

Co. Ct.]

HEARD V. HEWSON.

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The report was read and received. Ordered for immediate consideration and adopted.

Ordered, that the curriculum proposed in the report be the curriculum for the time mentioned therein.

A letter from A. O. Jeffrey, Secretary of the Middlesex Law Association, enclosing a report of that Association, was read.

Mr. Meredith's notice of motion on the subject of a Law School and Law Examiners was read.

Mr. Meredith moves that the subject-matter of his said notice of motion and the said letter and report be referred to the Legal Education Committee to consider and report, and that the Committee be requested to confer with the deputation appointed by the Middlesex Law Association. Carried.

Mr. Read's notice of motion on the subject of the Law School was read.

Mr. Read moved that the subject-matter of his resolution be referred to the Legal Education Committee. Carried.

Mr. Moss moved that Mr. Meredith be added as a member of the Legal Education Committee. Carried.

Ordered, that a call of the Bench be made for the first Tuesday of next Term for the election of a Bencher in the place of James Bethune, Esq., Q.C., deceased.

CANADA REPORTS.

ONTARIO.

COUNTY COURT OF NORTHUMBERLAND AND DURHAM.

(Reported by W. R. Riddell, Barrister-at-Law.)

HEARD V. HEWSON.

Replevin Act—R. S. O. c. 537, sec. 18—*Capias in withernam, when to issue*—"Eloigned."

Under an *ex parte* order a writ of replevin was issued, directing the sheriff to replevy to the plaintiff a certain mare. Before the execution of the writ by the Sheriff, the defendant had sold the mare; whereupon the Sheriff made the following return to the writ: "The goods, chattels and personal property in the within writ mentioned, viz.—one brown mare, cannot be found by me in the possession of the defendant herein. The defendant informs me that he sold the same, and does not know where it now is. I do not know where said

property is, and cannot have a view of it to deliver it as I am herein commanded." On this return the plaintiff took out a writ of *capias in withernam*, following, *mutatis mutandis*, the form given as No. 3 in R. S. O. c. 53; instead of the words "eloigned by the said C. D. out of your county to places to you unknown," in form 3, were inserted the words "were sold by the said George Hewson, and that you do not know where the said property is, and cannot have a view of it to deliver it." Under this writ another mare of equal value with the former, and belonging to and in the possession of the defendant was seized by the Sheriff and delivered to the plaintiff.

Baines for the defendant obtained a summons to set aside the writ of *capias in withernam*, and the proceedings thereunder on the grounds:

1. That the return of the Sheriff to the writ of replevin did not warrant the issue of the writ of *capias in withernam*.

2. That the writ did not conform to the form required by the statute in that behalf.

3. That as appeared by affidavit the property to be replevied had not been eloigned by the defendant, but had been sold *bona-fide* and for good and valuable consideration, etc.

Riddell, for plaintiff, as to the first point relied upon F. N. B. ed. 1730, p. 157 [68] *le rit de replegiare de averiis G* (a); and referred, also, to Arch Q.B. Prac., 13th ed., pp. 891, 898.

As to the second point he referred to sec. 18 of R. S. O., c. 53, c. 18, which requires the writ of *capias in withernam* to be in the words or to the effect of Form 3, and the writ should conform to the actual return.

As to the third point he contended that "eloigned" here and elsewhere meant removed, whether *mala fide* or *bona fide*, and did not necessarily mean removed to avoid seizure.

Baines, *contra*.—"Eloigned" means removed *mala fide* and to avoid seizure, and the writ was never intended for such a case as this.

CLARK, Co. J., gave judgment to the following effect:—I can find no authority, and I have been referred to none, to bear out the contention that to warrant the issue of a *capias in withernam*, the property directed to be replevied must have been removed to avoid seizure. "Eloigned," *elongata*, means "removed"—the law dictionaries do not add "fraudulently," or words indicating *mala fides*. Fitzherbert is authority, if any were required, that the return of the sheriff to the writ of replevin warrants the issue of the *capias in withernam*. And the *capias* conforms to the actual return, which is what, I think, the Replevin Act, sec. 18, requires. The summons must be dismissed, with costs in the cause to the plaintiff in any event.