NOTES OF CANADIAN CASES.

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CHANCERY DIVISION.

Ferguson, J.] [Sept. 15.

RUMOHR v. MARK.

Execution—Mortgage of real estate—R. S. O. c. 66, ss. 27 and 28—Costs.

Where A. held, by assignment, a mortgage of the plaintiff B.'s on real estate, as collateral security for the payment of two promissory notes made to him by B., the assignment containing a provision that on due payment of the notes the mortgage should be re-assigned *to the plaintiff*, and where A. also held by assignment a judgment obtained by a third person against B., and under writs of *fi. fa.* against goods and lands, the sheriff, by A.'s connivance, seized the said mortgage and certain title deeds of the land as the property of B.; and A., though requested by B. so to do, refused to re-assign the said mortgage to a third person named by the plaintiff, unless the amount of the judgment was paid, as well as the amount due on the notes; and B. thereupon brought this suit, claiming re-assignment on payment of the notes.

Held, A. must re-assign to the plaintiff on payment of the notes, for the mortgage was not a mortgage "belonging to the person against whose effects the writ of *fi. fa.* has issued," under sec. 28 of R. S. O. c. 66, for B. had assigned it, and the sheriff, therefore, could not seize it and make its value, over and above the notes, available by sale or otherwise for the satisfaction of the writs.

When the legislature authorized the seizure of securities as chattels, it pointed out the mode in which the sheriff should realize upon them, namely, by suing on them, and he is not obliged to bring such suit until he is indemnified, as stated in the Act. This excludes the idea of the sheriff selling such securities as he would a chattel of the ordinary kind seized by him. Therefore it cannot be effectively argued that the mortgage in this case was made a chattel by virtue of sec. 28, so that B.'s interest in it could be seized and sold under sec. 27, *Smith* v. *Baring*, 10 U. C. C. P. 247 nowithstanding.

The plaintiff B. had required the defendant to assign the mortgage to a third party. The defendant at the trial said, "The sole reason why I refused to assign the mortgage was because they would not pay me the amount of the judgment."

Held, therefore, as to costs, the plaintiff by not making a proper tender and demand, and by asking the execution by the defendant of an assignment, such as the latter was not obliged to execute, forfeited his right to costs up to the time of filing the statement of defence; but looking at the reason given by the defendant as the sole reason why he did not comply with what the plaintiff required, and the way in which the action had been defended, the defendant should pay the plaintiff's costs incurred after the filing and delivery of the statement of defence.

Wilson for the plaintiff.

Douglas for the defendant.

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MCCAUSLAND v. MCCALLUM.

Fixtures—Part of the freehold.

Certain counters were nailed to a scantling, which was placed in the wall of a drug store. The bottom or ledge of the counters was made fast to the floor of the store, and the end connected to the frame-work of the windows in such a way that the wainscotting at the bottom of the windows would be materially injured by taking them (the counters) out, and the floor of the building also would be considerably damaged.

Held, the counters were part of the freehold, and not chattel property.

Holland v. *Hodgson*, L. R. 7 C. P. 328, and *Keefer* v. *Merrill*, 6 Ont. App. 121, approved of.

Farley (with him *Doherty*) for the plaintiff.

Frazer for the defendant Selby.

Ferguson, J.] [Sept. 15.

PLUMB v. STEINHOFF.

Compensation for improvements—Unskilful survey—R. S. O. c. 51, ss. 29 and 30.

Damages may be assessed under the above section for improvements made by any defendant on land not his own in consequence of an unskilful survey, and that though the survey in question was made by a P. L. S., whom the defendant, merely as a private individual, employed to make it, and it is not a condition precedent to