

BOYD, C., FERGUSON, J., }
MEREDITH, J.

[Feb. 5.]

BREESE v. KNOX.

Fraudulent preference—Chattel mortgage given within 60 days pursuant to agreement prior to 60 days—Promise of preference—54 Vict., c. 20 (O.).

Where a debtor on June 25th, 1895, gave an agreement under seal to a creditor that in case he made default in payment of any sum he might owe the creditor upon demand, he would give a chattel mortgage on all his stock in trade; and on Nov. 11th, 1895, executed a mortgage accordingly to the creditor, and on Dec. 2nd, 1895, made an assignment for the benefit of his creditors.

Held, upon action brought by the assignee to set aside the chattel mortgage as a fraudulent preference, that notwithstanding the said agreement, the Act 54 Vict. c. 20, s. 1, applied, and the presumption thereby created was not done away with by reason of the agreement.

W. R. Riddell, for the defendant, appellants.

George Kerr and *R. W. Evans*, for the plaintiff, respondent.

ARMOUR, C.J., FALCONBRIDGE, J., }
STREET, J.

[Feb. 8.]

BROWN v. NEFF.

Action—Issue under Partition Act—Trial in High Court—Judicature Act, 1895, s. 91.

An appeal by the plaintiff from an order of Meredith, J., in Chambers, dismissing an application made by the plaintiff under s. 91 of the Judicature Act, 1895, for an order directing the trial in the High Court of an issue arising out of a proceeding taken under the Partition Act, which issue had been tried in a County Court, when the jury disagreed.

F. E. Titus, for the plaintiff: It is a proper case for trial in the High Court, inasmuch as difficult questions of law and fact arose, and that there was jurisdiction to make the order, citing *Symonds v. Symonds*, 20 C.P. 271.

Swabey, for the defendant: There was no jurisdiction to make the order because neither the issue nor the proceeding out of which it arose was an "action," and the words of s. 91 of the Judicature Act, 1895, were "in any action pending in a County Court." The same words were used in the Law Reform Act, under which *Symonds v. Symonds* was decided, but in the judgment of the Court the words "in any action" were omitted in quoting the section, and therefore the decision seemed to have proceeded upon a misapprehension, or upon a different enactment from that now in question. The issue here was not an "action"; see the interpretation clause of the Judicature Act, 1895, s. 2, sub-sec. 3, and *Hamlyn v. Betteley*, 6 Q.B.D. 63.

Per CURIAM: The decision in *Symonds v. Symonds* must be followed. We cannot assume that it proceeded upon an enactment which had no existence. We must rather suppose that the words "in any action" were omitted in quoting the section, by a printer's error. The case is a proper one for trial in the High Court, and the appeal must be allowed. Costs here and below to be costs in the cause.