

1876.

NEW ZEALAND.

MR. SMYTHIES' CASE: AFFIDAVITS OF MESSRS. MACASSEY, HOWORTH, AND SMYTHIES,

(IN THE COURT OF APPEAL IN 1872. FURTHER PAPERS RELATING TO).

In the Supreme Court of New Zealand, Otago and Southland District.

In the matter of "The Law Practitioners Act Amendment Act, 1871;" and in the matter of HENRY SMYTHIES, at present of Naseby, in the Province of Otago, Gentleman; and in the matter of the Petition of the said HENRY SMYTHIES, under the said "Law Practitioners Act Amendment Act, 1871."

I, JAMES MACASSEY, of Dunedin, in the Province of Otago, New Zealand, a barrister and solicitor of the Supreme Court of New Zealand, make oath and say as follows:—

1. I have been on the rolls of this Honorable Court as a barrister and solicitor, and have practised as such in Dunedin aforesaid since the month of September, one thousand eight hundred and sixty-five.

2. I know the above-named Henry Smythies, and came frequently in contact with him during the period that he practised as a barrister and solicitor of the Supreme Court in Dunedin, from the early part of the year one thousand eight hundred and sixty-six down to the year one thousand eight hundred and sixty-nine.

3. It was upon an application made by myself that the said Henry Smythies was in the year one thousand eight hundred and sixty-nine suspended from practising as a barrister and solicitor.

4. After the said Henry Smythies was admitted to practice as a barrister and solicitor of the Supreme Court, he was in the year one thousand eight hundred and sixty-seven employed in his professional capacity to prosecute two complaints brought in the Resident Magistrate's Court, Dunedin aforesaid, by a licensed victualler named Clements, against two men named respectively Edmonson and Dodson. The claim made by the said Clements in each of such actions was, to the best of my recollection and belief, for the recovery of a sum of twenty-five pounds for damages for the alleged wrongful interference with a right, asserted by the said Clements, to the sole privilege of selling liquors and refreshments at the Silverstream Racecourse on the occasion of some races being held there in the year one thousand eight hundred and sixty-seven. The said Clements was nonsuited in the Resident Magistrate's Court, and from such decision appeals were brought to the Supreme Court at Dunedin aforesaid. The appeals were both dismissed with costs. Appeals were then brought to the Court of Appeal in the name of the said Clements, but no security for costs was given. The appeals were dismissed with costs; and the said Clements afterwards became bankrupt, without, as I have been informed and believe, having paid the costs of the appeals awarded by the Court of Appeal. Throughout the proceedings of the Resident Magistrate's Court, the Supreme Court, and the Court of Appeal, the said Henry Smythies appeared as solicitor and counsel. On the fourth day of May, one thousand eight hundred and sixty-eight, the said Clements appeared before the Supreme Court, Dunedin, to be examined in the matter of his bankruptcy, with a view to obtain his final order of discharge. Annexed hereto, and marked with the letters "A" and "B" respectively, are copies of the Judge's notes of the evidence taken, and of a letter of the said Henry Smythies to the said Clements, offering to purchase his interest in the appeal then pending before the Court of Appeal. The said letter (together with another letter from the said Henry Smythies to the said Clements) was ordered by the Judge to be impounded, and is now in the custody of the Registrar of the Supreme Court. There is also annexed hereto, and marked with the letter "C," an extract from the *Otago Daily Times* newspaper report of the proceedings in the Supreme Court on the fourth day of May, one thousand eight hundred and sixty-eight, and which extract I believe to be substantially correct. The said Clements was, on the evening of the said fourth day of May, thrown from his horse and killed while on his way home to the Taieri.

