that they would attempt it under the circumstances, but that they could do as they pleased, to which defendant Israel D. Bowman said he would not have cared if it had not been given to the sheriff for a couple of days; that he then said he would not mind the irregularity of the execution if he could keep the store open as usual to the public for the remainder of the week, to which deponent said the sheriff would put their own clerk in possession if they wished that course taken, to which he replied that he did.

There was also filed on the part of plaintiff an affidavit of the sheriff, in which he swore that on the 21st of February, the writ of *fieri facias* was placed in his hands for execution; that on the same day defendants had knowlege that the writ was so placed in his hands for execution; that on the following day he called at the place of business of defendants for the purpose of seizing their stock-in-trade; that he had then no other execution in his hands against the defendants or either of them; but about 4 o'clock in the afternoon of the same day, a writ of execution against one of the defendants for nearly $60, in favor of Henry B. Bowman, who is the father of one of the defendants, and the father-in-law of the other defendant, was also placed in his hands; that when he called upon the defendants he saw both of them in their store in Berlin, and informed them of the nature of his business; that Israel D. Bowman, one of the defendants, told deponent the writ of *fieri facias* was irregular by being issued too soon, and could be set aside if they the defendants like to do so, that both of the defendants then stated to deponent that the objection they had to the writ herein being in deponent's hands was, that they wished to keep the store open as long as possible, to which deponent replied he could arrange that to their satisfaction; and subsequently saw them again on the same day, and both of them agreed to put their clerk, one Thompson in possession of the store as a sheriff's officer; that deponent accordingly put Thompson in possession under the writ issued herein, and defendants subsequently agreed to pay Thompson for his services in holding possession of the goods for deponent, and expressly consented to deponent's proceeding under the writ herein; that on 22nd February last, deponent advertized the stock-in-trade to be sold under said execution on the 3rd March last, and that he put up a notice of sale on the store of defendants in their presence, to which they made no objection; that from the general tenor of the conversation deponent had with the defendants, and on his agreeing with them to keep their store open with their clerk in possession and themselves in it as usual for the remainder of the week, deponent inferred that they defendants would take no steps to set aside said writ even if it were irregular.

Mr. Harrison contended that the assignee being a stranger to the judgment was not in a position to move to set aside the execution for irregularity; *Wilson* v. *Wilson*, 2 U. C. Pr., 374; *Perrin* v *Bowes*, 5 U. C. L. J., 138; *Balfour* v. *Ellison*, 8 U. C. L. J., 330: that the writ though issued too soon was not irregular, that even if irregular when issued, the irregularity had been expressly waived by defendants on and after the 22nd February. *Rawes* v. *Knight*, 1 Bing. 132; *Lloyd* v. *Hawkyard*, 1 Man. & Ry., 320: *Holt* v. *Ede*, 1 D. & L. 68; *Williams* v. *Rapelje et al.*, 11 U. C. Q. B. 420; *Jones* v. *Ruttan*, 6 U. C. C. P. 402; *Ross et al.* v. *Cool*, 9 U. C. C. P. 94; *Ringland* v. *Lowndes*, 9 L. T. N. S. 479;) and that the sheriff having acted upon their suggestion as a ground of waiver, the waiver was absolutely binding upon them; so that when the assignment was made, the execution was a binding writ in the sheriff's hands to be executed, and should prevail against the assignment (*Burn* v. *Carvalho*, 1 A. & E. 883; *Woodland* v. *Fuller*, 11 A. & E. 859.)

J. A. Boyd, contra, argued that the assignee was a proper person to move, and that the application might, if necessary, be made in his name alone. (27 & 28 Vic. cap. 17, s. 4, sub-sec. 9, s. 5, sub-sec. 9;) that the execution having been issued in violation of the express language of the C. L. P. Act was clearly irregular (s. 55), and that being so the assignment must prevail against it (27 & 28 Vic. cap. 17, s. 2, sub-sec. 7, s. 3, sub-sec. 22.) that defendants were not in a position to waive any irregularities in the issue of the writ, to the prejudice of the general body of their creditors. (*Ib.* s. 8, sub-sec. 5, *Evans* v. *Jones*, 11 L. T. N. S. 636), and therefore that the execution should be set aside with costs to be paid to the assignee.

ADAM WILSON, J.—The plaintiff was guilty of an unauthorised abuse of the process of the court in issuing his execution against the goods of defendants on the very same day on which he became entitled to enter, and did enter his judgment for want of an appearance to his specially endorsed writ of summons where the Statute declares he "may at the expiration of eight days from the last day for appearance *and not before*, issue execution."

The effect of this, if allowed, would be to sweep off the whole estate of the debtor, and to prevent its just distribution among the creditors rateably according to the deed of assignment of 27th February, under the Insolvency Act.

There had been no waiver I think of the proceedings taken, and I doubt if there could be to the prejudice of the other creditors according to the case of *White* v. *Lord*, 13 U. C. C. P. 289.

I have no doubt the application is properly made, and the execution will therefore be set aside with costs, to be paid to the assignee.

Summons absolute with costs.

CHANCERY.

(*Reported by* THOS. HODGINS, Esq., LL.B. *Barrister at-Law.*)

GORE BANK v. SUTHERLAND.

Trust estate—Costs of Trustees' defence—Mortgagee's costs—Practice.

A mortgagee filed his bill against the assignee of the mortgagor, whose title was that of an assignee for the benefit of creditors, under a trust deed excluding all preference and priority, praying that the trust estate might be first applied in payment of his specialty debt, and asking an account against the trustee with the view of charging the trustee with all payments made by him to simple contract creditors before satisfying the specialty debts. He then asked a sale of the mortgaged premises to make up any deficiency. The trustee, instead of filing a memorandum disputing the debt, put in his answer contesting the rig