his own wrongful detention of goods not belonging to the insolvent after a demand made for them upon him by the true owner, from whom they had been taken. Such wrongful detention cannot be justified by the assertion that the sheriff, who had wrongfully seized the goods, had given them to the assignee. If the goods were now in the hands of the sheriff, he, to set himself right with the true owner, and to protect himself from an action, might unhesitatingly restore the goods to the owner. When the official assignee, to whom he has delivered them (upon demand being made upon him by the true owner), refuses to restore them, *he* becomes a wrong-doer himself, wholly independently of the sheriff and of the wrong committed by him, and must be responsible for his own acts.

The affidavits and argument upon the appeals leave no doubt on my mind that these are cases in which I have a discretion enabling me to grant writs of replevin, and that I properly exercise that discretion by granting them, which I therefore do without further delay, to enable the official assignee, if so advised, to have my judgment reviewed by the court during the present Term; and as the Act of 1860 enables me to direct that a bond may be taken in less than treble the amount of the property. I think it proper to limit the amount to a sum not exceeding four thousand dollars in each case. The orders of Mr. Dalton will therefore be set aside, and the orders will go for the writs of replevin.

## DIVISION COURTS.

In the Third Division Court in the County of Elgin.

### OAKES v. MORGAN.

*Nonsuit after payment of money into Court—Div. Ct. Rule 130—Impounding money for defendant's costs.*

[St. Thomas, Aug. 19, 1872.—*Hughes, Co. J.*]

This was an action to recover an account claimed for work and labour. At the trial the plaintiff proved a special executory contract to serve defendant for a fixed period not performed on his part, but sought to recover as upon a *quantum valebat* for the time he had worked as plaintiff's hired servant. The defendant paid a specific sum into Court, less than plaintiff's claim. The plaintiff was, on his own evidence, nonsuited at the trial because he proved he had failed to perform his contract.

After the sitting, *E. Horton* (who acted as counsel at the trial) applied for an order to set aside the nonsuit, and for a new trial on the following grounds:—

1st. That the payment by the defendant into Court was an admission that defendant was indebted to the plaintiff in at least that sum.

2nd. That the ordering a nonsuit when money had been paid into Court was unjust and unprecedented.

3rd. That the plaintiff was and is entitled under the circumstances to the amount paid into Court, and acknowledged to be due from defendant to him.

*W. J. White*, attorney for defendant, shewed cause, and cited the several authorities hereinafter referred to, contending that the nonsuit was right, and that the money paid into Court could not be taken out by the plaintiff, as the practice of a court of record permits, because the 130th General Rule of 1869 provides against that practice; that it is in fact to be retained by the clerk until the final result of the cause; that it may be impounded to abide the order of the judge who may order it to be applied in discharge of defendant's costs.

No one appeared to support the application.

HUGHES, Co. J., delivered the following judgment:

The payment into Court was an admission that the defendant owed the plaintiff $8 and no more. The plaintiff proceeded with his claim for, and undertook to prove his right to recover more, in fact the whole of his demand, and would not accept the $8 in full; he, however, proved at the trial he was not entitled to any sum whatever.

After payment of money into Court there may be a nonsuit in a court of record, and that this is sustained by precedent, there is abundance of authorities, if authorities are required. *Gutteridge* v. *Smith* was the leading case on the subject, 2 H. Bl. 374; 2 Esp. 482, n. It was formerly held that after tender, plaintiff could not be nonsuited, but it is now settled that plaintiff may be nonsuited after a plea of tender: *Anderson* v. *Shaw*, 3 Bing. 290. The 69th section of the Division Courts Act applies the principles of practice of the Superior Courts to the Division Courts in cases not otherwise provided for. The 130th Division Court Rule of 1869, makes the practice different with regard to plaintiff's right to take the money out of a Division Court, from that which is the practice in the Courts of Record. The rule provides that it is *not* to be paid out to the plaintiff until the final determination of the suit, unless the judge shall otherwise order; the object of that rule is quite obvious; so that the grounds stated for setting aside the nonsuit herein are untenable. Besides this, I do not see how I could be expected to grant a new trial, when upon the plaintiff's own shewing the merits of the case are entirely against his right to recover any sum whatever; the application ought rather to have been for me to grant an order for the clerk to pay over (after deducting defendant's costs) the balance of the amount paid into Court, to the plaintiff.

The authority shewn by Mr. White, 2 Chit. Arch. Pr. (9 ed.) 1283, lays it down that the Court or a Judge, may, if the plaintiff fails in his action, and the money has not been taken out of Court by him, impound it to answer the defendant's costs.

I shall, therefore, order the application for a new trial to be discharged and the money paid into Court to be impounded to pay the defendant's costs; and after those costs are satisfied the balance to be paid to the plaintiff.