5. On or about the twenty-third day of September, one thousand eight hundred and sixty-eight, one Frank Alfred Orbell, for whom the said Henry Smythies acted as solicitor and counsel, recovered a verdict, in the Supreme Court at Dunedin, for a sum of one farthing, in an action brought against the late John Jones, of Dunedin aforesaid, Esquire, for malicious prosecution. A memorandum in error was lodged at the Supreme Court, on behalf of the said John Jones, Esquire, on the thirtieth day of September following; but, as such memorandum was open to a formal objection, it was deemed prudent to lodge a second memorandum in error, intituled in the Court of Appeal, and this was

accordingly done on the second day of October following. On the sixth day of October (the said Frank Alfred Orbell's costs having been in the meanwhile taxed) recognizances of bail were entered into by the said John Jones, Latham Osborne Beal, manager of the Bank of New Zealand, and Robert Miller Robertson, of Dunedin aforesaid, merchant. As his Honor Mr. Justice Chapman had left for England, and Mr. Acting Justice Ward for Wellington, simultaneously on the fifth day of October, it was impossible that the recognizances should be formally acknowledged before a Judge of the Supreme Court. The recognizances were taken by the then Registrar and Deputy-Sheriff (Mr. Catamore) in open Court, and he assured me, this deponent, that no further proceedings should be permitted to take place without the authority of the Court or a Judge. On the ninth day of October a writ of *capias ad satisfaciendum* was issued from the office of the said Henry Smythies for the amount of the taxed costs in the action of Orbell *v.* Jones, and under such writ the said John Jones was arrested. He was afterwards discharged upon paying the amount of the execution debt, which the said Mr. Catamore agreed to hold under an indemnity from the said John Jones until the return of the Judge from Wellington. The judgment which had been entered up in the name of the said Frank Alfred Orbell in his said action against the said John Jones was reversed by the Court of Appeal in Wellington on the thirtieth day of October, one thousand eight hundred and sixty-eight. On the following day a telegram appeared in the *Otago Daily Times* announcing such reversal:—

“Wellington, October 30.

“In the case of Jones *v.* Orbell, judgment was given for Jones—the defendant in the Court below. It will be remembered that in an action brought by Orbell against Jones, at the Supreme Court in Dunedin, for malicious prosecution, one farthing damages was awarded him. By the judgment just delivered in the Court of Appeal, it is decided that no costs be allowed Orbell in the previous action.”

6. Notwithstanding this announcement, the said Henry Smythies persisted in prosecuting an action in the Resident Magistrate's Court, Dunedin, wherein the said Frank Alfred Orbell was plaintiff and the said Alfred Augustus Catamore was defendant, and in which the said Frank Alfred Orbell claimed to recover from the said Alfred Augustus Catamore, as such Deputy-Sheriff as aforesaid, the amount received by him in that capacity from the said John Jones. The plaint came on for hearing in the Resident Magistrate's Court, Dunedin, on the fourth day of November; and I appeared on behalf of the said Mr. Catamore, Mr. Smythies appearing for the said Frank Alfred Orbell. I protested against the cause being further prosecuted after the reversal of the judgment in Mr. Orbell's favour by the Court of Appeal; but the said Henry Smythies insisted upon his right to recover, as no formal certificate of the judgment of the Court of Appeal had been produced. The Magistrate took time to consider his decision, and on the eleventh day of November gave judgment for the plaintiff, on the ground that, in the absence of formal proof of the judgment of the Court of Appeal, he had no other alternative. I append, marked with the letter “D,” extracts from the *Otago Daily Times* newspaper of the fifth and twelfth days of November, one thousand eight hundred and sixty-eight, to the substantial truth of which I beg to vouch. The Supreme Court subsequently (to wit, on the fifth day of March, one thousand eight hundred and sixty-nine) made absolute, at very considerable expense to the said John Jones, a rule obtained by him, on behalf of the said Alfred Augustus Catamore, to restrain and prohibit all further proceedings on the decision of the said Resident Magistrate in the said action of Orbell *v.* Catamore.

