REPORTS OF CASES

DETERMINED IN THE

PRACTICE COURT AND CHAMBERS

WITH

Points of Pleading and Practice,

DETERMINED IN THE COURTS OF

QUEEN'S BENCH AND COMMON PLEAS.

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but yet dates differ from other matters, and it has been allowed to state dates in figures.

With regard to the last objection: if the date be well stated, then the statement that the note was payable six months after the date proves that the note must have been due at the time of making the affidavit. Besides this, the demand upon this note is only for a balance due. The amount of the note is stated, and the balance claimed upon it is 393*l.* 14*s.* 1*d.*. According to Walmesley v. Dibden (4 Moore & P. 10) this is sufficient.

This affidavit contains two demands well stated and five demands uncertainly stated; and the only question is whether, upon the last clause of the affidavit, the defendant can be compelled to give bail for the demands which are well stated, or whether the arrest must be set aside *in toto*. There was an opinion entertained by the courts that an affidavit bad in part vitiated the whole, but that opinion has now been overruled. First, upon the old law, by the cases of Prior v. Lucas (1 Har. & Wol. 365), Jones v. Collins (6 Dowl. P. C. 526), and the Bank of England v. Reid (8 Dowl. 848); and, secondly, under the statute 1 & 2 Vic. ch. 110 confirming the decisions upon the old law, and applying the same to the new law, which prevents arrest except upon a judge's order. See Cunliffe v. Maltass (7 C. B. 695.)

The proper order now to be made is that the defendant be discharged from custody upon putting in special bail to the amount of.....£619 7 10
393 14 1

£1013 1 11

HOUGHTON AND MAY v. HUDSON.

Testatum Act, 8 Vic., ch. 36—Service of papers by putting up in Crown Office —Laches.

When an action is commenced by a writ issued under the authority of the Testatum Act, 8 Vic., ch. 36, from one outer county to another, the papers must be served as that act directs, and cannot, under the rule of M. T. 4 Geo. IV. be put up in the Crown office in the county where the venue is laid.

[QUEEN'S BENCH, T. T., 18 VIC.]

Read obtained a rule *nisi* on the plaintiffs, to shew cause why the interlocutory judgment in this cause, and all

subsequent proceedings, assessment of damages, judgment entered thereon, and writ of *Ca. Sa.*, should not be set aside with costs, for irregularity :

1st. Because the declaration and other proceedings were irregularly served.

2nd. Because the papers necessary to be served were not otherwise served than by putting them up in the office of the deputy clerk of the Crown for Lincoln and Welland, instead of serving the defendant's attorney, and the attorney who put in bail for her and gave notice of bail to the plaintiffs' attorney, or serving the defendant personally.

Or 3rd. Because the interlocutory and final judgment and the assessment of damages had all been obtained without notice to the defendant or her attorney, and by means of improper practice of the plaintiffs' attorney (as his letter to the sheriff shews), in tampering with the sheriff, in order to fix the bail.

Or why the defendant should not be relieved, by being let in to defend this action on the merits—and on the affidavits and papers filed.

A similar application had been made in chambers, and the parties having been heard by the learned Chief Justice of the Common Pleas, he discharged the summons with costs, but without prejudice to any motion to the court in the next term to rescind his order, or to renew or revive the application.

The defendant's attorney was Mr. Burton. His partner, Mr. Sadleir, made oath that on the 2nd of November, 1853, the defendant was arrested by the sheriff of Wentworth and Halton, upon a *Ca. Re.* issued from the deputy clerk of the Crown and Pleas office for the united counties of Lincoln and Welland : that special bail was duly put in and perfected on or about the 23rd of November, and notice thereof given to the attornies for the plaintiffs by Mr. Burton, as the defendant's attorney: that the plaintiffs' attornies (Eccles & Lauder) have no booked agent in the office of deputy clerk of the Crown and Pleas in the city of Hamilton : that no declaration or demand of plea, or notice of trial or assessment in this cause, was served on him, *this deponent*, or on any one in his office, nor had notice or knowledge of any such having

