

lawful United States currency, and before action tendered the same to the plaintiffs in such lawful currency, which the plaintiffs would not accept, and on the day of tender the amount in United States currency was worth \$212 38 in Canada currency, and which last sum is paid into court. Issue.

At the trial, at Toronto, before *Draper, C. J.*, a statement of facts was put in by consent, as follows:—

The covenant being, as alleged, in form a promissory note under seal of the defendants, payable at the Bank of the Republic, New York, was presented for payment on the 20th of June, but the defendants treated it as a promissory note, and allowing three days' grace, went to the place of payment and tendered the full amount, but neither the covenant nor any one authorised to receive payment was there. This was three days after it was due. Shortly after, defendants wrote to plaintiffs, asking them to present the covenant to their named New York agents for payment. Soon after the funds held by their agents for payment were returned to defendants in Toronto.

Some weeks after, this deed of covenant was presented at the New York agents by plaintiffs for payment, but it was not paid, and on the same day the plaintiffs also demanded payment at the Bank of the Republic, but without success.

Some years afterwards, in November, 1863, some correspondence took place between defendants and a person claiming to be the assignee of this claim. In October, 1864, the assignees wrote to defendants demanding payment, but no answer was sent. In November following, it was placed in a Toronto solicitor's hands for collection. On the 10th of the same month, defendants' attorney tendered to the plaintiffs' attorney \$518 in United States currency, reckoned at par, which was declined.

It was further admitted that the covenant was made in Toronto, where defendants then and now are domiciled, and that on the day it became due it was not presented at the Bank of Republic, nor had defendants any funds there to pay it.

On these facts the learned Chief Justice ruled that the plaintiffs were entitled to recover the full amount claimed, viz., \$757, including interest, and for this the plaintiffs had a verdict.

In Easter Term, *Burns*, for defendants, obtained a rule to set aside or to reduce the verdict, the damages being excessive, or why at least it should not be reduced by the amount paid into court.

During this term, *S. Richards, Q. C.*, shewed cause, citing *Judson v. Griffin*, 13 U. C. C. P. 350; *White v. Baker*, 15 U. C. C. P. 293.

Burns supported the rule, and cited *Jones v. Arthur*, 8 Dowl. 442; *Stor. Conf. L. sec. 313* b. 318; *Jones v. Arthur*, 4 Jur. 859; *Cooch v. Maltby*, 23 L. J. Q. B. 305.

HAGARTY, J., delivered the judgment of the court.

We do not see any thing in this case to take it out of the operation of the ordinary rule, that the plaintiffs should recover such damages as will put them in the same situation as if the contract had been duly performed. The defendants were bound to have paid the plaintiffs on the 20th of August, 1858; no valid excuse for their not

having done so has been offered. At all events, as they did not attend to pay the money at the place named on the proper day, it was their duty to find the plaintiffs and pay them. We therefore think that the plaintiffs are entitled on the face of the contract to an amount equivalent to the value of the sum at the place of payment on the 20th of August, 1858, besides interest from that date. We understand the parties to admit that at that time the dollar in New York and in Toronto was of the same value.

Assuming, as we do, that the delay in payment was the fault of the defendants, we cannot understand why the plaintiffs are now to lose one-third of their claim because their own currency has become depreciated in value. The defendants, on the other hand, have only to pay what they originally contracted to pay, viz., the same amount (apart from interest), which on the 20th of August, 1858, would have satisfied their covenant. The point seems expressly decided by our Court of Common Pleas in *White v. Baker*, 15 C. P. 293. The damages should be reckoned with reference to the time fixed for payment.

As to reducing the verdict by the amount paid into court, this is a mere formal matter, as it is conceded that defendants are of course entitled to credit for that sum. The plaintiffs have taken issue on defendants' plea, thereby denying the fact of the payment into Court. As, however, the defendants have raised other questions by the rule, we think the proper course is to direct the verdict to be reduced by the amount paid into court, neither party to have the costs of the motion or arguing in Term.

Rule accordingly.

COMMON PLEAS.

(Reported by S. J. VANKOUGHNET, Esq., M. A., Barrister-at-Law, Reporter to the Court.)

MCCURDY V. SWIFT, ADMINISTRATRIX.

Temperance Act of 1864, 27 & 28 Vic. c. 18. ss. 40, 41—By-Law—Livelihood of innkeeper—Right to sue before prosecution for felony—Death of party assaulted—C. S. U. C. c. 78 Pleading.

(Concluded from p. 11.)

While the Temperance Statute is chiefly for the regulation of morals, I think it may well be said that there has been a violation of it by the acts above mentioned; and perhaps it might not unsuccessfully be contended there had also been a violation of law generally.

Does this declaration, then, allege what the act declares shall be a violation of its provisions?

The declaration states that the defendant was in the possession and occupation of a certain inn, &c., as a house of public entertainment, then being under the charge of his servant, by his servant "wrongfully and in violation of the Temperance Act of 1864, in the said township, furnished and gave one William Wooley, while in the said inn, &c., intoxicating liquors, whereby he became and was intoxicated, and while so intoxicated did assault, &c., the said Angus McCurdy, whereby," &c.

The statute requires that the party shall, 1st, have drunk in the inn, &c.; 2ndly, to excess of intoxicating liquor; 3rdly, therein furnished to him; and 4thly, that while in a state of intoxi-