in sufficient time for publication in full: we endeavour to make up for this by giving notes of *every* decision received up to the *latest* moment of going to press, publishing such cases in full in the next issue.

The practitioner will perceive that the Reports are prepared with care and ability, and we have received from several quarters testimony to their usefulness. Country members of the profession would probably never hear of these cases, but for the *Law Journal*, as most of the Reports are from the *vivâ voce* decisions of Judges; and all concerned will best show their appreciation of the undertaking by aiding in the circulation of this Journal.

HARRISON'S C. L. P. ACT.

The second number of this publication has just been issued, and it is but justice to say that it sustains the charaction Mr. Harrison has even now earned—that of a careful and able annotator.—Indeed the work, when completed, will enable the practitioner to dispense with most of his text books on practice, and will largely aid in giving full practical value to the new laws.

The orders, we are told, already embrace a very large portion of the edition. Those who trust to procure the work when completed may not be able to do so then, and we recommend all to send in their subscription without delay, and thus *secure* a copy.

CHAMBER CASES.

Our Chamber Reports are again so numerous that we can only, as before, give notes of many of them, which want of space will not allow us to publish in full in this number:—

Street v. Cuthbert.

Leave granted to administer interrogatories under 176th section C. L. P. Act before plea pleaded; leave to plead several matters being asked for in the same summons, and the interrogatories having particular reference to the pleas sought to be pleaded.—Per Burns J., Oct. 4, 6.

Every v. Wheeler.

In an action by bearer of a promissory note against maker defendant cannot plead denying that the plaintiff is the bearer and also in confession and avoidance without leave, under

130th section of the C. L. P. Act, 1856, and if defendant do so plead, plaintiff may sign judgment under 135th section. And where, after execution issued, a judgment regularly signed is set aside upon the merits, defendant will be ordered to pay into court the amount for which judgment was signed. Per HAGARTY J., Nov. 8.

BRETT V. SMITH ET AL.

The affidavit on which an application is made for a writ of trial should show where the venue in the action is laid.—*Ib.*

NIMMO V. FLANNIGAN ET AL.

The statement in a declaration that a promissory note was duly presented and *dishonoured*, is a sufficient averment of non-payment as against the maker, and probably as against the endorser also; but query.—*Ib.*, Nov. 3.

STARRETT V. MANNING.

Defendant's attorney accepting service of summons has the same time within which to appear as if the service of the writ of summons had been served on defendant himself.—Per BURNS J., Oct. 8.

TAYLOR V. MCKINLAY.

Upon an application under 130th section of the C.L.P. Act, 1856, for leave to plead in denial of a deed or agreement, and at the same time in confession and avoidance of it, it should be shown that something material may turn upon the construction of such deed or agreement.—Per BURNS J., Oct. 18.

TAYLOR V. CARROLL.

In an action against Sheriff on his bond, and also for neglecting to arrest a party against whom plaintiff had issued a Capias, and for a false return of such Capias defendant will be allowed to traverse such party's indebtedness to plaintiff, and at the same time to plead "not guilty," and also to traverse the separate allegations of the declaration upon an affidavit of the matters required by 130th section of the C. L. P. Act, 1856, and further stating good reason for denying the indebtedness of such party to plaintiff.—*Ib.*, Oct. 23.

LOCK V. HARRIS.

On an application for a writ of trial, the affidavit on which the summons is obtained should show where the venue in the action is laid.—Per HAGARTY J., Nov. 8.

MONTHLY REPERTORY.

COMMON LAW.

EX. PARDINGTON V. SOUTH WALES RAILWAY CO. *May* 28.

Two directors of a completely registered joint stock company signed and sealed with the seal of the company a document, of which the following is a copy: "Three months after date we, two of the directors of the Ark Life Assurance Society, by and on behalf of the said society, do hereby promise to pay M. or order, the sum of £67 15s. 6d., for value received." There was no counter signature by the secretary of the company.

Held, a promissory note binding on the company, and not the parties who signed it.

EX. GULLIVER V. GULLIVER ET AL. *June* 6.

