

the Criminal Code referred to only applies in cases where before that section procedendo would have issued to send back a record ; that the information was, therefore not properly before the justice when he issued the second summons thereon, and that a writ of prohibition should be issued.

As a general rule, if a record is filed in a Superior Court upon a certiorari it cannot be sent back or removed : 2 Hawk, Pl. c. 27, §. 63, and a procedendo will only be issued in two cases ; first, where a cause removed from an inferior to a superior Court by certiorari, or otherwise, is sent down again to the same Court, to be proceeded with there, after it has appeared that the defendant had not good cause for removing it. Second, where it appears from the return that the Court above could not administer the same justice to the parties as the Court below, and there would be a failure of justice if the record was not sent back : Tidd's Practice, 410 ; Paley on Convictions, 382. See also *Palmer v. Forsyth*, 4 B. & C. 401 ; *King v. Kenworthy*, 1 B. & C. 711 ; and *King v. Neville*, 2 B. & Ad. 299.

Appeal allowed and prohibition granted without costs.

*Maclean*, for the Crown.

*Wade*, for the defendant.

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BANK OF BRITISH NORTH AMERICA v. MCINTOSH.

*Growing crops, mortgage of—Bills of Sale Act, ss. 3, 4—57 Vict., c. 1, s. 2, (M.)—Mortgage of crops to be grown—Equitable security.*

Appeal from the County Court of Brandon.

The contest in this case was between the plaintiffs, execution creditors, and Massey-Harris Co., claiming under a chattel mortgage made in 1893, by which the defendant agreed that all the crops of grain which the mortgagor might from time to time grow on the land, until the whole principal and interest secured by the mortgage should be paid, should be included in the mortgage, and that the mortgagor would from time to time, upon request, execute such further mortgage or mortgages of such crops, to the intent that such crops should be effectually held as a security for the payment of the debt thereby secured.

Defendant had also given the claimant subsequent mortgages in 1895 and 1896, covering crops to be grown on the same land, and expressly reserving the rights, remedies and powers, legal or equitable, held by the mortgagee under any existing mortgage.

The plaintiffs' execution was not placed in the sheriff's hands until after the mortgage of 1893, and under it the defendant's crops grown in 1896 had been seized.

*Held*, that while the instrument of 1893 could give no title at law by itself, yet a Court of Equity would enforce the agreement to give the further security, and, considering that done which ought to be done, would attribute the title to the mortgagee, and restrain others from interfering with the property to his injury, and that such a title can be asserted in an interpleader issue against an execution creditor, and that s. 4 of the Bills of Sale Act, R.S.M. c. 10, had not the effect of doing away with the equitable principle referred to, which existed independently of the statute.