7. On the thirteenth day of November, one thousand eight hundred and sixty-eight, and therefore about a fortnight after the said decision of the Court of Appeal had been made public in the *Otago Daily Times* newspaper, the said Henry Smythies took a formal assignment from the said Frank Orbell of the judgment, so as aforesaid recovered, in the Resident Magistrate's Court, Dunedin, on the eleventh day of November, one thousand eight hundred and sixty-eight, against the said Alfred Augustus Catamore. That although the said rule for a prohibition was made absolute on the fifth day of March, one thousand eight hundred and sixty-nine, the said Henry Smythies, in the month of June, one thousand eight hundred and seventy, brought an action in the Supreme Court at Dunedin, in his own name, as assignee of the judgment recovered against the said Alfred Augustus Catamore by the said Frank Alfred Orbell. The said action was defended by the executors of the late John Jones (who had died some time previously to its commencement), and judgment was given in favour of the said Alfred Augustus Catamore upon a demurrer, which terminated the suit. A copy of the pleadings in the said action accompanies this affidavit, and is marked with the letter “E.”

8. It is within my own knowledge that the proceedings taken, directly and indirectly, by the said Henry Smythies, to enforce the judgment originally entered up in the Supreme Court, in the action of Orbell against Jones, after such judgment had been reversed, and the reversal was publicly notified in Dunedin aforesaid, entailed upon the said John Jones and his representatives a cost of fully one hundred pounds, and down to the present time the costs of the action of Smythies against Catamore have never been asked for or paid.

9. On the ninth day of September, one thousand eight hundred and sixty-eight, one James Ure Russell made and filed, in the office of the Supreme Court at Dunedin aforesaid, a deed of arrangement for the benefit of his creditors, under the provisions of “The Bankruptcy Act, 1867.” The deed was, on the application of the said James Ure Russell, declared completely executed on the fourteenth day of September following, but the order of complete execution was not formally drawn up or issued until the tenth day of November, one thousand eight hundred and sixty-nine. The said Henry Smythies, without obtaining the leave of the Supreme Court enabling him to do so, issued a writ of *feri facias* against the said James Ure Russell on the eighth day of November, one thousand eight hundred and sixty-eight, upon a rule or order dated the twenty-first day of February, one thousand eight hundred and sixty-eight, for some costs provable under the deed, and delivered the writ to Isaac Newton Watt, Esquire, the Sheriff of Otago, for execution. The said Sheriff, having made a levy and seizure, under the said writ, upon the goods of the said James Ure Russell, was served with notice of the order declaring the deed completely executed; and the said Sheriff consequently withdrew from possession, and made a return, of which a copy, marked with the letter “F,” accompanies this affidavit. An action was afterwards (to wit, on the second day of June, one thousand eight hundred and seventy)

brought by the said Henry Smythies against the said Isaac Newton Watt, in the Resident Magistrate's Court, Dunedin, and the said Henry Smythies was nonsuited.

10. On the first day of April, one thousand eight hundred and sixty-eight, the said Henry Smythies issued, out of the Supreme Court at Dunedin, a writ of *capias ad satisfaciendum* in an action of Russell against Barton, requiring the then Sheriff of Otago to take and keep the defendant in the action until he should have satisfied a sum of one hundred and forty-six pounds eight shillings and threepence, alleged to be due for costs. The said writ was delivered to Alfred William Smith, Esquire, the then Sheriff, for execution. On the said first day of April, one thousand eight hundred and sixty-eight, the said Alfred William Smith was served by the plaintiff, in the action of Russell against Barton, with a notice in writing, of which the following is a true copy:—

“In the Supreme Court of New Zealand, Otago and Southland District. No. 2833.

“Between JAMES URE RUSSELL, Plaintiff; and GEORGE ELLIOTT BARTON, Defendant.

“To A. W. Smith, Esq., Sheriff of Otago.

“SIR,—

“I request and authorize you not to execute the writ of *ca. sa.* issued in the action and lodged with you this day, as I have long since settled this action and have no claim on the defendant; and this last-mentioned writ of *ca. sa.* has been issued without instructions from me, and without my knowledge or consent.

“Dated this 1st day of April, 1868.

“JAMES U. RUSSELL.

“Signed in my presence—Henry Howorth, Solicitor, Dunedin.”

