

the civil action of *Barber v. McCuaig* (No. 2), 31 O. R. 593. In that case an action had been brought which failed in the Supreme Court, 29 S. C. R. 126, because the plaintiff had not exhausted her remedies against the mortgaged lands and certain persons named. Afterwards, having exhausted her remedies as aforesaid, she brought a new action, alleging the same facts as in the former action, and that she had exhausted the said remedies. Upon defence of *res judicata* being set up, Meredith, C.J., in a carefully considered judgment, held that there could be no such plea successfully pleaded, where the former action failed by reason of the fact that it was prematurely brought. I think the same rule applies here, and that I had the right to grant the new writ upon the alteration of circumstances—but I think that such a writ should not be granted upon any ground which might have been taken upon the former application.

I consider, therefore, the one objection only, namely, that the term of imprisonment has expired.

The term of imprisonment begins on and from the day of passing sentence (see R. S. C. 1906 ch. 148, sec. 3), and consequently the full term here has long since expired. But it is contended that the facts of this case constitute an escape, and, therefore, the applicant here must serve the term equivalent to the whole amount of the imprisonment imposed. See R. S. C. 1906 ch. 146, sec. 196.

An escape is defined by R. S. C. ch. 146, sec. 185, thus: "Every one is guilty of an indictable offence and liable to two years' imprisonment, who, having been sentenced to imprisonment, is afterwards, and before the expiration of the term for which he was sentenced, at large within Canada, without some lawful cause, the proof whereof shall be upon him." Here the applicant was at large before the expiration of the sentence, and the whole question is whether he has shewn "lawful cause" for being so at large. The taking of bail was admittedly beyond the powers of the magistrate, and perhaps the magistrate would be liable for a voluntary escape or a negligent escape at common law—and it may be that the provisions of the Criminal Code, ch. 146, are wide enough to cover his case. And if the present applicant had, by force or artifice, by craft or guile, brought about his release, he would undoubtedly have been guilty of an escape both at the common