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*Mar. 24, 26 & 27.

*June 8.

ALEXANDER FRASER (DEFENDANT).....APPELLANT;

AND

ANDREW W. BELL (PLAINTIFF).....RESPONDENT.

CROSS-APPEAL.

ANDREW W. BELL (PLAINTIFF) .....APPELLANT;

AND

ALEXANDER FRASER (DEFENDANT)....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Pleading—Payment into court—Conditional plea—Plaintiff's right to withdraw money.

In an action for an account the defendant after setting up a discharge by the plaintiff of his cause of action against the defendant pleaded as follows:—"In case this honorable Court should be of opinion that the defendant is still liable .... the defendant now brings into court, &c., the sum of, &c., and states that the same is sufficient, &c." The plaintiff took the money out of court.

Held, Strong J. dissenting, that this was a payment into court in satisfaction which the plaintiff had a right to retain, notwithstanding his action was dismissed at the hearing.

Held, per Strong J., that this plea only recognized the plaintiff's right to the money in the event of the court deciding that the defendant was not discharged from his liability, but that on the facts presented the plaintiff was entitled to judgment for the same amount as the sum paid into court.

APPEAL from a decision of the Court of Appeal for Ontario (1) affirming the judgment of Ferguson J. in the Chancery Division by which an order for repayment of money paid into court and taken out by the plaintiff was refused, and cross appeal from the same decision by which the judgment of Ferguson J. dismissing the plaintiff's action was affirmed.

* PRESENT—Sir W. J. Ritchie C.J., and Strong, Fournier, Henry and Gwynne JJ.

(1) 12 Ont App. R. 1.

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The plaintiff Bell was assignee in insolvency of the firm of McDougal & Bro., who, prior to their insolvency, had assigned a quantity of timber to the defendant Fraser in trust to sell the same and, after paying all expenses, and retaining the amount of a claim he had against the insolvent, to pay over the proceeds to them. This timber, with other timber of Fraser's, was placed in the hands of one Knight, a broker, for sale, and it was sold and part of the proceeds paid over. Knight became insolvent and Bell brought an action for the balance due on the sale of the timber, claiming that Fraser was a trustee and was liable to account for money received by his agent.

The defendant, by his statement of defence, had pleaded, *inter alia*, that the plaintiff had discharged him from liability for the claim sued upon, and also this plea:—

"In case this honorable Court shall be of opinion that the defendant is still liable for the payment of the balance of the money mentioned in the next preceding paragraph, the defendant now brings into court ready to be given to the plaintiff the sum of $4,300, and states that the same is sufficient to pay in full all claims of the plaintiff in respect of the balance of the moneys received, &c."

The plaintiff took the money out of court and the case went to trial on the issues raised by the pleadings.

At the hearing the plaintiff's action was dismissed, but the learned judge refused to make an order for repayment to the defendant of the money taken out of court. The defendant appealed from this decision and the plaintiff appealed from the judgment dismissing his action. Both appeals were dismissed by the Court of Appeals and both parties appealed to the Supreme Court of Canada.

McCarthy Q.C. for the appellant. The rule relating

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to payment into court in equity cases is very different from the same rule at common law. This case is analogous to a suit in equity where the fund is placed in court *in medio* to abide the event of the suit. See *Lafone* v. *Smith* (1); *Jones* v. *Mackie* (2).

Gormully for the respondent. This is an action under the Judicature Act and the facts of its being in the Chancery Division does not make it a suit in equity. As a matter of fact, it is an action for breach of agreement and sounds in damages.

As to the plaintiff's right to retain this money the authorities are very clear. See *Berdan* v. *Greenwood* (3); *Goutard* v. *Carr* (4); *Hawkesley* v. *Bradshaw* (5); and *Wheeler* v. *The United Telephone Co.* (6).

McCarthy Q.C. in reply contended that none of the cases decided that a plea of payment into court could not be conditional.

