

Province of Prince Edward Island.

SUPREME COURT.

SULLIVAN, C. J.]

[Feb. 17.

DAVIES v. MCINNIS.

Sheriff—Negligence in not levying—Notice of rent due landlord—Action brought before return of fi. fa.—Attornment—Verbal notice.

Plaintiff placed a fi. fa. in the hands of defendant as sheriff on 29th Nov., 1893, returnable 30th May, 1894. On 23rd May, 1894, the fi. fa. was renewed for one year. The Writ of Summons was issued April 18th, 1895.

At the trial it was proved that in the Spring of 1894 there were goods in the hands of the execution debtor which might have been seized, of which fact the sheriff had notice but did not seize. On the debtor's farm there was a mortgage, with an attornment clause and one year's rent, \$200 (more than the value of the goods in question), was due and unpaid. The mortgagee gave defendant verbal notice that he would come in as landlord for rent if any levy were made.

For the defendant, it was contended that even if the sheriff had levied, the probability was that the mortgagee, as landlord, would have claimed as for rent in arrear, and there would not have been sufficient goods to realize this rent, and consequently plaintiff suffered no damage. Defendant also contended that this action should not have been commenced until the expiration of the year for which the fi. fa. had been renewed, citing *Moreland v. Leigh*, 1 Starkie 388.

Held, that the circumstances did not lead to the conclusion that the plaintiff would not have realized, had a levy been made, and that the damages in this case was the value of the goods upon which defendant might have levied, but did not.

Held, also, that the notice of the mortgagee, as landlord, not being in writing, was insufficient under the statutes of this Province.

On the point raised by defendant that the action was commenced too soon, the learned Chief Justice said: "In support of this contention reliance was placed on the case of *Moreland v. Leigh*, from which a general inference might be drawn that an action could not be commenced against a sheriff until after he had returned the writ. That case was decided at Nisi Prius in 1816, and is somewhat imperfectly and irregularly reported; but, as it is, it appears to me to be distinguishable from the present case in this, that it was an action for not having the amount of the levy at the return of the writ. It is cited in Atkinson's Sheriff Law as an authority for this proposition: that 'not returning a writ without other default, is not a cause of action.' It was cited without effect in *Jacobs v. Humphrey*, 3 L.J., Ex. 82; and *Mason v. Paynter*, 10 L.J., Q.B. 279; and in *Mullett v. Challis*, 20 L.J., Q.B. 161, it was cited by counsel but not followed by the Court. . . . In the present case the plaintiff having waited until after the return day named in the writ and until the lapse of nearly eleven months after the renewal of the writ, in all a period of nearly