

had not the effect of destroying it. The service of the petition in its altered condition could not, in the absence of knowledge of the alteration, be treated as a ratification by the respondent.

It was ordered that the petition served should be restored to its original state, and that the copy served should be amended to conform with the petition as it was when filed.

By consent of the petitioner, the Supreme Court of Canada allowed an appeal from the decision of Osler, J.A., and sustained the preliminary objections, but without costs.

Galt, J.] [29th October.
Chy. Divisional Court.] [7th Dec., 1887.

In re McQUILLAN AND THE GUELPH JUNCTION RAILWAY CO.

Arbitration—Disqualification—R. S. C. c. 109, s. 8, ss. 28—"The Judge"—Divisional Court—Appeal—Certiorari.

A motion was made to Galt, J., under R. S. C. c. 109, s. 8, ss. 28, to determine the validity of the cause of disqualification urged by land-owners against the arbitrator appointed by a railway company under the provisions of the Act. The objection was that the arbitrator was a ratepayer of a city largely interested in the railway company as a shareholder and creditor. He was not himself a shareholder, nor had he any personal interest in the matter, except as a resident of the city, in which he had no real estate, and was assessed on income only.

Held, by Galt, J., that the arbitrator was not disqualified.

Held, by the Chancery Divisional Court, that no appeal lay to the Divisional Court from the decision of the Judge acting under the Statute.

Held, also, that the Divisional Court had no power to remove the proceedings by *certiorari*.

J. L. Murphy, for the land-owners.

Aylesworth, for the Company

Ferguson, J.] [Nov. 25, 1887.

Re SMART INFANTS.

Infants—Custody—Habeas corpus—Petition.

A father was proceeding by *habeas corpus* to obtain an order awarding him the custody of his infant children.

Held, that a more comprehensive adjudication could be had upon a petition, and that there was jurisdiction to direct that a petition should be substituted for the *habeas corpus* proceedings; and such a direction was given where it appeared to be in the interest of the infants and all concerned.

J. Maclellan, Q.C., and H. J. Scott, Q.C., for the father.

S. H. Blake, Q.C., and H. Cassels, for the mother.

Rose, J.] [Nov. 23, 1887.
ROGERS & WILSON.

Mortgagor and mortgagee—Assignment of mortgage to third party—49 Vict. c. 20, s. 7 (O.)—Motion for judgment—Rule 322—Admissions in affidavit on former motion.

The defendant made two mortgages to the plaintiff on the same property. The first mortgage being overdue, the plaintiff brought this action, asking for sale, payment, and possession. After service of the writ of summons the amount due and costs were tendered by the defendant, and also an assignment of the first mortgage to a third party for execution by the plaintiff, under 49 Vic. c. 20, s. 7 (O.). The plaintiff refused to execute this because of his second mortgage, although he was willing to execute a discharge, and the defendant moved for a *mandamus* to compel him to execute an assignment.

Held, that the plaintiff was justified, notwithstanding the above enactment, in refusing to execute the assignment.

This motion having been dismissed, a statement of claim was filed, and a statement of defence in which the first mortgage was admitted, and the tender and refusal were set up. The plaintiff then joined issue. There was no reference in the pleadings to the second mortgage. On motion for judgment under Rule 322:

Held, that the admissions in the affidavit of the defendant used on the former motion could be read upon this motion; and that, in view of what was held upon the former motion, there must be judgment for the plaintiff upon the pleadings and affidavit.

Held, also, that a motion under this rule is properly a court motion.

A. M. Taylor, for the plaintiff.

C. C. Robinson, for the defendant.