ment over what he had before, but rather, being void during that period as against creditors having executions to get in the Sheriff's hands, they intended to make it absolutely null and void against creditors if it was not registered within the five days mentioned, though it might be registered afterwards.

In this view, I think the judgment of this Court in *Feehan* v. *the Bank of Toronto* correct.

I cannot say that I am free from doubt, but I think this view best accords with the intention of the Legislature.

In the judgment of the Court of Queen's Bench, in a suit between the same parties, 19 U.C. Q B 474, that Court arrived at a different conclusion; and assuming that the Legislature intended that these instruments should be valid from the beginning, and should only be void after five days, and if they were then registered that they should be valid thenceforward, their judgment is correct. I have not been able to bring my mind to this conclusion.

In my opinion, the judgment of the Court below should be reversed and the appeal allowed.

I do not think *Marples* v. *Hartley*, 3 L. T. N.S 474, makes any difference, that being no doubtedly in accordance with the English Act, and with the view I should probably take of our own Consolidated Statute if we had had no previous legislation on the subject.

This being a case in appeal, we are bound to decide according to our view of the law, notwithstanding the judgment of the case in the court of Queen's Bench.

DRAPER, C. J.—I continue of the opinion expressed in *Feehan* v. *the Bank of Toronto*, and concur in reversing the judgment of the Court below.

Per Cur.—Judgment reversed.

IN CHAMBERS.

TYRRELL ET AL. v. WARD.

Arbitrators' fees—Proof of payment.

Where the Master refused to tax against the unsuccessful party an arbitrator's fee upon proof only that a promissory note had been given to the arbitrator for the amount, a Judge in Chambers refused to interfere.

(November 8, 1861.)

On taxation of the bill of costs in this cause it appeared that there had been an arbitration between the parties, followed by an award in favour of plaintiffs, and that the sum fixed by the arbitrators as their fees was $160.

Before allowing the arbitrators' fee as against the defendant, the Master of the Court of Common Pleas required proof of payment.

There was no evidence of actual payment, but it was sworn that one of the plaintiffs had given his promissory note to the arbitrators for the amount of their fees.

Upon this it was contended that the Master was bound to tax the fee against defendant. The Master refused to do so.

R. Moore applied for a summons for a revision of taxation of costs in this taxation in this particular.

DRAPER, C. J., refused the summons.

MCINNES V. WEBSTER

Indigent Debtor—Custody in several causes—Discharge for non-payment for weekly allowance—Costs of former application.

Where a defendant is arrested and has the weekly allowance ordered in several causes, he is under sec. 4 of Cons. Stat. U. C. cap. 26 entitled to one sum of 10s. a week but in default of payment of that sum, he can properly claim to be discharged in all the causes.

The fact of non-payment of the costs of a former application to be discharged from custody, which was dismissed with costs is no reason for refusing a second application made upon proper and sufficient materials.

(December 1, 1861.

This was an application to discharge defendant from custody for non-payment of weekly allowance, payable by order of Mr Justice Burns granted on the 11th February last, or to supersede him because not charged in custody in due time.

Defendant was arrested in this cause and in one in favour of *Kerr et al.* on mesne process in December last.

On the 16th March last he obtained orders for the payment of the weekly allowance of ten shillings in each of these suits; he was regularly paid the allowance at 10s. a week under these orders until the 27th day of May last.

On the 1st June he was charged in execution in the suit of *Kerr et al* against himself. No application was afterwards made for the payment of the weekly allowance, and no allowance was afterwards paid.

On the 25th July last the defendant applied for his discharge from custody for non-payment of the weekly allowance, and the summons was discharged and costs ordered to be paid by defendant. These costs were not paid.

Jackson for plaintiff objected that defendant was not entitled to his discharge for non-payment of the weekly allowance, because subsequently to his obtaining the order for weekly allowance, he was charged in execution at the suit of Kerr. He also objected that the defendants did not show sufficient cause for his being superseded.

A. Cameron, contra.

RICHARDS J.—If the defendant had been paid the weekly allowance of 10s. by *Kerr et al* after they had charged him in execution, the plaintiff in this action might contend with a greater show of reason that defendant could not properly be discharged because the weekly sum of 10s was still paid him. But the facts clearly show that defendant has not been paid the weekly allowance he was ordered to receive in this cause, nor has he been paid the 10s a week, since the 27th of May last, in any cause in which he was confined.

The 5th section of Con. Stat. U. C., cap. 26, seems to me to provide that where a defendant is arrested and has the weekly allowance ordered in several causes, he is only entitled to one sum of 10s. a week, but in default of payment of that sum, he can properly claim to be discharged in all.

On the point raised I therefore think defendant entitled to the order discharging him from custody.

Though he has not paid the costs which he was ordered to pay on discharging a former summons, I still think he is entitled to his discharge, for the Legislature does not seem to attempt to that a party should be kept in custody for non payment of costs only, and certainly not for such a trifling sum as the costs of discharging a summons.

It is not explicitly shown in the papers produced before me when the order directing the payment of the weekly allowance in this cause was served; I assume, from all the affidavits, that it was served long ago, and it was probably filed in chambers on the application made by defendant for his discharge in July last.

The affidavit filed on behalf of the plaintiff clearly admits the orders were obtained in this suit and the suit of *Kerr et al* against the same defendant, and the payment of 10s weekly under the orders until the 27th of May last, and that the payment then ceased and has not since been made. This sufficiently shows the orders were made and the default in the payment required under them.

I think the order directing defendant's discharge should go.

CLARK V. IRWIN ET AL.

(*Reported by* HENRY O'BRIEN, Esq., *Barrister-at-law*)

2 W. & M ch. 5, sec. 4—*Treble damages and costs—Right to, how affected by reference to arbitration—"Recover."*

A reference to arbitration dissevers a plaintiff from recovering treble damages and costs in cases where he would otherwise be entitled to them under the statute of 2 W. & M. ch. 5 sec. 4. The word "recover" used in the statute means "recover by the verdict of a jury."

This was an application to revise the costs taxed on the part of the plaintiff, and to disallow the plaintiff treble damages awarded to him by the master under the following facts:—

The plaintiff, on 21st January, 1857, commenced an action against the defendants, under the statute 2 W. & M. ch. 5, sec. 4, and declared therein, on the 4th March, 1858, for the rescue of certain goods seized as and for a distress for rent. The defendants pleaded to the declaration on the 7th March, 1858.

On the 1st December, 1858—by the consent of parties, a judge in chambers made an order of reference, ordering the action and