IN THE SUPREME COURT OF BRITISH COLUMBIA.

—o—

(On Appeal to the Divisional Court.)

BETWEEN

THE BANK OF BRITISH COLUMBIA, *Plaintiffs,*

AND

ATWELL KING & CO., *Defendants;*

AND BETWEEN

JOSHUA DAVIES, *Claimant,*

AND

THE BANK OF BRITISH COLUMBIA, *Respondent.*

Upon hearing Mr. J. P. Walls, of Counsel for the Sheriff of Vancouver Island, and upon reading the affidavit of the said Sheriff, filed this day, and the affidavit of John Mount Langley, filed this day, and upon hearing Mr. Harry Dallas Helmcken, of Counsel for the Plaintiff, and Mr. Charles Wilson, of Counsel for the Claimant, it is ordered that upon payment of the sum of $650 into Court by the said Claimant, or upon his giving security to the satisfaction of one of the Judges of the Supreme Court for the payment of the same amount by the Claimant, to abide by any order to be made herein, the Sheriff of Vancouver Island do withdraw from the possession of the goods seized herein.

And it is further ordered that in the meantime, and until such payment made or security given, the said Sheriff continue in possession of the goods and the Claimant pay possession money from the time he so continues unless the Claimant desires the goods to be sold by the Sheriff, in which case the Sheriff is to sell the goods and to pay the proceeds of the sale, after deducting the expenses thereof and the possession money, from this date into Court in the cause to abide further order herein.

And it is further ordered that the parties proceed to a trial of an issue in the Supreme Court of British Columbia, in which the Claimant shall be Plaintiff, and the Execution Creditor shall be Defendant, and that the question to be tried shall be whether at the time of the seizure by the Sheriff, the property seized was the property of the Claimant as against the Execution Creditor.

And it is further ordered that this issue be prepared and delivered by the Plaintiff therein, within ten days from this date, and returned by the Defendant therein within three days after delivery, and be tried at Victoria.

And it is further ordered that all proceedings in the suit of Joshua Davies against the said Sheriff be stayed in the meantime, and until further order.

And it is ordered that the question of costs, and all further questions, be reserved until after the trial of the said issue, and that no action shall be brought against the Sheriff for the seizure of the said goods.

And it is further ordered that nothing in this Order is to interfere with the authorization of the said Atwell King to carry on the retail business on those premises in the usual manner as hitherto.

Dated the 14th day of January, 1888.

(Signed) MATT. B. BEGBIE, *C. J.*

IN THE SUPREME COURT OF BRITISH COLUMBIA.

BETWEEN

JOSHUA DAVIES, *Plaintiff,*

AND

JAMES ELIPHALET MCMILLAN, *Defendant.*

VICTORIA, by the Grace of God, of the United Kingdom of Great Britain and Ireland, Queen, Defender of the Faith.

To JAMES ELIPHALET MCMILLAN.

WE COMMAND YOU that within eight days after the service of this writ on you, inclusive of the day of such service, you cause an appearance to be entered for you in an action at the suit of JOSHUA DAVIES.

AND TAKE NOTICE that in default of your so doing the plaintiff may proceed therein and judgment may be given in your absence.

Witness, SIR MATTHEW BAILLIE BEGBIE, Knight, Chief Justice, the 11th day of January, 1888. [L.S.]

The defendant may appear hereto by entering an appearance, either personally or by solicitor, at the office of the Registrar of the Court at Victoria.

This Writ was issued by CHARLES WILSON, Broughton Street, Victoria, Solicitor for the said plaintiff.

INDORSEMENT.

The plaintiff's claim is for wrongfully seizing the plaintiff's goods; and the plaintiff claims $8,000.

AFFIDAVIT.

I, JAMES ELIPHALET MCMILLAN, of Victoria, British Columbia, Sheriff of Vancouver Island, make oath and say as follows:—

1 Under and by virtue of a writ of *fi. fa.*, which appeared to me to have been regularly issued out of this Honourable Court in this action, directed to me, commanding me that I should levy of the goods and chattels of the above-named defendant $530 and $16.50 for taxed costs, and also interest on the said sum at the rate of 6 per centum per annum, from the th day of January, 1888, which the above-named plaintiff had recovered against the said defendants in this Honourable Court, and indorsed to levy the whole, besides $3.50 for costs of said writ, and Sheriff's poundage, officers' fees, and all other legal incidental expenses. I did on the day of January, instant, take possession of certain goods and chattels in the store of the above-named defendant, situate on Government Street, Victoria, and the said goods and chattels still remain in my possession as Sheriff.

2. On the 11th day of January, instant, I was served with a writ of summons issued out of this Honourable Court, a copy whereof is hereunto annexed and marked "A."

3. This application for an interpleader order is made to this Honourable Court solely on my own behalf as Sheriff and for my own indemnity only, and I do not collude in any manner with the said Joshua Davies, or the said plaintiff or defendant.

Sworn at Victoria this 14th day of January, 1888, before me.

GEO. JAY, JR.,
Commissioner to administer Oaths in the Supreme Court of B. C.

J. E. MCMILLAN.

IN THE SUPREME COURT OF BRITISH COLUMBIA.

—o—

Appeal from the County Court of Victoria, holden at Victoria.

BETWEEN

TURNER, BEETON & CO., *Plaintiffs,*

AND

ATWELL KING & CO., *Defendants,*

AND BETWEEN

JOSHUA DAVIES, *Claimant,*

AND

TURNER, BEETON & CO., *Respondents.*

The 21st day of March, 1888.

Upon motion by way of appeal from the County Court of Victoria, holden at Victoria, from the judgment of the Honourable Sir Matthew Baillie Begbie, Knight, Chief Justice, sitting and acting as County Court Judge, and dated 16th day of February, 1888, whereby it was adjudged and declared that, touching the claim of the said Joshua Davies to certain goods taken in execution in this action, he the said Joshua Davies had no right of property in the said goods taken in execution in this action, as against the said plaintiffs, Turner, Beeton & Co.; and it was further adjudged that the said Joshua Davies do pay the costs of the said Turner, Beeton & Co., of procuring and trying this interpleader issue, to be taxed by the Registrar, together with the taxed costs of the Sheriff, to be retained by him out of the amount levied, but without prejudice to the right of the said Turner, Beeton & Co. against the said Joshua Davies for the amount so retained. And upon the case being called on for hearing on the 13th day of March, 1888, and upon hearing Mr. Theodore Davie, Q.C., and Mr. C. Wilson, of counsel for the said Joshua Davies, and Mr. S. Perry Mills, of counsel for Turner, Beeton & Co., and what was alleged by counsel, this Court did order that the appeal should be adjourned for argument until Tuesday, the 14th March, 1888, at 11 o'clock, and this matter coming on for further argument on the said 14th day of March, 1888, in the presence of counsel aforesaid, this Court did order that this matter should stand for judgment, and this matter standing for judgment this day in the presence of counsel aforesaid, this Court doth order and declare that the judgment of the said Honourable Sir Matthew Baillie Begbie, Knight, sitting and acting as County Court Judge as aforesaid, be affirmed, and the appeal herein be and the same is hereby dismissed out of this Honourable Court, with costs of and incidental to this appeal to be taxed and paid by the said Joshua Davies to the said Turner, Beeton & Co., or their solicitor, forthwith after the taxation thereof. And this Court doth order and adjudge the same accordingly.

By the Court,

JAMES C. PREVOST.

IN THE SUPREME COURT OF BRITISH COLUMBIA.

—o—

(On Appeal to the Divisional Court.)

BETWEEN

THE BANK OF BRITISH COLUMBIA, *Plaintiffs,*

AND

ATWELL KING & CO., *Defendants,*

AND BETWEEN

JOSHUA DAVIES, *Claimant,*

AND

THE BANK OF BRITISH COLUMBIA, *Respondents.*

Friday, the 23rd day of March, A.D. 1888.

Upon hearing Mr. Helmcken, on behalf of the Bank of British Columbia, in support of an application to show cause why the order made herein and dated the 14th day of January, A.D. 1888, should not be rescinded, and the claimant be barred from prosecuting his claim, and that he do pay the costs of and occasioned by the said order, or for such other and further relief as the nature of the case may require, upon hearing Mr. Wilson, on behalf of the above-named claimant, and Mr. Walls, for the Sheriff of Vancouver Island, it is ordered that the said application be dismissed with costs, to be taxed and paid by the Bank of British Columbia to the claimant and the said Sheriff, and it is further ordered that in lieu of taxation the Sheriff's costs are hereby fixed at the sum of $5.

(Signed) MATT. B. BEGBIE, C. J.

IN THE SUPREME COURT OF BRITISH COLUMBIA.

—o—

(On Appeal to the Divisional Court.)

BETWEEN

THE BANK OF BRITISH COLUMBIA, *Plaintiffs.*

AND

ATWELL KING & CO., *Defendants,*

AND BETWEEN

JOSHUA DAVIES, *Claimant,*

AND

THE BANK OF BRITISH COLUMBIA, *Respondents.*

Take notice that the Bank of British Columbia appeals from the Order of the Honourable the Chief Justice made herein and dated the 23rd day of March instant, dismissing their application to rescind the order made herein and dated the 14th day of January, A.D. 1888, and to bar the claimant.

And further take notice that the Divisional Court will be moved on Wednesday, the 28th instant, at the hour of 12 o'clock noon, or as soon thereafter as counsel can be heard, or whenever the said Court shall sit, by Mr. Drake, Q.C., of counsel for the said Bank, for an order on their behalf that the said order of the 23rd day of March, instant, may be set aside, and

that the said order of the 14th day of January, A. D. 1888, may be rescinded, and that the claimant barred, and that he do pay the costs of and occasioned by the said orders and of this appeal to be taxed, or for such further and other relief as the nature of the case may require.

Dated this 26th day of March, A D. 1888.

Yours, &c.,

ROBERT EDWIN JACKSON,

Solicitor for Bank of British Columbia.

To CHAS. WILSON,

Solicitor for Claimant.

And to J. P. WALLS, ESQ.,

Solicitor for Sheriff of Vancouver Island.

EXHIBIT 1.

IN THE DIVISIONAL COURT.

Present:—The Honourable Mr. Justice CREASE, and the Honourable Mr. Justice WALKEM.

BETWEEN

THE BANK OF BRITISH COLUMBIA, *Plaintiffs,*

AND

ATWELL KING & CO., *Defendants,*

AND BETWEEN

JOSHUA DAVIES, *(Claimant) Plaintiff,*

AND

THE BANK OF BRITISH COLUMBIA, *Respondents.*

Monday, the 16th day of April, A. D. 1888.