Gormully for the appellant in the cross-appeal cited *Speight* v. *Gaunt* (7); *Massey* v. *Banner* (8); *Wren* v. *Kirton* (9); *Lewin* on Trusts (10).

McCarthy Q.C. for the respondent referred to *Re Brier* (11); *Warner* v *Jacob* (12).

Sir W. J. RITCHIE C.J.—An examination of the pleadings shows that the plaintiff by his statement of claim sets forth five distinct clauses or causes of action, the second of which is the only one necessary, in the view I take of the case, to be considered.

That claim is in respect of the proceeds of a quantity of timber mentioned in one of the clauses of the agreement on which the first alleged claim is founded, which timber had been placed by the defendant in the

(1) 4 H. & N. 158.
(2) L. R. 3 Ex. 1.
(3) 3 Ex. D. 251.
(4) 13 Q. B. D. 598 n.
(5) 5 Q. B. D. 302.
(6) 13 Q. B. D. 597.
(7) 22 Ch. D. 727; 9 App. Cas. 1.
(8) 1 J. & W. 241.
(9) 11 Ves. 377.
(10) 8 Ed. p. 435.
(11) 26 Ch. D. 238.
(12) 20 Ch. D. 220.

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hands of one Knight for sale. By the statement of defence different answers are pleaded to all the claims. As to the second, it is alleged that the defendant gave the plaintiff an order which he accepted upon Knight for the money due by him, that he received part of it from Knight, and agreed to look to him alone for the whole of it, and discharged the defendant from all liability for it.

The statement of defence as to this claim is as follows:—

In case this honorable court should be of opinion that the defendant is still liable for the payment of the balance of the money mentioned in the next preceding paragraph, the defendant now brings into court ready to be given to the plaintiff the sum of $4,300, and states that the same is sufficient to pay in full all claims of the plaintiff in respect of the balance of the moneys received by the said A. F. A. Knight, mentioned in the seventh paragraph of this statement of defence, and of all interest thereon, and of all damages for non-payment thereof, or for omission to credit the same on the defendant's claim, pursuant to the deed set out in the seventh paragraph of the plaintiff's statement of claim.

Under this statement of defence the $4,300 was paid into court. The amount appears to have been made up by calculating the interest up to the time of payment into court. The plaintiff took it out after joining issue generally on the statement of defence. The action was taken down for trial, and the defendant having succeeded in disproving his liability as to all the causes of action, now asks that the money thus paid into court and paid over to the plaintiff may be ordered to be repaid to him.

It is not necessary, in my opinion, to determine whether the plaintiff's bill should have been dismissed or not, as I think the plaintiff had a right to take the amount paid in out of court, which, on the argument, appeared to be really the only question in controversy. The authorities, viz: *Berdan* v. *Greenwood* (1),

(1) 3 Ex. D. 251.

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Goutard v. *Carr* (1), in which *Berdan* v. *Greenwood* was followed and approved; *Hawkesley* v. *Bradshaw* (2), in which Lord Bramwell took the same view of the law, and *Wheeler* v. *The United Telephone Co.* (3), which were relied on by the learned Chief Justice and Mr. Justice Osler in the court below, are too clear and too much in point to be got over.

I cannot think this money was paid in without any object to be attained and by which operation defendant would gain no advantage if defendants present contention is to be upheld (under the rules as they were then). As Mr. Justice Osler says:—

Different forms of expression are to be found in the cases such as "without admitting any liability," *Wheeler* v. *the United Telephone Company* (3). "Lest contrary to what the defendant believes and contends," *Berdan* v. *Greenwood* (4), *Coghlan* v. *Morris* (5), "if by reason of any wrongful act the plaintiff has sustained damage," *Goutard* v. *Carr* (1); but the prevailing fact is that money is paid into court under the pleading, and that the defendant is thereby enabled to avail himself of it as a defence in the action.

I am, as he was, unable to see any substantial distinction between the expression here used, "In case the court should be of opinion that the defendant is still liable," and those found in the pleadings in the cases cited.

