Peck R 3. Johns (N Y) ch. R. 415. Millspaugh vs Mc Burney Paige ch. R 512. Erwin vs Vent. 6. Mumford R 269 – Kemp vs Squire 1 Desaus 205. In a Court of Law the Court will strike out a judgment obtained by default upon affidavits – 3 Johns Cases 92 – 6 Johns Rep. 129 - 131. – 14 Johns Rep 342-3. Cairns Rep 95. Tidds Practice 508 – 4 Burr. R 1996 – In the case of Oliver vs Palmer & Hamilton 11 Gill & Johns 142. 147 this question is discussed by the Court of Appeals, 1 Johns ch. R 541. 201 – 3. Johns ch. R. 424. 415. 2 Brams Rep. In this case the surprise arose from the non appearance of defendant by some mistake or misunderstanding as appears by the affidavit of Petitioner. The petitioner has merits and in all such cases, if the Court be satisfied of that fact the judgment or decree will be stricken out and the party let in to try the case upon the merits as matter of Course, as is fully shown by all the authorities referred to upon the question. To a legal mind it would be a monstrous proposition to submit to a Court of Equity, that if a plaintiff either in a Court of Law or Equity should obtain an unjust judgment or decree by default through mistake surprise or inadvertence of defendant, that the Court should refuse upon application during the term of which said judgment &c was obtained to strike out &c, and let defendant in to try the case on the merits. No injury could result from such a course, but it would be promotive of justice and prevent absolute injury and perhaps ruin to defendant. It is respectfully submitted that it has been the uniform practice in this State and elsewhere for Courts both of Law and Equity to strike out judgments and decrees during the term &c. in cases similar in circumstances to the one now before this Court, as is fully shown by the authorities referred to in this case. Courts usually, in cases like this strike out or open the decree during the term &c upon the affidavit of defendant that he has a complete defence upon the merits: but in this case the defendant is ready and wishes to produce proof before the Court, to be taken in such way and manner as the Court shall order, to be read, at the consideration of the petition of defendant to prove that the Complainant has not a shadow of claim to sustain his decree obtained in this case under the circumstances &c

J. M. Palmer Solr for Petitioner
Wm Tabler "

And afterwards to wit, at the twenty first day of January in the year of last aforesaid the said defendant by his Solicitor aforesaid filed in Court here a prayer of appeal in writing in the following words and figures following, to wit,

John A. Castle vs William Tabler } No 2539 Equity
In the Circuit Court for Frederick County
Sitting as a Court of Equity

William Tabler the Defendant in this case by his Solicitor prays an appeal to the Court of Appeals of this State from the decree passed and made in this case on the 20th day of August 1855 by the said Court, and that the Clerk of said Court file in said case this prayer for an appeal this 21st day of January 1856 and that a transcript of the record in this case be transmitted to the Court of Appeals

J. M. Palmer Solr for William Tabler "

And the said cause was thereupon further continued by regular continuances from term to term of the said Court until the second Monday of February in the year eighteen hundred and fifty seven, and afterwards to wit, on the third day of March in the year last aforesaid the Court passed the following order, to wit,

John A. Castle vs William Tabler (of Lewis) } No 2539 Equity
In the matter of the petition of the Defendant to strike out the decree &c

The bill in this case was filed and the Subpoena issued on the 30th January 1854 returnable on the second Monday of February 1854 and was duly served and returned by the Sheriff – An Interlocutory decree was passed on the 28th of August 1855 the February Term to which the Subpoena was returned having passed – all answers were issued, testimony taken and a final decree passed on the 20th of August 1855, on the 4th October 1855 a petition was filed by defendant seeking to strike out the decree and asking that he might be allowed to come in and make his defence to the original Bill. The defendant does not allege in his petition that the Subpoena was not served on him as appears by the Sheriffs return but that if it was served on him he did not understand it or to that effect. The Complainant on the 8th day of October 1855 filed his answer to the defendants application and filed therewith the affidavit of the Deputy Sheriff shewing that the Subpoena had been duly served on Complainant and stating the circumstances which proved that there could have been no misunderstanding on the part of the Defendant. Other matters are alleged in the defendants petition and denied in the defendants answer, but they are not deemed material to the question before the Court, That is whether any cause appears to relieve the Defendant from the effect of the act of 1820 ch 61. The Complainant is entitled to the benefit of the provisions of that act provided he has pursued its provisions which the proceedings in the cause shew that he has done. The Subpoena was duly returned Summoned the defendant failed to appear in person or by Solicitor according to the exigencies of the Writ – That the Subpoena was served is not been directly denied by the defendant, and is affirmed as well by the return as the affidavit of the Deputy Sheriff – The final decree was duly obtained.

On the 13th October 1855. the defendant filed another petition asking that a Commission might issue to take evidence which he proposed to offer to prove the allegations in his first mentioned petition that he had a good defence on the merits to the original Bill of Complaint for the purpose of justifying and strengthening his affidavit as to the surprise & mistake by which the decree was obtained. No mistake or surprise is alleged except in regard to the service of the Subpoena. It is not perceived with what propriety evidence can be allowed to be taken setting up a defence to the Bill on its merits in the same manner as if the Defendant had appeared and answered or what purpose such purpose could answer. It could not shew that the Subpoena had not been duly served by the Sheriff, nor could it shew that the defendant had appeared and answered.

It is thereupon this third day of March 1857 adjudged and