Upon motion by way of appeal this day made into this Court by Mr. Drake, Q. C., of counsel for the above named, the Bank of British Columbia, from the order of the Honourable the Chief Justice, dated the 23rd day of March, A. D. 1888, dismissing the application of the said Bank to rescind the order made herein by the said Chief Justice on the 14th day of January, A. D. 1888, ordering, *inter alia*, the Claimant and the said Bank to proceed to the trial of an interpleader issue, and upon hearing Mr. Wilson, of counsel for the above named Claimant, and upon reading the orders of the 14th day of January, A. D. 1888, and the said order of the 23rd day of March, A. D. 1888, and the judgment of the Honourable the Chief Justice pronounced in an interpleader issue wherein the above named Claimant was plaintiff and Turner, Beeton & Co. were defendants, on the 11th day of February, A. D. 1888. This Court doth order:—

1. That the said order of the 14th day of January, A. D. 1888, and of the 23rd day of March, A. D. 1888, be rescinded.

2. This Court doth further order that the said Claimant be, and he is hereby forever barred from prosecuting his claim mentioned and referred to in the affidavit of James Eliphalet McMillan used in support of the application for the order of the 14th day of January, A. D. 1888, and sworn the same day against the Bank of British Columbia.

3. This Court doth further order that the claimant bring no action against the said James Eliphalet McMillan, Sheriff for Vancouver Island, for anything done by him under and by virtue of the writ of fieri facias issued in this action, and dated the 6th day of January, A.D. 1888. Nor for any moneys paid by the claimant to the said order of the 14th day of January, A.D. 1888.

4. This Court doth further order that each party bear his own costs of and occasioned by the said orders and of and consequent upon this appeal.

And this Court doth order and adjudge the same accordingly.

By the Divisional Court,

JAMES C. PREVOST, R.

IN THE SUPREME COURT OF BRITISH COLUMBIA.

—o—

IN THE MATTER OF JOSHUA DAVIES, PETITIONER, AND TURNER, BEETON & COMPANY., AND THE BANK OF BRITISH COLUMBIA, JUDGMENT CREDITORS OF ATWELL KING.

JUDGMENT.

BEFORE HON. J. H. GRAY, J. NOVEMBER 20th, 1888.

This is a most unusual proceeding. It is an application for leave to prosecute a bill of review of suits, one in the County Court and one in the Supreme Court, adjudicated upon in different stages by four Judges of the Supreme Court sitting in original and appellate jurisdiction. It involves novel points of law, and, as affecting not only the particular litigants but the business public in general, demands serious consideration.

The petitioner says he has suffered a great wrong. That the proceedings in the Courts have done him great injustice—so much so as to necessitate recourse to the unusual remedy he now asks the Court to grant.

The first question then is: Has any such wrong been done to the petitioner in the proceedings and adjudication above referred to as to necessitate the application of an exceptional remedy?

Secondly: Is the exceptional remedy now asked for the proper one?

Petitioner asks that he may point out the errors in law which he alleges are to be found on the face of these proceedings and adjudications, and, having obtained a hearing thereon, take such steps by appeal or otherwise as will remedy the injustice he has suffered. The facts of the case as set forth in the petition, briefly stated, so far as to bring out the law points only, are:—

1. That on 2nd January, 1888, the petitioner bought from one Atwell King, a trader in Victoria—his stock-in-trade for $8,000, and on the same day took a bill of sale and possession thereof—and retained in his service as shopman the said Atwell King, at a fixed salary.

2. That the sum of $8,000 was on the same day paid and satisfied to one E. M. Johnson, the said Atwell King's agent, in his presence and by his direction.

3. The said assignment or bill of sale was registered on the 4th January.

4. That on 5th January, 1888, Turner, Beeton & Co. recovered a judgment against said Atwell King in the County Court, under a short service summons, for $337.20 and costs (Sec. 53, Co. Ct. Jurisdiction Act, 1888.) By an amending Act passed in 1887, No. 35, the judgment so recovered is to be taken to be brought for and to enure to the benefit of all the creditors of the party summoned.

5. On this judgment so obtained Turner, Beeton & Co. on the same day issued an execution, and the Sheriff seized the goods which had been sold to the petitioner, and were then in his possession, of which the petitioner gave notice to the Sheriff and claimed the goods.

6. On the following day, the 6th of January, the petitioner paid to the Sheriff $395, the amount of said judgment and costs, in accordance with the provisions of the interpleader sections of the Co. Ct. Act, 1885 (sections 29 and 30); and on the 18th January an interpleader summons was issued in the suit of Turner, Beeton & Co. against King to try the right of property in the goods so seized.

7. On the 2nd February the trial came on before the Chief Justice, acting as a County Court Judge, and a jury, the contention being: That the assignment or bill of sale to the petitioner was void under 43 Vic. (1880), ch. 10, entitled "An Act respecting the fraudulent preference of creditors by persons in insolvent circumstances."

On the trial answers were given by the jury to some questions submitted to them by the learned Judge, and on the 16th February the learned Judge gave judgment against the petitioner, and declared the bill of sale invalid.

8. From this judgment the petitioner appealed under the 173rd sec. of the County Court Act to the Court of Appeal created by that Statute for hearing appeals from the County Court, the decision of such Appellate Court to be final. That Court dismissed the petitioner's appeal and confirmed the judgment of the Court below.

So far, therefore, all matters between Turner, Beeton & Co. and the petitioner arising out of the sale by Atwell King to the petitioner of the goods seized were closed, *res adjudicata.* The material advantages were with Turner, Beeton & Co., and whatever might be their position with reference to the other creditors of Atwell King under the Act of 1887, No. 35, so far as the petitioner was concerned the final action of the Appellate Court (right or wrong), and the payment of the execution, put an end to his contest with them. So strong was my view as to this point that, as the presiding Judge, I offered at once to dismiss the petition as against Turner, Beeton & Co., with costs, but their counsel declined to accept the offer for fear of some future contingent possibility as to costs in some possible future suits or proceedings that might or might not in some unforseen way arise, any order in reference to which I declined to make, neither having the power to make such an order, or the persons or facts before me to justify such an interference with the future. It is enough to settle present disputes. The first branch of the case is, therefore, disposed of.

The second is of a far different character, involving different considerations and different legal points.

1st. On the 6th January, 1888, the Bank of British Columbia recovered judgment in the Supreme Court of British Columbia against the said Atwell King for $530 debt and $16.50 costs, issued execution thereon, and the Sheriff again seized thereunder the goods purchased by the petitioner as aforesaid; on the 11th petitioner gave formal notice to the Sheriff and put in his claim; on the 13th he commenced an action against the Sheriff for wrongfully seizing his goods, and on the same day the Sheriff took out an interpleader summons in the Supreme Court, and on the 14th January the Chief Justice made an order directing the petitioner and the Bank of British Columbia to proceed to the trial of an interpleader issue to decide the property in the said goods. Issue was joined. On the 24th February petitioner complied with the Chief Justice's order, gave the security, and paid the Sheriff the possession money.

2nd. On the 28th February a summons was taken out before the Chief Justice to fix the day of trial of the interpleader issue between the petitioner and the Bank, the hearing of which application by consent was transferred to Mr. Justice Walkem, who directed the application to stand until the Bank of British Columbia could apply to a Judge in Chambers to rescind the order of the 14th January directing the petitioner and the Bank of B. C. to proceed to interpleader issue to decide the property of the said goods.

3rd. On the 23rd March, 1888, accordingly the Bank applied to the Chief Justice to rescind his order of the 14th January as last aforesaid—on the ground that the judgment in the interpleader issue between Turner, Beeton & Co. and the petitioner had decided that the petitioner had no right of property in the goods as against the creditors of the said Atwell King. The Chief Justice refused to rescind his order—on the ground that the judgment in Turner, Beeton & Co.'s case was *res inter alios acta*—and if allowed to operate as an estoppel against petitioner must also so operate against the Bank, that such a construction of the Act would open the door to great frauds, and confer unlimited jurisdiction on the County Court.

4. From this decision of the Chief Justice the Bank appealed to the Divisional Court, and on the 16th April, 1888, the said Court delivered the following judgment:—

"IN THE SUPREME COURT OF BRITISH COLUMBIA.

'In the Divisional Court. Present: The Hon. Mr. Justice Crease and the Hon. Mr. Justice Walkem. Between the Bank of British Columbia, plaintiffs, and Atwell King & Co., defendants; and between Joshua Davies (claimant), plaintiff, and the Bank of British Columbia, respondents.

"MONDAY, the 16th day of April, A.D. 1888.

"Upon motion by way of appeal this day made unto this Court by Mr. Drake, Q. C., of counsel for the above named the Bank of British Columbia, from the order of the Honourable the Chief Justice, dated the 23rd day of March, A.D. 1888, dismissing the application of the said Bank to rescind the order made herein by the said Chief Justice on the 14th day of

January, A.D. 1888, ordering *inter alia* the claimant and the said Bank to proceed to the trial of an interpleader issue, and upon hearing Mr. Wilson, of counsel for the above-named claimant, and upon reading the orders of the 14th day of January, A.D. 1888, and the said orders of the 23rd day of March, A.D. 1888, and the judgment of the Honourable the Chief Justice pronounced in an interpleader issue wherein the above-named claimant was plaintiff, and Turner, Beeton & Co. were defendants, on the 16th day of February, A.D. 1888, THIS COURT DOTH ORDER :

"1. That the said orders of the 14th day of January, A.D. 1888, and the 23rd day of March, A.D., 1888, be rescinded.

"2. This Court doth further order that the said claimant be and he is hereby forever barred from prosecuting his claim mentioned and referred to in the affidavit of James Eliphalet McMillan, used in support of the application for the order of the 14th day of January, A.D. 1888, and sworn the same day against the Bank of British Columbia.

"3. This Court doth further order that the claimant bring no action against the said James Eliphalet McMillan, Sheriff for Vancouver Island, for anything done by him under and by virtue of the writ of *fieri facias* issued in this action and dated the 6th day of February, A.D. 1888, nor for any moneys paid by the claimant to the said Sheriff under and by virtue of the said order of the 14th day of January, A.D. 1888.

"4. This Court doth further order that each party bear his own costs of and occasioned by the said orders, and of and consequent upon this appeal.

"And this Court doth order and adjudge the same accordingly by the Divisional Court.

[L.S] "JAMES C. PREVOST, R."

Stamps, $1.00.