STRONG J.—I am of opinion that the money paid into court in this case is not to be considered as having been paid in under order 26. The action is one for an account and to such an action order 26 does not apply. *Nicholls* v. *Evens* (6).

The fund in court was, I consider, paid in, as accord-

(1) 13 Q. B. D. 598 n.
(2) 5 Q. B. D. 302.
(3) 13 Q. B. D. 597.
(4) 3 Ex. D. 951.
(5) 6 L. R. Ir. 405.
(6) 22 Ch. D. 611.

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ing to the old chancery practice money was constantly paid in, by a trustee as the balance of a trust fund in his hands to be held *in medio* until the right to it was formally disposed of by the judgment. This practice has never been abolished, but is still in force. Here the defendant recognised the plaintiff's right to the fund, not absolutely but conditionally on the court determining that he had not been discharged from all liability in respect of moneys received by Knight by the effect of an order on Knight given to the respondent by the appellant, but in the event of this point being determined against the defendant, it appears to me very clear that the answer recognizes the plaintiff's title to the money in question The 7th, 8th and 9th paragraphs of the statement of defence, upon a fair and reasonable construction, appear to me to be conclusive against the appellant's contention. By paragraphs 7 and 8 the appellant raises the defence that he was discharged from all liability by reason of the order given by him in favor of the respondent on Knight. It is clear, however, upon the evidence that that order had not the effect of discharging the appellant from any liability he was under as trustee for the respondent in respect to the timber in question, or in respect of the proceeds derived from its sale. Such an exoneration of the appellant was expressly and carefully guarded against by the respondent's solicitor in taking the order; Mr. *Gormully's* letter of the 29th of November, addressed to the appellant, most distinctly stipulates that no waiver of liability such as that which the appellant pleads in the 7th paragraph of his statement of defence shall be implied from the acceptance of this order. Whether there was such a liability apart from any discharge appears to me a question which does not arise, inasmuch as upon a fair construction of paragraphs 8 and 9 there

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is an implied admission of liability for the money in Knights hands in the contingency of the order being held not to operate as a discharge. The word "discharge" there used implies a pre-existing liability, as does also the expression "still liable." The manifest object of the pleader was, by paying this money into court, to induce the respondent to accept it in satisfaction and so avoid an account which might result in a much larger measure of liability than that which the appellant thus conceded. The evidence, however, shows conclusively that the appellant might, with due diligence, have obtained payment of this money from Knight, and I am not prepared to admit that *Speight* v. *Gaunt* has anything to do with this case. It recognizes a general rule as to the duties of trustees, but the application of that rule to the facts of the present case in no way relieves the appellant from his responsibility for the money which came into Knight's hands.

Taken in conjunction with the circumstances actually existing, which, as I have said, show that the appellant was liable for money received by Knight, I read the 9th paragraph as an admission of this liability, and a submission that the money in court should be paid to the respondent in the event of the order on Knight not being held to be a discharge.

I am of opinion that the judgments of the courts below should be varied in conformity with the foregoing opinion, by declaring the respondent entitled to the money paid into court, and by ordering the appellant to pay all the costs below as well those of the action in the Chancery Division as of the appeal and cross appeal.

FOURNIER J.—I am of the opinion that the appeals should be dismissed.

HENRY J.—I concur in the decision arrived at. I

think the party here paid the money into court under a rule whereby plaintiff was entitled to take it out and keep it as a result of the proceedings in court. Under the old system of paying money into court a party could not deny liability, but here the party pays money in and, at the same time, denies his liability to pay it. So if the plaintiff has taken the money out of court I think that he has not done so wrongfully.

I think, under all the circumstances, the respondent is entitled to the costs of all the courts because he could not say that he accepted this money in full satisfaction. He could not do so where a party pays in money and at the same time contests his right to pay it.

I concur in the decision as to the main point of the case arrived at by the learned Chief Justice, and think the whole costs of the appeal should be allowed to the respondent.

