jority of the judges in that case, for at present I think there is great force in the observations of Burns, J., who dissented from that judgment.

The legislature have substituted an appearance to the writ in ejectment for any plea by way of denial of the claimants right, and have enacted that upon the entry of such appearance an issue may be made up "by setting forth the writ and the fact of the appearance with its date, and the notice limiting the defence, if any," with the direction to the sheriff to form a jury; and it is further provided that, with certain exceptions, (not applicable in this instance,) the question at the trial shall be whether the statement in the writ of the title of the claimants is true or false.

The object of the notice of the nature of the title intended to be set up by the claimant or defendant at the trial seems to have been to prevent expense on either side in obtaining and producing evidence to prove matter, which, but for such notice, they might apprehend their opponent's case rendered necessary. The appearance, in effect, operates as a general denial of the claimant's right to possession, and it may be well argued, that when the defendant files his notice of the special ground on which he asserts his own right to retain possession, the statement, "besides denying the title of the claimant," means no more than that he does not waive the legal consequence of his appearance, namely, that he shall not be put out of his possession until the statement in the writ of the claimant's title to possession of the premises is established, that these words are of no greater effect than in an action on the old form of ejectment, a plea of not guilty would be. Whether, if the claimant's notice of title had asserted a right to possession as landlord of defendant, the term or tenancy being at an end, a different effect to the appearance and to the "denying the title of the claimant," would not be given, is another question.

To apply this to the present case. If the defendant's notice of title had been admitted that the claimants were his landlords, it would at least be questionable whether the latter would not have been bound to prove that they were entitled "under the last will of Charles Arthur Smith," for the statute requires that the claimant shall be confined to proof of the title set up in his notice. But the defendant, though denying the claimant's right to possession sets up as the sole ground of that denial his alleged right to six months' notice to quit, and thereby either waives the proof of the particular title set up in the claimant's notice, or may be taken to admit it; and his notice being put in evidence becomes, for the purposes of the trial, proof of the alleged title of the claimants to recover, but it is consistent with this that he should deny their right to eject him until they prove his tenancy is at an end. There seems some difficulty in holding, that by following the words of the statute in giving notice of the sole answer on which the defendant relies to the claim, he deprives himself of the power o setting up such answer, though true and otherwise conclusive.

It would seem peculiarly hard, that the defendant, whose notice of title is used by the claimants, to save themselves from giving proof, otherwise indispensable, should, by the same notice, be debarred from requiring proof, that his tenancy is at an end, in other words, that the claimants should use the admission in his notice as the sole proof of their title to recover as landlords, and yet should deny its operation to protect the defendant's rights as their tenant. To this application of the decision in *Carturight* v. *McPherson*, I cannot accede, nor do I think the judgment of the Court of Queen's Bench can be taken to go that length

Upon the evidence and the affidavits for defendant which are unanswered, I think there should be a new trial. It was positively sworn, that the defendant entered in May, and I do not think the receipt dated 30th March, 1861, though worded for three years' rent *up to date*, (which three last words are interlined,) necessarily imports that the tenancy commenced at that day was due, the distress warrant was not produced, and it must have been issued some days before the date of this receipt according to the evidence of the bailiff. The question non-waiver, rather than of the commencement of the year of the tenancy, seems to have occupied the attention of the jury.

But as in any view the year will expire next May, it can scarcely be necessary that there should another trial take place. The interest of both parties would point to an arrangement by which the costs of another trial may be saved.

So far as this motion is concerned, I think there should be a new trial, costs to abide the the event.

Per cur.—Rule absolute.

PRACTICE COURT.

(*Reported by* THOMAS HODGINS, ESQ., LL.B., *Barrister at-Law*).

SCOTT v. MCRAE.

A vessel seized for breach of the revenue laws having been replevied from the collector, the writ of replevin was set aside

[Chambers, 31st Jan, 1861]

Mr. Justice Hagarty, on the 15th of January, 1861, granted a summons on the sheriff of the County of Haldimand, and on the plaintiff, or his attorney, &c., to shew cause why the property replevied in this case should not be delivered up to the defendant; and on the 19th of January, 1861, he granted a summons on the plaintiff to shew cause why the writ of replevin, and the copy and service, and the execution of the said writ, and all proceedings thereon, should not be set aside with costs, on the ground that the property replevied was seized for a breach of the revenue laws of this Province, and was at the time it was replevied in possession of the defendant, as collector of customs for the port of Dunnville, and was claimed and held as forfeited, and therefore could not be replevied.

ROBINSON, C. J.—Upon the affidavits I make the summons absolute. The Replevin Act cannot, I think, be applied to take a vessel or goods seized for breach of the revenue laws out of the custody of the collector; and upon the facts stated on the part of the collector it would be proper at any rate to set aside the writ under the late statute of 1860, 23 Vic, ch. 45, and by an order properly drawn up under the fourth section of that Act.

KERR ET AL. v. FULLARTON ET AL—CORNWALL ET AL. GARNISHEES.

Garnishment—Interpleader

Where proceedings are taken to garnish a debt, which is claimed by a third party as assignee, there is no power to direct an interpleader issue between such third person and the judgment creditor, to try the validity of the alleged assignment.

In Easter Term *McBride* obtained a rule *nisi* to rescind and set aside an order of McLEAN, J., made in this cause, which ordered an issue to be tried between the above-named judgment creditors and Alexander Gillespie and others, on the ground that the said order was not authorised by the statute in that behalf, and on grounds disclosed in affidavits and papers filed. The rule was granted on the application of counsel for defendant McCollum, and for Gillespie, Moffatt & Co.

The order of Mr. Justice McLEAN was made on the 17th of May, 1861, and ordered that the claimants, Alexander Gillespie and others named, and the said judgment creditors, do proceed to the trial of an issue in the Court of Common Pleas, in which the claimants should be plaintiffs and the judgment creditors defendants, and the question to be tried should be whether the assignment alleged to have been made by the said Thomas McCollum (one of the judgment debtors) of the judgment recovered by him in the Court of Queen's Bench against the garnishees, was null and void as against the creditors of the said Thomas McCollum, on the ground that the same was made either with intent of giving one or more of the creditors of McCollum a preference, while he was in insolvent circumstances, or unable to pay his debts in full, or knew himself to be in a state of insolvency. The order further directed how the issue should be made up, and when and where tried, and as to the costs, and enlarged a summons, dated the 13th of April, 1861, calling on the garnishees to shew cause why they should not pay the debt due by them to McCollum to the judgment creditors.

There was no dispute as to the right of the judgment creditors against the judgment debtors, and they obtained an attaching order, which was served on McCollum, one of the debtors, and also upon the garnishees, against whom McCollum had recovered a judgment. The summons on which the attaching order was made bore date on the 6th of April, 1861.