5. It is to error in law appearing on the face of this judgment and order that the present application is to be confined. It will be noticed—

1st. That these proceedings before the Divisional Court are in the suits of the Bank of British Columbia against Atwell King—and the petitioner as claimant against the Bank of British Columbia as defendant.

2nd. That the judgment rescinds the orders of the Chief Justice of the 14th January for the interpleader issue in the Bank's suit as to the claim of property by the petitioner, and his further order of the 23rd of March refusing to rescind said order of the 14th January.

3rd. It orders that the said petitioner be forever barred from prosecuting against the Bank of British Columbia his claim to the goods referred to in the application of the 14th January.

4th. It further orders that the petitioner shall bring no action against the Sheriff for anything done by him under the execution issued in the Bank's suit on the 6th of January, nor for any moneys paid by the petitioner as claimant to the Sheriff under the Chief Justice's order of the 14th January.

It will be observed from the recital that this order of the Divisional Court is based upon reading the Chief Justice's order of 23rd March, dismissing the application to rescind his order of 14th January, on reading his said order of the 14th January, and the judgment of the Chief Justice delivered in the County Court in the interpleader suit between the petitioner as claimant, and Turner, Beeton & Co. as defendants.

6. The errors in law in this order of the Divisional Court are alleged to be :—

1st. That the orders of the 14th January and the 23rd March made by the Chief Justice were good in law, and the rescinding those orders by the Divisional Court was not warranted by the judgment in Turner, Beeton & Co.'s case referred to in the Divisional Court's orders.

2nd. That the order restraining the plaintiff forever from prosecuting his claim against the Bank was on a matter in no way before the Divisional Court on appeal.

3rd. That the order that the petitioner should bring no action against the Sheriff for anything done by the Sheriff under the execution issued by the Bank, or for moneys paid to him by the petitioner under the Chief Justice's order of the 14th January, was on a matter in no way before that Court.

4th. That the said order was inconsistent with the express provisions of the Interpleader Act, and an exercise of original and not of appellate jurisdiction, and was not warranted by Rule 405 of the Supreme Court, being neither such an order as ought to have been made by the Chief Justice when directing the interpleader issue, or such as the case required.

5th. That it directly interfered with an existing suit, namely: That of the petitioner against the Sheriff, which was in no way whatever before the Divisional Court, in which no defence had been put in, no issue joined, and no application to the Divisional Court made.

The judgment in the case of the petitioner against Turner, Beeton & Co. in the interpleader suit, the authority on which the Divisional Court relies, could not possibly be binding on others than the parties to the suit. It was the judgment of an inferior Court of limited jurisdiction, not of concurrent jurisdiction, beyond $1,000. It was not a judgment *in rem*. It barely operated on one-twenty-fourth part of the subject matter in dispute—$337 out of $8,000. The Act under which that judgment was obtained declared that the amount recovered was to be and enure for all the creditors of the party summoned. What was to become of the difference between the $337 and the $8,000? It cannot be said—because the petitioner failed in that suit—which from certain circumstances became final as between himself and Turner, Beeton & Co., that, therefore, he could not defend against any other person who might try to get the balance of the $8,000 or the property for which the $8,000 was paid by the petitioner. If the petitioner was estopped by the judgment in that case, the Bank and other creditors of King, the parties on the other side for whose benefit by statute the Turner, Beeton judgment was to enure, must equally be estopped, and the consequence would be that a statute intended to prevent fraudulent transfers of property by insolvent debtors could be made the greatest instrument of fraud.

The learned Chief Justice considered that, as between the Bank and Davies, what had taken place between Turner, Beeton and Davies was *res inter alios acta*, and not binding on the Bank or Davies as between them.

A distinction as to *res inter alios acta* is well recognized as to where a judgment is offered in evidence to establish the mere fact, that a verdict was given or a judgment pronounced between the same parties, and where it is offered between other parties, as *a means of proving some fact*, which is found by the verdict, or upon the supposed existence of which the judgment can alone be supported. In the latter case the evidence will not in general be admissable to conclude third parties. In the present case the judgment is used by the Divisional Court not for the purpose of proving a judgment, but for the purpose of proving the fact that the transfer of the property was a fraud. It is not clear upon what principle it got before the Divisional Court. Their sitting was not on appeal from that judgment; it was not a trial of the merits between the Bank and Davies, but simply to consider whether an order made by the Chief Justice that an enquiry should be held whether certain property the Bank had seized under an execution against Atwell King could be claimed by Davies—a statutory right and authority, 1st, for the claimant; 2nd, for the Judge who orders the enquiry—and as it so happened, the Judge who in this case knew more than any other person whether, as between the Bank and Davies, enquiry into such claim should take place, and who had ordered it. Moreover, it is to be observed that at that time it was impossible to say, as between the Bank and Davies, what facts or points might be raised on the pleadings in that case to test the validity of the Turner, Beeton judgment, or its effect upon other parties, or upon the balance of the money, exceeding $7,500.

In testing the Bank's right to seize that property under execution, the point might have been raised that the Bank had no right because, as one of the creditors of King, it was estopped by the judgment of Turner, Beeton & Co., who, by statute, were made trustees for King's creditors, and their judgment had been paid—for if Davies was estopped so was the Bank and the other creditors, the *cestui que* trusts, and therefore the Bank could not under their execution seize the goods a second time—a proposition most gratifying to Mr. Atwell King, who thus would pay his $8,000 debts by $337, or perhaps what would have suited King as well, Davies' property, for which he had paid, would, under this Divisional Court decision, be liable to seizure under executions from any number of King's creditors in suits against King himself, in not one of which could Davies intervene, while King himself or his appointees held and appropriated the consideration money which Davies had paid. Well did the Chief Justice say such a construction would open the door to fraud. It it is not necessary here to say whether such points could be well taken or not. Evidently these and other considerations induced the Chief Justice to consider that the rule *res inter alios acta* applied, and to refuse to rescind his order, allowing the parties to establish their rights in the ordinary way. Moreover, as justly observed by the Chief Justice, the statutory jurisdiction of the County Court, which is limited to $1,000, might thus indirectly be increased by many thousands, as in this very case it is contended that it covers the right to $8,000, less

$337. But how can the judgment of an inferior Court of limited jurisdiction stay the action of the Supreme Court in a suit in the Supreme Court between other parties than those in the County Court on a question exceeding the jurisdiction of the latter by $8,000 to $1,000. A Court cannot do indirectly what it cannot do directly. As authority, it can have no weight whatever, further than respect for the reasons on which that judgment was founded, may influence the decision of the Supreme Court. Whether the judgment in the Turner, Beeton case was founded on such good reasons as to justify a similar conclusion in the Supreme Court in a similar case may be examined hereafter, but so far as the present point goes it appears, with all deference to the Divisional Court, that the reasons of the Chief Justice for refusing to rescind his order of 14th January were sound, and in that respect the error charged as appearing in the rescinding order of the Divisional Court must be considered well taken.

When the other two parts of the Divisional Court order are examined it is difficult to reconcile some conflicting points. The order appealed from was a refusal of the Chief Justice to rescind his order in the suit of the Bank of B. C. directing the trial of an interpleader issue to decide the right of property in the goods.

His order directing that issue was made on the application of the Sheriff, and contained the preliminary provision for the Sheriff's security and protection in carrying out that order required by and in accordance with the practice of the Courts in such cases. If the order was carried out the Sheriff had his protection under the order and the security paid in, if it was not carried out he incurred no risk under the interpleader issue, and had his full authority and protection under the execution to hold the goods and sell. Except by the interpleader issue there was nothing exceptional in the case. Why the Divisional Court should protect the Sheriff any more than in hundreds of ordinary sales under executions does not appear; but the extraordinary part is, that the Chief Justice's order did protect him for any exceptional risk he ran; that order is rescinded by the Divisional Court, the risk is not run, but the protection thrown around the Sheriff by the Divisional Court is more than he could legally have demanded if he had incurred the risk many times over. Not only so, but it goes further. It forever bars the petitioner from prosecuting his claim against the Bank, and further orders that he shall bring no action against the Sheriff for anything done under the execution, nor for any moneys paid by the petitioner to the Sheriff under the Chief Justice's order of the 14th January—thus practically deciding the merits and results of the main action brought by the petitioner against the Sheriff which had never been heard, and in which the Sheriff had not even put in a defence—and where the application before the Divisional Court was simply on an interlocutory proceeding in another suit. Thus in an action in the Supreme Court in which the petitioner alleged that the Sheriff had seized nearly $8,000 worth of petitioner's property under an execution from the Bank of British Columbia, the Divisional Court orders him to stop all proceedings in his suit against the Sheriff, because in the County Court somebody else had got the better of him to the extent of $337 in a matter alleged to be the same, or arising out of the same transaction.

By the 2nd section of the Act constituting the Divisional Court (chap. 5, 1855), the Divisional Court has all the powers and authorities before held and exercised by the Full Court in interlocutory matters, and its judgment shall be deemed a judgment of the Full Court, and shall be executed and carried out as such. A diligent search into the proceedings of the Full Court has disclosed no instance in which that Court ever decided upon the merits of a case unheard, or before a defence was put in, and made a final and absolute order barring further proceedings, because in another and inferior Court, in another case between other parties, a judgment had been rendered which, as between those parties in that inferior Court, had been made final.

But, as the Divisional Court has on the face of its decision incorporated the Turner-Beeton judgment with that order, it becomes necessary to examine it. It was, as must be well understood, a judgment on an interpleader issue in the County Court, in which the petitioner Davies was plaintiff and Turner, Beeton & Co. defendants. The latter had, under a judgment against Atwell King, seized goods which petitioner claimed as sold to him by King; a jury was summoned and sworn to try the issue—they brought in no verdict—they answered certain questions submitted by the Chief Justice, who, acting as a County Court Judge, was trying the case.

The learned Judge considered these answers, and himself decided in favour of Turner, Beeton & Co., that the claimant (the petitioner) had no property in the goods as against the creditors of the said Atwell King.

It is submitted :—

1st. That according to the law and practice in British Columbia, a judgment so arrived at is not valid : that where on the application of either plaintiff or defendant (sec. 79, County Court Act), a jury has been summoned and sworn to try the issue, the duty of the jury is not completed, or the rule ordering a jury filled, until a verdict has been returned or the jury discharged according to law ; that the conclusions of a Judge as to the meaning and effect of certain answers to questions put by the Judge, is not a verdict or equivalent to a verdict, and that on the point raised in the present suit between the Bank and the petitioner, as to the right of property in the goods seized by the Bank under execution and claimed by the petitioner, there has been no valid adjudication whatever.

