

Q. B. Divisional Court.] [Feb. 6, 1888.

ADAMS v. WATSON MANUFACTURING CO.

Debtor and creditor—Partnership—Change in firm—Assignment for creditors under 48 Vict. c. 26—Rights of assignee—Fraudulent preference—Amendment—Rule 103.

The firm of R. & Co., consisting of three members, supplied goods to the defendants up to the 2nd of December, 1885. After that date one of the members retired, and assigned his interest in the assets of the firm to the remaining partners, who continued to carry on business under the same firm name, and subsequently made an assignment to E. under 48 Vict. c. 26, for the benefit of their creditors. E. sold to the plaintiff the account supposed to be due from the defendants to R. & Co. for the price of the goods supplied, and the plaintiff brought this action for the amount of such account.

The defendants, however, set up that the goods in question were not purchased by them, but were consigned to them for sale by R. & Co., and that the proceeds of the goods actually sold were by instruction of R. & Co. remitted to H. & Co., to whom R. & Co. had assigned the proceeds of such sale, and submitted that H. & Co. should be made parties.

At the trial, it appeared from the evidence that the defence was undertaken and conducted for the defendants by H. & Co. The trial judge found that no debt had ever existed from the defendants to R. & Co., and dismissed the action, refusing to add H. & Co. as parties.

The plaintiff moved, by way of appeal from this judgment, seeking to make H. & Co. and E. parties, and to charge the defendants in the character of bailees of the residue remaining unsold of the goods consigned to them by R. & Co., in which he claimed an interest, subject to the right of H. & Co. if the transfer to them should be upheld, or absolute if that transfer should be set aside as a fraudulent preference.

Held, that these questions were "questions involved in the action" within the meaning of Rule 103, having regard to the manner in which the defence was conducted, and to the fact that the transfer to H. & Co. was set up in the defence, and that the plaintiff should be allowed to amend under that rule; but that the amendment must be confined to the plaintiff's possible rights.

By s. 7 of 48 Vict. c. 26, E. was the only person entitled to enforce the right of the creditors of R. & Co. to set aside the transfer to H. & Co.; but that transfer was not made by the same firm of R. & Co. which assigned to E.; the two estates were distinct, and the creditors of the original firm, not the creditors of the new firm, were those against whom only a fraudulent preference by the original firm could be declared void. The plaintiff could have no higher right than E., through whom he claimed, and could not therefore attack the assignment to H. & Co.

The plaintiff was granted leave to amend by adding H. & Co. as defendants, his claim against them to be limited to an account of their debt and of payments on account thereof, and as against the original defendants to obtain the unsold goods as soon as the debt due H. & Co. should be satisfied; and by adding E. as a plaintiff upon filing his consent, payment by the plaintiff of the defendants' whole costs to be a condition precedent. Falconbridge, J., *dubitante* as to the disposition of costs.

G. T. Blackstock, for the plaintiff.

John Crerar, for the defendants.

Street, J.]

Feb. 9, 1888.

*In re HOOPER AND ERIE & HURON
RAILWAY CO.*

Railway company—Notice of expropriation—Desistment.

A railway company at different times served H. with three several notices, under the Dominion Railway Act, stating that portions of land owned by him were required for the company's line. To each of the first two notices H. replied by a notice appointing an arbitrator, but stating such appointment to be expressly without prejudice to his right to insist that the company had no right to take any part of his land. The company served successive notices of desistment from all their three notices, and H. gave notice that he objected to the third notice of desistment, and claimed that the company had no right to desist from their third notice of expropriation.

Held, that the company had not exhausted their powers of desistment, but had the right to desist from their third notice. H. could