been served ever come to his knowledge, or, as he believed, to the notice or knowledge of any one in his office: that in consequence of no such papers having been served, he always supposed that the plaintiffs had abandoned further proceedings in this cause; and the first step which he knew the plaintiff had taken, subsequent to the arrest, was the issuing of a *Ca. Sa.* on the 12th of June (1854), and placing it in the hands of the sheriff of Wentworth and Halton, in order thereby to fix the defendant's bail: that he found the following proceedings to have taken place in the office of the deputy clerk of the Crown and Pleas for the united counties of Lincoln and Welland—*viz.*, declaration filed on the 14th of February (1854); interlocutory judgment signed on the 22nd of February; damages assessed at the assizes for Lincoln and Welland in March, at 218*l.* 16*s.* 8*d.*; final judgment entered on the 12th of June; and on the same day a *Ca. Sa.* issued to the sheriff of Wentworth and Halton: that there was no affidavit of the service of any declaration or demand of plea, or notice of assessment or trial among the judgment papers in the cause, nor any intimation of any such papers having been sreved: that he believed no declaration, demand of plea, or notice of assessment or trial was ever served on the defendant personally, or ever came to her knowledge, but that the obtaining judgment by the plaintiffs' attornies, as they had done, (which the deponent presumed was by sticking up the papers in the office of the deputy clerk of the Crown and Pleas for Lincoln and Welland), was a trick to prevent the service of the said papers coming to the knowledge or notice of the defendant's attorney, and so to obtain judgment by default: that the plaintiffs' attornies knew that the deponent and his partner intended to defend this action, and knew the grounds of defence, which the deponent believed was a good one upon the merits.

Annexed to this affidavit was a letter which the plaintiffs' attornies wrote to the sheriff of Wentworth and Halton, when they sent to him the *Ca. Sa.*, as follows:

"The sheriff at Hamilton will oblige Mr. Lauder by returning him on Monday next the enclosed writ, *non et inventus*, as Mr. Lauder is desirous of fixing the bail. The

sheriff, Mr. Lauder trusts, will give the matter his attention. I presume the writ will reach you about 12 o'clock to-morrow; but should it be later, I hope it will be taken to the office and marked received, and filed as of to-morrow. Five shillings is herewith enclosed to pay the fees. Writ will be returned to me here as directed above."

[This was dated Niagara, June 12, 1854.]

Mr. Burton made affidavit that notice of bail, as he understood, was given in his name, as the defendant's attorney: that he had not taken part personally in the management of any of the proceedings: that he was not aware, until after the *Ca. Sa.* was lodged with the sheriff that a declaration had been filed, or any subsequent proceedings taken, and had no notice or knowledge that damages had been assessed, or judgment entered thereon, till after the lodging of the *Ca. Sa.*: that he had been since informed that the declaration was served by putting the same up in the office of the deputy clerk of the Crown *at Niagara.*

An affidavit of service of notice of bail on a clerk of the plaintiffs' attornies was put in, which notice was signed by Mr. Burton, attorney for defendant, or rather in his name.

Mr. Sadleir, partner of Mr. Burton, made another affidavit, to the effect that the affidavit to hold to bail in this cause was made by an agent of the plaintiffs, and that he believed he would be able to prove upon a trial, from admissions made by that agent, that the plaintiffs were well aware, when they sold the goods for which this action is brought, that the defendant was a married woman, and that the agent was aware of it when he made the affidavit: that no appearance was filed by the deponent, Mr. Sadleir, or his partner, as the defendant's attorney in this cause, in any office, either for the counties of Lincoln and Welland or elsewhere, unless the bail piece filed and notice given by his partner be deemed an appearance: that no time was lost by him in moving to set aside the assessment after he knew of it, and that the first intimation which this deponent, or, as he believed, any one in his office, had of such a proceeding, was his ascertaining at the sheriff's office for Wentworth and Halton, that a *Ca. Sa.* had been lodged there to fix the

bail: that he had no notice or knowledge of a verdict having been taken, or a judgment entered, till about the day before, or the day after the end of last term, he was not positive which, but too late for him to move in this cause to set aside proceedings.