Replication on equitable grounds—Statute of Limitations—Set-off—Will—Assent of executor.

To an action against an executor on a debt due by his testator, the defendant pleaded, first, the statute of Limitations, and secondly, that at the time of the death of the testator the plaintiff was indebted to him in an equal amount, which being still due the defendant was willing to set-off against the plaintiff's claim. To the first of these pleas the plaintiff for replication on equitable grounds, replied that the causes of action therein mentioned accrued within six years before the death of the testator; that he by his will appointed the defendant his executors, and devised certain freehold estate to them upon trust to sell, and also the residue of his personal estate upon trust to call it in, and should out of the monies to arise from the sale of the real estate, and the calling in of the personal estate, pay debts and legacies, and hold the residue in trust for the plaintiff and his other children in equal shares, averring the sufficiency of the money thus realized to pay all debts and legacies. To the second plea the plaintiff replied for the replication on equitable grounds, that the testator devised and bequeathed to him certain freehold estate and a certain sum of money, and devised and bequeathed certain other property, real and personal, to his other children, and declared that the money and other effects then already advanced and delivered by him to his children, should be deemed advancements, and that they should not be required to account for the same; averring that the matters of set-off were money and effects so advanced, &c.

Held, that both these replications were bad.

Q.B. THOMAS V. THE BARON VON STUTTARHEIM. *Nov.* 3.

Practice—Examination of witness in extremis—Application for rule absolute in the first instance—Common Law Procedure Act, 1851, *sec.* 46.

The court will not grant a rule absolute in the first instance for the examination of a witness, although he be at the point of death.

Semble, that sec. 46 of the Common Law Procedure Act, 1851, does not give the court the power of doing so.

C.P. WARD V. STEWART ET AL. *Nov.* 4.

Contract—Construction of.

By the terms of a written contract the plaintiff was to receive from the defendants a per centage commission on the proceeds of some cargoes of palm oil coming to them from Africa, but was to be entitled to no commission on any wet, dirty, or unmerchantable palm oil. Some of the oil brought over had small quantities of water in it, but was merchantable. The oil was of a description which is hardly ever entirely free from water, and the weight only, and not the quality, was affected in the present instance by the presence of the water. It was in evidence that any amount of wet made the oil wet. The judge ruled that if the oil were either wet or dirty the plaintiff was not entitled to commission on it, and the defendants had a verdict.

Held, that the direction was right.

C.B. ATWOOD ET AL V. EMERY. *Nov.* 7.

"As soon as possible,"—Meaning of a contract.

The defendant on the 30th Nov. 1855, wrote to the plaintiffs to send him some iron hoops as soon as possible. They were not sent till the 30th January following, when the defendant refused to accept them. An action was brought upon the special contract, to which the defendant pleaded that the hoops were not sent "as soon as possible."

At the trial WILLES, J., directed the jury that the words "as soon as possible" must be construed with regard to the circumstances of the plaintiffs, and without any regard to the time within which other persons in the trade could have executed the order.

Held, that the direction of Willes J. was correct.

C.B. VORLEY V. BARRET. *Nov.* 7.

Demurrer to the replication on equitable grounds—Princicipal and surety—Discharge of principal by mistake a good equitable answer to a plea of discharge of principal by co-surety in action against him for contribution.

