

1888      cised in France? It appears to me that would be impossible.  
 WERLE & Co.      There is no sale in France and there are no contracts made in  
                          v.      France; there is no receipt of money in France. It appears to me  
 COLQUHOUN.      the profits are earned in England in respect of goods ordered in  
                          —      England, sent to England and paid for in England by English  
                          Lopes, L.J.      customers. I think, therefore, the profits in question arise from a  
                               trade exercised in England and are assessable.

I wish to add that I entirely agree in what was said by the Master of the Rolls, namely, that there may be profits arising from a trade exercised in England without there being any establishment in this country.

With regard to ss. 41 and 44, I do not know that it is necessary to say anything, as we were not asked any question with regard to them, but they were used by Mr. Cohen in his argument, and I have only to say that I entirely agree with what was said by Mr. Justice Mathew in the interpretation he put upon those sections.

*Appeal dismissed.*

Solicitors for appellants: *Hollams, Son & Coward.*

Solicitor for Crown: *The Solicitor of Inland Revenue.*

A. M.

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[IN THE COURT OF APPEAL.]

*March 27, 28.*

ANLABY AND OTHERS v. PRÆTORIUS.

*Practice—Defence, Time for delivery of—Specially indorsed Writ—Irregular Judgment, setting aside—Power to impose Terms on Defendant—Orders III., r. 6; XX., r. 1; XXI. rr. 6, 7; LXX. r. 1.*

The service of a writ specially indorsed under Order III., r. 6, is delivery of a statement of claim to the defendant within the meaning of Order XXI., r. 6; so that the defendant has ten days from the time limited for appearance within which to deliver his defence.

Where a plaintiff has obtained judgment irregularly, the defendant is entitled *ex debito justitiæ* to have such judgment set aside; and the Court has only power to impose terms upon him as a condition of giving him his costs.

So *held* by Fry and Lopes, L.JJ., reversing the decision of the Queen's Bench Division.

APPEAL from the Queen's Bench Division.

Action to recover 67*l.*, money lent by the plaintiffs to the

defendant. The writ was specially indorsed, under Order III., rule 6, in the usual form. The indorsement was headed "Statement of Claim" and named the place of trial, and was signed by the plaintiffs' solicitors.

The writ was issued on January 14, and served on January 21, and the defendant entered an appearance on January 26. On February 7 the plaintiffs entered judgment on the ground that the defendant had not delivered his statement of defence within the prescribed time. The defendant delivered statement of defence on February 7, after judgment had been entered, but the plaintiffs refused to accept it. On February 9 the defendant took out a summons to set aside the judgment, and asking that the costs should be paid by the plaintiffs. The master dismissed that summons with costs, and the defendant's appeal to Hawkins, J., at chambers, was also dismissed with costs. The defendant then appealed to the Divisional Court (Huddleston, B., and Manisty, J.), who ordered that the judgment entered and execution (if any) issued should be set aside if the sum of 34*l*. was paid into court within four days, and that the costs should be costs in the cause, but that the appeal should be dismissed with costs if the money was not so paid into court. The defendant paid that sum into court and appealed, asking that the judgment should be set aside, and that the costs of the application should be paid by the plaintiffs.

*J. G. Witt*, for the appellant. The judgment entered by the plaintiffs was premature and irregular. The special indorsement on the writ was a statement of claim within the meaning of Order XXI., r. 6, and the defendant had therefore ten days from the delivery thereof, or from the time limited for appearance, whichever should last happen, within which to deliver his defence. The last day for appearance was January 28, so that the entry of judgment on February 7 was within the ten days, and therefore wrongful. By Order XX., r. 1, where a writ is specially indorsed under Order III., r. 6, "no further statement of claim shall be delivered, but the indorsement on the writ shall be deemed to be the statement of claim." So also by Order XXVIII., r. 1, "the plaintiff may, without any leave, amend his statement

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of claim, whether indorsed on the writ or not," under certain specified conditions; and in App. C., s. iv., under the heading "Statements of Claim," forms of statements of claim which may be specially indorsed on the writ, under Order III., r. 6, are given. It is clear, therefore, that for the purpose of determining the time for delivery of the defence, the service of the writ was delivery of a statement of claim to the defendant. The judgment having been wrongfully obtained the defendant is entitled to have it set aside *ex debito justitiæ*, and the Court below had no power to impose terms upon him as a condition of setting it aside.

[He referred to *Veale v. Automatic Boiler Feeder Company*. (1)]

*Israel Davis*, for the respondents. A writ specially indorsed under Order III., r. 6, is not a statement of claim within the meaning of Order XXI., r. 6. The special indorsement is only in lieu of a statement of claim, and the defendant cannot require delivery of a statement of claim where the writ is so specially indorsed. A writ so indorsed has always, in practice, been treated as a writ and not as a pleading. It may be served on the defendant at any time, and is not affected by the rules which regulate the delivery of pleadings: *Murray v. Stephenson*. (2) It is submitted, therefore, that this case properly comes within Order XXI., r. 7, which provides that where the defendant has neither received nor required delivery of a statement of claim he must deliver his defence within ten days after his appearance, which period in the present case expired on February 5. The judgment was therefore properly obtained on February 10.

