

jury assessed the damages, and judgment was entered for the plaintiff.

Held, that where the plaintiff furnishes evidence which the judge thinks sufficient to support his case, the case cannot be withdrawn from the jury; the mere fact that the defendant does not call evidence to controvert the plaintiff's evidence by no means concludes the matter, for the jury might refuse to credit the plaintiff, and properly find a verdict for the defendant. The judge in this case exceeded his jurisdiction by assuming the functions of the jury; and the right to have the case submitted to the jury being an absolute statutory right, the violation of it was ground for prohibition.

Shepley for plaintiff.

Aylesworth for defendant.

Q.B. Div'l Ct.]

[June 22

IN re SOLICITORS.

Solicitor and client—Taxation of costs—Offer by solicitor.

The solicitors rendered to a client ten bills of costs, amounting in all to \$428.83. The client obtained an order for taxation, reserving his right to dispute his liability to pay the bills, and reserving also the costs of the order and taxation. The bills were taxed at \$329.76, more than one-sixth being taxed off; but the solicitors contended that they were not liable for the costs of the taxation under R.S.O., c. 147, s. 35 because of an offer made by them before the order but after service of the notice of motion therefor, to take \$250 in full of all the bills, and a subsequent offer to take \$200 in full of all but one. These were not offers to reduce the bills to the sums named, but were offers to take such sums if the bills were paid without dispute as to the client's liability upon them. The offers were rejected and the taxation proceeded with the above result. When the question of the liability upon the bills was still undetermined the client applied for costs of the order and taxation.

Held, that the solicitors when their offers were rejected remained in a position to claim the full amount at which their bills might be taxed, and therefore such offers could not avail them; and they must pay the costs of the order and taxation.

Re Allison, 12 P.R. 6, approved and followed.

Shepley for the solicitors.

W. H. Blake for the client.

Chy. Div'l Ct.]

[June 28.

MCKAY v. MAGEE.

Costs—Scale of—Action to set aside conveyance as fraudulent—Judgment under \$200—Other claims against judgment debtor—Creditors' Relief Act.

The decision of BOYD, C., 13 P.R. 106; ante p. 284 was affirmed on appeal by a Divisional Court.

J. B. Clarke for appeal.

Middleton contra.

C.P. Div'l Ct.]

[June 29.

TROUTMAN v. FISKEN.

Judgment Debtor—Examination of—Judgment for costs only—Rules 926, 934.

A person against whom a judgment has been recovered for costs only cannot be examined as a judgment debtor.

Rules 926 and 934 considered.

Meyers v. Kendrick, 9 P.R. 363, has not been affected by the introduction of Rule 934, and is still the law.

J. F. Gregory for judgment creditor.

H. E. Irwin for judgment debtor.

FERGUSON, J.]

[June 29.

BENNETT v. WHYTE.

Costs—Scale of—Jurisdiction of County Court—Counter claim—Set off.

The plaintiff in his statement of claim alleged certain transactions between him and the defendant, in the whole comprehending over \$1,000, and claimed a balance of \$169.72, and interest from the 1st January, 1888. The defendant by his statement of defence denied that he was indebted to the plaintiff in any sum, and alleged that the plaintiff was indebted to him for goods supplied and on certain promissory notes in the sum of \$1,325.74, for which he counter claimed.

Held, that the matter of the counter claim was really a set-off, and even if it was not improper to call it a counter claim, having regard to Rule 373, this could not change its real character.

Cutler v. Morse, 12 P.R. 594, referred to.

The action was tried without a jury, and the plaintiff recovered \$120.75, "together with his costs of action to be taxed according to the proper scale applicable."