Plaintiff, in reply, filed an affidavit contradicting the assertion that when Montgomery sold the land to Keeling and took back a mortgage, he (plaintiff) acted as solicitor for Montgomery, alleging that he acted for the defendant alone; contradicting the assertion that while acting as solicitor for defendant, he became aware of the defect in the title of Montgomery; alleging that he did not discover the defect until a considerable time after the sale of the land from Montgomery to defendant, and until long after he had advanced to defendant the amount for which defendant gave plaintiff a mortgage; that upon the representation of Montgomery, to the effect that the title was perfectly clear, defendant dispensed with an examination of title; that for the purpose of protecting his own interest, he (plaintiff) procured a deed of the property from Mary Gale; that he never, to his knowledge, saw Mary Gale, or had any communication with, or made any representation to her, directly or indirectly; that immediately on receiving a deed from Mary Gale, he made it his business to see Montgomery, and offered, in order to guard against the accident of his (plaintiff's) death, to execute any document necessary to protect his (Montgomery's) mortgage; and denying collusion between himself and defendant. An affidavit of defendant, and another of Bouchier Eaton, an articled clerk in the office of plaintiff, corroborating the affidavit of plaintiff in different particulars, were also filed.

McBride showed cause, and contended, first, that as Montgomery's affidavit was contradicted by those of plaintiff and defendant, his summons must be discharged; and, secondly, that Montgomery was not sufficiently in possession to be entitled to make the application. On the latter point, he referred to the language of the section, which required an affidavit from applicant "showing that he is in possession of the land either by himself or his tenant;" and cited *Thompson* v. *Tomkinson et al.*, 11 Ex. 442. He also submitted, that a mortgagee out of possession is not entitled to the benefit of the section, as he cannot be said to be in possession either by himself or his tenant.

Harrison, contra, submitted, first, that sec. 9 of Con. Stat. U.C. cap. 35, under which the application was made, is in substance the same as the former act, 11 Geo. II. cap. 19, sec. 13; secondly, that in the construction of the latter act, the word "landlord" was held to extend to all persons, including mortgagees out of possession, claiming title under or in privity with defendant (*Doe dem. Hebblethwaite* v. *Roe*, 3 T. R 783; *Lovelock dem. Norris* v. *Doncaster*, 4 T. R. 122; *Doe dem. Tillyard* v. *Cooper*, 8 T. R. 645; *Doe dem. Pearson* v. *Roe*, 6 Bing. 613); third, that the possession now necessary need not be more actual than that formerly required, but the contrary, the former statute using the word "landlord," while the present act uses the expression "any other person" (*Butler* v. *Meredith*, 11 Ex. 93; *Croft* v. *Lumley*, 4 El & B. 608): fourth, that the court will not try questions of title on affidavit, especially if collusion suggested, but allow applicant to defend where he is really much interested in the result of the suit (*Harrington* v. *Harrington*, 3 U.C. L. J. 30; *Webster* v. *Horsburgh*, 3 U.C. L. J. 32).

DRAPER, C. J.—I think the order should go to allow Montgomery to defend. The defendant may be treated as in possession under Montgomery, and as between *them* a tenant to him. Then the defendant seems to be willing to aid the plaintiff, which will unavoidably be a detriment to Montgomery's interests. The application is plainly that of Montgomery, who appears to be the first mortgagee of defendant, the plaintiff having taken a subsequent mortgage from him.

I therefore grant the order, on payment of costs; Montgomery to appear forthwith, and take short notice of trial if necessary.

Summons absolute.

ROBERT A. LAND v. JASPER T. GILKISON AND HUMPHREY ARTHUR

Ejectment—Writ of injunction refused.

Held, that the Common Law Procedure Act does not authorize the issuing of a writ of injunction in an action of ejectment. The law is now settled. Decisions to the contrary in Upper Canada are no longer to be followed.

(April. 1861)

This was an action of ejectment. It appeared that defendant Arthur executed a mortgage to the defendant Jaspar T. Gilkison, on certain land in the township of Barton, which mortgage defendant Gilkison subsequently assigned to the plaintiff.

Default having been made in the payment of the mortgage money, this action was brought.

Plaintiff, on an affidavit that the defendant threatened to remove the buildings, dwelling houses and fences off the mortgaged land, applied for a writ of injunction.

Harrison, in support of the application, cited *Robins* v *Porter*, 2 U.C. L. J. 230; *Bell* v. *White*, 3 *Ib* 107; *Fraser* v. *Robins*, *Ib.* 112.

BURNS, J.—It is not now the practice to allow the issue of writs of injunction in actions of ejectment. At one time I held differently; but since *Baylis* v. *Le Gros*, 2 C. B. N. S. 318, I have always refused applications for writs of injunction in actions of ejectment. That case decides that the Common Law Procedure Act does not authorize the issue of the writ in any such action. Most, if not all of my brother judges concur with that decision.

BOULTON v. RUTTAN.

23 Vic. Cap. 42 s. 4.—*Reference for Trial to County Judge—When.*

Held, that under statute 23 Vic., cap. 42, sec. 4. to warrant a judge of the superior courts in referring a cause for trial to a judge of the county court, the writ must not only be issued from, but venue laid in the county to which the reference for trial is required

Where a defence is one not merely for time, it may be doubtful, particularly if the amount is large, if a judge would direct the trial of the issue before a county court judge against the consent of the defendant.

(May 29, 1861.)

O'Brien obtained a summons to shew cause why this case should not be tried before the judge of the county court of Northumberland and Durham. The writ was taken out at Cobourg but the venue laid in Norfolk. The defendant pleaded a special plea, which plaintiff in his affidavit in support of the summons stated was not true.

Beaty shewed cause, filing an affidavit of the defendant. He objected to the summons on the ground that the venue being laid in Norfolk the cause must, could not be referred to a judge of another county; and further, that on the facts and pleadings, as appeared by the papers filed, the cause was not such a one as came within the meaning of the statute.

O'Brien, contra, contended that the statute provided that the cause should be referred to the judge of the county court where action was *commenced*; that the suit was commenced when writ was issued; that the statute in cases of this sort did away with the rule of law as to trying a cause where the venue is laid; that the plea even if true, shewed no defence to the action; and that the cause could be more satisfactorily tried before the judge of county court. He also applied to amend, if necessary, the summons by referring the cause for trial to the county judge of Norfolk, or by changing venue to Northumberland.

RICHARDS, J.—The statute requires that the issue shall be tried by the judge of the county where the action was commenced, "and such action shall be tried there accordingly, and the record shall be made up as in other cases."

I take it for granted that the issue must be tried in the county where the venue is laid, unless it appears from the statute that the legislature intended some other course should be taken. It is doubtless requisite that the issue should be tried in the county court of the county where the action was commenced, but as the venue here is not in that county, it seems to me that the case cannot properly be tried there, whilst the venue is laid in another county.

The plaintiff asks me now to make an order to amend the declaration by changing the venue to the United Counties of Northumberland and Durham, and then to make his summons absolute. It is not desirable at any time to make an order for a different object than that sought in the summons, though it is sometimes done when it is with a view to carry out the same purpose that the summons seeks to accomplish. In this case, however, the only object to be gained is to get down the trial sooner than would be the case if the action were tried in the superior court.

The plaintiff sues on a note which he apparently acquired after it became due. The defendant entertains a strong opinion that the plaintiff is not entitled to recover, and is most anxious to