2nd. That the answers to the questions put by the Judge to the jury are inconsistent with each other, without the rider attached, and cannot possibly sustain his conclusion, and, with the rider attached, directly negative it.

3rd. That the confirmation of that judgment by the Appellate Court, however conclusive it may be between the parties to that suit, has no binding power or authority in any other suit between other parties.

The first point has been twice decided in the Supreme Court of British Columbia on argument before the Full Court *in banc*, on appeals taken in two cases, namely, Fan *v.* Fan, July 24th, 1885, and in Wraight *v.* Young, 20th August, 1885, in which cases the principle was distinctly laid down that in cases where juries are summoned and sworn the parties are entitled to have a verdict, and the Judge cannot assume that power to himself (*vide* Hunt *v.* Chambers, 20 Chancery Division, 370).

In the Turner, Beeton case, in which the petitioner was the contending party, he was entitled to have had from the jury a distinct general verdict covering all the ingredients of the case, not merely answers to the few ingredients the Judge might point out in certain questions, and among those ingredients under the concluding clause of the 2nd section of the Act (c. 10, 1880) respecting fraudulent preference of creditors, namely : "Nothing herein contained shall invalidate or make void any *bona fide* sale of goods in the ordinary course of trade or calling to innocent purchasers," was the direct point, whether, under that clause, the petitioner's purchase was not a *bona fide* one, in the ordinary course of trade, and whether he was not innocent of any collusion with King to defraud his creditors. The petitioner was entitled to have had on that point the distinct verdict of the jury. Clear-headed, practical business men, sitting as a jury, may come to the most correct conclusion on the whole case, and yet be unable to stand a catechism of questions as to how in their several minds each point was determined so as to make all agree. The right to have the jury's direct verdict, is one of the most sacred rights the law gives a litigant. The answers given by the jury to the questions submitted by the Judge are an illustration. Taken from the records of the County Court, produced in Court and examined by myself, they are as follows :—

1. Was the purchase by Davies *bona fide* and for his own benefit ? Ans.—Yes.

2. Was the payment by Mr. Davies *bona fide*, *i. e.*, Was the money paid by him to E. M. Johnson as agent for King simply ? Ans.—No.

Or 3. Did Davies pay it to him in order to enable him to prefer Green and Strouss to the creditors ? Ans.—Yes.

4. Was King at the time insolvent, *i. e.*, without the command of money to meet demands then actually due from him ? Ans.—Yes.

5. Did King intend to give a preference to Green and Strouss over and before his other creditors ? Ans.—Yes.

6. If so, did Davies know it ? Ans.—No.

7. Did Strouss and Green intend to obtain a preference ? Ans.—Yes.

We answer the 3rd question in the affirmative because we say that Davies did not on the 2nd January know that there were any other creditors.

The 1st, the 3rd with its rider, and the 6th are consistent and clearly in favour of the petitioner, as bearing on the concluding passage of the 2nd section of the Act above referred to. The 2nd, both question and answer, except as qualified by the rider to the 3rd, is confusing and inexplicable, and the 4th, 5th, and 7th, if the answers to the 1st, 3rd, and 6th be correct, have no bearing on the petitioner Davies, because his innocence as a purchaser is found by the 1st, 3rd with the rider, and the 6th. Upon these answers, which upon any other construction are inconsistent, the learned Judge bases his judgment against the petitioner and in favour of Turner, Beeton & Co,, contrary to what appears to have been the idea of the jury.

All this difficulty would have been avoided if the jury had simply brought in, or been instructed to bring in, a plain verdict.

Even in cases where the Judge having all the materials before him may supplement the finding of the jury, and, by drawing his own conclusions from the evidence before him, assume as a fact proved that which the jury have not found, and thus render complete that which the jury left incomplete; yet it seems to me clear law that his conclusion on facts not pronounced upon by the jury, should be consistent with the conclusions of the jury on the facts on which they have pronounced. In this case, his conclusions are clearly inconsistent with the answers of the jury to the 1st, 3rd and 6th questions with the rider, as applied to the concluding passage of the 2nd section of the Act referred to; otherwise, what did the jury mean by saying the purchase by Davies was *bona fide*, and for his own benefit? It cannot be *bona fide* if intended to cheat some one else, or prefer some one contrary to law.

On the authority of this judgment, incorporated in their own order, the Divisional Court say the petitioner shall not in the suit of the bank put in any claim to the property which the bank had seized, which the learned Chief Justice, who had tried the Turner, Beeton cause, had given him leave to do; and who, after consideration, on a distinct application on behalf of the bank, had refused to withdraw the permission so given—not only so, but in the bank's case, in which the point had not been raised at all on appeal—absolutely forever bar the petitioner from prosecuting his claim against the bank, or proceeding against the Sheriff for anything he had done, or for the moneys paid to him by the petitioner, under the Chief Justice's order.

With all deference to the high authority of that Divisional Court, it does seem to me that the petitioner shows good cause to ask to have its proceedings reviewed.

From this Divisional Court order leave to appeal to the Supreme Court of Canada was refused by one of the Judges of that Divisional Court, on the ground that it was not a judgment of the Court of final resort in the Province, though the Act of the Province creating it said its judgment should be final.

The next phase of this most extraordinary of extraordinary cases takes place in England. The petitioner applied to the Privy Council for leave to appeal, and pending a long and attentive hearing by the Court, suddenly an order in council made some few months before—which had escaped the notice of both Court and counsel—was unearthed, which, dated the 12th July, 1887! required that leave to appeal must be applied for to the Court appealed from within 14 days after its decision, and which order in council was first published in British Columbia about the time that the Divisional Court made its order, but had not come to the notice of the bench or the bar in the Province. A more extraordinary combination of untoward circumstances never, perhaps, before occurred to any one person arising out of one transaction in any legal proceedings. The counsel for the petitioner calls it "The Comedy of Errors."

The counsel for Turner, Beeton & Co., and the counsel for the Bank of British Columbia, and the Sheriff, raise many technical objections to the mode of remedy asked for, even so far as to say no error whatever appears on the face of the judgment—that the reasons for the judgment constitute no part of the judgment—which is embraced in the simple words, "let judgment be entered for the plaintiff or defendant," as the case may be, and outside of those words you cannot look. It would be a melancholy waste of time, of labour, and of learning, and a mockery of justice, if such a limitation could exist.

The petitioner has exhausted every ordinary mode by which, in this country or in England, he could obtain a hearing, and he now asks that he may, through the exceptional process of a bill of review, have the opportunity of being heard, and his case adjudicated upon in some such way that appeal may be taken to the highest Courts of the Dominion or the Empire, if he is advised so to do.

The points raised affect the interests of every business man in the country. I decide none: but the facts, the judgments, the orders, the proceedings, the Statutes, the practice, the argument before me, show most decidedly a wonderful difference of legal opinion in the application of law to the property and persons of litigants before the Courts.

I have been reminded two or three times during the argument that the four other Judges of this Court have agreed upon the question. That, of course, necessitates the most careful consideration on my part, but, fortunately, our Courts are so constituted that difference of opinion on the Bench creates no embarrassment or ill-feeling; each Judge believing that it is his duty to decide according to the best of his knowledge and his conscientious conviction.

Briefly summing up, it is claimed that the petitioner paid $8,000 for the goods, $395 to the sheriff under the execution in Turner, Beeton & Co.'s case, and other sums of money under order of the Court in the suit of the Bank of British Columbia. That the goods themselves have been sold under the orders of the Court and the amount of $6,233.96 paid therein, the amount of the bank's judgment being first deducted. That through erroneous decisions of the Courts of this Province he had been deprived of his money, his goods, and right of action for redress in this Province; and was deprived of his remedy, by appeal to the Privy Council in England, by circumstances which could not have been foreseen or guarded against by ordinary prudence.

That throughout, his conduct and actions have been *bona fide* and in accordance with law, and he asks that by means of a bill of review, he may have a hearing of his case, so that an adjudication thereon may be had, and that he may be enabled, if advised so to do, to carry his appeal to the highest Court of the Dominion or of the Empire.

It will be observed the granting this application concludes no party; each or any defendant may raise his objection or state his defence as he may be best advised. The only point I am asked to decide is, whether the petitioner has shown sufficient legal reasons to claim this opportunity and this unusual remedy.

As far as I am able I have given this case the most careful consideration, and on every principle of law, on every principle of justice, on every principle that divides right from wrong, I think that the petitioner should have this opportunity and this remedy as against the Bank of British Columbia.

The application therefore will be dismissed so far as it affects Turner, Beeton & Co., but without costs, they having declined the offer made them shortly after the opening of the case, and continued opposing the application to its close.

As affects the Bank of British Columbia, the application is granted with costs to be costs in the cause.

Let the order be drawn up accordingly.

The order of Judge Gray to bring a bill of review was afterwards set aside by the Full Court.

Joshua Davies brought an action against the Sheriff to recover damages for wrongfully seizing and selling the goods, and by his amended statement of claim, dated 29th October, 1890, claimed $15,000 damages. The case was tried before the Chief Justice and a special jury on the 19th January, 1891, and a verdict returned in favour of Davies for $9,161. Judgment on the verdict was given by the Chief Justice for the amount thereof, and the following were

REASONS FOR JUDGMENT.

The following are the reasons of the learned Chief Justice:—

The parties not having been able to come to terms, I have now to give judgment.

The findings of the jury place the plaintiff in a very different position from that in which he was placed by the verdict of the jury on the interpleader issue in 1888, although the first question now left to the jury is not answered at all. The main issue being as to whether the sale by King to the plaintiff was affected by the Statute, c. 10, and that Statute expressly excepting from its operation all sales made in the ordinary course of business, the first question I wrote down was "whether the sale (*i. e.*, by King) was in the ordinary course of business?" To this the jury say neither yes nor no; but they say the purchase was made by the plaintiff in the usual course of business, which is wholly beside the matter, and merely ignores the question. The Statute, therefore, is not inapplicable on this ground. But there is, I think, in other answers, sufficient to show that the Statute does not apply; so that the bill of sale to plaintiff is valid, and the goods when seized by the Sheriff were the plaintiff's goods.

The plaintiff is entitled to have judgment according to the verdict, unless it be utterly without evidence, or utterly contrary to the evidence, such as no man could reasonably arrive at.

