

statute into effect, by restoring the road to its former state of usefulness?

"It may be that the company not having done it, are properly held to be guilty of nuisance, though authorised to lay the track across the road, because, if they have not performed the conditions on which the authority was given to them, they are to be looked upon as occupying the highway without authority.

"The defendants' counsel should have notice that judgment has been moved for, and an opportunity of filing affidavits or addressing the court."

Afterwards, in Trinity Term, no arrangement having been come to respecting the nuisance complained of, *Patterson* again asked for judgment. *Mr. Bell*, solicitor for the Grand Trunk Railway Company, being in court, and having received notice that judgment would be moved for, said he had no instructions; that he was not solicitor for this part of the line, (in Etobicoke,) but at Belleville; that the solicitor here, *Mr. Gall*, was absent, that he was not prepared to engage for any thing, or to represent the company in the matter.

He urged that the prosecutors and the company should refer to some competent and disinterested engineer, as to what was reasonable and proper to be done for obviating the detriment complained of to the highway, and that this conviction should stand as it was, without sentence passed upon it, till the result was known.

The prosecutors' counsel did not object to this, but complained that he had met with nothing but delay in his efforts to have something done, and that the company would give no attention to it.

It was intimated that there was some difficulty between the company and contractors in regard to this matter, and that this had induced the company to delay taking such steps as would otherwise be proper.

The prosecutors filed affidavits, the defendants filed none.

Those on the part of the prosecution stated various attempts made to procure the abatement of the nuisance without proceeding to extremities, repeated promises on the part of the defendants, but nothing done, and the highway in the meantime becoming worse, and for a time last spring nearly impassable. And that the costs of the prosecution, including disbursements, amounted to £84 13s. 6d.

ROBINSON, C. J., delivered the judgment of the court.

This case is very like *Regina v. Scott et al.*, 3 Q. B. 543; see also *Regina v. North of England R. W. Co.*, 9 Q. B. 315.

The defendants have had ample notice of the moving for judgment, and opportunity of producing affidavits in mitigation: they show nothing, and apparently take no trouble in the matter.

The proper sentence seems to be that they should pay a fine, and that the nuisance complained of be abated.

As to abating the nuisance, there may be great practical difficulties in the way, and such as, if the parties had in a proper manner laid them before us, might have influenced our judgment, but we are left to conjecture upon that point. Under the Railway Law in Ireland there are commissioners, who on behalf of the public would have had the highway restored to its proper state at the expense of the company, and in England, or here, another course was open than that by indictment, namely, by moving for a *mandamus* to the company to carry the statute into effect, by restoring the highway to its former state as nearly as circumstances will permit; but the course which has been taken is a legal course, though perhaps not the most convenient, and we must give effect to the conviction.

Our judgment is that defendants pay a fine to the Queen of £100, and that the nuisance complained of be abated.

WILSON V. KERR ET AL.

Assignment in trust for Creditors—Improper stipulations—Change of possession—Description of goods.

"All and singular the stock in trade of the said W." (the assignor) "situate on Ontario Street, in said town of Stratford, and also all his other goods, chattels, furniture, &c."

Held, an insufficient description as to all the goods.

In an interpleader issue to try the validity of an assignment in trust for creditors, the court being left to draw the same inferences as a jury.

Held, that it was fraudulent for the assignor to assign on the understanding that he should be allowed to keep possession of his household furniture.

Held, further, that the assignment was also fraudulent, because it contained a stipulation that no creditors should share except those executing within forty days, and a release in full on condition of their getting the dividend out of the proceeds of the goods assigned, with a proviso that the surplus should go to the assignor.

Held also, that the facts stated below did not show a sufficient change of possession to dispense with filing.

INTERPLEADER. The plaintiff claimed under an assignment from R. D. Wilson, his brother. The defendants were execution creditors of R. D. Wilson.

The assignor, R. D. Wilson, being insolvent, proposed to some of his creditors to make an assignment to them for the benefit of his creditors generally, but he wanted to reserve to himself the privilege of being unmolested in the possession of his household furniture. This was declined.

He then made an assignment to his brother, the plaintiff, who lived at Hamilton, sixty or seventy miles from the shop in which the goods were, and he gave as a reason for this, that his brother would be more anxious to make the most of the property. His brother did go up to Stratford, and stayed two or three days, and assisted in taking stock, and then he locked up the building and returned to Hamilton, leaving the key in possession of the postmaster at Stratford, from whom it seemed to have got into the possession of R. D. Wilson, who had constant access to the shop by a back entrance, though the street door was kept fastened.

The assignment was dated 13th of March, 1858. It was made to the plaintiff, in trust for creditors who should execute within forty days. A clause of release by creditors executing of all claim beyond what the dividends might produce was contained in the instrument, and the surplus, after paying out the proceeds rateably to the creditors who should execute, was by the terms of the trust to be paid over to the assignor.

The property intended to be transferred by the deed was described as "all and singular the stock in trade of the said R. D. Wilson, situate on Ontario street, in said town of Stratford, and also all his other goods, chattels, furniture, household effects, horses and cattle, and also all bonds, bills, notes, debts, choses in action, terms of years, leases, securities for money."

At the trial, at Stratford, before *Robinson, C. J.*, after all the evidence had been given, the parties agreed that it should be left to the court to determine whether the plaintiff was entitled to succeed in regard to all or any part of the property claimed, or whether a nonsuit should be entered.

The defendants objected on the trial, that the goods assigned were not sufficiently described, and especially as to the household furniture, and everything besides the stock in trade; and also that the assignment which had been filed under the act was fraudulent, because there was no such change of possession as could make it valid.

A verdict was taken for the plaintiff, subject to the opinion of this court upon the evidence, the court to be at liberty to draw the same inferences as they might think the jury should have done.

Martin, for the plaintiff, cited *Gulderstee v. Corby et al.*, 15 U. C. R. 153; 27 L. J. Ex. 378; *M. Pherson v. Reynolds*, 6 C. P. 425; *Congreve v. Eccles*, 10 Ex. 298; *Reclus v. Copper*, 5 Bing. N. C. 136; *Florry v. Denny*, 7 Ex. 581; *Gulderstee v. Ault*, 16 U. C. R. 401.

Burton, for defendants, cited *Short v. Raitan*, 12 U. C. R. 75; *Olmead et al. v. Smith et al.*, 15 U. C. R. 121; *Balknell v. Bondome*, 16 U. C. R. 206; *Harris et al. v. Commercial Bank*, *Id.* 437.

ROBINSON, C. J.—There was a visible change in this respect, that the shop was no longer kept open, but it is hard to say that there was such a change made of the custody of the goods from the hands of the assignor, to the hands of the assignee as might be expected to follow a *bona fide* transfer. The assignment was filed according to the statute, and therefore the objection as to possession not being changed could only be urged as constituting a badge of fraud.

Then, further, I think the goods were not sufficiently described by stating them to be situated on Ontario street, without saying they were in the shop or on the premises of the assignor situate upon that street; and as to any thing but the stock in trade there really was no description at all.

It was fraudulent, too, I think, for the assignor to assign only