MAY 19TH, 1902.

DIVISIONAL COURT.

Re SNURE AND DAVIS.

Landlord and Tenant—Overholding Tenants Act, R. S. O. ch. 171—Breach of Covenant in Lease—Chattel Mortgage made by Mother of Tenant—"Wrongful" Refusal to Go Out of Possession—"Clearly"—Upon Certiorari, the Court can Look only at the Proceedings and Evidence Below.

Motion by Loyal Davis and Elizabeth Davis to set aside an order made by the Judge of the County Court of Lincoln, on the 18th January last, purporting to be made under the Overholding Tenants Act, adjudging that Jacob E. Snure, the landlord, was entitled to the possession of the lands in question, and permitting a writ of possession to issue to put the landlord in possession as against the applicants, the tenants. The applicants contended that their lease had not expired or been determined at the time these proceedings were taken; that nothing was done by the tenants which entitled the landlord to declare a forfeiture of the lease; that there was a bona fide matter of dispute between the parties, and the Judge should not have determined the matter summarily, but should have dismissed the case and left the landlord to his remedy by an ordinary action at law. The landlord distrained for rent by virtue of an acceleration clause to be enforced if the tenants gave a chattel mortgage. The goods on the demised premises were seized and sold under a chattel mortgage made by the mother of one of the tenants.

G. Kerr, for the tenants.

T. Mulvey, for the landlord.

THE COURT (BOYD, C., MEREDITH., C.J.) held that the order should be set aside.

BOYD, C.—Under the Overholding Tenants Act two things must concur to justify the summary interference of the Judge: (1) the tenant must wrongfully refuse to go out of possession, and (2) it must appear to the Judge that the case is clearly one coming under the purview of the Act. The two adverbs ("wrongfully" and "clearly") seem to be used emphatically, and on a consideration of the evidence and proceedings returned, neither requirement is adequately met by the applicant, the landlord. The whole proceeding was nugatory from the outset for the want of a proper notice specifying the breach complained of, and no such breach as was relied on has in fact taken place.

MEREDITH, C.J.—It is only the proceedings and evidence before the Judge sent up pursuant to a writ of *certiorari* at which we may look for the purpose of determining