

framed, for as the amount of costs can not be known till the suit is at an end, they cannot be first paid—that is, before the suit is begun—although they may be secured.

But first, as to the defendants' right to a verdict on the fourth plea. We think he was entitled to succeed on that issue, for in fact the plaintiff was not the holder at the time of this action; and to entitle the execution creditors, or the bailiff, to give the evidence which was given in support of the action in the payee's name, those facts should have been replied which gave the right under the statute to use his name, though he was not the holder of the note; or the special facts might have been set out in the declaration, as the defendants indeed contend they should have been.

As to the other objections, I do not at present think it would be necessary to prove a judgment to support the execution, though it would be safer to aver and prove the judgment in such a case, as the legislature has not dispensed with the necessity.

With respect to the real plaintiff being bound to make it appear upon the trial that security had been given for costs as the statute directs, we apprehend that was not necessary, but that if security had not been given, the proper course would have been to stay proceedings till it had been given. The Common Law Procedure Act, sec. 265, being a provision in *pari materia*, though regarding proceedings upon seizure of securities under executions from higher courts, says that the sheriff shall not be bound to sue in such cases unless he is indemnified as to costs. Under that act the sheriff clearly might waive security if he chose. The section 154 of the Division Courts Act, it may be urged, means nothing more, but the question applies differently under the two statutes, and in reason the security in such a case as the present may, we think, be insisted upon, and perhaps the want of it might be pleaded, with proper averments, in bar of the maintenance of the action.

This provision, as to costs, furnishes an argument in favour of what has been contended for, that when a security is being enforced under these clauses in the Division Courts Act the record ought to disclose it, in order that both parties to the action may be aware of the special facts, which otherwise they might not be.

Upon the whole, however, admitting that it was not indispensable that the declaration should have set forth the special facts, showing that this was an action brought under the 152nd clause of the act, yet it was necessary in our opinion, when the defendants denied that the plaintiff was holder of the note, which must mean in this case what the same plea would mean in any other case, that the plaintiff should reply in such a manner as would shew the purpose for which the action had been brought, and which gave authority to use the plaintiff's name without his privity, and not for his benefit.

But as this, so far as we know, is the first occasion that has arisen for discussing the provisions of this statute, we have made up our minds that although in strictness the defendants' main objection is entitled to prevail, we will not conclude the plaintiff, but will direct that a new trial be had on payment of costs by the plaintiff, with liberty to him to amend his pleadings as he may be advised.

#### GLASS, SHERIFF, v. WIGMORE.

*Conveyance of prisoners to Penitentiary.*

It is the duty of the sheriff of the county in which a city is, and not of the high bailiff of such city, to convey to the penitentiary prisoners sentenced at the Recorder's Court.

(T. T. 25 Vic.)

This action was brought by the plaintiff against the defendant to recover a sum of money which the plaintiff alleged the defendant had received for the plaintiff's use, and by consent of the parties, and by order of a judge, according to the Common Law Procedure Act, the following case was stated for the opinion of the court:

The plaintiff is and has been since the first day of September, A.D. 1853, sheriff of the county of Middlesex, and has since his appointment had the care of the jail of the said county, and the appointment of keepers thereof.

The defendant is high bailiff of the city of London, duly and regularly appointed.

There has been a recorder's court established in and for the said city, and a recorder for the said city duly appointed, who presides at the sittings of the said court.

The jail of the said county of Middlesex is used as a jail for the said city, and prisoners are committed thereto by the mayor and other magistrates for the said city, the council thereof not having directed otherwise, and an annual sum is paid for the use of the said jail by the said city of London.

The defendant has, whenever the said court is in session, by the order of the court, taken the prisoners committed for trial at the said court from the said jail to the court, and when prisoners have been sentenced by said court to be imprisoned in the provincial penitentiary, has upon receipt of the commitment conveyed them to the said penitentiary, and has charged and received payment therefor, which has been paid by the provincial government from the fund for the administration of criminal justice.

The question for the opinion of the court is whether the said defendant had the right to take the said prisoners to the court for trial, and when sentenced to the penitentiary to convey them there and receive payment therefor.

If the court shall be of opinion in the negative, then judgment shall be entered for the plaintiff, and costs of suit.

If the court shall be of opinion in the affirmative, then judgment of non pros, with costs of defence, shall be entered for the defendant.

*Basis for the plaintiff, cited Consol. Stats. U. C., ch. 54, secs. 391, 367, 379, 401, 420; ch. 31, sec. 132 sub-sec. 4; ch. 120, sched.; ch. 127; Consol. Stats. C., ch. 111, sec. 11; Rev. War et al., 1 B. & C. 258.*

*M. C. Cameron, contra, cited Consol. Stats. U. C., ch. 55, sec. 177, et seq.; ch. 31, sec. 138.*

ROBINSON, C. J., delivered the judgment of the court,

We are of opinion that while the law remains on its present footing it is the sheriff of the county in which the City of London is, and not the high bailiff, who is to convey to the penitentiary the prisoners sentenced to that prison by the recorder's court of the city.

The legislature would probably, in reviewing the subject, not think it expedient to change this arrangement; but whether they would or not the Penitentiary Act, as it now stands, ch. 111 Consolidated Statutes of Canada, it appears to us, commits the duty clearly to the sheriff, and the chapter 120 of the Consolidated Statutes of Upper Canada provides that the sheriff shall be paid for such duty, when it is his duty, and when he has done it.

The 12th section of the statute, ch. 111, (Consol. Stats. C.) it is true is confined to convicts sent from Lower Canada, but it equally serves to shew the intention of the legislature, for there are local bailiffs in cities in Lower Canada as well as in Upper Canada; and the 15th clause is not confined to Lower Canada, but applies to the whole province, and shews that the legislature intends that the sheriff of the county in which the city is, is the officer who is to have the powers necessary for carrying the prisoners through all parts of the province to the penitentiary.

Our judgment is for the plaintiff.

Judgment for the plaintiff.

#### THE BUFFALO AND LAKE HURON RAILWAY COMPANY v. THE CORPORATION OF THE TOWN OF GODERICH.

*Harbour—Assessment—Consol. Stats. U. C. ch. 55, sec. 3.*

Land covered with the waters of a harbour is not taxable. Held that the Buffalo and Lake Huron Railway Company could not be taxed for the Goderich Harbour.

This was an action brought to recover \$254 for taxes collected by defendants from the plaintiff for the Goderich Harbour, for the year 1860, and a case was stated for the opinion of the court, in substance as follows:—

The Canada Company, under the act of Upper Canada 7 W. IV. ch. 50, acquired a right to improve the Goderich Harbour, so as to make it navigable for vessels, and by that act, on the harbour being so rendered navigable an act for the reception of vessels frequenting the same, were entitled to exact tolls at certain rates prescribed on all such vessels and the goods contained in them.