Now, the jury find that the vendor was solvent at the time of the sale, *i. e.* "generally" solvent, but that the sale itself at an undervalue made him generally insolvent. I conceive that that is not such an assignment as is struck at by the Statute. And it seems probable that if King had assigned for the benefit of his creditors they would all have been paid in full; and that is what I take the jury to mean. Then there is surely considerable evidence to justify the finding that the Sheriff exceeded his duty, the fact being that on a writ endorsed for $350.00, he seized the whole stock of goods, valued at $12,000.00 or $14,000.00, and which actually fetched, under all disadvantages, $8,000 or $9,000; the goods being easily divisible, so that he could have seized a reasonable amount. Then, further, when that writ was wholly paid off, he retained possession of the whole stock under colour of another writ for $530, in favour of the Bank of B. C., and when this was also fully paid and satisfied he still retained possession of the whole stock in expectation of other writs on other judgments (which indeed soon afterwards came in, but were not lodged when the Bank's writ was satisfied) and held on for four months keeping the stock in the expensive store, and a man in possession; and after all this, the Sheriff then sold in a manner that the jury found, and I do not disagree with them, and not at all calculated to realize the best results.

Under these circumstances I must give judgment for the amount at which the jury estimate the damage, viz., $9,161.00. As to what they add, "the money in Court to form part of this amount," it is wholly beyond their power to dispose of that money, and no effect can be given to that part of this verdict; although I quite agree that that would be a very proper application of the money in Court, if possible, as indeed I clearly stated to counsel when they moved for judgment; but I suppose they found some difficulty in the way. Costs will follow the result.

—o—

The defendant appealed to the Supreme Court of British Columbia, and the following judgments were delivered reversing the judgment of the Chief Justice:—

FULL COURT.

BETWEEN

JOSHUA DAVIES,
Plaintiff,

AND

JAMES ELIPHALET MCMILLAN,
Defendant.

Before JUSTICES CREASE, MCCREIGHT, WALKEM AND DRAKE.

August 26th, 1891.

JUDGMENT.

MCCREIGHT, J.—This is an appeal from the judgment of the Chief Justice which he delivered upon the findings of the jury before whom the case was tried, and there was also an argument upon a motion for a new trial, which I shall deal with presently. Paragraphs 36 and 37 of the Statement of Defence assert that the proceedings and judgment on the interpleader issue between Davies, and Turner, Beeton & Co. is conclusive against Davies' right to the goods for all purposes and between all parties, but I think this proposition cannot be maintained. It is to be remembered that the interpleader issue was only for the purpose of informing the conscience of the Court as to whether in the case of Turner & Co. *v.* King the goods were available to satisfy the execution creditors and could have no ulterior operation. If conclusive against Davies for all purposes and between all parties it would also have been equally conclusive in his favour against all creditors if the decision had been for him; but this as a proposition obviously could not be maintained. The decision was not *in rem.* Order 57, rule 4 (14), English, (*see* Cababe on Interpleader, p. 49; and 2 Arch. Pr. p. 1,300, 14th ed.) for the consolidation of interpleader orders would have been wholly useless if such a doctrine was correct. Outram *v.* Morewood, 3 East, and the notes to the Duchess of

Kingston's case, 2 Sm. L. Ca., may be referred to as showing the conditions of a plea in bar and the operation of *res judicata*. Lastly, the very recent case of McNair & Co. *v.* Adenshaw P. & C. Co. (1891) at 2 Q. B. 505, 507 C. A., shows that "the decision of a Judge on an interpleader issue is not a final judgment, but it is a decision in a proceeding, which is in the nature of an interlocutory proceeding" (referring to McAndrew *v.* Barker, 7 Ch. D., p. 701). But then it was contended that the Divisional Court order of the 16th day of April, A. D. 1888, operated as a stay of proceedings. Now it seems too late to insist on this as a stay of proceedings after verdict and judgment. But I think it could not have, at any time, been successfully invoked, and indeed the proceedings before the Chief Justice and the Divisional Court show as much; for at the end of last year he refused to stay proceedings in the action, and the Divisional Court, though divided, affirmed his judgment or order. I may observe, that perusal of the order of the 16th April, 1888, coupled with the orders of the 14th January and 23rd March preceding, seem to show that the object of the order of the 16th April was mainly to keep alive the protection afforded to the Sheriff by the order of the 14th January, whilst rescinding in other respects that order as well as the order of the Chief Justice, of the 23rd March, refusing to rescind his previous order. If the order of the 16th April was meant to protect the Sheriff *in omnibus*, it is, I think, *ultra vires*, and as such, an appeal from it would have been and was unnecessary—*see* per Jessel, M. R., Cape Breton Co. *v.* Fenn, 17 Chan. D., 202 C. A. This view may work a hardship on the Sheriff, but if the findings of the jury in this case are to prevail then the goods must be taken to have been the goods of Davies, as from the date of his purchase for all purposes, and at all events such protection could at best extend only to sales made under the writ of the 6th January, at suit of Bank of British Columbia for $546.50. The trespasses complained of in the present action seem to consist mainly of sales made by the Sheriff during the month of April and for the purpose of course of satisfying other executions, amounting to a large sum and affecting goods worth $7,000 or $8,000 at the least, and there is no averment in the statement of defence that the trespasses set out in the statement of claim are covered by the order of the 16th April, nor could any such statement have been proved.

I think sec. 90 of the County Court Act, Consolidated Statutes, cannot help the Sheriff for the above reasons, if the finding of the jury is to stand, and I think the Act is concerned only with the case in hand, that is, Turner *v.* King, for $337. If it had been meant to give all the jurisdiction of a Superior Court very different language would have been employed.

I think no case of election can be made out on the part of Davies to take the proceeds of the Sheriff's sale merely by reason of Davies applying to have the money paid out of Court to him, inasmuch as such application was not made till the 12th December, 1888, and the Writ of Trespass, &c., had already issued during the previous month of November, as well as for other reasons. (*See* the Judgment, Clough *v.* London and North Western Railway Co., L. R., 7 Ex., in the Exchequer Chamber.)

With respect to the argument on the rule for a new trial, some of it was applicable as much to an appeal against the judgment of the Chief Justice upon the verdict or findings of the jury as to the rule, but it will be convenient to deal with it as it was addressed to us.

Now, it does not seem to me that the findings of the jury; firstly, that Davies did not intend that any particular creditor should be preferred; and secondly, that he bought out and out for himself, are exhaustive and conclusive in favour of Davies—and that it has been settled by a line of cases, including Tuer *v.* Harrison, 14 C. P. Ontario, and up to Burns *v.* Mackay, 10 Ontario Reports, 167 (affirmed on Appeal, *see* 18 Appeal Ont., per Osler, J., p. 164) that a concurrence of wrong intent on the part of the purchaser as well as the seller, is necessary in order that the deed should be held void. The imperfect answer of the jury to the question "Was the sale made in the ordinary course of business?" seems, to me, not very material in this view. A sale not made in the ordinary course of business, is not necessarily made with intent to prefer or fraudulent, though of course suspicious. I do not wonder at the jury finding in favour of Davies, or at least their finding may be easily explained by the circumstance that Davies paid $8,000, and that the goods when sold under apparently a careful, if not skilful, sale by the Sheriff, realized only $6,894 net; as to this, *see* Baxter *v.* Pritchard, 1 Adolphus & Ellis, and the question put by Littledale, J., in that case.

Mr. Richards, for the defendant, I believe, admitted he could find no English or Ontario case, or in the Supreme Court of Canada, to the effect that sales not made in the ordinary course of business are necessarily fraudulent, under this Act, or void.

Mr. Richards argued there was misdirection in the charge of the Chief Justice in assuming

that legal insolvency, as well as commercial insolvency, was necessary to make the Act apply ; but assuming this to be so, this is not material if the purchaser satisfies the provisions of the Act, or rather has so acted as to exempt himself from its operation, and I think the two findings of the jury to which I have referred go that length.

Mr. Richards argued that judgment should not have been given by the Chief Justice for the sum of $9,061, as that amount was only given on the footing that the Sheriff was to have the sum of $6,894, which he paid into Court, but I think that cases cited by Mr. Wilson go far to answer that objection, *i. e.*, Mears *v.* Griffin, 1 Man. & Gr. ; Sheridan *v.* Pigeon, 10 Ontario Rep., 632 and 637 ; and Bicknell *v.* Smith, 62 Pennsyl., p. 45 ; but I think that the objection admits of a further answer, namely, that the recommendation of the jury was little more than a statement of the law. It is held in Richmond *v.* White, 12 Chan. D., C. A., that a party paying money into Court under an order loses none of his rights to the fund—*see* especially per Cotton, L. J. Therefore the question must be determined, as if that amount were still in the Sheriff's hands. Now, if that were so under the old system of pleading (and the new would not substantially differ) the plaintiff would sue the Sheriff for the proceeds of the sale, as for money had and received, and would join a count in trover or trespass for the goods. If successful, he would take his verdict no doubt for the larger sum, that is, the damages, and upon payment of that amount the defendant would be entitled to the proceeds or the goods if they continued in specie. This seems to be amply proved by Buckland *v.* Johnson, 23 L. J., C. P., per Jervis, C. J., qualified by Brinsmeed *v.* Harrison, L. R., 6 C. P., showing that the property did not vest in the trespasser till he had paid the damages, but did thereupon. Whence it should seem that if the verdict and judgment stand and the Sheriff pays the damages, he will be entitled to the money in Court, the result of the litigation being that whilst Davies is entitled to damages, the Sheriff is or will be entitled to the goods or the proceeds. Of course, this assumes that Davies owns the goods under the Bill of Sale of January, 1888, and it is just possible, though not probable, that in a suit on behalf of the creditors, this position might be successfully controverted, but even if such action was brought on behalf of the creditors, on the principle that he who seeks equity must do it, the plaintiff would have to pay Davies the sum he had paid, of $8,000, and of course this would not be done merely for the purpose of obtaining the proceeds in Court, namely $6,894. An action by one creditor alone on his own account, would probably under all the circumstances be stayed, and an action on behalf of all directed, which, no doubt, in view of the preliminary payment or offer to be made, would be dropped.

Of course, before so large a sum as $6,894 was paid out, due precautions would be taken by the Court, but it does seem to me that it may be looked upon as a kind of salvage to the Sheriff if the verdict stands. As to which, however, I am by no means sure that my learned brothers entertain the same views as I do. I cannot say the verdict is such as reasonable men could not have arrived at, and I have to bear in mind that the finding of fraud, or its absence, is especially within the province of the jury.

