

the general provisions of the Canada Evidence Act upon which that case turned.

This section 134 seems to introduce into actions for penalties under the Act the same exceptions to the general rules regarding discovery as exist in ordinary civil actions, under the laws of the Province. One of those rules undoubtedly is that discovery will not be compelled from a defendant in an action to recover penalties: *Martin v. Treacher*, 16 Q. B. D. 507; *Saunders v. Wiel*, [1892] 2 Q. B. 321; *Mexborough v. Whitwood*, [1897] 2 Q. B. 111.

The decision of *Reg. v. Fox*, 18 P. R. 343, turned upon a provision in the Canada Evidence Act which was held to govern the case, and not upon the general provincial law of evidence; it does not therefore establish a rule generally applicable to civil suits in this Province.

I think, therefore, that the defendant in an action for penalties might have successfully resisted an attempt to compel him to submit to an examination for discovery; in an ordinary common law action he was of course bound to submit to examination, and he did so.

Having by proceeding at common law obtained from the defendant the discovery which he could not have had in an action for penalties, he then applied to amend his statement of claim by turning his action into one for penalties. At the time he made the application, more than a year had expired since the act complained of was committed, and he could not have brought a new action for the penalties: see sec. 142 of the Act.

I think, under these circumstances, that, notwithstanding the indorsement upon his writ, the plaintiff must be taken to have conclusively elected to pursue his common law remedy, and that the appeal should be dismissed with costs.

*cf.* B. Elliott, London, solicitor for plaintiff.

Gibbons & Harper, London, solicitors for defendant.

FERGUSON, J.

MARCH 4TH, 1902.

WEEKLY COURT.

FOX v. KLEIN.

*Mortgage—To Two Different Mortgagees—Action for Sale by One Claiming Relief for Himself Only, Improper.*

*Davenport v. James*, 7 Hare 252 *n.*, followed.

Motion for leave to amend the pleadings in a mortgage action by striking out the name of one of the mortgagors, defendant James J. Mallon, deceased, who joined in the mortgage as administrator of John J. Shea, who died seized