

are to be disregarded, in view of the opinions of the judges of the Court of Appeal in *London and Canadian L. & A. Co. v. Morphy*, 14 A. R. 577.

*Per* STREET, J.—It is not necessary to inquire whether the statute relates to partnership dealings; apart from it the plaintiff is entitled, as surety for the defendant to the extent of one-half of the debt, to the benefit of the security, having made the payment with the intention of keeping the debt alive and not of extinguishing it, as shown by his taking an assignment; and the fact that a trustee was not introduced is not material. *Prima facie* the defendant was liable to pay one-half the judgment; it was, therefore, for his benefit that the partnership accounts were gone into; and he could not claim the benefit of the Statute of Limitations, more especially as he submitted to have the accounts taken, and did not raise the statute till after they had been taken.

G. C. Campbell, for the plaintiff.

Aylesworth, for the defendant.

### Common Pleas Division.

The Divisional Court.]

[March 10.

BOND v. CARMEL.

*Illegal arrest and imprisonment—Conviction for having liquors near public works—Destruction of liquors—Necessity of quashing conviction before action commenced—Putting in new conviction after return to certiorari—Notice of action—Statement of cause of action and service—Sufficiency of defence of "not guilty by statute"—Necessity to refer to section of statute—Venue—Order for destruction of liquors—Non-production of at trial—Admissibility in Divisional Court.*

Action against two justices of the peace for the illegal and malicious arrest of the plaintiff, and the destruction of his stock of liquors. The defendant was arrested and convicted for having liquors for sale near public works, and imprisoned. Writs of *habeas corpus* and *certiorari* were issued, and on the return thereof the plaintiff was discharged. Under a writ of *certiorari*, directed to the defendants, the conviction was returned not under seal. The

return was made by the defendants' solicitor, to whom all the papers, including the conviction, had been delivered by the defendants to look over, and in his affidavit accompanying the return he swore that the conviction returned was the one made by the defendants. It was objected that the conviction should have been quashed before action brought.

*Held*, by ARMOUR, J., at the trial, that not being under seal, this was not necessary.

*Haucke v. Adamson*, 14 C. P. 201; and *McDonald v. Stickney*, 31 U. C. R. 581, followed.

It was urged at the trial, and in the Divisional Court, that the alleged return to the *certiorari*, being a *certiorari* in aid of a *habeas corpus*, did not preclude the defendants from putting in a properly sealed conviction. No such conviction, however, was produced, but one of the defendants stated that in his belief such conviction existed.

*Held*, that as the return was made to the *certiorari* directed to the defendants, and did not refer to the *certiorari* in aid directed to the gaoler, and in the face of the solicitor's affidavit, the conviction could not be received.

*Per* ROSE, J.—And for the additional reason that the evidence disclosed a want of *bona fides*.

The notice of action stated that the cause of action arose "in the month of May last, 1887, at said village of M., and in the town of P.," and was not served personally on the defendant C., but was served on his agent at his head office, also at his place of residence, and on his solicitor. The statement of claim alleged the service of each notice. The only defence was not guilty by statute, R. S. O. c. 73, s. 11, the section referring to notice being s. 10.

*Held*, by ARMOUR, J., and affirmed by the Divisional Court, that the statement of time and place, as well as the service, was sufficient.

*Oliphant v. Leslie*, 24 U. C. R. 398, followed.

*Held*, also, by the Divisional Court, that no objection could now be taken to the notice, as under the O. J. Act and rules, when the defence of "not guilty by statute" is set up, the particular section of the statute relied on must be pleaded.

The venue was laid at Toronto, but was changed by order, and the action was tried at Port Arthur, in the district where the cause of action arose.