Next, if the entry of judgment was wrong, the Court below had power to set it aside on terms under Order LXX., r. 1, and having exercised their discretion, this Court ought not to interfere; and the cases shew that, if the defendant is entitled *ex debito justitiæ* to have the judgment set aside, the Court has power to impose terms because by his summons he asked to have it set aside with costs: *Abbott v. Greenwood* (3); *Bartlett v. Stinton* (4); *Pearce v. Chaplin*. (5)

(1) 18 Q. B. D. 631.

(3) 7 Dowl. 534.

(2) 19 Q. B. D. 60.

(4) Law Rep. 1 C. P. 483.

(5) 9 Q. B. 802.

Further, the defendant has acted upon the order of the Court below by paying the 34*l.* into court, and is therefore precluded from questioning that order. He might have allowed execution to issue, and then brought his action for trespass.

*J. G. Witt*, in reply, was asked to confine his argument to the effect of Order LXX., r. 1.

A wrongful entry of judgment is not within Order LXX., r. 1., which only applies where the parties have made some slip or blunder in their proceedings, and the party making it comes to ask the favour of the Court. Here the Court below ordered the defendant to pay money into court on the erroneous view that the judgment was regular, and the defendant must ask as an indulgence to have it set aside. The distinction between cases in which the plaintiff has obtained judgment improperly, and cases in which, though he was strictly entitled to enter judgment, the Court think that some relief should be given to the defendant, is pointed out in *Smith v. Sydney*. (1)

[He also referred to *Cash v. Wells*. (2)]

FRY, L.J. The most material question raised in this case is one of practice. The plaintiffs delivered to the defendant a writ, and indorsed upon it was what has been described, correctly I think, as a statement of claim. The indorsement states the nature of the claim and the amount claimed, and all the particulars which a statement of claim is required to give. The writ was issued on January 14 and served on the defendant on January 21, and the defendant entered an appearance on January 26. The question turns on Order XXI., rr. 6, 7, and on what was the earliest date upon which the plaintiff could enter judgment in default of delivery of the defence. Rule 6 is as follows: "Where a statement of claim is delivered to a defendant he shall deliver his defence within ten days from the delivery of the statement of claim, or from the time limited for appearance, whichever shall be last, unless such time is extended by the Court or a judge." Now the last day for appearance was the 28th, and judgment was entered on February 7. If, therefore, the time for delivery of defence ran from January 28, the entry of judgment was

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(1) Law Rep. 5 Q. B. 203.

(2) 1 B. & Ad. 375.

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premature. Rule 7 provides that "a defendant who has appeared in an action, and who has neither received nor required the delivery of a statement of claim, must deliver his defence (if any) at any time within ten days after his appearance, unless such time is extended by the Court or a judge." We have, therefore, to consider whether a statement of claim was delivered in this case. If it was not, the time for delivering the defence ran from January 26, and the judgment was regular. I am of opinion that a statement of claim was delivered by the plaintiff when the writ was served on the defendant. Order xx., r. 1, I think, determines the point. It is: "Where the writ is specially indorsed under Order III., r. 6" (which was the case here), "no further statement of claim shall be delivered, but the indorsement on the writ shall be deemed to be the statement of claim." The words, "no further statement of claim shall be delivered," imply that the indorsement is a statement of claim, and the succeeding words make it still more clear by providing that the indorsement "shall be deemed to be the statement of claim." I am clearly of opinion that the indorsement on the writ was a statement of claim, and, therefore, that rule 6 of Order xxi. applied to the case. It follows that the defendant had ten days from the delivery of the statement of claim, or from the time limited for appearance, within which to deliver his defence; and as the writ was served on January 21, and the time limited for appearance was January 28, the last day for delivering the defence was ten days from January 28, and the judgment entered on February 7 was premature and irregular. In such a case the right of the defendant to have the judgment set aside is plain and clear. The Court acts upon an obligation; the order to set aside the judgment is made *ex debito justitiæ*, and there are good grounds why that should be so, because the entry of judgment is a serious matter, leading to the issue of execution, and possibly to an action of trespass. We were pressed with the argument that Order lxx., r. 1, gives a discretion to the Court which applies here. Rule 1 provides that "non-compliance with any of these rules, or with any rule of practice for the time being in force, shall not render any proceedings void unless the Court or a judge shall so direct, but such proceedings may be set