The charge to the jury of the learned Chief Justice (*see* p. 118, Appeal Book) criticises the sale and transaction with some severity, and judging from the evidence, as against some of the parties, I cannot say that it is unmerited ; but the validity of the transaction, according to the authorities to which I have referred, seems to depend, as far as Davies is concerned, upon his own bonâ fides. But the evidence (*see* p. 22, etc., Appeal Book,) shows Davies had the sale under consideration on Saturday, the 31st December. That about noon on the 2nd January (*see* question 16) he asked his legal adviser to prepare a bill of sale. His bonâ fides further appears from questions and answers 47, 48 and 70, as to what King told him of his solvency, and *see* further questions 13, 96, 103 and 104, and lastly 124, showing that King was present when E. M. Johnson received the money for him. The jury, as it seems to me, were fully entitled to infer bona fides from his evidence. It is impugned by no one, except partially by King, but even he admits, question 1,024, that Davies called round on the morning of the 31st December and looked at the stock. The questions and answers, where he may be considered as impugning the conduct of Davies, appear to questions 1,032, 1,039, 1,122, 1,168 and 1,170, but we should remember the circumstances under which he gave evidence. He seems to have felt much the questionable position in which he was placed, by omitting to follow Mr. Mills' advice as to making an assignment, and would naturally feel disposed to lay blame on every one concerned in the transaction, whether innocent or not. I only mention this as showing that the findings of the jury were such as reasonable men might well have returned, especially having regard to the payment by Davies of $8,000, and I will only add

that the charge as to the proviso in the Act as to sales in the ordinary course of business (*see* p. 119 of Appeal Book), differs from the interpretation placed on that proviso by the Court of Common Pleas in Ontario, in Tuer *v.* Harrison, 14 C. P., at p. 456.

I think the judgment of the Chief Justice should be affirmed, and that the order nisi for a new trial should be discharged.

JUDGMENT.

CREASE, J. :—

In this appeal from the judgment of the learned Chief Justice, the Judges in Appeal have conferred long and carefully. Although not fortunate enough to come to an unanimous decision, my learned brother Mr. Justice Walkem and myself concur in the opinion which our learned brother Mr. Justice Drake has expressed in his written judgment which I have read, and in the reasons, as well as the conclusions, of which I concur. There is nothing which I can usefully add to it, except to note, what I did not see recorded, that the decision of the Divisional Court delivered on 16th April, 1888, on an appeal from a decision of the learned Chief Justice in the case of the Bank of B. C. *v.* Atwell King, and between Joshua Davies *v.* Bank of British Columbia, was based on the principle which had been always acted upon in the Courts of British Columbia, that when a deed of assignment is avoided under such circumstances as were proved in this case it is set aside once and for all against all creditors ; and in giving that decision the construction was put upon the several portions of section 90 of the "County Court Act" as is adopted by a majority of the Judges in the present appeal. I consider and adjudge that the appeal in the present case should be allowed, and the action dismissed, with the costs of this Court and of the Court below, but that there should be no costs of the motion for a new trial made at the same time.

HENRY P. PELLEW CREASE, J.

JUDGMENT.

DRAKE, J. :—

The facts show that Atwell King sold out his stock in trade, consisting of toys and fancy goods, to the plaintiff for $8,000, of which sum $1,500 only was paid to the vendor, the remainder of the purchase money was in the shape of a promissory note for $6,500 made by the plaintiff to a Mr. Baker, and indorsed by him, and also by E. M. Johnson, and apparently discounted at the bank, and the proceeds paid to Garesche, Green & Co. and Strouss, the two chief creditors of King, and which payments discharged their claims in full.

It is alleged that Johnson and Strouss together obtained the plaintiff as purchaser of the goods without communicating to him why or wherefore King desired to sell. Johnson arranged the price and received the money and distributed it as to $1,450 to King and the remainder to these two creditors.

The whole surroundings of this transaction are suspicious. Johnson says he was acting as King's agent, but he certainly was not acting in his interest, and admits he was acting for Garesche, Green & Co. and Strouss, in order to obtain payment of their debts.

The transaction was completed late at night, apparently in a considerable hurry, Johnson apparently being afraid that on a calm consideration King would execute an assignment for the benefit of his creditors. The plaintiff purchased the goods after a most cursory and casual inspection, not lasting ten minutes and no questions asked, no invoices produced, and no books examined. The rooms in which the greater part of the goods were stored were never entered. The price offered being between 50 and 60 per cent. of the alleged value. A bill of sale was prepared by Mr. Wilson, as solicitor for Davies, and executed in the evening by King, Strouss and Davies being present. The whole evidence shows that inducements were held out to King not to make an assignment for creditors, but to complete this transaction by which he would get $1,500 and these special creditors would be preferred, whereas if he made an assignment for creditors he would only receive $500 under the Homestead Act.

King at this time was greatly involved, and a great deal of discussion has taken place as to whether he was in insolvent circumstances at the time of the act, and did the plaintiff

know it, the jury having found that King was commercially insolvent, but not generally. In my opinion if a person is commercially insolvent (if that means he cannot meet his trade bills as they become due), he is in insolvent circumstances, and all the facts in this case support that view. King was refused bank accommodation ; he owed $12,000, and all he had to meet his liabilities was his stock of goods and some book debts of little value ; his household furniture belonged to his wife, and was not, therefore, an available asset. The value of his goods would be what they would realize at a forced sale, and that has been ascertained to be under $8,000.

Under the Statute in Ontario, which is almost identical with the one on our Statute Book, the Courts in Ontario have, after a considerable difference in opinion, finally decided that there must be knowledge of the insolvency, both as regards the debtor and as regards the person in whose favour an assignment is made. The fact that an insolvent trader makes an assignment in favour of a creditor not knowing of the insolvency is no reason for setting the deed aside. Although these decisions are not binding on us, yet they are entitled to great weight, and should not be lightly discarded.

(*See* Johnson *v.* Hope, 17 O. A. 10 ; Gibbons *v.* McDonald, 19 O. R. 292.)

But the present case is different from all those which were cited. This is not the case of a creditor preferred by his debtor, but of a sale made to a stranger for the purpose of preferring certain special creditors; an indirect way of trying to avoid the Act. The Act says that nothing in the second section contained shall invalidate or make void any *bona fide* sale of goods in the ordinary course of business to innocent purchasers. This was not a *bona fide* sale in the ordinary course of business ; the ordinary course of business was not to sell out a retail dealer's entire stock and fixtures in one lump. Therefore this sale not being in the ordinary course of business is not invalidated by the Act. On this point the jury did not make any answer to the question submitted to them, " was the sale of the 2nd January, 1888, made in the ordinary course of business ? " Their answer was " Yes, as far as Davies was concerned." That is no answer to the question. The insolvent circumstances of the debtor were known and believed in by Strouss and Garesche, Green & Co., so much so that they commenced legal proceedings for the recovery of their debts. There was material knowledge of this fact in both debtor and creditor. Can then the intervention of a third person in the position of Mr. Davies prevent the operation of the Act and render valid this bill of sale ? I think not ; there is such a thing as being wilfully blind and deaf, and it appears to me that the present plaintiff was both. He made no enquiries of King ; he never even mentioned the price or asked whether King was willing to sell, or if Johnson was authorized to sell for him. He never paid over the purchase money to King, but to Johnson, his alleged agent ; although King was there, and Strouss was there, he carefully abstained from obtaining any information on the subject. I therefore think that the deed thus obtained was and is void as against the other creditors of King, but the case does not rest here. The assignment to the plaintiff was made on the 2nd January, and the plaintiff entered into possession of the goods; on the 5th January a judgment was obtained by Turner, Beeton & Co. in the County Court under section 90 of the County Court Act, and a warrant of execution was placed in the defendant's hands, who levied on the goods, whereupon the plaintiff gave notice of claim. Before proceeding to discuss the proceedings which subsequently took place on this interpleader it will be as well to dispose of the contention which was prominently urged, that proceedings taken under section 90 of the County Court Act enure for the benefit of all creditors. The section says " that any judgment that may be recovered and any execution shall enure for the benefit of the creditors of the parties summoned." This means that the party obtaining the judgment and the fruits thereof shall divide the amount recovered amongst all the other creditors. The latter part of the section " that such and the like proceedings may be taken thereon as upon a creditor's suit " is difficult to give effect to, because a decree in a creditor's suit is in its nature a judgment for all the creditors, and such a decree is only known in an administration action, and the course of proceeding after such a decree is clearly laid down, but here no procedure is given. This section does not give to the judgment that may be obtained the same effect as an administration decree, if it did and made the assets of the debtor divisible in equal shares amongst his creditors the Act would be trenching on bankruptcy and insolvency, a subject not within the scope of Provincial legislation, but it may have this effect, that a judgment thus obtained enures to the benefit of all creditors, and in setting aside the deed of assignment the deed was set aside once and for all for the benefit of all creditors. Reverting to the incidents of the proceedings, the defendant on receiving notice of claim by the plaintiff in

Turner's case interpleaded, and an issue was directed, and on the 2nd February, 1888, the issue came on for trial before the Chief Justice sitting as a County Court Judge and a jury.

The questions then submitted to the jury were:—

1. Q.—Was the purchase by Davies *bona fide* and for his own benefit? Ans.—Yes.

2. Q.—Was the payment by Davies *bona fide*; *i. e.*, was the money paid by him to E. M. Johnson as agent for King simply? Ans.—No.

3. Q.—Did Davies pay it to him in order to enable him to prefer Green and Strouss to the creditors? Ans.—Yes.

4. Q.—Was King at the time insolvent; *i. e.*, without the command of money to meet demands then actually due from him? Ans.—Yes.

5. Q.—Did King intend to give a preference to Green and Strouss over and above his other creditors? Ans.—Yes.

6. Q.—If so, did Davies know it? Ans.—No.

7. Q.—Did Strouss and Green intend to obtain a preference? Ans.—Yes.

These questions show that the facts submitted to the Jury in the first trial are identical with those of the present action. On these findings the learned Chief Justice gave judgment against the present plaintiff, the claimant in the interpleader, and declared the bill of sale invalid against creditors.

The plaintiff appealed from that judgment to the Supreme Court, and that Court dismissed his appeal and confirmed the judgment of the Chief Justice.

This judgment then finally declared the invalidity of the deed of assignment from King to Davies as against creditors.

