

And whatever effect a provision in such agreement reserving the rights of the creditor against the surety may have on the extension of time, it is idle as regards the stipulation for an increased rate of interest.

Lash, Q.C., for the plaintiffs.

MacLaren, Q.C., and *Shepley*, Q.C., for the defendant.

Chancery Division.

FERGUSON, J.]

[Dec. 22, 1893.]

IN RE COWAN & AFFIE.

Trial—Res judicata—Division Courts—Right to jury—Mandamus to judge.

Affie brought action against Cowan in the Division Court for \$45 for the price of certain hogs; Cowan counterclaimed \$5 for ten days' keep and feed of the hogs. The judge nonsuited the plaintiff, without saying anything about the counterclaim. Cowan then brought action in the same court against Affie, claiming \$32 for 80 days' keep of the hogs, inclusive of the ten days in respect to which he previously claimed the \$5, and he demanded a jury. Affie disputed the claim, and set up that it was *res judicata* in the former action. This latter action came up for trial, and when the jury was about to be called the defendant objected on the above ground, and the judge upheld the objection, and refused to allow the trial to go on, and entered judgment of nonsuit against Cowan, saying that he had intended in the former action to dispose finally of both claim and counterclaim, and was willing, if necessary, to amend his judgment to that effect so far as he had power to do so.

Held, on motion for a mandamus to compel the learned judge to proceed with the hearing of the second action above mentioned, that the issue whether there had been a former adjudication of the matter in dispute was one to be determined by the jury and not by the judge, the case being one in which the plaintiff was entitled to a trial by jury, the learned judge having and exercising the same powers as those possessed by a judge sitting at *nisi prius* in cases tried and that must be tried by a jury, and the judgment of a nonsuit having been pronounced without jurisdiction the case was still pending, and the order for a mandamus must be granted.

Aylesworth, Q.C., for the motion.

Watson, Q.C., *contra*.

STREET, J.]

[Dec. 22, 1893.]

SMITH & FORT WILLIAM SCHOOL BOARD ET AL.

Public school—Municipal corporations—Ultra vires—Contract of school board—54 Vict., c. 55, s. 116, Ont.

Held, that the school board of a city, town, or incorporated village have no power or authority to enter into any contract for the building of a schoolhouse until the necessary funds have been provided, under 54 Vict., c. 55, s. 116; and