

CANADA REPORTS.

ONTARIO.

CHAMBERS.

PAGE V. PROCTOR.

Witness Fees—*Con. Stat. Can., cap. 79, sec. 8.*

A certificate under the above section will not be granted unless the conduct money has been tendered to the witness at the time of service of subpoena upon him. Is it not sufficient that he received unused fees for a former trial which did not take place.

McPhillips moved, pursuant to *sec. 8, C. S. C., ch. 79*, for a certificate, that one Cox, who had been duly served in the Province of Quebec with a subpoena, to attend and give evidence upon the trial of this cause, at Toronto, had not appeared according to the urgency of the writ, but had made default, &c.

It appeared that the witness had been served with a subpoena to attend the trial at a former assize, at which the case did not come on, and he did not attend, having been duly notified not to do so. He had then been paid a sufficient sum for his conduct money.

On being served with the subpoena on the present occasion, he admitted to the person who served it the receipt of the money so paid, and that he had not attended upon the subpoena, and he made no objection to attending, on the ground of non-payment of conduct money with the subpoena now served.

OSLER, J.—This is a matter which concerns the liberty of the subject, and however unreasonable the conduct of the witness may have been, I think I am precluded by the express terms of the 9th sec. of the Act, from granting the certificate moved for. That section enacts that no such certificate of default shall be transmitted by any Court, nor shall any person be punished for neglect or refusal to attend any trial . . . in obedience to any such subpoena, etc., unless it be made to appear to the Court transmitting and also to the Court receiving such certificate, that a reasonable and sufficient sum of money, to defray the expenses of coming and attending to give evidence, and of returning from giving such evidence, had been tendered to such person *at the time* when the writ of subpoena, &c., was served upon him.

The money which had been paid to the wit-

ness, with the former subpoena, was a debt due by him to the plaintiff, recoverable as such in the ordinary way, and may no longer have been available to defray the witnesses' travelling expenses upon the sudden call of a subpoena. I think, at the very least, he should have been asked whether he required the fees to be again paid to him, or if he would treat those already paid as sufficient for the present emergency. Something of that kind ought to be deemed equivalent to a tender, although I am not prepared to say what an actual tender must not, in any case, be shewn under the statute, in order to punish the party for a contempt.

The matter must be passed upon by the Quebec Court, and it would be extremely unsatisfactory if that Court should decline to act upon our certificate, because, in the opinion of such Court, nothing less than actual tender would do.

I shall be quite ready to re-consider the question, if it should come before me in the full Court; but as it strikes me at present, the motion must be refused.

NOTES OF CASES.

PUBLISHED IN ADVANCE BY ORDER OF THE LAW SOCIETY.

QUEEN'S BENCH DIVISION.

IN BANCO, DECEMBER 24, 1881.

GOODALL V. SMITH.

Sale of Goods—Waiver of Condition.

The defendant at Toronto having by telegram and letter offered the plaintiff at Landsdowne twelve carloads of barley, f.o.b. at Toronto, at 60c. per bushel, of the quality of barley previously shipped by the defendant to the plaintiff, subject to inspection by the plaintiff at his own expense at Landsdowne, the plaintiff answered by telegram, "All right; will take the lot. Ship one car on receipt, quick." The car was sent by defendant, as well as several other cars, all of which were paid for. The defendant, however, still asked for inspection, but the plaintiff did not inspect.