GWYNNE J.—The difficulty existing in this case appears to me to have arisen from sufficient attention not having been paid to the matters put in issue between the parties by their pleadings on the record. The plaintiff is assignee in insolvency of a firm of lumber merchants named J. L. McDougal & Bro, who became insolvent on or about the 18th day of October, 1877.

The plaintiff, as assignee of the said insolvents and by virtue of the proceedings in their insolvency, became the owner of an undivided half of certain timber berths or limits, subject to a certain charge thereon in favor of the defendant, and the defendant at the date of the said insolvency and thenceforward until the sale thereof continued to be absolute owner of the other undivided half of the said limits. In the month of March, 1882, the plaintiff, as such assignee, instituted this action against the defendant.

In his statement of claim he alleges several distinct causes of action, the first of which is stated in the 7th

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and 8th paragraphs which are in substance as follows:

7th Paragraph. On the 29th July, 1881, the plaintiff and defendant entered into an agreement in writing signed by them whereby, among other things, they agreed as follows:—

1. That the said limits should be offered for sale by public auction on or before the 1st day of November, 1881, in such parcels as the plaintiffs should deem best for the realization of the highest price, subject, however, to the proviso that if the said limits should be offered for sale in more parcels than one each parcel should be sold subject to a condition making void the sale of such parcels, unless the price realized by the sale of the whole of the said limits should reach in the aggregate the amount of one hundred thousand dollars.

That the defendant should receive the purchase money upon the trusts following, that is to say:

a. To pay himself one half of the total price received for the limits.

b. Out of the other half to deduct the sum of $58,603.\frac{08}{100}$ dollars, being the amounts of the claim properly provable by him against the estate of the said insolvents, after subtracting therefrom the amount received from the sale of the raft of timber mentioned in his claims filed against said estate with interest thereon from the 20th day of September, 1881.

c. To pay the balance to the plaintiff as assignee of the said estate, and it was thereby further agreed that the account of the sales of the timber by A. F. A. Knight & Co. should be verified at the expense of the estate if required. That the balance of the timber in the hands of A. F. A. Knight & Co. belonging to the estate, as shown in the said account sales, is 48,030 feet 84-12 inches, and that on this the defendant had a lien for his claim aforesaid, and if this should be sold before the sale of the limits it was agreed that the amount realised therefrom should be deducted from the amount of the defendant's claim as aforesaid Mr. Knight's and other proper charges to be first deducted. That if the limits should not be sold at the sale thereof the creditors should have the option, to be exercised within twenty-one days thereafter, of paying the defendant the amount of his said claim, and should thereupon be entitled to a transfer of one undivided half of the said limits on payment of the usual transfer fees, and in default thereof that the defendant should be entitled to the security held by him as the amount of his claim. The above to be a complete settlement between the said defendant and the said estate, and the said defendant to have no further claim against the said estate or the said undivided half of said limits or timber belonging to said estate.

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8th Paragraph alleges that

The said limits were sold in the manner provided by the said agreement and the defendant received the purchase money arising from such sale, but that although all conditions had been performed and fulfilled and all things had happened and all times elapsed necessary to entitle the plaintiff to be paid the balance due to him under the said agreement, yet that the defendant did not pay the whole of the said balance to the plaintiff, but paid only a part thereof contrary to the said agreement.

The above contained the first item or cause of action set out in the plaintiff's statement of claim, and the amount, if any, which the plaintiff should recover in respect thereof would be the difference between the amount of the balance remaining of one half of the amount realised from the sale of the limits, after deducting therefrom the amount of the defendant's claim remaining unpaid, and the amount, which, as the statement of claim admits, had been paid by the defendant to the plaintiff arising from the sale of the limits.

