was some evidence in corroboration of the positive statement, and it was for the jury to determine whether the evidence of the prosecutrix was true or not.

Rule discharged.

THOMPSON v. MCDONALD.

Promissory note—Giving time to surety—Equitable defence.

Action on a promissory note made by defendant payable to W. or bearer, and by him delivered to the plaintiff. *Plea*, on equitable grounds, that the note was made by defendant as surety, jointly and severally with one C., to secure a debt due from C. to W., as W. well knew: that W. transferred to the plaintiff after it became due, and without consideration; and that W. after it fell due and before the transfer, and the plaintiff after such transfer, without defendant's consent, *gave time to C.* to the prejudice of defendant. *Held*, no defence.

Action, on a promissory note made by defendant payable to one James Ward or bearer, and by him transferred to the plaintiff

Plea, on equitable grounds, that the said note was made by defendant jointly and severally with one C., to secure a debt due from the said C to the said James Ward; and that the said James Ward, at the time he received the said note so made as aforesaid, well knew that the defendant received no value or consideration therefor, and that the same was made by the defendant as security for the said C., and that the said James Ward transferred and delivered the said note to the plaintiff after the same became due and payable, without any consideration or value given by him for such transfer and delivery thereof; and that the said James Ward, after the said note became due and payable, and before the transfer and delivery thereof to the plaintiff, and the plaintiff after such transfer and delivery, without the consent or knowledge of the defendant, gave the said C. time for the payment of the said note, and hath forborne for a long period of time to enforce payment of said note, to the prejudice of the defendant.

Demurrer.—That the plea does not deny that the said James Ward gave consideration for the said note, nor shew any want of consideration for the making of the note, but, on the contrary, does shew consideration: that it does not appear by the said plea but that the said James Ward received consideration for the transfer of the said note; and that it does not appear by the said plea that there was any binding contract to give time to either of the said makers, or that there was any consideration for such forbearance.

McMichael for the demurrer. *Hector Cameron*, contra. *Perley* v. *Loney*, 17 Q. B. U. C. 279, was referred to.

ROBINSON, C. J. delivered the judgment of the court.

We are of opinion that this plea is insufficient. It states only that the holder of the note has given time to the principal debtor, not that he has by any agreement bound himself to do so. What is set up is a mere forbearance or indulgence shewn to the principal debtor, and this alone has never been held to discharge the surety.

It is unnecessary therefore to consider the sufficiency of the plea in other respects as an equitable defence.

Judgment for plaintiff on demurrer.

SCOTT v. KELLY.

Contract—Assignment—Payment by mistake—Money had and received—Trover.

M. had a contract to supply wood to a railway company, for which he was to be paid when it had been inspected and accepted. While 152 cords were lying in the company's yard for inspection, he assigned all the wood that belonged to him with other property, to the plaintiff for the benefit of his creditors. He at the same time made over his interest in the contract to the defendant, who completed it, and the company afterwards by mistake paid defendant for these 152 cords, as well as for what he had himself supplied.

Held that the plaintiff might recover this sum as money had and received, but that he could not maintain trover, there having been no conversion by defendant.

Held, also, that defendant could not object that the assignment to the plaintiff was not properly filed.

DECLARATION. First count, for money payable by defendant to plaintiff for goods bargained and sold, for money received by defendant for the use of the plaintiff, and for money found to be due from defendant to plaintiff on an account stated. Second count, in trover, for 152 cords of wood.

Pleas. 1. To first count, never indebted. 2. To the second count, not guilty. 3 and 4, to the second count, the wood not the plaintiff's property, and that the plaintiff was not lawfully possessed.

At the trial at Sarnia, before *Burns*, J., the facts appeared as follows: A person of the name of Minty had a large contract with the Great Western Railway Company for supplying them with wood. He had got out and delivered 952 cords, of which 800 cords had been accepted and paid for. The remainder, 152 cords, on the 4th May, 1858, had been delivered at the station, but had not yet been measured, inspected, or accepted by the company. It was proved by Minty that after the wood once was delivered by him on the premises of the company he could not remove it without permission from the company, but that the delivery to the company was not complete until the wood had passed inspection, and was measured by their agent, according to the specification in the contract with the company. While these 152 cords remained still not inspected or measured, and as yet unaccepted by the company, Minty made an assignment of his property to the plaintiff for the benefit of creditors, and in that assignment included these 152 cords of wood. The assignment was executed on the 4th of May, 1858, and filed in the county clerk's office on the same day. No affidavit was made by the bargainee therein mentioned. Minty was indebted to the defendant, and for his benefit at the same time assigned to him the contract with the company, in order that he, the defendant, might fulfil the residue of it. The defendant did complete the contract, and delivered 390 cords, and received payment for that quantity. The company, subsequent to the assignment of the 152 cords to the plaintiff, accepted the wood, and in July after, when they accepted the 390 cords, from the defendant, not knowing or overlooking the fact of a portion of the wood being assigned to the plaintiff distinct from the assignment of the contract, paid for the whole quantity to the defendant. The defendant admitted he had received payment from the company for these 152 cords, and that it was an error on the part of the company, but said that as he had received the money he should keep it, as he was a creditor of Minty's.

The defendant's counsel, at the trial, made the following objections to the plaintiff's recovery, either in assumpsit for money had and received or upon the count in trover. 1. That upon the count in trover there was no taking of the wood by defendant proved, and therefore that count could not be sustained. 2. That upon the count in assumpsit there was no privity between the plaintiff and the defendant established. 3. That the amount due from the company for the wood might be looked upon as a debt due, and then it could not be assigned so as to give the plaintiff a right to maintain a suit in his name. 4. That the assignment to the plaintiff, not having an affidavit of the bargainee attached, was not in accordance with the statute.

The learned judge overruled the objections, holding that the facts entitled the plaintiff to recover either upon the count in trover or in assumpsit, and that the facts taken separately might perhaps support either view. The plaintiff might take an assignment from Minty of his title in the wood, subject to the right of the Great Western Railway Company to accept or reject it, and if the defendant afterwards pretended to the company that these 152 cords of wood were his, and he sold it as such, trover might have been maintained against him, upon the inference that such conduct amounted to a taking on his part; or if the defendant merely received payment for it in error on the part of the company, without his contributing to that error, then the money received by the defendant was so much money belonging to the plaintiff in the defendant's hands. As to the objection that the bill of sale did not contain an affidavit of the bargainee, the judge held that the defendant was not in a situation to raise such an objection to prevent the money from being recovered from him.

The jury gave a verdict for the plaintiff, £96 15s., and leave was reserved to the defendant to move the court to enter nonsuit, if the court should think the objections ought to prevail.

Davis obtained a rule *nisi* accordingly, or for a new trial.

Prince shewed cause.

ROBINSON, C. J., delivered the judgment of the court.

The objection to the count in trover I take to be correct; there was no conversion of the wood by the defendant. But for the money had and received by the defendant, I think the plaintiff was clearly entitled to recover.

The defendant was proved to have admitted that he had received