Plea, general issue, by statute, Consol. Stat. U. C. ch. 126, secs. 1, 10, 11, 16, 19 20; 29–30 Vic. ch. 51, sec. 355, sub-secs, 1, 2, 3, 4, 10, 12, 13, 17, public acts.

The jury found for defendant on the first count, and for the plaintiff on the second and third counts.

Defendant obtained a rule on the plaintiff to shew cause why the verdict on the second and third counts should not be set aside, and a nonsuit entered, because the second count shewed that defendant was a public pound-keeper and acted as such, and it did not allege that the act complained of was done maliciously and without reasonable and probable cause; and because the third count could not be maintained against defendant, who was a public officer; he should have been declared against specially, and malice and want of reasonable and probable cause alleged against him.

This rule, after argument, was discharged, and the defendant appealed, on the same grounds.

McMichael, for the appellant. It is settled that defendant is a public officer within Consol. Stat. U. C. ch. 126: *Davis* v. *Williams*, 13 C. P. 365. The second count is defective, because it does not allege, according to the statute, that defendant acted maliciously and without reasonable and probable cause; and the fact of a sale of the colts impounded stated in the count did not, nor did the evidence as to the same, though made after tender of the bond by the plaintiff, deprive defendant of his protection under the statute. This view prevents the third count being used against the defendant: *Brose* v. *Huber*, 15 U. C. R. 625, 18 U. C. R. 282; *Huist* v. *Buffalo & Lake Huron R. W Co.*, 16 U C R. 299; *Alton* v. *The Hamilton and Toronto R. W. Co.*, 13 U. C. R. 595.

Moss, for the respondent. Even if the second count be objectionable as framed, the trover count is maintainable, because defendant by his wrongful refusal to take the bond, without any excuse for his refusal, forfeited the protection of the statute, and became a wrong-doer. He could not suppose he was acting within the line of his duty, or under the provisions of the statute; his conduct became wilful and unjustifiable: *Connors* v. *Darling*, 23 U. C. R. 541; *Neill* v. *McMillan*, 25 U. C. R. 485; *Kendall* v. *Wilkinson*, 4 E. & B. 680; *Pease* v. *Chaytor*, 1 B. & S. 658; *Pillott* v. *Wilkinson*, 3 H. & C. 845; *Grainger* v. *Hill*, 4 Bing. N. C 212; *Aldred* v. *Constable*, 6 Q. B. 381; *West* v. *Nibbs*, 4 C. B. 172.

WILSON, J.—This is a case in which the defendant, a public officer, had the right to receive the colts and to impound them.

The owner was also entitled at any time before sale to replevy or get back the colts on demand made for them, without payment of any poundage fees, on giving satisfactory security to the pound-keeper for all costs, damages, and poundage fees that might be established against him.

The plaintiff, alleges in his second count, that before any sale of the colts by defendant he offered to give and did give to defendant satisfactory security, as required by the statute, for all costs, &c, and then demanded the colts back from defendant yet defendant refused to give them up, and wrongfully and improperly sold them.

The defendant does not now dispute these facts. What he says is, that the count should have been framed on the first section of Consol. Stat. U. C. ch. 126, and should have alleged that the sale was made maliciously and without reasonable or probable cause, and that the third count, which contains no such allegation either, cannot be maintained.

The facts shew an excess of jurisdiction, under the second section of the Act.

The pound-keeper is to sell only in the event of the cattle not being replevied or redeemed. Here the plaintiff not only offered to the defendant security under the statute, but he gave it to him; yet the defendant sold the colts, when his duty was to return them to the plaintiff.

Pease v. *Chaytor*, 1 B. & S. 658, appears to me to be quite in point. *Leary* v. *Patrick*, 15 Q. B. 266, and *Kirby* v. *Simpson*, 10 Ex. 358, are also applicable.

The defendant complains only of the count in question on the ground of pleading—that it does not contain the allegation of malice, &c., according to the first section of the Act. He does not complain of any improper direction of the judge, nor that the verdict was against law and evidence, because it was proved the defendant had reasonable and probable cause for believing he had the right to act as he did, or that he had the right to proceed to a sale notwithstanding the delivery of the bond, or that he disputed or denied the sufficiency of the bond; but merely that, as a matter of pleading, the count is insufficient because it is not alleged he acted maliciously, &c.

Properly he is not entitled to have a nonsuit entered. It is, if an objection at all, the proper subject of a demurrer, or a motion in arrest of judgment.

The third count, however, is free from such objection, and as there is no complaint against the direction to the jury or their finding, the plaintiff is entitled to retain his verdict; *Booth* v. *Clive*, 10 C. B. 827; *Hardwick* v. *Moss*, 7 H. & N. 136.

I think the second count does shew a case in excess of jurisdiction, and therefore it was not necessary to allege that the defendant acted maliciously, &c.

If it do not shew such a case, a nonsuit or verdict for defendant is not the proper remedy, so long as the alleged objection appears on the face of the count, and the count itself was proved.

The third count is free from any insufficiency of pleading, and no objection has been made to the charge or finding. On that count, at any rate, the plaintiff must have a verdict, but I think he is entitled to his verdict as it stands on both counts, and that the appeal must be dismissed with costs.

MORRISON, J., concurred.

Appeal dismissed.

INLOLVENCY CASE.

IN RE HEYDEN, AN INSOLVENT.

Insolvent—29 Vic. ch. 18, sec. 13—Lien for costs.

Held, overruling *In re Ross*, 3 P. R. 394, that under 29 Vic. ch. 18, sec. 13, a judgment creditor who had an execution in the sheriff's hands at the making of the assignment, was entitled to rank for his costs of the judgment as a privileged creditor against the insolvent.

[29 U. C. Q. B., 262.]

This was an appeal from a decision of the judge of the county court of Brant, affirming the award of the official assignee, who awarded that