The second item of plaintiff's cause of action is stated in the 9th paragraph of his statement of claim, as follows :—

9th paragraph—The plaintiff also says that although the balance of the timber mentioned in the additional clauses of the said agreement was sold before the sale of the said limits, the defendant did not deduct the amount realized thereupon from the amount of the defendant's claim against the said insolvent estate, as provided in the said agreement, but deducted the whole amount of his claim, namely, the sum of $58,003.08 mentioned in the said agreement, from the proceeds of the sale of the said limits, and did not account to, or credit the plaintiff for, the proceeds of the said timber.

The amount claimed by the plaintiff under this second item of his claim is the amount realized from the sale of the 48,030 feet of timber mentioned in the agreement as the balance remaining unsold when the said agreement was entered into.

The third item of the plaintiff's claim is set out in the tenth paragraph of his statement of claim, in which

10th paragraph the plaintiff sets out in full an indenture under

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seal, bearing date the 29th day of May, 1887, between the firm of J. L. McDougal & Brother of the first part and the defendant of the second part whereby the said firm did transfer to the defendant a quantity of timber upon trust to sell the same and out of the proceeds to pay: 1st. All costs, charges, expenses and customary dues; 2nd. All men's wages and expenses at the port of Quebec; 3. To pay certain drafts and bills of exchange accepted by the defendant for the accommodation of the said firm, and every renewal thereof; 4th. To retain and pay to himself, the defendant, divers other sums therein mentioned, 2½ cents per cubic foot of the timber, commission, &c., &c.; 5th. To pay the balance, if any, to the said firm. And the plaintiff alleged that although the timber mentioned in the said agreement had been sold by the defendant, and that all conditions had been fulfilled, and that all things had happened and all times had elapsed to entitle the plaintiff to an account of the proceeds of the said timber, and to be paid the balance due to him on such account, yet, that the defendant has not accounted for nor paid to the plaintiff the proceeds of the said timber, and the defendant has improperly charged the plaintiff with large sums for expenses and has improperly made large deductions from the quantity of timber admitted to have been received by him for alleged loss in culling and waste in shipping and otherwise, and upon taking the accounts of the sales of the said timber between the plaintiff and the defendant the plaintiff is entitled to credit for divers large sums of money which he has not received and which have not been paid to him by the defendant.

The fourth item of the plaintiff's claim is stated as follows in the 11th paragraph of his statement of claim:—

11th paragraph - The plaintiff as assignee of the said insolvent estate, and under and by and with the advice and consent of the creditors of the said insolvents, made an agreement with the defendant in the month of November, 1877, by which it was agreed that for and in consideration of certain commission then agreed to be paid and allowed to the defendant the defendant should take the timber then made and the timber and supplies then being on the limits of the insolvents, and should make all necessary advances and employ and pay workmen to make timber on the said limits for the remainder of the said season and for the benefit of and on account of the said estate and should raft and take the said timber to market, and should out of the proceeds of the sale of the said timber repay himself his said advances and commission agreed

upon and should pay the balance to the plaintiff, and the plaintiff says that the defendant did make and take out the timber under the said agreement and has received the proceeds thereof, but although all conditions have been fulfilled and things happened and all times elapsed to entitle the plaintiff to be paid the balance due to him on account of the said raft, the defendant has not paid or accounted to him for the proceeds of the said raft.

The fifth and last item of the plaintiff's claim is set out as follows in the

12th paragraph—The defendant, in or about the month of November, 1877, took possession, and has ever since been in possession of a farm upon the limits of the said insolvents and has received and taken hay, oats and other produce of the said farm, and has sold the same and received large sums of money therefor for which he has not accounted to the plaintiff and which the plaintiff claims to be paid, and the plaintiff claimed: 1. Payment of the amount which should be found due by the defendant; 2. That all proper directions might be given and accounts taken and 3. Such further and other relief as the nature of the case might require.

From the above statement of claim it is apparent that the first of the above causes of action is for a simple money demand for a balance claimed to be due from the defendant to the plaintiff upon the agreement of the former and in respect of moneys which had been received by the former to the use of the latter.

