

patient, and a claim by solicitors to lien for costs on the money paid into Court by the Garnishees.

Held, 1. The municipality had the right to recover under s. 93 of the Public Health Act.

2. Solicitors have no lien for their costs in Division Court proceedings.

Province of Manitoba.

KING'S BENCH.

Richards, J.]

FOX v. ALLAN.

[Nov. 19, 1902.]

Weight and Measures Act—Burden of proof of illegality — Voluntary payment—Appropriation of payments.

County Court appeal. The chief part of the plaintiff's claim was for the price of threshing oats and wheat for defendant, and the defence was that the quantities had been ascertained in a manner prohibited by s. 21 of the Weights and Measures Act, R.S.C. c. 104, and that therefore the plaintiff could not recover. It appeared from the evidence that the oats threshed had been measured by the bag, but it also appeared from a statement rendered to plaintiff by defendant that he had credited plaintiff with the amount of his account for threshing the oats, and charged him with certain items, dated prior to any other credit to plaintiff, and amounting to about the same as the price of threshing the oats.

Held, following the rule in *Clayton's case*, that defendant had appropriated the amount of his said charges in settlement of the price of threshing the oats and, following *Hughes v. Chambers*, 14 M.R. 163, that he could not now set off such amount against the price of threshing the wheat.

As to the threshing of the wheat, the bargain was that defendant was to pay 5¼ cents per bushel by car measurement if it was clean, if not, then by bag measurement, neither of which mode would be legal under the statute. The defendant offered no evidence, and there was no express testimony as to how the wheat had been measured, but the trial Judge held that the proper inference was that the measurement had been by the bag. Defendant in the statement rendered to plaintiff had credited him with the threshing of 4,597.20 bushels of wheat at 5¼ cents per bushel.

Held, following *Hanbury v. Chambers*, 10 M.R. 167, that the trial Judge was not bound to draw such inference in a case where it would enable defendant to evade payment of an honest claim; that, as there was no conflict of testimony, the appellate Judge was free to follow his own views as to the conclusions to be drawn from the evidence; that the