When Mr. Sadleir moved in chambers against the plaintiffs' proceedings, he filed an affidavit also to the effect, that since special bail was perfected the defendant had continually resided in the city of Buffalo, out of the jurisdiction of this court, until a few days before he made that affidavit, when he went there in order to obtain from her an affidavit that no papers had been served upon her since her arrest, and he found that she had removed to a greater distance in the State of New York. He swore that to the best of his belief the defendant had not been within the jurisdiction of this court since her arrest, and that she had no place of residence therein.

The defendant, Mrs. Hudson, made an affidavit before a commissioner of deeds in the city of New York (whose signature and official character and authority to administer oaths was certified by her Majesty's consul for the city of New York) that, since the service of the copy of *capias* upon her, no other copies of papers in this cause had been served upon her, or left at her place of residence, or come to her knowledge; that she thought the plaintiffs did not intend to proceed in the cause, and was surprised when she learned for the first time, on the 12th of July, that judgment had been signed; that she had no knowledge of any proceedings having been taken in this cause after her arrest until the 12th of July; and that she had a good defence to this action on the merits.

On the part of the plaintiff it was shewn by affidavit that a copy of the declaration and demand of plea were put up in the office of the deputy clerk of the Crown and Pleas at *Niagara—i. e.*, for the counties of Lincoln and Welland—on the 14th of February, and of the notice of assessment on the 16th of March; that interlocutory judgment was entered in the plea-book in that office, and that a full term of the Queen's Bench had elapsed since the assessment of damages; and that the service of the papers above mentioned was made

on Mr. Burton, the defendant's attorney, by their being put up in the Crown office at Niagara, as above stated.

Mr. Lauder, partner of William Eccles, Esquire, the plaintiffs' attorney, made an affidavit that the plaintiffs resided in Montreal; that this action was brought to recover the amount of an account contracted by the defendant, carrying on business at St. Catharines in Upper Canada in her own name, who was supposed by the plaintiffs to be a widow; that she absconded from St. Catharines last fall, taking with her large quantities of goods; that an application by the defendant to set aside her arrest was refused; that she was rendered by her bail first put in, and gave new bail, which was allowed by the judge of the county court, without time being given to the plaintiffs' attorney to make inquiry and shew cause against it; that soon after the defendant one of her bail left this province, and that the deponent, on going to Buffalo, found that this one of her bail and the defendant were living together there, the bail having also absconded; that the deponent, conceiving that he had been badly used in the matter, and apprehending that there was a plan concerted to defraud the plaintiffs, who had sold their goods to the defendant in good faith, *determined to get judgment in the best way he could,* and with this view served the declaration, demand of plea, and notice of assessment by putting them up in the *Crown office at Niagara,* neither Messrs. Burton and Sadleir nor either of them having any booked or known agent within the counties of Lincoln and Welland, being the counties in which the *venue was laid,* and where *all the papers in this cause were filed;* that the deponent had not, nor his partner, to the best of his knowledge, any intimation that Messrs. Burton and Sadleir were going to defend the suit, though the deponent supposed they were, Mr. Sadleir having declared that the plaintiffs would never get a shilling of their claim; that they endeavoured in vain to come to a compromise; that he would now consent, on the plaintiffs' part, to take one-half of the verdict and costs, and give time to pay it on receiving security; that the defendant had not to his knowledge been in this province since November last; that, having received the notice of bail, signed by Mr. Burton as attorney for the defendant, the deponent could not regu-

larly serve any papers on the defendant herself; that his reason for writing the letter which he did to the sheriff with the *Ca. Sa.* was, that the writ might be duly marked as of the day received, and that he might do his duty towards the plaintiffs in this cause without any consultation with the defendant's attornies; and he complained that a copy of his instructions in a suit should be sent by the sheriff to the attorney for the other party without the order of the court; that if the defendant's attornies had demanded a declaration, or applied for a *supersedeas*, they would have discovered that the plaintiffs were proceeding in the suit; that he thought he would have acted improperly if he had not acted as he did, the sheriff shewing a desire, as he alleged, to prejudice the plaintiff,—the defendant absconding with all the goods, and one of the bail going with her and being worth nothing.

