

A summons was issued, calling on the garnishees to show cause why they should not severally pay to the judgment creditors the amounts alleged to be due by them to the judgment debtor Tillie.

On the return of the summons, affidavits were filed, showing that the judgment debtor Tillie had, in September 1861, sold and transferred the note he held against McDonald and Moore to one Walter Scott, who sued the note when it became due, and Moore, who was only surety for McDonald, settled the suit with Scott before the attachment; and that Tillie had, in 1861, long before the plaintiffs had any judgment against Shepherd and Tillie, assigned Bell's mortgage to Scott.

The plaintiffs, therefore, asked for permission to file an affidavit stating that the transfer of the note and mortgage to Scott was colorable, and that in truth Scott was only an agent or trustee of the judgment debtor Tillie.

BURNS, J.—The object of asking leave to file this affidavit is, that the garnishees may be compelled to deny their liability to pay Scott. If it be granted, it is argued that the garnishees may protect themselves by applying for an interpleader issue under the Interpleader Act to compel Scott to interplead with the plaintiffs, to determine the question which of the two, Scott or the plaintiffs, are entitled to the proceeds of the securities.

This is an ingenious way of putting the case, but I think it clear that the Legislature never intended to harrass the debtor of the judgment debtor to that extent or in that way.

The claimant of the securities ought to be before the court or judge, and it is clear that no authority exists to bring him before the court unless the Interpleader Act can be used in the way suggested. It would seem very odd first of all to order a *scire facias* to issue upon the garnishees to show cause why they should not pay the debt owing by them, merely with a view that they again in their turn should call upon the plaintiffs and the assignee of the securities to interplead with each other as to who is the proper party to call for payment from the garnishees.

The law is defective with respect to this matter, and in England it has been remedied by the 29th and 30th sections of 23 & 24 Vic. cap. 125, passed 28th August, 1860. Under these sections, whenever it is suggested that the debt sought to be attached belongs to some third person, the judge has power to bring such third person before him, and then may either bar the claim of such person or make any order he shall think fit with respect to the lien or charge, if any, of such person.

Such a provision would be proper to be enacted in this country; but the fact of its having been enacted in England, where the previous law was as ours is now, shows that in such cases as the present the inquiry which the plaintiffs wish in this case could not there previously have been obtained.

I must refuse the application.

#### VANLUVAN V. TOLAN.

*Costs of the day for not proceeding to trial according to a Rule—Rescinding Rule.*

Where, upon a cause being called on for trial, counsel for plaintiff states he is not ready, and counsel for defendant, though present in court, does not move upon having the cause struck out or a nonsuit entered, in consequence whereof the cause is passed over, defendant is not entitled to costs of the day.

(Chambers, 13th September, 1862.)

This was an action for slander and malicious prosecution. Notice of trial was served on 29th April last for the then next Spring Assizes, to be holden at Kingston on 9th May last. The record was entered for trial. There were 43 civil cases on the docket. This was number 36. On the afternoon of Saturday, being the second day of the Assizes, there being no business before the court, the presiding judge (Barre) stated his willingness to take any case that was ready, and asked counsel in the different cases if they were ready. The counsel for the plaintiff in this case stated that plaintiff had a number of witnesses in attendance, but that two of his most important witnesses were absent, under the belief that a case so low down on the docket could not be reached on the second day of the assize. The counsel for defendant, though apparently ready, did not insist upon the cause being struck out of the docket or upon having a nonsuit entered. The cause was accordingly, like other causes, passed over. On the following Monday cause No. 12 on the docket was proceeded with

and not finished till the afternoon of the following Wednesday. The remaining causes on the docket preceding this, together with criminal business, occupied the court till the following Saturday, when the court ended, having disposed of all causes on the docket excepting the two causes preceding this (36) and a few causes following it. The presiding judge refused to make any remarks.

Defendant afterwards, on 28th May last, having filed the usual affidavit obtained the usual rule for costs of the day against plaintiff, he not having proceeded to trial pursuant to notice.

Kingsmill, for plaintiff, in Trinity Term last obtained a rule in the Practice Court, calling upon defendant to shew cause why the rule for costs of the day should not be re-cinded.

By consent this rule was enlarged before a judge in chambers.

John Patterson shewed cause.

The following cases were cited in argument: *Morgan v. Fernyough*, 11 Ex. 205; *Warne v. Hall*, 1 L. T., N. S., 574; *Scott v. Crossthwaite*, 6 U. C. L. J., 159.

MORRISON, J., having consulted Burns, J., made the rule absolute.

#### IN THE MATTER OF THE CONVICTION OF JAMES SULLIVAN.

*Certiorari for removal of Conviction—Practice.*

Where it is shewn to a judge in chambers that there is a reasonable doubt as to the legality of a conviction under the Master and Servants Act, the judge will order the issue of a writ of *certiorari* for the removal of the conviction, notwithstanding the confirmation of the conviction by the court of sessions to whom an appeal was made against the legality of the conviction.

(Chambers, September 25th, 1862.)

This was an application for an order authorizing the issue of a writ of *certiorari* for the removal into the Court of Queen's Bench of a conviction alleged to be illegal.

The conviction, which was under the Master and Servants Act, Con. Stat. U. C., cap. 75, was in the following form:—

PROVINCE OF CANADA,  
County of Oxford,

TO WIT:

[L. S.]

Be it remembered, that on the sixth day of August, in the year of our Lord one thousand eight hundred and sixty-two, complaint was made before me, the undersigned, one of Her Majesty's Justices of the Peace in and for the County of Oxford, for that James Sullivan, of the Town of Woodstock, in the said County of Oxford, hired and employed one Edward Moles as a journeyman or skilled laborer to work for him, the said James Sullivan, at the wheelwright trade or business as such journeyman or skilled laborer, at the said Town of Woodstock, at the wages of eight dollars per week, and that he, the said Edward Moles, did duly work and labor for the said James Sullivan, as such journeyman or skilled laborer, at Woodstock, aforesaid, for the time of ten weeks, at the said wheelwright trade or business, from about the twelfth day of May last past, at the said wages of eight dollars per week; and that the said James Sullivan had not paid and refused to pay the said Edward Moles the sum of fourteen dollars and sixty-eight cents, being the balance of said wages for the said time of ten weeks, due and owing by the said James Sullivan to the said Edward Moles; and now at this date, to wit, on this seventh day of August aforesaid, at Woodstock aforesaid, the parties appeared before me, the said justice, and I, having heard the matter of complaint, did adjourn the said complaint until the eighth day of the said month of August for a further hearing and examination; and on the said eighth day of the month of August, having heard the said complaint and examined the witnesses produced before me, I do order and adjudge the said James Sullivan to pay to the said Edward Moles the sum of fourteen dollars and sixty-eight cents, or a balance found to be due by the said James Sullivan to the said Edward Moles for wages for the service or work so done and performed by the said Edward Moles for the said James Sullivan, the said sum of fourteen dollars and sixty-eight cents to be paid in twenty-one days from and after the said eighth day of the said month of August; and I do further order and adjudge that the said James Sullivan do pay to the said Edward Moles the sum of three dollars and seventy-five cents for his costs in this behalf; and that if the said several sums be not paid on or before the thirtieth day of the said month of August,