After giving the matter much thought and consideration, we have arrived at the conclusion that we must discharge the rule for the mandamus.

Rule discharged, without costs.

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ECCLES ET AL., EXECUTORS OF HUGH ECCLES, v. PATERSON AND HOLE.

*Ejectment—Proof of Title.*

In ejectment against two defendants the plaintiffs proved a mortgage in fee made by one while he was in possession as owner, and duly assigned to them, and that the other defendant came in after, without shewing how.
*Held*, sufficient, *primâ facie*, to entitle the plaintiffs to a verdict against both.
(T. T., 26 V., 1862.)

EJECTMENT.—The plaintiffs proved a mortgage in fee from defendant Paterson, duly assigned to their testator.

At the trial, at Toronto, before Morrison, J., one James Paterson, the son of the defendant, swore that he knew the lot; that his father (the defendant) was in possession as owner when the mortgage was made. The defendant Hole, he said, went into possession after, he did not know how; his father was not in possession at the time of the trial.

It was objected that there was no evidence to entitle the plaintiffs to recover possession. This the learned judge overruled, holding that a *primâ facie* case had been made out, and there was a verdict for the plaintiffs.

*Robert A. Harrison* moved for a new trial as regarded Hole, for misdirection, citing *Doe Wilkes* v. *Babcock*, (1 U. C. C. P. 392,) and *Doe Crew* v. *Clarke*, Rob. & Har. Dig. "Title" 14.

HAGARTY, J., delivered the judgment of the court.

The latter case is not, we think, applicable. There may be some expressions in the former case that give colour to the application, but on the plaintiffs' own evidence there the title was clearly shewn to be in the Crown, and defendant could not be assumed to be a wrong-doer. In fact the plaintiff shewed that he himself had not title as against defendant.

We have always understood it to be the rule, and a most wise and salutary rule it is, to hold such evidence as was given in this case to be sufficient *primâ facie*, and that in the absence of any contradictory proof from defendant, to direct a jury in favour of the plaintiff.

A man in full possession, claiming to be owner, makes a deed in fee to one through whom the plaintiffs claim. After this time another gets into possession in some unexplained manner, and to a process in ejectment the mortgagor and this person appear and defend.

We think the latter may be described in the words of Bramwell, B., in *Davison* v. *Gent* (1 H. & N. 748):—"The defendant" (there were two) "is in this dilemma: either his entry was altogether tortious, or he came in under the tenant, and is therefore estopped from denying the plaintiff's title."

We also refer to *Doe Hughes* v. *Dycball* (M. & M. 346); *Hogg* v. *Norris* (2 Fos. & Finl. 246); *Bikker* v. *Beeston* (1 Fos. & Finl. 685); *Homes* v. *Pearce* (Ib. 283).

As Sir W. Erle remarks in one of these cases, if defendant Hole had any title he could easily have offered proof of it. We think there should be no rule.

Rule refused.

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## COMMON PLEAS.

*(Reported by* E. C. JONES, Esq., *Barrister-at-Law, Reporter to the Court.)*

IN RE THE JUDGE OF THE COUNTY COURT OF THE COUNTY OF ELGIN IN A CAUSE OF MEDCALFE v. WIDDIFIELD.

*County Court—Jurisdiction of—Penalty—Con. Stat., Can. ch. 6, sec. 81.*

*Held*, that the County Courts has jurisdiction in an action for the penalty imposed by the 81st section of Con. Stat. of Can., ch. 6, for selling spirituous or fermented liquors on polling days.
[T. T., 26 Vic.]

*D. B. Read, Q. C.*, obtained a rule *nisi* for a writ of prohibition to the County Court of the County of Elgin, and to the judge thereof, prohibiting any further proceedings being taken in the said cause either to enter judgment or to issue execution, or any other proceeding in the cause, on the ground that on the face of the proceedings it appears and is shewn by the affidavits and papers filed that the said County Court had no jurisdiction over the said cause, or the cause of action on which a verdict has been recovered therein, or to entertain the same, and to shew cause why the plaintiff should not pay the costs of this application.