ROBINSON, C. J.—The case in this court referred to in the argument (Parke v. Anderson, 5 U. C. R. 2) is expressly in point as to the sufficiency or insufficiency of the service in this case, for the circumstances were similar. In both the writs were *testatum* writs taken out of a deputy office in an outer district, and executed upon a defendant in another outer district; and in both cases the statute 8 Vic. ch. 36, which authorised for the first time the taking out of *testatum* writs from any office but the principal office at Toronto, comes to be considered. I agree in opinion with what was said in that case, and should at any rate consider its authority binding as a decision of this court, for it does not conflict with any statute, but gives effect to the statute (the Testatum Act) according to its letter, and I think also according to its intention and spirit. It might be reasonably imagined that papers put up in the principal office in Toronto would meet the eye of the attornies of the court or their Toronto agents; but it was much less likely that papers put up in a deputy's office in the country would be seen by attorneys resident in any or every other county. That consideration led me very much to doubt, in the case of Clemow v. The Officers of Ordinance (5 U. C. R. 458), whether we could properly give such a construction to the old rule of the court, of Michaelmas Term, 4 Geo. IV., as would uphold the service of declarations

and papers, by putting them up in the deputy's office in the county from which the first process issued, when the defendant's attorney resided in Toronto. But I do not see how we could give to the rule of court a more limited construction, looking at its language, and we held the service to be sufficient, though not without hesitation and reluctance, for it certainly was not a reasonable practice, though it seemed to be sanctioned by the rule. I doubt, I must say, whether the learned judges who made that rule contemplated such an effect of it; though if they did not, the rule is very incautiously worded, since it seems to admit of no other construction than was given to it in the case referred to.

But that was not, as this is, a case of a *testatum* writ issued from a deputy's office in the country. The Legislature, in authorizing that practice, have thought fit to make it a condition that in all such cases "the service of papers shall be made upon the defendant, or, if he appear by attorney, then upon such attorney, at his office in the usual mode, or upon his agent at Toronto, according to the existing practice of the Court of Queen's Bench." This seems to make an end of all question about the irregularity of the service.

The case of Hamilton v. Brown et al. (1 Chamb. Rep. 257) was decided upon other grounds than the sufficiency of the service. It is not stated in the case whether the writ was a *testatum* writ, and the provision in the Testatum Act does not seem to have been referred to.

I do not think that we can tell the defendant that she comes too late, although a term elapsed from the assessment of damages before application was made. Final judgment was entered in the deputy's office on the 12th of June. The term ended five days afterwards. The defendant's attorney moved in chambers as soon as he knew that any proceeding had taken place subsequent to the service of process; and it is positively sworn by the defendant's attorney that no paper was ever served upon him, and that he had no knowledge of any proceeding being taken till after the *Ca. Sa.* had been placed in the sheriff's hands. Interlocutory judgment was signed and damages assessed when no declaration had been served or plea demanded, and no notice of assessment served

either on the defendant or her attorney, which is contrary to the statute.

The plaintiffs, I think, were in no better situation than if they had done nothing, after arresting the defendant, but make up a record, go to trial, and enter judgment, without serving or attempting to serve in any manner any intermediate proceeding.

BURNS, J.—The case of Parke v. Anderson (5 U. C. R. 2) does not appear to be alluded to in the case of Clemow v. The Principal Officers, &c., (Ib. 458), and the first inquiry is whether these two cases are in any way at variance with each other. After an examination of the facts of each, I do not think there is a variance. The former case is clearly one under the provisions of the Testatum Writ Act, 8 Vic. ch. 36; but the latter case, I take it, from the manner of the statement, was an action commenced under the former law; that is, the original writ was sued out and served in the same district. When the latter was the case, if the defendant, instead of employing an attorney residing in the same district, employed one residing out of it, then the rule of court M. T. 4 Geo. IV., applied; and if the attorney defending had no agent within that district, the plaintiff's attorney was at liberty to serve papers by affixing them in the crown office in the district wherein the action was brought. The case now before us is like that of Parke v. Anderson. The original writ is sued out to the united counties of Lincoln and Welland, and the *testatum* to the united counties of Wentworth and Halton, where the defendant was arrested and bail put in. The question is, whether the statute has made a different mode of service necessary in suits commenced under the authority of the act. The difference between the two cases is obvious, though whether that difference be sufficient to account for a different mode of service I do not say. In the case where the suit is commenced by the original writ being sued out and served within the same county by an attorney not residing in that county, or, where so commenced, the defendant goes out of the county to employ an attorney to defend him, the court appears to have determined that such in either case was a sufficient rea-

