

much as was necessary to satisfy the judgment recovered by Allworth against Asa Howard and others. At the time appointed Burke, the garnishee, appeared before the judge of the county court in chambers, pursuant to the summons. He admitted that there was a debt of a certain amount to be paid by him to Asa Howard, but alleged that it was only payable by instalments, for payment of which the time had not arrived. At the said time Mr. Edward Horton appeared before the judge, and claimed a right to be heard for the purpose of shewing that the debt could not be attached at the instance of Allworth, or any other execution creditor, on the ground that it had been assigned to him, Horton, by Howard, before the order to attach had been issued or served. The right of Mr. Horton to appear for such purpose was objected to by Mr. Abbott, attorney for Allworth, and by Mr. Stanton, who had several attaching orders for the purpose of attaching part of the same money in the hands of Burke.

The consideration of the application was postponed to give time to consider as to the objections urged to Mr. Horton having a right to be heard, and before the time appointed for proceeding with the hearing the objection was abandoned by Messrs. Abbott and Stanton; and then Mr. Horton produced an affidavit shewing that he had sold some lots of a property known as the Thompson farm to Howard; that Howard then agreed to hand him over the note of \$500 which he held against Burke, of which Horton as his attorney was to collect \$200 to pay himself for the lots, and the balance to be applied in some other suit in Horton's hands for collection: that relying on this arrangement made before Howard absconded, he, Horton, had procured conveyances to be made to one Thompson, to whom Howard was indebted, at the request of Howard, the purchaser of the lots, and that such arrangement appeared in Howard's hand-writing entered in a book in his own possession, but found amongst his papers by his wife after he had absconded.

Mr. Abbott then, in reply to Mr. Horton's claim and affidavit, filed an affidavit of his own, stating that Asa Howard absconded from Canada some months previously: that a short time ago, and long after Howard absconded, Edward Horton, Esq., who claimed a portion of the money due by the garnishee, Burke, to Howard, and who has made an affidavit in the matter, told him, Abbott, that he did not hold any assignment of any portion of the moneys owing from the said Burke to the said Howard; that he, Abbott was informed and believed that the Thompson farm mentioned in the affidavit of the said Edward Horton, including the two town lots therein stated to have been sold by the said Edward Horton to the said Howard, was on the 21st day of March last the property of the said Edward Horton, Edward M. Yarwood, William K. Kains, and David John Hughes, Esquire: that they were then, and had been for a long time, and still were the parties beneficially interested therein, and that he had good reason to believe that the name Horton & Co., in the memorandum referred to in the said affidavit of the said Edward Horton, meant the persons mentioned in the foregoing paragraph.

On that affidavit being read the judge objected to his name being made use of and mixed up in the matter, and asked Mr. Abbott whether he meant that he was interested in the application which Horton was making to prevent the order being made for paying over the money to Burke, and Mr. Abbott replied that he had made the affidavit to contradict the affidavit of Mr. Horton. Mr. Hughes then stated that if it was intended to be alleged that he was interested in the matter he could not proceed any further with it: that if he was interested he ought not to proceed with it, and if he was not that affidavit should be withdrawn; and he told Mr. Abbott to enquire from his brother-in-law Mr. Kains: that he knew every thing about the purchase of the Thompson farm, and could give every information on the subject; and that he would adjourn the further hearing of the summons till he, Abbott, should have time to enquire on the subject of the Thompson farm, and ascertain as to the alleged interest of the parties therein.

The consideration of the application was further adjourned, and Mr. Abbott then offered another affidavit similar in all respects to the other, except that the name of Mr. Hughes was omitted, and the words "and another" inserted in its place. The judge was requested to proceed on that affidavit, but declined doing so, alleging that he could not proceed so long as the charge of interest

remained directly or indirectly, and he handed back the papers which had been laid before him in support of or against the summons at the instance of Allworth. Subsequently an application was made to the judge to allow another barrister to dispose of the matter, but Mr. Ellis, who was then acting for Mr. Horton, would not consent to that course. Finding that they could not proceed to get an order for their clients to have the money in Burke's hands paid on the judgments recovered against Howard, Mr. Abbott and Mr. Stanton again applied to Mr. Hughes to proceed in adjudicating on the several summonses which were pending before him, and, as Mr. Hughes says, they did so in a menacing manner, stating that Mr. Hughes compliance *could save more troublesome proceedings*, while they allege that no threat of any kind was used by either of them, and that all that either of them did was to request Mr. Hughes to re-consider the proceedings.

Mr. Hughes then told the parties he could proceed no further under the circumstances, and he drew out or dictated a statement to the clerk of Mr. Abbott or Mr. Stanton referring to matters of a personal nature, and the unhappy difference existing between them; and then for the first time, as far as can be seen from the papers, objected to proceed on account of Mr. Edward Horton being connected with him by marriage, and Mr. Horton being personally interested in the result. In closing this paper Mr. Hughes makes a statement amounting to a species of irritating reply, which I think a sense of his own position ought to have prevented his making: "Having said this much I am now prepared to await the result of the troublesome proceedings with which the parties yesterday thought proper to alarm me, and which I have no doubt, indeed I have too much reason to feel, have not been forbore or spared on my account, or from any apprehension that they might be troublesome to me."

There are various other statements and accusations contained in the affidavit of the judge to compel whose action in a portion of his judicial duty a mandamus in this case has been applied for, and whatever may be the bitterness of feeling or the hostility existing towards him on the part of the practitioners making the application, there is too much reason to fear that there is not a better or more kindly disposition entertained towards them by him. But while I must regret the existence of such evident hostility between gentlemen whose professional duties must bring them very often together, and while I cannot but think that a proper and conciliatory spirit on either side would long since or might certainly long since have led to the removal of the obstacles which have caused a stay of proceedings undoubtedly injurious to the parties interested, it is necessary without further delay to decide whether on the affidavits before us a mandamus can properly be issued to compel the performance of those acts of duty which the parties desire to have performed by the judge of their county.

I am not surprised that upon the reading of Mr. Abbott's affidavit, stating who the parties were in whom the title of the Thompson farm was vested on a particular day, the judge should make the enquiry whether it was intended to impute to him an interest in the subject matter of Mr. Horton's claim to the money payable by Burke to Howard for certain lots of that farm sold by Horton to Howard, and afterwards conveyed by the proprietors to one Thompson to discharge a debt of Howard. The terms of that affidavit are such that it is difficult to imagine what other object could have been intended by it. The disavowal of that object, while Mr. Abbott declined to withdraw that portion of it, which, as it appears to me, was useless to his case, could scarcely remove the impression that such must have been its original intention, and while that continued to be the case, I cannot say that the judge acted improperly in so bearing to act in a matter in which a charge of personal interest might even seem to be fastened upon him. The title to the Thompson farm might be vested in him as one of four proprietors, and yet he might not be interested in the proceeds arising from the sale by the managing owner of two small lots worth only £50 together. If the parties were desirous to get the money they had in view for their clients on the attaching order they might surely have abandoned such an affidavit, but the pertinacity in adhering to it would seem to indicate an intention to compel the judge to abstain from adjudicating on the question on which their right to the money depended, or to compel him, if he did so adjudicate, to submit to the charge of acting in