so long as it is not used as a protection and means of delay, or the breach of it by the plaintiffs, can be to the other creditors If they cannot complain of this friendly or preferential judgment (and I think they cannot), they cannot complain either that a fraudulent bargain made between the plaintiffs and the defendant as to the mode in which this judgment should be dealt with, has not been carried out by the plaintiffs, but is so conducted as any judgment fairly obtained ought to be conducted, by being promptly enforced The failure to keep this improper bargain, to the prejudice of the defendant's other creditors, is a matter solely between the plaintiffs and the defendant, with which the other creditors have nothing whatever to do.

It does not appear that this applicant will not be satisfied out of the defendant's goods and if it distinctly appears he is not likely to lose, when he still holds in his hands the property which he sold to the defendant for $1 800 for a little more than one half that sum, having already been paid the difference betwe : this larger claim and the amount of his judgment.

Rule discharged, without costs.

COMMON LAW CHAMBERS.

(*Reported by* ROBERT A. HARRISON, ESQ. *Barrister-at-Law.*)

SOMMERS v. CARTER

Security for costs—Time for application.

Where appearance was entered on 13th September, 1862 declaration filed on 29th of same month order for security for costs obtained on 7th October 1862, on the ground that plaintiff had left Canada, that order rescinded on 11th March, 1863 on the ground of his return Plaintiff again left Canada in October 1863 An application made in March 1864 for security for costs, was held not to be too late, there being nothing to shew when defendant first had notice of plaintiff leaving in October, 1863, or that he defendant had taken any steps in the cause, between that date and the date of his application.

(Chambers, March 30th, 1864.)

This was a summons calling upon plaintiff to shew cause why all the proceedings in the cause should not be stayed, until security for costs were given by plaintiff to defendant.

On 13th September, 1862, the defendant entered his appearance.

On 29th of same month, declaration was filed.

On 7th October, 1862, defendant obtained an order for security for costs, on the ground that plaintiff had left Upper Canada, and was resident in the State of Michigan.

On 9th of the same month, the order for security for costs was served.

On 11th March, 1863, the defendant upon an affidavit, that during the month of October preceding he had returned to Canada, and was at the time of the application, residing in the Township of Norwich, in the County of Oxford, as his usual and permanent place of residence, obtained an order rescinding the order of 7th October, 1862, directing security for costs to be given.

In October, 1863, plaintiff again returned to the United States of America, there to reside.

On 21st March, 1864, notice of trial was served for the then coming assizes, to be holden on 30th of same month, in and for the County of Oxford.

On 24th March, the affidavits were sworn on which to apply for a second order for security for costs.

On 26th of same month, the summons was granted.

There was nothing to shew either when the pleas were filed, or when issue was joined in the cause.

S Richards, Q.C., for defendant.

W. Freeland, for plaintiff.

DRAPER, C. J.—The only objection I see to the defendant's application, is apparent delay. Plaintiff left Canada in October, 1863—this application is just made. It is not shewn that defendant only recently discovered that plaintiff had gone; but this case differs from any that I can find. The defendant applied early, and obtained an order for security for costs in October, 1862. No security was given, and in March, 1863, the plaintiff got that order rescinded, on the ground that his absence was temporary and he had returned. Since then no step has been taken in the cause, until the 21st of this month, and defendant makes this application immediately thereafter.

In *Duncan* v *Stint*, 5 B & Al 702, reference is made to a previous case, where the court said "When a cause is pending, a party if he means to apply for security for costs, must take no step after he knows that the plaintiff is out of England."

In *Wainwright* v. *Bland*, 4 Dowl. P. C. 547, there had been a trial, and the application for security was made after notice of trial again given. Defendant admitted he knew plaintiff had gone abroad before the trial, and it was held he was too late, and that he should have moved before; as expense might have been unnecessarily incurred.

Brown v. *Wright*, 1 Dowl. P. C. 95, the court quote and act upon the passage cited from *Duncan* v. *Stint*.

Doe v. *Brood*, 1 Dowl. N. S 857, proceeds on the same principle, and so in *Foster* v. *Coster*, 8 A. & E. 419 (in notes)

There is nothing to shew when plea was pleaded, or issue joined, unless the latter step were taken by plaintiff on the day on which he gave notice of trial

The declaration was filed on 29th September, 1862, and as the first order for security for costs was not obtained until 7th October, 1862, the plea was probably pleaded before that order. If so, no step in the cause, strictly speaking, has been taken since then, for the order for security and the order rescinding it, are collateral proceedings.

It appears to me, therefore, looking at the plaintiff's delay in proceeding at the fact that it does not appear that defendant took any step in the interim, and considering what I take to be the principle of the cases cited, I should make this order.

Order accordingly.

CROSS v. WATERHOUSE.

Trespass—Verdict for 1s—Plaintiff's costs—Defendant's costs.

Where plaintiff in an action of trespass for false imprisonment, recovered a verdict for one shilling only, and the judge refused to certify it was held that plaintiff was entitled to no costs whatever, and that as plaintiff was entitled to no costs, sec 328 of Consolidated Statutes Upper Canada, cap 22, which enables a defendant under certain circumstances to set off so much of his costs of defence, between attorney and client, as exceed the taxable costs that would have been incurred in the Division Court against plaintiff's verdict and costs, was inapplicable.

(Chambers, April 12, 1864)

Plaintiff obtained a summons on 28th March last, calling upon the defendant to shew cause why an order should not be made upon the master to review his taxation herein, and directing him to disallow to defendant so much of the defendant's costs taxed between attorney and client, as exceed the taxable costs of defence which would have been incurred in the inferior court, and not to set off the same against plaintiff's verdict, upon the ground that the plaintiff having sued in trespass and recovered by the verdict of a jury, less damages than $8, and the judge at the trial having refused to certify, plaintiff was entitled to no costs whatever, and that it is only where a plaintiff is entitled to some costs, that defendant is allowed to tax his costs of defence as between attorney and client, and set off the same against plaintiff's verdict and costs, and why the writ of execution directed to the sheriff of the County of Hastings, against the goods and chattels of one plaintiff, for the excess of costs taxed by the master to the defendant, should not be set aside, upon the ground that the said writ was not warranted in law, and upon grounds disclosed in affidavits and papers filed.

The affidavits shewed that the action was trespass for false imprisonment, the pleas were not guilty and leave and license, upon which the plaintiff joined issue.

The cause was tried at the Fall Assizes for the year 1863, at Belleville, before Morrison, J. Plaintiff recovered a verdict for one shilling only. The judge refused to certify under Consolidated Statutes Upper Canada, cap. 22, secs. 324, 328. Defendant afterwards applied for and obtained an order for the delivery of the postea to him.* The defendant then gave notice of taxation of costs before the deputy clerk of the Crown, at Belleville. Plaintiff produced no bill. Defendant on 11th March, 1864, taxed his bill between attorney and client, and set off so much of it as exceeded the taxable costs that would have been incurred in a Division Court, against plaintiff's verdict, leaving a balance against plaintiff of $75 59, for which execution was issued by the defendant, directed to the sheriff of the County of Hastings, against the goods

* 10 U. C. L. J., p. 73.