That the said Alfred William Smith, acting under my advice, declined to detain the defendant; and a rule was afterwards obtained by the said Henry Smythies, on his own behalf, calling upon the said Alfred William Smith to show cause why he should not pay to the said Henry Smythies the amount indorsed on the writ of execution. And in one of the affidavits upon which the said Henry Smythies moved for and obtained his rule *nisi*, he set forth a copy of an agreement for the compromise of the judgment debt and costs in the said action of Russell against Barton, and which agreement bore date the fifth day of December, one thousand eight hundred and sixty-six. The said rule so obtained by the said Henry Smythies as aforesaid against the said Alfred William Smith was discharged with costs.

11. In another case in which the said Henry Smythies was solicitor upon the record for one of the parties, a document, purporting to be a copy of an order made by his Honor Mr. Justice Chapman in Chambers, was served at my office by a clerk of the said Henry Smythies. Acting under the belief that the original order had been duly signed, my hands were tied for a period of between two or three weeks during the Judge's absence in Southland; but on his return I discovered that the original order had never been signed, although the copy served upon me had “H. S. Chapman (l.s.)” written upon it. I am unable to remember at the moment the name of the case in which the occurrence in this paragraph mentioned took place, but I have a clear remembrance of the facts as I brought them under the notice of the Judge in Chambers immediately after his return from Southland.

12. The facts deposed to in this affidavit I am enabled to state from personal knowledge, as I was engaged in all of the cases referred to either as solicitor or counsel.

13. I do not wish it to be inferred that I have stated every circumstance connected with the transactions hereinbefore referred to; but, if further explanation is desired, I beg respectfully to refer to the papers and proceedings in the various matters and causes before mentioned.

14. I am willing to attend for examination before their Honors the Judges who are to inquire into the truth of the allegations contained in the petition of the said Henry Smythies; but as the Provincial Council of Otago (of which I am a member) is now in session, I venture to leave the subject-matter of my attendance to the discretion of their Honors.

JAS. MACASSEY.

Sworn at Dunedin, in the Province of Otago, this eighth day of May,
one thousand eight hundred and seventy-two.

HENRY HOWORTH,
A Solicitor of the Supreme Court of New Zealand.

A.

[Extract from the Note Book of Mr. Justice Chapman, 4th May, 1868.]

Re WILLIAM CLEMENTS, a Bankrupt; WILLIAM CLEMENTS examined by Mr. WARD.

I CARRIED on business as an hotelkeeper for six months, from August to February. I started with borrowed money. There was no furniture with the house. I gave eighty pounds odd for it. I borrowed the money of Pritchard. I borrowed two hundred and fifty pounds and sixty-six pounds. I gave him a bill of sale. I was not then engaged in litigation. I made a composition with my creditors, five shillings in the pound. About one month before I took the public-house, I was engaged in illicit distillation. I brought an action about a booth. I paid the costs in the Magistrate's Court and this Court. Mr. Smythies took it to the Court of Appeal. I assigned the right of action to him. He appealed at his own cost. I saw in the paper that he had carried it to Wellington. He said, “Oh, we are sure to win it.” In consequence of that, I was thrown into gaol. Crop and stock were carried away by the flood. I had two cows; they were included in the bill of sale. The debt to Campbell was an old debt. I borrowed it without security, to go to Hokitika. I owed him one hundred and twelve pounds; he says so. My claim against him is fourteen or fifteen pounds.

This is the exhibit marked with the letter “A,” referred to in the annexed affidavit of James Macassey, sworn before me at Dunedin, this 8th day of May, 1872.

HENRY HOWORTH,
A Solicitor of the Supreme Court of New Zealand.

B.

DEAR SIR,—

Ratray Street, 5th August, 1867.

I am willing, if you are, to take an assignment of your right of action against Edmonson and Dodson in discharge of my claim against you, and to carry on these cases at my own expense. At least, let me know if you consent; and then, if I can go on with them, I will as I propose. Please write me.

Faithfully yours,

HENRY SMYTHIES.

