

a contemporaneous parol agreement existed under which he was not to be personally liable upon it, but was to pay it only so far as moneys of Harford Ashley came to his hands for the purpose, should have been rejected: *New London Credit Syndicate v. Heale*, [1898] 2 Q. B. 487; *Young v. Austin*, L. R. 4 C. P. 553; *Abrey v. Crux*, L. R. 5, C. P. 37; and the jury should have been told that the debt due by Harford Ashley to Albert Loucks, and the forbearance of Albert Loucks in consideration of the giving of the notes, were a sufficient consideration for the making of them by defendant, and the binding character of the sealed agreements executed by defendant and Harford Ashley should have been pointed out to them. Under ordinary circumstances, where objection has not been clearly taken at the time to the admissibility of evidence, and to the charge to a jury, it is a sound rule to refuse to allow a new trial upon these grounds. But where, as here, it plainly appears that there has been an entire misconception on all hands of the real points in issue, and a mistrial has been the result, the Court should exercise its discretion and direct a new trial, because, apart from the evidence of defendant, which is in direct contradiction of his own solemn agreements, there is nothing whatever to support the verdict in his favour.

Appeal allowed, and new trial directed. Costs of first trial and appeal to be costs in the cause.

BRITTON, J.

OCTOBER 30TH, 1902.

TRIAL.

ELLIOTT v. HAMILTON.

Execution—Sale of Land under—Assignment for Benefit of Creditors—Priorities—Costs.

Action to recover possession of the east half of lot 8 in the 7th concession of the township of Tay. On 5th January, 1878, plaintiff recovered judgment against defendant, who was the owner of the land in question, for \$1,567.80 debt and \$22.75 taxed costs. On 19th December, 1896, a writ of fi. fa. was issued against the goods and lands of defendant, and placed in the hands of the sheriff of Simcoe. The sheriff subsequently made a return of "nulla bona" to that part of the writ requiring him to make the money out of defendant's goods, and he seized and duly advertised for sale the interest of defendant in the land in question. The sale took place on the 27th February, 1899. On the 24th February, 1899, defendant made an assignment for creditors under R. S. O. ch. 147, to one Clarke. On the day of sale, and before