

defence without alleging the facts constituting reasonable and probable cause.

2. That the paragraphs objected to were calculated to make it doubtful whether the plaintiff could safely go to trial leaving the allegations contained in them upon the record, as the defendant had left it open for himself to prove other and distinct facts for the purposes of this defence, and that the plaintiff might be misled into assuming the allegations therein to be all that he had to meet, and for that reason they ought, under rule 318, to be struck out.

Application granted, costs to be costs in the cause to the plaintiff.

T. H. Metcalf, for plaintiff. *C. H. Campbell, Q.C.*, for defendant.

Province of British Columbia.

SUPREME COURT.

Full Court.]

KING v. BOULTBEE.

[Sept. 10.

Practice—Garnishee proceedings—Order that money remain in court until new action commenced—Whether nullity or not.

Appeal from order of FORIN, Co. J. The action was commenced in the County Court of Rossland on 28th Oct., 1899, to recover \$171, and a garnishing summons was also issued and served on the garnishee who, on 30th Oct., paid into court \$173.70. On 17th Nov. an order was made setting aside all the proceedings but ordering that the moneys in court remain to abide the result of an action to be commenced forthwith in respect to the same cause of action. The order also provided that the question as to whether the moneys were attachable should be determined as of the date of the issue of the garnishing summons so set aside. The new action was commenced on 18th November.

On 21st Nov., the defendant assigned the moneys then in court, and on 14th Feb., 1900, a summons was taken out in the first action on behalf of the defendant and the assignee for the payment out of court of the moneys to the assignee. This summons was dismissed, and the defendant and the assignee appealed. The order of 17th November was not appealed.

Held, per McCOLL, C.J., and WALKER, J., dismissing the appeal, that the order of 17th Nov. was not a nullity, and as it was not appealed against it was valid. IRVING and MARTIN, JJ., dissenting. Appeal dismissed.

Duff, for appellants. *MacNeill, Q.C.*, for respondent.