O'Hare showed cause, and cited Bromage v. Prosser, 4 B. & C. 247, S. C., 6 D. & R. 296; Davis v. Fortune, Ib. 597; Arundell v. White, 14 East. 224; Bul. N.P. 13-14; 1 H. Bl. 282; Purcell v. Macnamara, 9 East. 361, S.C., 1 Camp. 199; Rees dem. Howell v. Bowen, 1 McLel. & Y. 383; Chambers v. Bernasconi, 1 Tyr. 335, 397; Tay. Ev., 1284, 1419, 1421, 1422.

ROBINSON, C.J., delivered the judgment of the court.

We are of opinion that there was not sufficient evidence to charge the defendant. All that was pretended to be in any manner proved was, that he made the affidavit upon which the writ was sued out. No other agency whatever in causing the arrest of the plaintiff was attempted to be proved against him. This being so, it was necessary to give legal evidence that he made the affidavit produced; that such an affidavit was sworn to by him. Now there was not only no evidence, beyond the production of the document, that such an affidavit was sworn to by any person, but there was no evidence that there was a person of the name of this defendant who was either a general agent of Moodie, the plaintiff in the writ, or who was specially authorized to act for him in this particular matter.

The entire want of apparent connection between this defendant and the record in the original action distinguishes this case from that cited, of Hennell v. Lyon (1 B. & Al. 182); and the judgments delivered in that case show that the very ground on which identity was *primâ facie* assumed in that case was wanting in this. The same remark applies, we think, to the case cited of Spafford v. Buchanan (3 O.S. 2[illegible]) in which case, as in Hennell v. Lyon, there was the fact that the affidavit produced purported to be the affidavit of the person who, as a party to the cause, must, in the ordinary course of things, have made the affidavit produced, in order to warrant the proceeding which had taken place; and the only question was whether the court ought not, in a civil proceeding, to assume in the first instance, and until the contrary was proved, that the affidavit was genuine.

Now in this case, until it was proved that the defendant Blacklock was an agent of Moodie, the plaintiff in the writ, there was no foundation for the presumption that an affidavit had been made by him, and no reason for assuming that the person by the name of Blacklock, whose name was signed to that paper, was such agent.

To hold that upon the evidence given at this trial there was a case established against this defendant, would be to go much beyond what was determined in Spafford v. Buchanan,—in which case, moreover, the judgment of the court was not unanimous.

Rule discharged.

BROCKVILLE AND NORTH AUGUSTA PLANK ROAD COMPANY v. CROZIER.

(Hilary Term, 19 Vic.)

(*Reported by C. Robinson, Esq., Barrister-at-Law.*)

16 *Vic., cap.* 190, *sec.* 2—*Tolls—Too high grade—Estoppel.*

Where the defendant, a stage proprietor, made use of a road constructed under the General Road Act, 16 Vic., cap. 190, with his vehicles, for months, without objection, and the Company had allowed the tolls to stand over for settlement periodically.

Held, that he could not object to pay on the ground that the grade of the road was in some places above that fixed by the statute.

Held, also, that the tolls in this case had been imposed, by resolution, with sufficient formality and certainty.

[14 Q.B.R. 27.]

Assumpsit, for tolls. The declaration alleged that the defendant, on the 14th of March, 1855, was indebted to the plaintiffs in £100 for tolls payable by the defendant for horses, cattle, carriages, &c., of the defendant, which before that time had travelled upon a certain plank road of the plaintiffs in the United Counties of Leeds & Grenville, and through a certain gate of the plaintiffs erected upon the said plank road; and for divers other tolls and fees before that time of right due by the defendant to the plaintiffs for divers other horses, cattle, carriages, &c., of the defendant, which had before that time travelled upon and passed along a certain other road of the plaintiffs, and through certain other toll-gates of the said plaintiffs, erected upon the said road; and that afterwards, in consideration of the premises, to wit, on, &c., the defendant promised the plaintiffs to pay them the said sum of money on request. Yet, &c., (stating breach of the defendant's promise.)

The defendant pleaded—1st. Non-assumpsit, and four special pleas, which were demurred to.

At the trial at Brockville, before *Macaulay, C. J.*, it appeared that the road was made by a joint stock company, associated under the provisions of the statute 12 Vic. cap. 84. The articles of association were entered into on the 22nd of February, 1851, and five directors were then chosen, the declared object of the company being to construct a plank or macadamized road from the main road leading from Brockville to Prescott, at the division line between lots eight and nine in the first concession of Elizabethtown, to North Augusta, the capital stock to be £3000, to be held in shares of £5 each. The road was partly in the County of Leeds and partly in Grenville.

The tolls were fixed on the 1st of November, 1852, by a minute, of which the following is a copy:—

"Brockville, Nov. 1, 1852.

"The directors of the Brockville and North Augusta Plank Road Company met this day. Present—Dr. Edmonson, President; Samuel J. Bellamy, James Crawford.

"*Resolved*—That the tolls to be charged at the gates on the Brockville and North Augusta Plank Road, after this date, be as follows, viz.:

"For any team, double or single, passing gate No. 1, 1½d.

"Gate No. 2—For every double team, 2d.; and for every single team, 1½d.

"Gate No. 3—For every double team, 2d.; for every single team, 1½d.; for every horse and rider, 1d.;" (with other charges for cattle, &c.")

To this resolution was attached the corporate seal of the plaintiffs.

Afterwards the following resolution was passed at a meeting of five directors, holden on the 12th of December, 1853:

"*Resolved*—That the secretary do advertise for tenders for a lease of the gates on the Brockville and North Augusta Plank Road for one year, from the 2nd of January, 1854, and that the tolls to be charged at each gate shall not exceed the following rates, viz.:

"Gate No. 1—2d. in winter and 3d. in summer.

"Gate No. 2—(Same.)

"Gate No. 3—(Same.)

"Single teams, 1½d. in winter, and 2½d. in summer.

"Winter months to commence on 1st December and end on 28th February.

"Summer months to commence on 1st March and end on 30th November."

The defendant was proprietor of a public stage running from Brockville to Merrickville, over the whole of the road in question, conveying the mail and making a daily trip, (except on Sundays)—that is, going the one day and returning the next.

The plaintiffs claimed for tolls on the defendant's two-horse stage, through all the gates, from the 1st of August, 1851, to the 1st of February, 1855.

In regard to the road the following statement of facts was agreed to upon the trial: That the toll-road commences at Brockville; at the distance of one-and-a-half mile on the road is toll-gate No. 1, and coming into Brockville from No. 1 toll-gate there is a hill about half way between the two points, the grade of which exceeds one foot in twenty, the whole rise of the hill being 13 feet and 1 inch and 75-100, which exceeds