

C. of A.]

NOTES OF CASES.

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IN THE ONTARIO COURTS, PUBLISHED  
IN ADVANCE, BY ORDER OF THE  
LAW SOCIETY.

## COURT OF APPEAL.

C. C.]

[Dec. 1, 1879.]

NERLICH V. MALLOY.

*Division Court Bailiff—Action for false  
return.*

To an action against a bailiff and his sureties for a false return, they pleaded that the bailiff immediately levied, but that he was at once notified by the attorney of one of the principal creditors of the execution debtor, that if he proceeded to sell, the debtor would be placed in insolvency, and that before the goods were sold, and while they were being advertised pursuant to the statute, a writ of attachment was issued, and an assignee appointed, whereupon the bailiff gave up the seizure and returned the writ, and that the plaintiff suffered no damage.

At the trial the learned Judge withdrew the case from the jury, and directed a verdict for the defendant, on the ground that this plea and another had been proved, and refused a rule *nisi* for a new trial.

*Held*, reversing the judgment of the County Court, that the plea was a good defence to the action, although under the 221st section of the Division Court Act the plaintiff would have been entitled to nominal damages upon the bare proof of breach of duty, without showing any injury; but that it was for the jury and not for the Judge to say whether the inaction of the bailiff had caused the plaintiff's damage, and a new trial was therefore ordered.

Before commencing the present action, the plaintiffs had taken summary proceedings by way of summons, under the 220th section of the Division Court Act, against the bailiff, which summons was discharged.

*Held*, that the order was not a bar to an action, under the following section, for a false return.

*O'Donohoe* for the appellant.

*J. McDougall* for the respondent.

*Appeal allowed.*

Q. B.]

[Dec. 1.]

GAULT V. BAIRD.

*Insolvent Act—Deed of composition.*

A deed, professing to be under the Insolvent Act, was made between the insolvents of the first part, certain sureties of the second part, and "the several persons, firms and corporations who are creditors of the parties of the first part, and also are mentioned in the annexed list, of the third part." It provided for the payment of composition by the insolvents of 75c. in the dollar, which payment was guaranteed by the sureties, and contained the following clause: "This deed shall be ineffectual unless and until completed by all creditors having claims for over one hundred dollars."

*Held*, on demurrer, affirming the judgment of Osler, J., that this clause only applied to creditors mentioned in the annexed list, and that certain other creditors, having refused to come into the arrangement did not prevent the deed from being operative.

*H. J. Scott* for appellant.

*G. C. Gibbons* for respondent.

*Appeal dismissed.*

C. C.]

[Dec. 1.]

RE McCracken.

*Insolvency—Landlord's lien.*

*Held*, If before an assignment or attachment in insolvency the landlord has levied, the assignee cannot take the goods out of his possession without payment or tender of the six months' arrears.

After the assignee has taken possession, the landlord cannot seize, but he is entitled to be paid the six months' arrears out of the proceeds of the goods in the demised premises, in preference to any other claim.

The landlord is not a privileged creditor, but is merely entitled to a lien upon the goods of the insolvent which he might have distrained.

If the assignee sells upon credit, he must arrange with the landlord before the goods are removed; otherwise he becomes liable to an order for immediate payment.

If the creditors or inspectors order the assignee to make such a sale, and do not provide him with the means of satisfying