The plaintiff and defendant became sureties for one Watson by endorsing a bill for £300: Watson became bankrupt. The plaintiff had had other dealings with Watson, and had advanced him £2661 6s. 6d. for the purpose of erecting houses pursuant to a building agreement, and had supplied him with building materials worth £1512 for the same purpose, as well as £136 17s. 4d. for other purposes. After the bankruptcy of Watson the plaintiff and the assignees agreed that the building agreement should be delivered up to the plaintiff to be cancelled upon the payment by the plaintiff of £150 in full discharge of all claims which they might have upon the houses and property comprised in the agreement, and that the plaintiff should relinquish all claims on the bankrupt or his estate for the said monies which had been so advanced to the said bankrupt for such building purposes, and for the building materials. The attorneys of the parties in drawing up the agreement, made the plaintiff "relinquish all claim for moneys advanced to and for the bankrupt, and his claim for goods supplied for the above mentioned purposes. The plaintiff having paid the £300 upon the bill which was dishonored by Watson, sued the defendant for contribution. The defendant pleaded that the plaintiff had discharged Watson the principal by the above agreement, to which the plaintiff replied on equitable grounds that the memorandum of agreement was drawn up by mistake, the real agreement being confined to claims of the plaintiff for the moneys advanced for building purposes, and having no reference to the £300 bill, and being already executed; he also denied that he had relinquished his claim against the bankrupt for the £300; to which replication the defendant demurred.

Held, that it was doubtful whether the terms of the memorandum of agreement included the claim for the £300, but that even if that were so, the defendant by demurring having admitted the mistake, the replication was a good equitable answer to the plea, and that it was not necessary that a court of equity should reform the agreement that not having been executed.

Semble, per WILLES J., that where the plea is legal the replication may be considered either upon legal or equitable grounds, where it is stated to be upon equitable grounds, but only upon equitable grounds where the plea is an equitable plea.

NOTICES OF NEW LAW BOOKS.

TABLE OF THE PROVINCIAL STATUTES *in force, or which have been in force in Upper Canada, in their chronological order, showing which of them or what parts of any of them are now in force, and by what subsequent acts they have been amended, continued, repealed, or otherwise affected; with a continuation of the* INDEX TO THE STATUTES IN FORCE *to the end of the Session of* 1856. *By* G. W. WICKSTEAD, *Q.C., Law Clerk of the Legislative Assembly.*

This work was prepared by order of the Legislative Assembly. We have examined it with care, and can speak with confidence of its merits.

The indefatigable Law Clerk has satisfactorily accomplished a very difficult, a very dry, and a very irksome task. Few can estimate the labour and skill necessary to produce such a work. We trust that the body to determine the Law Clerk's remuneration will make reference to a well informed quarter before deciding.

A good Index to a 500 page work on practice is worth at least $200. The most ordinary observer can perceive the immense difference between a simple index to an ordinary work and the difficult and complicated matter the Law Clerk has been engaged on.

The value of these works on the Statute Law to the Legislator and Lawyer is incalculable. The labour of the new Commission will be reduced to mere consolidation, and the saving to the public thereby will be very great. We repeat that a most necessary task has been most satisfactorily accomplished. If the continuation of the Index had been printed on one side only and sent in loose sheets, it would have been very convenient for interleaving in the appropriate places in *the* Index, and the Speaker, the Law Clerk, or the party who regulates these matters would not require to *make* a precedent had he adopted the plan referred to.

REPUBLICATION OF THE ENGLISH REPORTS IN LAW AND EQUITY. *Edited by* CHAUNCEY SMITH, *Counsellor-at-Law. Published by Little, Brown & Co., Boston.*

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THE DIVISION COURT DIRECTORY.

Intended to show the number, limits and extent, of the several Division Courts of Upper Canada, with the names and addresses of the Officers—Clerk and Bailiff,—of each Division Court.†

COUNTY OF LINCOLN.

Judge of the Division Courts, EDWARD C. CAMPBELL, Esq.,—Niagara P.O.

First Division Court.—Clerk, Wm. B. Winterbottom—Niagara P.O.; *Bailiff*, P. Frim—Niagara P.O.; *Limits*—The town and township of Niagara.

Second Division Court.—Clerk, Thomas Burns—St. Catharines P.O.; *Bailiff*, James Webster—St. Catharines P.O.; *Limits*—The town of St. Catharines and the townships of Grantham and Louth.

Third Division Court.—Clerk, Abishai Morse—Smithville P.O.; *Bailiff*, Robert Thompson—Smithville P.O.; *Limits*—The townships of Clinton, Grimsby, Gainsborough and Caistor.

† *Vide* observations *ante* page 198, Vol. I., on the utility and necessity of this Directory.