

[Chanc. Ch.]

McTAGGART V. MERRILL—WILSON V. WILSON.

[Chan. Ch.]

Taylor's Orders, 3rd ed., p. 35, 76; Morgan's Chy. Stats., 4th ed., p. 422, 425, 478.

The REFEREE held that, since under the English decisions above mentioned (29 Beav. 259, and 30 Beav. 218), although notice of motion for decree was not allowed to be served by publication, yet, by a more roundabout process, the decree was actually pronounced, with no other notice to the defendants than by advertisements—and seeing that under our practice the only mode of bringing a defendant before the Court is by serving him with notice of motion, and that R. S. O. c. 40, secs. 93, 94, seems to allow a much wider latitude as to service—it appears only in accordance with the decisions to allow the orders asked for. But, before incurring the expense of advertising, &c., he thought it was desirable to take the opinion of a Judge.

BLAKE, V.C., on reference to him, held that the view taken by the Referee was correct.

WILSON V. WILSON.

Costs—Interpleader Issue in Co. Ct.—Conflicting decision in Q. B. on the same point.

Where the Court of Chancery had, with consent of all parties, directed an interpleader issue to be tried by the County Court, which was settled on a point of law, and not as a question of fact, and judgment obtained by the defendant, he was allowed the usual order for costs, although notice of appeal had been served, and although there was a conflicting decision in the Q. B. on the very same point.

[Mr. Stephens, Referee.

In this matter an execution creditor declining to admit the *bona fides* of a mortgage, under which the property in question was claimed, an issue was directed by the Court of Chancery to be tried by the County Court. At the trial no oral evidence was given, but the attack on the mortgage was confined to points of law. A formal verdict was entered for the claimant, which was afterwards set aside in Term.

Donovan now moved, on behalf of the execution creditor, for an order for costs of the trial of the interpleader issue.

Doyle, *contra*: (1) notice of appeal has been served, and until the appeal is disposed of the application for costs is prema-

ture; (2) upon similar objections to the same mortgage the Queen's Bench had lately decided in favour of its validity, and as it is a pure question of law, this Court will accept the decision of the Queen's Bench in preference to that of the County Court; (3) there was no jurisdiction in the Court to make the interpleader order, and therefore the trial and all proceedings under it are a nullity: R. S. O., cap. 40, sec. 99. When the interpleader order was obtained it was not stated that the matter in dispute was a pure question of law, and not a question of fact, *O'Donohoe v. Wilson*, 42 U. C. R. 329; (4) the order was granted under R. S. O., cap. 40, sec. 99, not under R. S. O., cap. 54, sec. 22.

Donovan, in reply: (1) the order was granted under R.S.O., cap. 54, sec. 22. The County Court Judge is, in such cases, in the position of arbitrator, and there is no appeal except to the Court of Appeal: R.S.O., cap. 54, sec. 23; (2) the fact that the higher Court gave a different decision makes no difference as to the costs: *Craig v. Phillips*, W. N. 271; L. R. 7 Chy. Div. 249; *Queen v. Doty*, 13 U.C.R. 398. The Court will not review the decision on the interpleader issue: *Gourlay v. Ingram*, 2 Chy. Ch. 309.

Hoyle, for Sheriff: Claimant cannot now raise such an objection, as he submitted to the order. It was at the request of all parties that the issue was tried in the County Court.

The REFEREE—As to the first objection, the interpleader order was granted on the application of the Sheriff on the usual material, and the issues are drawn in the established form. All parties were represented on the application, and no objection was then taken by the claimant that such an order could not properly be made. On the contrary he pressed his claim; the execution creditor resisted it, and both assented to the order. If any one knew at that time that there would be no issues of fact to be tried it must have been the claimant, but he did not take the objection. The interpleader issue was prepared and delivered and both parties appeared at the trial and submitted to the jurisdiction. If there is anything in the point raised, I think it is to