The writ issued from the County Court on the 8th of August, 1861, and the declaration was filed on the 22nd day of the same month. It claimed two penalties of $100 each from defendant, in separate counts, for neglecting to close and keep closed his tavern, by Consol. Stat. of Canada, ch. 6, and for selling spirituous and fermented liquors to divers persons in his tavern contrary to the provisions of that act.

The pleas were, 1st, *nil debet*. 2nd, that at the time when, &c., the liquor sold or given was by way of refreshment to travellers lodging at defendant's tavern, but not otherwise 3rd, to so much of the declaration as alleges the not closing and keeping closed the tavern, that there was not at the time of passing the said act, or before the passing thereof, any law requiring taverns or hotels to be closed on Sunday during divine service.

Issue was taken on the 1st and 2nd pleas, and there was a demurrer to the second and third pleas, and defendant gave notice of exceptions to the declaration.

It was sworn that the issue was tried on the 11th of March, 1862, and a verdict rendered for the plaintiff for $100 on the second count. That plaintiff had served a copy of his bill of osts on defendant's attorney with notice of taxation. That judgment had not been entered.

*Crombie* shewed caused. He referred to the Consol. Stats. Canada, ch. 6, sec. 81, and the Interpretation Act., ch. 5, sec. 6, sub-sec. 17, and cited *O'Reily qui tam* v. *Allan*, 11 U. C. Q. B. 526; *Apothecaries' Company* v. *Burt*, 5 Exch. 363; *In re Birck*, 15 C. B. 743; *Ricardo* v. *Board of Health*, 2 H. & N. 257; *In re Chivers* v. *Savage*, 5 E. & B. 697.

*Read, Q. C.*, contra, cited *Roberts* v. *Humby*, 3 M. & W. 120; *In re Hunt* v. *North Staffordshire R. W. Co.*, 2 H. & N. 451; *Marsden* v. *Wardle*, 3 E. & B. 695; *Jones* v. *Owen*, 5 D. & L. 669; *Darby* v. *Cosens*, 1 T. R. 552; *Leman* v. *Goulty*, 3 T. R 4.

DRAPER, C. J.—The action in the County Court is founded on the 81st section of the Consol. Stat. Canada, ch. 6—"Every hotel, tavern and shop, in which spirituous or fermented liquors or drinks are ordinarily sold shall be closed during the two days appointed for polling in the wards or municipalities in which the polls are held, in the same manner as it should be on Sunday during divine service, and no spirituous or fermented liquors or drinks shall be sold or given during the said period under a penalty of $100 against the keeper thereof, if he neglects to close it, and under a like penalty if he sells or gives any spirituous or fermented liquors or drinks as aforesaid." And in sec. 87 of the same act, "All penalties imposed by this act shall be recoverable with full costs of suit by any person who will sue for the same by action of debt, or information in any of her Majesty's courts in this province, having *competent jurisdiction*, and in default of payment within the period to be fixed by such court, such offender shall be imprisoned in the common gaol of the place until he has paid the amount which he has been so condemned to pay and the costs."

The case of *In re Apothecaries' Co.* v. *Burt*, 5 Exch. 363, is, as regards the language of the statute, nearer the present case than *O'Reily qui tam* v. *Allan*, though it may be difficult to draw any solid distinction between the language of our act 4 & 5 Vic., ch. 12, and the English act 55 Geo. III., ch. 194, sec. 26. The court refused a writ of prohibition in that case, which was applied for because it was contended that the action was brought in such a form as to assert a claim for four penalties of £20 each, whereas the County Court, under the English act, 9 & 10 Vic., ch. 95, only had jurisdiction in "all pleas of personal actions where the debt or damage claimed is not more than £20, whether on balance of account or otherwise." Neither at the bar nor by the court does it appear to have been doubted that the County Court had jurisdiction, provided the debt claimed was not more than £20.

I think that if the case in the Exchequer conflicts with *O'Reily qui tam* v. *Allan*, we should rather be guided by the former. In the statute under our consideration the jurisdiction is given to any court of competent jurisdiction. And looking at the Consolidated