The defendant's statement of defence to this cause of action alleges that the whole balance of the moneys arising from the sale of the timber limits, after deducting the amount of defendant's claim by way of lien thereon, was $42,233.73 and that the defendant paid to the plaintiff $42,000.00 of that sum and retained the balance of $233.73 to pay a counter claim which he asserted that he had against the plaintiff for the conversion by the plaintiff, as assignee of the insolvent estate, to the use of that estate of certain property of the defendant, and he claimed by way of counter claim the right to retain the said sum in payment and satisfaction of the property so converted. To this defence the plaintiff simply joined issue and the matter there-

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by put in contestation was the truth of the matter alleged by way of defence. As to the sum of $12,233.73 being the balance in which alone the plaintiff was interested, that was admitted to be correct as was also the statement that the defendant had paid $42,000.00 thereof, so that the issue was in fact limited to the correctness of the defendant's counter claim which the learned judge who tried the case found for the defendant. Upon this issue, therefore, it is clear that the plaintiff's action should not have been dismissed, but that a verdict should have been found and judgment given for the defendant in terms affirming the establishment of his defence and his counter claim, for the defence admitted the plaintiff's cause of action to the amount of $233.73 unless he should establish his counter claim, and displaced the cause of action so admitted only by establishing his counter claim. He was, therefore, clearly entitled to judgment on that issue.

Now, the second of the above causes of action which is set out in the 9th paragraph of the plaintiff's statement of claim is also a simple money demand for a balance claimed to be due from the defendant to the plaintiff upon the agreement of the former and in respect of monies alleged to have been received by the former to the use of the latter.

The defendant's statement of defence to this cause of action, in short substance, alleges that $8,470.02 was the amount of the proceeds of the sale of the 48,030 feet of timber in the agreement, set out in plaintiff's statement of claim, stated to be the balance remaining in A. F. A. Knight's hands for sale, and that upon demand made by the plaintiff on the defendant for that sum the defendant gave the plaintiff an order upon the said Knight for that sum, and that the plaintiff accepted the order and applied to Knight for the same and

received from him $4,500.00 on account of such sum of $8,470.02 and the plaintiff thereby agreed to look to said Knight for the payment of the balance of the said sum of $8,470.02 *and discharged the defendant from the payment of the same* but

In case this honorable court should be of opinion that the defendant is still liable for the payment of the said balance the defendant now brings into court, ready to be given to the plaintiff, the sum of $4,300 and states that the same is sufficient to pay in full all claims of the plaintiff in respect of the balance of the monies received by the said A. F. A. Knight and all interest thereon and of all damages for non-payment thereof or for omission to credit the same on the defendant's claim pursuant to the deed set out in the 7th paragraph of the plaintiff's statement of claim.

The only replication which the plaintiff makes to this statement of defence is joinder in issue.

Now, it is to be observed that the defendant does not set up any defence of the nature that he never had been liable to the plaintiff, but that Knight alone was, in respect of the proceeds of the sale of the 48,030 feet of timber; on the contrary, the defendant admits his original liability and his omission, as alleged in plaintiff's statement of claim, to credit the amount on the defendant's claim pursuant to the deed in the statement of claim mentioned, and he professes to avoid this original liability and such his omission to credit the amount by alleging that the plaintiff had taken the draft on Knight for $8,470.02 and had taken part from him, and had agreed to look to him for the balance, and had discharged the defendant therefrom; but in case the defendant should fail to establish this discharge and the court should hold that the defendant's original liability still remains then he pays the $4,300.00 into court as sufficient *to satisfy* him for the balance of the proceeds of the sale of the timber, for *all damages occasioned by defendant's omission to credit the same on his claim* as he had agreed to do by the deed set out in the plaintiff's statement of claim. Upon this defence

