

C. L. Cham.]

BELL V. CUFF—BROOKE V. BANK OF UPPER CANADA.

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Durand supported the application. The court will stay proceedings where the parties and the title are the same in both actions: *Ch. Arch. Prac.* 11 Ed. 1039—1041—1370.

ADAM WILSON, J.—The principle which applies in such a case is to stay proceedings if the plaintiff is acting vexatiously by bringing a second action: *Short v. King*, *Strange*, 681; *Melchart v. Halsey*, 2 W. Bl. 744; *Danvers v. Morgan*, 17 C. B. 530; *Pashley v. Poole*, 3 D. & R. 53; *Faith v. Guppy*, 12 Jur. N. S. 1011; and therefore the court would not stay the second action where the plaintiff had to abandon his first suit by reason of a mistake which he amended in his new action: *Short v. King*; *Pashley v. Poole*, *ante*; nor would they stay the second suit where the verdict was obtained in the first one by fraud, and perjury: *Doe Kerr v. Thomas*, 2 B. & C. 622.

There is no general rule that a plaintiff is compelled to pay the costs of a first action before he is suffered to proceed with the second; *Pashley v. Poole*, 3 D. & R. 53; *Doe Kerr v. Thomas*, 2 B. & C. 622; *Danvers v. Morgan*, 17 C. B. 530; *Prowse v. Loxdale*, 3 B. & S. 896.

Some light is thrown also upon the law by the provision which the legislature has made for security for costs being given in such a case, and the 76th section of the Ejectment Act, which is very general in its language, I think should be read in connection with the 1st section of the 29 & 30 V. c. 42, which enacts that security for costs shall be given when the second suit is brought for the same cause as the first one.

Upon a consideration of the authorities, as this second action is not brought for the same cause as the former one was brought for, there is no ground for staying it until the costs of the former action have been paid.

It may be possible, if it were made to appear that the question involved in the present action was involved in and could have been tried in the first action, and that the present one is brought to harass and oppress the defendant, that relief might be given, for I do not think it would be exceeding the powers of the court to interfere in such a case, otherwise a plaintiff might have fifty such actions pending, or forty-nine judgments against him, and a fiftieth action pending in respect of a different alleged forfeiture, the trial of any one of which claims would have settled the rights between the parties, and yet he might forbear to try the question, and thus keep perpetually annoying the defendant with fresh actions and the defendant would have no redress.

I think the present application must be discharged, but I do not think it is a case for costs.

Summons discharged.

BROOKE V. THE BANK OF UPPER CANADA.

Corporation—Forfeiture of bank charter—Effect on tenure of office by president and directors—Service of process.

Service of process was made upon A. as president of a bank. The last election of officers was in June, 1866, when A. was elected president for one year. No election of directors or president had taken place since then, and A. never in fact resigned his office as president. In September, 1866, the bank suspended specie payment, and before 60 days thereafter they assigned their property and assets to trustees, and from thence had ceased to do business as a bank. It was provided by the charter, amongst other things, that a suspension of specie pay-

ment for sixty days, or an excess of the debts of the bank by three times the paid up stock and deposits, &c., should operate as a forfeiture of the charter, &c.

Held, 1. That the total annihilation of the bank was not contemplated by these provisions, and it does not follow from the loss of the charter that there must be a dissolution for all purposes.

2. That some formal process is necessary finally to determine and put an end to all the functions of a corporation.
3. That notwithstanding the suspension and assignment, the bank was still a corporate body, liable to have its property sold or administered for the satisfaction of debts.
4. That A. must still be looked upon as the president of the bank, and an application to set aside the service upon him was discharged with costs.

[Chambers, October 10, 1867.]

This was a summons to set aside the service of process made upon Mr. Allan, who was served as president of the Bank of Upper Canada, upon the ground that the bank having suspended specie payments for more than sixty days consecutively, a forfeiture of their charter had been created, and that there existed no such corporation as the defendants were represented to be, and that even if there were such a corporation, that Mr. Allan was not the president, or an officer of the bank.

It appeared from the affidavits filed that the last election of officers was in June, 1866, when Mr. Allan was elected president for one year, and that the bank suspended specie payments in September, 1866; and before sixty days therefrom, the bank (on the 12th November, 1866) assigned, with the consent of the shareholders, all their property and assets to trustees, and had ceased from that period to do any business as a bank. That no meeting was held in June, 1867, for the election of directors and president, and that Mr. Allan had never in fact resigned his office of president.

MacLennan shewed cause. He contended that the bank did exist in fact as a corporation, notwithstanding the forfeiture of the charter; that properly its corporate powers could not be determined, whether by suspension of specie payments or by the assignment of its assets, except by proceedings taken for that purpose, and that the officers last elected, and who had never resigned, must be considered to be the proper officers of the bank for service of process and other purposes. He referred to the act of incorporation, 19 & 20 V. c. 121, secs. 7, 8, 33, 35, 36; *Grant on Banking*, 462, 539; *Stewart v. Dunn*, 12 M. & W. 655; *Grant on Corporations*, 283, 295, 301, 305, 306, 309; *Angell & Ames on Corporations*, sec. 777.

G. D. Boulton supported the application, and argued that the forfeiture of the charter, which, it was expressly declared by statute, should follow in the event of suspending specie payments, was in fact a dissolution, or was equivalent to a dissolution of the corporation; and, in such a case there could be no longer any officers of the corporation, for the corporation itself was utterly gone and determined, and the service itself was therefore irregular. *Slee v. Bloom*, 19 Johnston, 456; *Kyd on Corporations*, 447, 515; 1 Bl. Com. 500, 501; *Angell & Ames on Corporations*, sec. 779; 19 & 20 Vic. secs. 2, 7, 8, 32.

ADAM WILSON, J.—By sec. 7 of the act, ten directors are to be elected annually at a general meeting of the shareholders, to be held annually on the 25th of June, and the directors elected shall be capable of serving as directors for the ensuing twelve months; and at their first meet-