son to compel the attorney so suing out his writ or defending to have an agent in the county where the suit was commenced; and hence the rule of court. The Testatum Writ Act conferred a privilege upon plaintiffs to sue out the original writ in the county where the venue was intended to be laid, and upon that to sue out a *testatum* to the county where the defendant resided, instead of being obliged to sue out the original writ from the principal office in Toronto to the county where the venue was laid, and then upon that to sue out the *testatum* to the county in which the defendant resided. Whether such was a reason for the statute enacting that service of papers shall be made upon the defendant, or if he appear by attorney, then upon such attorney, at his office in the usual mode, or upon his agent at Toronto, according to the existing practice of the court, as before remarked, I do not say. The provision in the statute is only for service of papers upon the defendant or his attorney. It would seem not to apply to service upon the plaintiff's attorney, as in the case under the rule of court, and it may be said in such cases that the defendant must serve his papers on the plaintiff's attorney, wherever he may reside. Perhaps by analogy it might be that the defendant would be right in serving papers as the plaintiff must do. The question now is, when an action is commenced under the provisions of the *testatum* writ act, whether the service of papers by the plaintiff must be made as the act directs, or whether the rule of court is as available to plaintiffs in actions so commenced as in those commenced according to the previous practice. We must bear in mind that the rule of court provided only for the then existing mode of carrying on suits, though undoubtedly that rule would be applicable to a change in the practice, if there were nothing to indicate to the contrary. If the Legislature had been altogether silent as to the mode of service of papers, then it would have been a question whether the rule of court was applicable, or whether the difference I have already pointed out would have been sufficient to prevent the operation of the rule upon suits commenced under the alteration of the law. The statute does, however, declare how some portion of the papers shall be served, and that was

enacted while the rule of court existed. Agents at Toronto are recognized by the statute, upon whom service might be made, but not agents in the outer counties or districts. The difference between the description of agents must be noted too. By the rule of court the agent at Toronto was a general agent, but the agency in the outer districts or counties would be confined to suits commenced in and served within the same county or district.

I am of opinion we are not at liberty to say the rule of court avoids the act of Parliament, and I see no indication of the Legislature which authorizes the introduction of the rule of court to the relief of plaintiffs in respect of suits commenced by virtue of its authority. The enactment is not that papers *may* be served in a particular mode, which would not necessarily exclude other modes of service, but here the statute is that papers *shall* be served in a particular manner, which seems to exclude any other.

It appears sufficiently, I think, that the defendant and her attorney had no notice of the cause proceeding, until the writ of *Ca. Sa.* upon the judgment was placed in the hands of the sheriff. We cannot say this is a case of irregular service, because in fact there has been no service at all. The proceedings since and after the filing of the declaration must therefore be set aside.

DRAPER, J., concurred. Rule absolute.

CAMERON V. CAMPBELL.

13 & 14 Vic. ch. 53, sec. 78—Setting off costs—Costs as between attorney and client—What are costs in the cause.

The plaintiff obtained a verdict within the jurisdiction of the Division Court, and he was allowed by the master to enter judgment for Division Court costs in addition to his verdict.

Held, that the defendant was entitled to set off the excess of his costs incurred over division court costs against the plaintiff 's costs, and an order was made to amend the judgment roll accordingly, but the learned judge refused to order an amendment of the roll so as to allow this excess to be set off against the verdict.

The defendant's costs not having been taxed with sufficient liberality *as between attorney and client*, a revision was also ordered on that ground.

Costs of applying to rescind a judge's order to allow county court costs were held not to be costs in the cause.

[CHAMBERS.]

In an action upon the common counts the plaintiff obtained a verdict for 12*l.* In taxing costs, the master properly allowed