

C. L. Cham.]

CRAIG V. CRAIG—SQUIRE V. DREENAN—ROWE V. WERT.

[Chan. Cham.]

CRAIG V. CRAIG.

Execution—Abandonment—Interpleader—Landlord—Distress.

A sheriff made a seizure on certain goods in the middle of September, but put no bailiff in possession, merely taking the word of the execution debtor that the goods would not be removed, and the goods were distrained for rent on Oct. 2nd. The sheriff thereupon took the goods out of the landlord's hand under pretence of the execution.

Held, that there had been an abandonment by the sheriff as against the distress warrant.

When goods are under seizure for rent they are *in custodia legis*, and the sheriff has no right to seize them under an execution.

On an application by a sheriff for an interpleader order under such circumstances, the landlord's claim being taken to be *bona fide*, the legality of the seizure under the distress cannot be enquired into in chambers, and the sheriff's application for relief by interpleader was therefore refused.

[October 18.—MR. DALTON.]

This was an application by a sheriff for an interpleader order under the following circumstances: The sheriff seized the goods in question about the middle of September, but put no bailiff in possession, merely taking the word of the execution debtor that he would not remove the goods. Rent became due on 1st October when the goods were removed off the premises. On October 2nd, the landlord seized the goods for rent on the ground that this removal was fraudulent within the meaning of the statute. On Oct. 3rd the sheriff made a second seizure while the goods were in possession of the landlord's bailiff. The landlord notified the sheriff that he claimed the goods under distress for rent. The sheriff thereupon applied for an interpleader. Affidavits were filed both by the claimant and the execution creditor as to whether or not the removal was fraudulent.

Black, for execution creditor.

O'Brien, for landlord, cited *Impey*, 4th ed. 105, 110—11; *Castle v. Ruttan*, 4 C.P. 252; *Hart v. Reynolds*, 13 C.P. 501; *Robertson v. Fortune*, 9 C.P. 427; *Wheeler v. Murphy* 1, Prac. R. 336.

Osler, for sheriff, cited: *Ackland v. Paynter*, 8 Price 95; *Hamilton v. Bouck*, 5 O. S., 664. Interpleader Act, 1865.

MR. DALTON thought that (1) under the circumstances the first seizure by the sheriff must be considered to have been abandoned; (2) that the goods being under seizure for rent they were *in custodia legis* and the sheriff had no right to seize them under an execution, and (3) that the question of the validity of the landlord's claim could not be discussed in chambers. The summons was therefore discharged with costs, except

as to the costs incurred in respect to the question of fraudulent removal, which were held to have been incurred unnecessarily.

SQUIRE V. DREENAN.

Pleading—Estoppel—Judgment.

When in an action on a promissory note against an endorser the defendant pleaded in estoppel that the note was given as security for the performance of a certain agreement between the plaintiff and one M., that the defendant endorsed as security for M. the maker, and that the plaintiff had brought an action against M. on the agreement, in which action M. had pleaded *non assumpsit* and had judgment on the plea.

Held, that the plea was no answer to the declaration.

[October 18.—MR. DALTON.]

This was an application to strike out a plea, pleaded in terms as above, as being framed to prejudice, embarrass, and delay the plaintiff.

Spencer, for plaintiff. The judgment in the former action is not an estoppel to the plaintiff suing in this action, the parties not being the same and the causes of action not being identical. See *DeColyar on Guarantees*, pp. 26, 27; *Drake v. Mitchell*, 3 East, 251; *Nelson v. Couch*, 15 C. B. N. S. 99; *Carter v. James*, 13 M. & W., 137.

Osler, for defendant. Plaintiff should have demurred, and should not have moved to strike out the plea. The plaintiffs do not allege that the plea is embarrassing.

MR. DALTON thought that the plea was no answer to the declaration and that it should be struck out.

Order accordingly.

CHANCERY CHAMBERS.

(Reported for the *Law Journal* by H. T. BECK, M.A., Student-at-Law.)

ROWE V. WERT.

Appeal from Master—Report—"Special circumstances"—Delay—Mortgage—Dower.

On an application for leave to appeal from a master's report after the time limited, leave was not granted where there had been a delay of some six months, and no explanation offered.

When a bill was filed by a first mortgagor for a sale of the mortgaged premises, there being also a second mortgage, the mortgagor's wife having barred her dower in the first mortgage, but not in the second mortgage, and the master, on a warrant being taken out after the sale for the purpose of taking accounts, in his report thereon, found the widow entitled to dower as against the second mortgagee.

Held, That under G. O. 220, the master had power in his final report to entertain the question of dower, and report thereon as a "special circumstance," and that