COMMON LAW CHAMBERS.

Regina v. Reiffenstein.

Extent—Commission to find debts—Affidavit of danger—Felony and civil remedy.

Held, 1. That a debt whereon to found a writ of extent may be found on inquisition without *vivâ voce* testimony.

2. That an affidavit of danger is sufficient if it satisfy the judge to whom the application for a fiat for a writ of extent is made, that there is danger that the debt will be lost if immediate remedy is not granted.

3. That it is not an irregularity, that an inquisition finds that the defendant was a debtor to the crown on the 20th of July, the inquisition being filed and a writ of extent issuing on the 21st July.

4. That the rule which prevents a civil remedy being taken whilst the prosecution for the felony which is the foundation of the action is not concluded, does not apply where the Crown, and not a private person, is the plaintiff.

[Chambers, December 30th, 1870.]

This was an application to set aside a writ of extent.

On the 17th July last, a commission to find debts against the defendant, a clerk in the office of the Receiver-General, was issued from the Court of Queen's Bench, on a fiat of the Chief Justice of the Common Pleas, founded on an affidavit of John Langton, auditor of public accounts, who stated the fact of the indebtedness; but no *vivâ voce* testimony was taken by the commissioners, who acted on this affidavit alone.

The commission with the finding of the debt by the commissioners and jury thereon endorsed, was returned and filed on the 21st of July, when, on reading the commission, inquisition and affidavit of danger, a writ of extent was by *fiat* of a judge taken out, directed to the sheriff of the county of Carleton.

The affidavit of danger, filed on the application for the *fiat*, was made by Mr. Langton, as follows:—

"That I was the auditor of the public accounts of the late Province of Canada for many years immediately before the establishment of the Dominion: that I have been the auditor of the public accounts of the said Dominion ever since its establishment, and that I have a personal knowledge of the facts hereinafter mentioned and contained:

That one George C. Reiffenstein, was for many years, and up to the establishment of the said Dominion, a clerk in the department of the Receiver-General of the said late Province: that he has been ever since the establishment of the said Dominion up to the twenty-sixth day of June now last past, a clerk in the department of the Receiver-General of the said Dominion, and that a portion of his duties, as such clerk, was the superintendent of the distribution of the municipalities fund of Upper Canada:

That it has been up to this time ascertained on investigation of the accounts of the said George C. Reiffenstein, that he has, during the period he has been so acting as such clerk as aforesaid, from time to time, fraudulently misappropriated divers large sums of money which belonged to the government of the said late Province, and the said Dominion respectively; the whole or considerable portions of which said sums of money he fraudulently converted to his own use; such several sums of money amounting, in the whole, to the sum of twenty-two thousand dollars or thereabouts, and that he, the said George C. Reiffenstein, is now a defaulter and indebted to the government in that amount:

That the said George C. Reiffenstein is at present in custody in the common gaol of the said county of Carleton, in respect of the fraudulent misappropriation aforesaid, and criminial proceedings are now being taken against him therefor:

And lastly, that I am informed and do verily believe, that the said George C. Reiffenstein is possessed of monies and other property within the said county of Carleton; and that it is desirable that an immediate writ of extent should issue on behalf of the Crown to attach such monies and other property; and I verily believe, that unless such writ of extent do issue forthwith there is danger of the said monies and other property being made away with and entirely lost to the government of the said Dominion, and of the claim of the crown for the monies so misappropriated as aforesaid being thus defeated."

The return to the commission to find debts, as well as the writ of extent alleged that the defendant became a debtor of record to the Crown on the 20th July, 1869.

On the 25th November, the writ of extent was returned and filed with the sheriff's return thereto. Mrs. Reiffenstein, wife of the defendant, subsequently appeared and claimed part of the property, real and personal, seized under the extent.

O'Brien, on filing verified copies of the papers above referred to, obtained a summons calling on the Attorney-General for the Dominion to shew cause why the said writ of extent herein, and all proceedings had thereunder, should not be set aside on the following grounds:—

1. That the requisition to find debts was taken on the affidavit of John Langton only, the said John Langton not being present upon said inquisition, nor any evidence of any witness being taken *vivâ voce*.

2. That the writ issued without any affidavit of insolvency or other affidavit sufficient to shew grounds according to the practice.

3. That the writ of extent misstated the day that the defendant became a debtor of record, the inquisition to find debts not having been returned and filed until 21st July, whereas the writ states him to have been a debtor of record on the 20th July.

4. That the affidavits on which the said writ issued charged that a felony was committed, so that no writ could issue to find debts, or debts be found or enforced which were the subject of the felony, until the prosecution of the defendant to conviction for the felony; or why all proceedings herein should not be stayed until the fifth day of next term &c.

R. A. Harrison, Q.C., shewed cause, and took the following preliminary objections:—

That the original writ was not before the court, and on this ground alone the application must be discharged. It would not suffice to put in a copy, as the defendant had done in this instance: *Manning's* Exch. Prac. 114; *King* v. *Mallett*, 1 Price 395.

The application is too late. A motion to set aside a proceeding for irregularity must be made promptly. The extent was issued on the 22nd