

Feb. 11, 1904, while he was going to his place of business and returning to his home, about three-quarters of an hour after he had left the police court at Halifax where he had attended to prosecute and give evidence as a necessary and material witness for the Crown, in a prosecution instituted by himself the previous day, for an aggravated assault committed on him on Feb. 6, 1904. On a motion to discharge the prisoner from custody the sheriff, to an order made by Graham, E. J., in the nature of a writ of habeas corpus, under R.S., c. 181, "of securing the liberty of the subject," returned the above order of Weatherbe, J., as the cause of the prisoner's detention. The grounds of the motion were (a) the prisoner's privilege from arrest while returning from giving evidence in Court, and (b) alleged excessive fees indicated in the margin of the judge's order.

Held, 1. Dismissing the application, that, under all the circumstances, and as the judge's order was of punitive and quasi-criminal character, the defendant as a witness was not privileged from arrest under it. Sec. 242 of the Criminal Code, *Gibbs v. Phillipson*, 1 R. & M. 19, and *Re Gent*, 40 Ch. D. 190, referred to.

2. The order was one that could not be impeached under habeas corpus proceedings. *MacKay v. Campbell*, 39 C.L.J. 486; *Re Sproule*, 12 S.C.R. 140; *R. v. Beamish*, 5 C.C.C. 388, referred to.

3. In view of s. 37 of the Collection Act, which makes the judgment of the judge upon the appeal under the Act final, the prisoner's remedy, if any, was either to tender the amount properly due, or to sue for the penalty for taking excessive fees provided by R. S. c. 185, s. 2, but that in any event, under s. 40 of the Collection Act, even if the present application lay, as the evidence taken upon the examination shewed there was ground for making this order, the application should be refused. *R. v. Doherty*, 3 C.C.C. 505; 32 N.S.R. 235; *R. v. Mordock*, 4 C.C.C. 82; 27 A.R. 443; *R. v. Spooner*, 4 C.C.C. 207; 32 O. R. 451, referred to.

J. M. Davidson, for applicant. *J. J. Power*, contra.

COUNTY COURT DISTRICT No. 6.

MacGillivray Co., J.]

RE ARCHIBALD.

[Sept. 21, 1903.]

Partition—Dower—Merger—R.S.N.S. 1900, c. 140, ss. 3, 4(1) and 16.

Samuel Archibald died intestate, leaving two sons and one daughter to whom his real property descended as tenants in common. Before partition one of the sons died intestate, leaving a widow but no issue. The Act as to descent of real property provides: Sec. 3. "If the intestate leaves no issue one-half of his real property shall go to his father and the other half to his widow in lieu of dower, and if there be no widow the whole shall go to the father."

Sec. 4 (1). "If the intestate leaves no issue nor father, one-half of his real property shall go to his widow and the other half in equal shares to