

Chan. Ch.] VARDEN v. VARDEN—LONDON AND CAN. L. AND A. CO. v. PULFORD. [Chan. Ch

Times, 501; *Courtoy v. Vincent*, 15 Beav. 486; *Wilson v. McCarthy*, 7 Prac. R., 132; *Robinson v. Wood*, 5 Beav. 388.

*Armour*, for Gilchrist. Until a cheque is actually made out, the interest of Gilchrist is a mere chose in action, which is not liable to execution: *Quarman v. Williams*, 5 Beav. 133; *Wood v. Vincent*, 4 Beav. 419. There is no precedent for the order asked.

The REFEREE held that he was at liberty to take the simpler course and order payment out to the petitioner directly, inasmuch as, if it were necessary, he could direct the cheque to be forthwith made out, in which case it was admitted the Sheriff could seize.

*Order granted.*

#### VARDEN v. VARDEN.

*Examination of opposite party*—R. S. O., c. 62, sec. 18—C. S. U. C., c. 32, sec. 15—C. S. C., c. 79, sec. 4.

*Held*, that R. S. O. cap. 62, sec. 18 does not authorize calling the opposite party as a witness, except only at the hearing or trial.

[Mr. Stephens, Nov. 9.—Proudfoot, V.C., Dec. 2, 1878.

In this case the plaintiff had given eight days' notice to the defendant's solicitors, pursuant to R. S. O., cap. 62, sec. 18, of his intention to cross-examine the defendant upon her answer. She, however, failed to appear.

*H. Cassels* now applied to the Referee for an order to take the answer off the files, and to note the bill *pro confesso* against her under the provisions of R. S. O., cap. 62, sec. 18. He cited *Moffatt v. Prentice*, 6 Prac. R. 33, and urged that the statute rendered it unnecessary to personally serve the subpoena. He also cited *McMurray v. G. T. Ry. Co.*, 3 Chy. Ch. 130.

*Hoyles contra*, urged that the statute did not apply, inasmuch as it only speaks of calling the opposite party as a witness at the hearing on trial, and that *Moffatt v. Prentice* was not in point. He referred to *Sefton v. Lundy*, 4 Chy. Ch. 33. The subpoena

must be personally served before punishment can be awarded.

*Cassels*, in reply: *Sefton v. Lundy* does not apply.

The REFEREE: I think the application under the wording of the statute is intended to be made to the Court at the hearing.

*Application dismissed, without costs.*

On appeal PROUDFOOT, V. C., held that the language of the statute was quite clear, and continued: "But it was contended that in this section the Revised Statute only consolidated the previous Act C. S. U. C., c. 32, sec. 15; and that in *McMurray v. G. T. R.*, 3 Chy. Ch. 130, it was assumed that this applied to such an examination. This Act, C. S. U. C., cap. 32, sec. 15, however, is general in its terms, and contains no such limitation of the examination to the hearing or trial, as in the Rev. Stat., and it might very well bear the construction assumed in the case cited, and yet give no countenance to this application. The Rev. Stat. indeed refers to the other as its original, but the revisers were not confined to mere consolidation, or at all events, these variations have been sanctioned by Parliament (41 Vic., c. 6, Ont.)" As to the argument that the construction placed on the C. S. C., cap. 79, sec. 4, in *Moffatt v. Prentice*, 6 Prac. R. 33, was an authority for the present application, the learned Vice Chancellor held that that statute empowered the judge to compel the attendance at any examination of witnesses, but that this is not the case with R. S. O., cap. 62, sec. 18.

*Appeal dismissed with costs.*

#### LONDON AND CAN. L. AND A. CO. v. PULFORD.

*Costs—Deposit on sale by subsequent incumbrancer*—G. O. 429, 456.

Where, under G. O. 456, a subsequent incumbrancer had demanded a sale and paid \$80 into court as deposit; *held*, he could not, after the expenses of the sale had been incurred, be called on to pay any more, although the actual costs were taxed at \$165. *Semle*, the plaintiff should