Before this decision was arrived at, namely, on the 6th of January, 1888, the defendant again seized, under a writ of *fieri facias* issued by the Supreme Court in an action wherein the Bank of British Columbia were plaintiffs and King defendant, and in this case the present plaintiff gave notice of claim, and on 11th of January, 1888, commenced an action against the defendant, the writs being indorsed, for wrongfully seizing the plaintiff's goods, and claimed $8,000. The defendant thereupon interpleaded, and the Chief Justice, on the 14th January, made an order directing the trial of an interpleader issue; in the meantime, before the day fixed for the trial of this interpleader, the above mentioned judgment of the Chief Justice was rendered in the interpleader action wherein the plaintiff was claimant against Turner, Beeton & Co., whereupon the Bank of British Columbia applied to the Chief Justice to rescind his order directing an interpleader issue on the ground that the same facts would be in issue as was decided in the Turner, Beeton & Co. case. The Chief Justice refused the application, whereupon the Bank appealed to the Divisional Court, and on the 16th of April that Court rescinded the interpleader order and further ordered that the claimant, the present plaintiff, be forever barred from prosecuting his claim mentioned and referred to in the affidavit of the defendant of the 14th January, 1888, which sets out the writs of summons. And it was further ordered that the present plaintiff bring no action against the defendant for anything done by him under the writ of *fieri facias* dated 6th of January, 1888, nor for any moneys paid to the defendant by virtue of the order of the 14th January, 1888.

The present action is identical with the one thus barred by this order, except that the damages are claimed at $15,000 in lieu of $8,000.

On the 16th of January the defendant made a further seizure under a writ of *fieri facias* issued out of the Supreme Court at the suit of J. A Skinner & Co., and from that time forth a large number of writs were placed in his hands, and he sold the goods thus seized by him; he paid the Bank's execution, and before any other payments could be made the plaintiff, in May, 1888, obtained an order directing the Sheriff to pay the amount of his sales into Court. This order was made on the ground that the plaintiff was a creditor of King. The affidavit on which the order was made is, however, missing. The plaintiff subsequently commenced and abandoned two other actions against the defendant, and on the 22nd of November this action was commenced asking for damages against the defendant as well as the Bank of British Columbia. Subsequently the action against the bank was abandoned, and the plaintiff proceeded against the present plaintiff alone.

The defendant has by his pleadings raised the issue of *res judicata;* whether or not the judgment of the Divisional Court of the 16th April, 1888, was right, it is too late now to set it aside even if this Court had the power, which by Statute it expressly has not. By that judgment the plaintiff is barred from prosecuting his claim against the defendant. That claim is shown by the writ of the 11th January, 1888, being for damages for wrongfully seizing the

plaintiff's goods. What is this action but an action for damages for wrongfully seizing the plaintiff's goods? In my opinion, therefore, the plaintiff has no right of action against the defendant on the present pleadings.

It was argued that the judgment of the Chief Justice in the interpleader action of Davies *v.* Turner was not a bar as *res judicata*, as that decision was not between the same parties, although under the authority of Kinnersley *v.* Cope, 2 Doug. 517, that judgment might be given in evidence although nominally between different parties, yet substantially between the same; and Story, Equity Pleadings, 8 Edn., sec. 783*b*, lays it down that it is not indispensable to render a former decree conclusive against a party that he should have been named in a former proceeding; it will be sufficient that it embrace his interest in the subject matter in such a form as to have admitted of his contesting the same question which is now presented.

I think the effect of the Chief Justice's judgment is a protection to the Sheriff on two grounds, first, as being *res judicata*, and, second, that the judgment, as I have already pointed out, enures to the benefit of all King's creditors, under section 90 of the County Court Act.

The case of Richel *v.* Magrath, 14 App. C. 665, is in point. The plaintiff in that case had brought an action against the Bishop of Oxford and others, and his action was dismissed. Magrath having been appointed to the living which was the subject of not being able to obtain possession, commenced an action against Richel, who thereupon set up as a defence the same facts which he set up in his claim against the Bishop. The Lord Chancellor in giving judgment said it would be a scandal to the administration of justice if the same question having been disposed of in one case, the litigant was to be permitted by changing the form of proceedings to set up the same case again. It must be in the jurisdiction of the Court of Justice to prevent a relitigation of the same questions which the Court has decided in a separate action.

The principle here enunciated is repeated *in re* May, 28 Chan. Div. 518, by the Master of the Rolls, and is further illustrated in Bank of Hindustan & Alison's case, 9 Chan. App. 7. Alison was a shareholder in the Imperial Bank, which bank transferred its business to the Bank of Hindustan. Alison, after the amalgamation paid calls on his shares, but subsequently refused to pay any further calls, relying on the decision of Vice-Chancellor Giffard, in 6 Eq. 9, that the agreement between the two banks was void. The Bank of Hindustan sued Alison for the amount due, and a verdict was found for the Bank, subject to a special case, and the Court of Common Pleas held that the amalgamation of the banks having been declared void, they gave judgment for Alison, and at p. 25 of 7 Chan., Sir J. Mellish says it is clear that the judgment of the Court of Common Law is not only conclusive with reference to the actual matter decided, but it is conclusive with reference to the grounds of decision provided, that from the judgment itself the actual grounds of decision can be clearly discovered. And Justice Willes, in Langmead *v.* Maple, 18 C.B., N.S., 255, says the conditions for exclusion of jurisdiction on the ground of *res judicata* are, that the same identical matter shall have come already in question in a Court of competent jurisdiction that the matter shall have been controverted and finally decided.

These cases seem to govern the present case, and, in fact, if the decision of the Chief Justice has been in favour of the deed it would have equally bound the Sheriff and could have been pleaded by Davies in any subsequent seizure of goods.

On the second point, the case of Jenkyn *v* Vaughan, 3 Drury 419, appears applicable. The Vice-Chancellor says it is not in dispute that a subsequent creditor is entitled to participate if the instrument (*i. e.*, a deed which would be void under the statute 7 Elizabeth) is set aside by any creditor, and in the case of *re* Madden, 27 Ch. D. 529, decree (in an action to set aside a deed as fraudulent under Elizabeth), was that the conveyance was void as against the plaintiff and all other creditors. The principle of these cases appears to be that a deed of assignment which has the effect of defeating or delaying creditors when set aside, is set aside for the benefit of all creditors, and any other construction would lead to a multiplicity of suits, which is contrary to the policy of our laws. This deed, therefore, having been set aside in favour of Turner is set aside in favour of all King's creditors.

I don't think it is necessary to discuss the question of election raised by the defendant's counsel, as there is no sufficient evidence of an election here, contrary to the cause of action specified in the writ.

There is still another ground which I think entitles the defendant to succeed.

The plaintiff by his pleadings has laid his damages as arising from a seizure by the defendant of his goods on the 6th January, 1888. The defendant was protected by the order of the 16th April from all actions by the plaintiff in respect of anything done under the writ

of *fieri facias* issued in the Bank of British Columbia action. This was the only writ under which the defendant was in possession until the 16th January, 1888, and as he sold goods to pay the Bank of British Columbia debt, his protection extends to everything done by him in realizing this judgment.

This fact does not appear to have been brought to the attention of the jury, and the damages appear to have been assessed generally for everything done by the Sheriff on and after the 6th January.

This point, however, is comparatively of small importance in the view I take of the other grounds. I think the appeal should be allowed, and the action dismissed with costs of this Court and the Court below, and as with the present appeal an action for a new trial on behalf of the defendant was made, I think there should be no costs of that motion.

Here Davies set up his claim against the Sheriff. Turner was substituted for the Sheriff, and if Davies could renew his action against the Sheriff he could renew his action against Turner. Davies failed; he then commenced another action on the same state of facts against the Sheriff, and the Court barred him from further proceeding. He abandoned that action and commenced the present one on the same facts. In my opinion it would be a scandal to allow this action to proceed. There must be some finality to litigation and to allow an unsuccessful litigant to bring action after action for the same subject matter, varying the nominal defendants and the damages, would render the administration of justice a delusion and a snare.

The judgment of the learned Chief Justice must therefore be reversed.

Contemporaneously with the present appeal an application on behalf of the defendant for a new trial was made and argued. Taking the view I do of the law as applicable to the case a new trial will be unnecessary.

WALKEM, J.:—I have read the Judgment of my brother Drake, and I concur in that and in the reasons upon which it is founded.

The plaintiff Davies appealed to the Supreme Court of Canada, with the result that the judgment of the Full Court was reversed, and the judgment of the Chief Justice restored.

The following was the judgment of the Court:—

SUPREME COURT OF CANADA.

DAVIES *v.* MCMILLAN.

GWYNNE, J.:—

This appeal must, in my opinion, be decided solely upon the contention insisted upon by the defendant, that the decision in the interpleader issue in the County Court case of Turner, Beeton & Co. *v.* King, constitutes a complete bar to the present action. Whatever collusion there may have been between King's creditors, Garesche, Green & Co., and Strouss & Co., and King himself, to procure King for their benefit to make the sale which he did to Davies, of which the other creditors of King might have had reason to complain, Davies does not appear to have been a party to any such collusion. He appears to have acted solely in his own interest and as a *bona fide* purchaser for value. The amount paid by him for the stock of goods purchased appears to have been the fair cash value at the time, and the evidence failed to establish either that Davies knew of King's circumstances as being insolvent, or that his intention in making the sale was either to defraud his creditors or any of them, or to give some or one a preference over others, even if that knowledge could prejudice Davies' rights as a purchaser, and the jury have found that Davies in making the purchase had no intent that any creditor of King's should be preferred. In short, the only conclusion which the evidence in the case and the finding of the jury warrant is that the purchase made by him was in perfect good faith for valuable consideration actually paid by him and without any fraudulent intent being entertained by him. Such a transaction cannot in my opinion be held to be fraudulent and void without imputing to the Statute relied upon

an intent in the interest of the creditors of a vendor to make the Courts of Justice parties to the committal of fraud upon innocent purchasers for value; and no such construction can be put upon the Statute. Accordingly, the learned Chief Justice of British Columbia who tried the case rendered judgment for the plaintiff upon the answers of the jury to the questions submitted to them; and that such judgment is that which was warranted by the answers of the jury to the questions submitted to them, upon their finding as to which, the right of the plaintiff to recover in the action depended (assuming the action not to have been barred by the judgment on the interpleader issue in the County Court case of Turner, Beeton & Co. *v.* King) cannot in my opinion admit of a doubt. Then as to the effect of the judgment on the interpleader issue in the said County Court case, I concur in the judgment of Mr. Justice McCreight in the Supreme Court of British Columbia, namely, that such judgment cannot operate as a bar to the present action. To hold that such judgment, from which there is no appeal to this Court, as there is from a judgment on an interpleader issue in an action commenced in a superior court, would so operate, would give to a judgment of an inferior court of limited jurisdiction the effect of being conclusive in an action in the Supreme Court of British Columbia, and in this court of appeal, in respect of a cause of action wholly beyond the jurisdiction of the County Court to entertain.