aside either wholly or in part as irregular, or amended, or otherwise dealt with in such manner and upon such terms as the Court or a judge shall think fit." But in the present case we are not concerned with an instance of non-compliance with a rule, nor with an irregularity in acting under any rule. The irregular entry of judgment was made independently of any of the rules; the plaintiff had no right to obtain any judgment at all. I do not think, therefore, that the case comes within r. 1, and we must consider what is the right practice without reference to that rule. There is a strong distinction between setting aside a judgment for irregularity, in which case the Court has no discretion to refuse to set it aside, and setting it aside where the judgment, though regular, has been obtained through some slip or error on the part of the defendant, in which case the Court has a discretion to impose terms as a condition of granting the defendant relief. But although the Court is bound to set aside an irregular judgment *ex debito justitiæ*, it has always exercised a discretion as to costs, and has imposed terms as a condition of the exercise of that discretion—a common term being that the defendant shall not bring any action. It was contended that the discretion arises, not when the Court awards costs, but when it is asked to award them, and the language of Erle, C.J., in *Bartlett v. Stinton* (1) was relied on in support of that contention. It is to be observed that in that case the judge had made an order for costs in favour of the defendant upon the terms of his bringing no action, and the Chief Justice dwells upon that fact in his judgment. I do not think he meant to say that if an order for costs had been refused the judge could have imposed terms. In *Cash v. Wells* (2) the defendant had obtained a rule calling upon the plaintiff to shew cause why a judgment and subsequent proceedings thereon should not be set aside as against good faith, with costs, and the plaintiff asked the Court to impose as a condition upon the defendant, that he should not bring any action. The defendant refused to accept those terms. Bayley, J., said, "We cannot impose them without the defendant's consent. He applies to us *ex debito justitiæ* to have proceedings set aside which are against good faith. We are not compelled, however,

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(1) Law Rep. 1 C. P. 483.

(2) 1 B. &amp; Ad. 375.

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to give him the costs of his rule; and unless he will consent not to bring any action, we make this rule absolute without any costs." I think the true view is that where the Court gives costs there is power to impose terms on the defendant, but where costs, though asked for, are not given there is no such power.

It was further contended that the defendant had availed himself of the order of the Court below in this case, and therefore had precluded himself from appealing against that order. The action was brought for 67*l*. The defendant admitted that he owed 34*l*., and the Court thereupon ordered him to pay that sum into court. He paid it in, and it is said that by so doing he acted upon the order of the Court, and cannot afterwards seek to set it aside. I do not think that that is a just conclusion to draw. He was in the predicament of being compelled to pay in the 34*l*., or the judgment against him would stand. In paying it in he was acting under the compulsion of the order—not acceding to it.

The learned judges in the court below appear to have thought that it was unnecessary to decide the point of practice, and to have treated the case as though they had power to make a modified order which should meet the justice of the case. For the reasons I have given, I cannot assent to that view. I am of opinion that the appeal should be allowed.

LOPES, L.J. I am of the same opinion. The main question, which involves a somewhat important point of practice, is whether the case comes within r. 6 or within r. 7 of Order XXI.; in other words, whether the indorsement on the writ of summons is, or is not, a statement of claim. I think that Order XX., r. 1, decides that question. The words, "no further statement of claim shall be delivered," mean that that which has been delivered, namely, the writ specially indorsed under Order III., r. 6, is a statement of claim; and the words, "the indorsement on the writ shall be deemed to be the statement of claim," make the matter still clearer. I am, therefore, of opinion that a statement of claim was delivered within Order XXI., r. 6; and that the judgment entered by the plaintiff was premature and irregular.

I entirely agree that Order LXX., r. 1, does not apply here. It

was meant to apply where a party had made some blunder in his proceedings, as by delivering a pleading too late; but the present case seems to me altogether outside the operation of r. 1, because the judgment was entered prematurely, without any right whatsoever. To obtain that judgment was a wrongful act, not an act done within any of the rules. The defendant is therefore entitled *ex debito justitiæ* to have it set aside. I cannot accede to the argument that the defendant is precluded from enforcing his right to have the judgment set aside because he has availed himself of the order of the Court by paying 3*l.* into court under that order. He paid in that sum because he could not help himself. As to costs, they are clearly within the discretion of the Court. The defendant is willing to allow the plaintiffs to take the 3*l.* out of court, and I think that he ought to have his costs. I entirely agree with the judgment of my brother Fry, and I am of opinion that the defendant is entitled to have the judgment set aside with costs.

*Appeal allowed.*

Solicitor for appellant: *Edward Betteley.*

Solicitors for the respondents: *Wilkinson & Dresser.*

W. A.

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BETTS *v.* ARMSTEAD.

*April 19.*

*Adulteration—Scienter—Sale of Food and Drugs Act, 1875 (38 & 39 Vict. c. 63), s. 6.*

By s. 6 of the Sale of Food and Drugs Act, 1875, "no person shall sell to the prejudice of the purchaser any article of food or any drug which is not of the nature, substance, and quality of the article demanded by such purchaser, under a penalty not exceeding 20*l.*":—

*Held*, that an offence within that section was committed, although the seller did not know that the article sold was not of the nature, substance, and quality demanded.

CASE stated by justices of the town of Nottingham under 42 & 43 Vict. c. 49.

The respondent sold to the prejudice of the purchaser a loaf containing a quantity of alum, and he was prosecuted therefor under s. 6 of the Sale of Food and Drugs Act, 1875. He stated in defence that he did not know that the bread contained alum,