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I am of opinion that the plaintiff was, upon the authority of *Goutard* v. *Carr* (1) and of *Wheeler* v. *United Telephone Co.* (2), entitled to withdraw, as he did, the amount so paid into court, but whether he was or not, was in truth unimportant in the present case, for upon the issue raised by the plaintiff's joinder in issue to the defendant's defence to the cause of action all that was in issue was, in substance, whether or not the plaintiff had discharged the defendant, as alleged, from the original liability which, by his statement of defence, he admitted, and if not whether the amount paid into court was or not sufficient to pay everything demanded by the plaintiff in respect of the matters to satisfy which it had been paid in; and as the defendant had to abandon as incapable of proof his defence as to his having been discharged by the plaintiff as asserted in his statement of defence, he, by the express terms of that statement, admitted the plaintiff's absolute right to the $4,300.00 so paid into court. But as the plaintiff offered no evidence in support of the issue that the amount so paid into court was insufficient to pay for all damages and demands in respect of which it was paid in, the defendant was entitled to a verdict and judgment in his favor upon this part of this issue joined in respect of the cause of action to which this defence is pleaded.

In answer to the third cause of action, which is set out in the 10th paragraph of plaintiff's statement of claim, the defendant, in short substance, pleads by way of defence that the instrument sued upon in the 1st and 2nd causes of action, above set out, was executed to secure all claims and demands of every nature and kind whatsoever arising in respect of the deed in the 10th paragraph of plaintiff's statement which upon a full and complete account between the plaintiff and defendant were stated and settled and

(1) 13 Q. B. D. 598 n.

(2) 13 Q. B. D. 597.

secured by the deed of the 29th July, 1881, set out in the 7th paragraph of the plaintiff's statement of claim. To this statement of defence the plaintiff having simply joined issue the sole question was as to its truth, and the learned judge having found in favor of the defendant, upon this issue also defendant was entitled to judgment being entered in his favor thereon.

In answer to the 4th cause of action which is set out in the 11th paragraph of the plaintiff's statement of claim, the defendant pleads by way of defence an account stated and settled between the plaintiff and defendant in respect of this cause of action, at which statement of account the defendant was found indebted to the plaintiff in the sum of $1,912.00 which sum the defendant paid to the plaintiff and the plaintiff accepted in full satisfaction of all claims and demands whatsoever in respect of this part of his claim and as set out in the 11th paragraph of his statement of claim. On joinder in issue to this defence the defendant appears to have been entitled to judgment also in his favor. To the 5th and last cause of action as set out in the 12th paragraph of the plaintiff's statement of claim, the defendant pleads that all the matters comprised in this cause of action were taken into consideration and included in the account stated and settled between plaintiff and defendant prior to the execution of the deed of the 29th July, 1881, and that the amount by that deed secured to be paid to the plaintiff was the balance found due to him upon the stating and settling of such account. Upon issue joined by the plaintiff to this plea also the learned judge has found the issue in favor of the defendant so that the defendant was entitled to judgment upon this issue also and upon the whole record, while the plaintiff was entitled to retain the money paid into court the defendant was entitled to judgment upon all of the above issues. The defen-

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dant, however, does not appeal against the judgment of the court below which, instead of giving judgment for the defendant on the above issues, has dismissed the plaintiff's action; on the contrary he rests his appeal which is against so much of the judgment as refuses to order repayment to him of the money paid into court by him, upon the judgment dismissing the plaintiff's action. On the other hand, the plaintiff's cross appeal seems to have been taken for the sole purpose of insisting upon his right to have recovered upon the issue joined on the second of the above causes of action in the plaintiff's statement of claim mentioned —the sum which was paid into court, if it had not been paid in, and taken out by the plaintiff, but if he should succeed in resisting the defendant's appeal in respect of his claim to have the money so taken out of court repaid to him, the plaintiff admits that he can establish no further claim against the defendant. Substantial justice will therefore be obtained by dismissing both appeals with costs and leaving the judgment to remain as pronounced in the court below although it is not in the precise form which, upon the issues joined, that judgment should have assumed.

Appeal dismissed with costs.

Solicitors for appellant: *Pinhey, Christie & Christie.*

Solicitors for respondent: *Gormully & Sinclair.*