The action is one of trespass brought against the defendant for breaking and entering the plaintiff's shop, and continuing therein for a long space of time, to wit, for four months, and taking and selling the plaintiff's goods and chattels therein to the plaintiff's damage of $15,000.

The facts of the case appear to be that on the 5th January, 1888, the defendant as Sheriff entered the plaintiff's shop and made a seizure and levy on goods therein to the amount of $370, to satisfy an execution issued out of the County Court of Victoria, in British Columbia, at the suit of a firm of Turner, Beeton & Co. against one Atwell King, and placed in the hands of the Sheriff to be executed. On the 6th January, 1888, the plaintiff gave notice to the defendant that he claimed to be the owner of the goods so seized, and paid to the defendant $395 as security for the said judgment debt, interest and all costs in case the plaintiff should fail to establish his ownership of the said goods; and thereupon the defendant then withdrew from the possession of the goods seized under the said writ of execution. On the same 6th day of January, 1888, the defendant as such Sheriff made another seizure of goods in the said shop to the value of $550, to satisfy an execution issued out of the Supreme Court of British Columbia at the suit of the Bank of British Columbia against the said Atwell King. These seizures were made upon the contention that the goods so seized were the goods of King, the defendant in said actions.

The plaintiff having given notice to the defendant that he claimed that the goods so seized under the said execution at the suit of the Bank *v.* King were the goods of the plaintiff, the defendant upon the 14th January, 1888, obtained an order of the said Supreme Court in the suit of the Bank of British Columbia *v.* King, which order is not produced, but whereby it appears, by a bond by way of security given in pursuance thereof, to have been ordered that on payment of $550 into Court by the said plaintiff, or upon his giving security to the satisfaction of one of the Judges of the said Court for the payment of the same amount by the plaintiff, according to the direction of any rule or order to be made in the said cause, and upon payment to the defendant of possession money and expenses from the said 6th January, the said defendant should withdraw from the possession of the goods and chattels seized by him under the said writ of execution, and that unless such payment should be made, or such security be given, the said defendant should proceed to sell the said goods and chattels so seized, and pay the proceeds of such sale, after deducting the expenses and possession money from the date of the said order, into Court in the said cause to abide further order, and that the parties should proceed to the trial of an issue in which the said Davies should be plaintiff and the Bank of British Columbia the defendant; and that the question to be tried should be whether at the time of such seizure the said goods and chattels seized were, or any part was, the property of the plaintiff. Subsequently (the terms of the said order having been complied with by the plaintiff upon his part) the defendant, in compliance with the said order upon his part, abandoned possession of the said goods seized under the said writ of execution at the suit of the Bank of British Columbia *v.* King.

By a record of the proceedings of the County Court in the case of Turner, Beeton & Co. *v.* King it appears that on the 18th January, 1888, an interpleader order issued in that case which is not produced to us, but which appears to have been to the like effect as the

above order issued in the case at the suit of the Bank of British Columbia *v.* King, whereby it was ordered that the parties, Davies, and Turner, Beeton & Co. should proceed to the trial of an issue, in which Davies should be made plaintiff, and the said Turner, Beeton & Co. should be made defendants, and that the question to be tried should be whether at the time of the seizure of the goods and chattels seized by the Sheriff under the writ of execution at the suit of Turner, Beeton & Co. *v.* King, the same, or any of them, was the property of Davies. This latter issue appears by the record of the proceedings in the said County Court to have been tried on the 2nd February, and judgment to have been rendered thereon upon the 16th day of February, 1888. Now, upon the 17th and 21st of January, and upon the 3rd and 10th of February, the 3rd of March, and the 7th, 10th, 12th, 17th, and 23rd of April, 1888, respectively, the said Sheriff made several other levies upon and seizures of the goods and chattels in the same shop of the plaintiff, to the amount of about $8,000, under divers executions against the said King placed in the Sheriff's hands to be executed, and upon the 10th, 11th, 12th, 25th, 26th, and 27th days of April he proceeded to sell and sold the same. It is for these seizures and sales so made upon and subsequently to the 17th day of January, 1888, that the present action is brought.

Now, in order to set up the judgment of the County Court upon the interpleader issue in the County Court case of Turner, Beeton & Co. *v.* King as a bar to the present action, the matter so relied upon as a bar must be specially pleaded by way of estoppel, as in Fletters *v.* Allfrey, L. R. 10 C. P. 29, and as the judgment upon that issue could not upon its face show any ground of estoppel of the present action, it would be necessary that the plea should contain suitable averments of what was the precise matter in contestation in such interpleader issue and of what is the precise matter in contestation in the present action, so as to raise for adjudication the question of estoppel relied upon by the defendant. Thus it was not only necessary to set out what was the issue directed to be tried, namely, whether the goods and chattels seized by the Sheriff under execution at the suit of Turner, Beeton & Co. *v.* King were, or any of them was, the property of Davies, but also the particular matter of fact upon which that question of title depended, namely, whether the deed of conveyance by which the goods and chattels so seized had been conveyed by King to Davies was or was not fraudulent as against the creditors of King, and the finding of the jury upon the trial of such issue. And since at the trial thereof the jury rendered no verdict against Davies upon such issue, but merely answered certain questions submitted to them by the Judge who tried the issue, who, upon the answers of the jury to such questions, afterwards rendered judgment, it would have been necessary to set out in the plea of estoppel the questions submitted and the answers of the jury thereto and the judgment of the Judge thereon ; and if it should then appear that such answers of the jury did not warrant a judgment to the effect that the said conveyance by King to Davies was fraudulent and void as against the creditors of King, and that by reason thereof the goods and chattels so seized were not the property of Davies, but that, notwithstanding the Judge who tried the issue upon such answers of the jury rendered a judgment to that effect against Davies upon such issue, the plea of that judgment by way of estoppel to the present action would be bad in substance and could constitute no bar whatever to the present action. Now we have before us, though not in the form of such a plea by way of estoppel, what were the questions which were submitted to the jury upon the trial of said interpleader issue and the answers of the jury, whereby it appears that such answers did not warrant a judgment against Davies in the interpleader issue to the effect that he had no property in the goods and chattels there in question by reason of the conveyance whereby the said goods and chattels were transferred and conveyed by King to Davies, having been fraudulent and void as against the creditors of King. The jury found, as a matter of fact, in answer to the only questions submitted to them upon which the title of Davies to the goods in question mainly depended, that Davies had purchased them from King for his own benefit, and that he had no knowledge of King having had any intention to apply the purchase money paid by Davies for the goods and chattels so purchased by him to some of his (King's) creditors in preference of others.

Another of the questions submitted to the jury appears open to the question whether it was relevant to the issue being tried but to which I make reference by reason of the answer of the jury thereto, which was really favourable rather than otherwise to the title of Davies. The jury were asked to say whether Davies paid King the purchase money of the goods purchased by him in order to enable King to prefer two of his creditors named Green and Strouss in preference to his other creditors? To which the jury answered "Yes," adding that they so answered the question in the affirmative because they said Davies did not then know that King had any other creditors.

Upon these answers the learned Chief Justice of British Columbia rendered judgment against Davies in the interpleader issue in the County Court case, which judgment was maintained by the Supreme Court of British Columbia acting as a Court of Appeal from judgments rendered in the County Court. The learned Chief Justice, who also tried the present action, and not, as I think, without reason, expressed a doubt of the correctness of his former judgment, and being of opinion that the judgment rendered in the interpleader issue was not a bar to the present action, rendered judgment for the plaintiff with $9,151 damages. This judgment a majority of the Supreme Court of British Columbia has set aside and rendered judgment for the defendant, upon the ground that the judgment in the interpleader issue in the County Court is a conclusive bar to the present action.

The judgment in that interpleader issue, if it had been appealable to this Court, would not, in my opinion, have been maintained. Not having been so appealable, the judgment of the Supreme Court of British Columbia was conclusive in the matter of that issue, but for the reasons already given it cannot operate as a bar to the present action. It was also suggested, but scarcely argued, that by reason of the order made in the case of the Bank of British Columbia *v.* King for the trial of the interpleader issue ordered in that case, the present action cannot be maintained, but that order, rightly or wrongly, was rescinded by the Supreme Court of British Columbia without any trial of the issue thereby ordered, and therefore the order in the rescinding order that (notwithstanding that the interpleader issue between Davies and the Bank never was tried) no action should be brought by Davies against the Sheriff in respect of the seizure made by the Sheriff under the execution at the suit of the Bank *v.* King was *ultra vires*, and that order can have no operation as a bar to the present action.

It was in like manner suggested that the action of Turner & Beeton *v.* King in the County Court was brought under the provisions of a Statute of the Legislature of British Columbia, viz.: Ch. 7 of the Statutes of 1885, sec. 53, as amended by Statutes of 1887, ch. 9, which enacted that by leave of the Court, upon affidavit, or other proof satisfactory to any County Court Judge that a party about to be summoned was about to abscond or defraud any of his creditors, a summons might be made returnable in such time from the service thereof as such Judge might direct, and that such summons might also issue when the party has absconded, and that whenever a summons should issue under the section that the suit should be deemed and taken to be brought on behalf of all the creditors of the party summoned, and that any execution, or process in the nature of an execution, should enure to the benefit of all the creditors of the party so summoned, and that such and the like proceedings might be had and taken thereon as upon a creditor's suit brought in the Supreme Court of British Columbia; and it was further suggested that under the provisions of this Statute the interpleader issue in the County Court and the judgment therein operated and enured to the benefit of all the creditors of King and constituted a bar to the present action; but what the Statute says is that the suit in the County Court and any execution issued therein should so operate and enure, not that an incidental proceeding at the suit of a stranger such as an interpleader issue, or ordered to be tried in respect of a matter within the limited jurisdiction of the County Court, should operate and enure to the benefit of all the creditors of the defendant in the County Court case, so as to determine the title to the property claimed adversely to them to an amount of thousands or of hundreds of thousands of dollars in excess of the jurisdiction of the County Court. The Statute is susceptible of no such construction.

Upon the whole, I am of opinion, for the reasons already given, that the appeal must be allowed with costs, and that the judgment rendered in favour of the plaintiff by the learned Chief Justice who tried the case must be restored with costs.

VICTORIA, B.C.:
Printed by RICHARD WOLFENDEN, Printer to the Queen's Most Excellent Majesty.