Mr. W. Clements.

This is the exhibit marked with the letter "B," referred to in the annexed affidavit of James Macassey, sworn before me at Dunedin, this 8th day of May, 1872.

HENRY HOWORTH,

A Solicitor of the Supreme Court of New Zealand.

C.

SUPREME COURT—BANKRUPTCY SITTING.

His Honor Mr. Justice Chapman sat on Monday, to hear applications under the Bankruptcy Act.

Re *William Clements*.

This insolvent came up for examination and discharge. Mr. Barton appeared for him, and Mr. Ward for Mr. Edmonson, an opposing creditor. The insolvent said that he was carrying on business at Otakia, as hotelkeeper. He started two months after making a deed of arrangement. He borrowed money from one Pritchard, who held a bill of sale over everything he possessed. He had been compelled to make a deed of arrangement with his creditors through losses in an illicit distillation speculation he was connected with. He was engaged in an action against Mr. Edmonson. Mr. Smythies was his solicitor, and, when the case was lost on appeal here, Mr. Smythies took the case up to Wellington on his own responsibility. He did not want to go on with it, but Mr. Smythies wrote to him stating that he was willing to carry on the case at his own expense, and would take an assignment of the right of action in discharge of his claim. The letter was produced and read with a subsequent letter, in which Mr. Smythies offered to take ten pounds and a bill for costs. The insolvent went on to say that his crops were lost by the floods.

Mr. Barton applied for the insolvent's discharge, contending that Mr. Smythies' letter exonerated his client from responsibility. The letter was not an assignment, but was an agreement for an assignment upon which Mr. Smythies had acted.

After argument, the Judge granted the final order. He commented upon the evidence that had been adduced, and said that the transaction with reference to the appeal had a suspicious look, and required further investigation. He ordered the letters to be impounded.

This is the exhibit marked with the letter "C," referred to in the annexed affidavit of James Macassey, sworn before me at Dunedin, this 8th day of May, 1872.

HENRY HOWORTH,

A Solicitor of the Supreme Court of New Zealand.

D.

RESIDENT MAGISTRATE'S COURT.—WEDNESDAY, 4TH NOVEMBER.

(Before A. R. CHETHAM STRODE, Esq., R.M.)

Orbell v. Catamore.

THIS was a summons taken out by Mr. Frank Orbell against Mr. Catamore, as Deputy Sheriff, to recover the sum of £95 17s. 7d., received by him under an execution in the suit of *Orbell v. Jones*, tried at the last sitting of the Supreme Court. Mr. Smythies, in opening the case yesterday, explained that the plaintiff brought an action against Mr. John Jones, at the last session of the Supreme Court, and obtained judgment. The defendant, as Registrar, taxed the plaintiff's costs, and entered up judgment. He (Mr. Smythies), as solicitor for the plaintiff, gave notice to Mr. Macassey, the counsel for the defendant Jones, that the costs were taxed at £92, and requested a cheque for the amount. Mr. Macassey intimated his intention to appeal. Notice of error was given, but no bond, as required by the Act to make the notice of error a stay of execution, was given by the defendant. He (Mr. Smythies) again wrote to Mr. Macassey, and pointed out the error in the matter of the bond, and that, therefore, unless a cheque was given for the amount, execution would issue. Ultimately a *ca. sa.* was issued and lodged with the defendant as Deputy Sheriff, Mr. Jones was arrested, and he paid to the defendant the amount of the execution. The defendant admitted to his (Mr. Smythies') clerk that he had the money, but refused to pay it over, he having been indemnified by Mr. Jones. Mr. Smythies read from the Sheriff's Act of 1864, wherein he explained it was enacted that it was the duty of the Sheriff, as soon as he received the money, to pay it over to the plaintiff. The defendant had, in his opinion, assumed a position which he could not maintain. He now urged that he was not indebted; but how could he set up that defence when it was shown he had received the money under the execution? It might be contended by the other side that the Court of Appeal had decided that Mr. Jones was not liable for the costs, but there was no evidence of the judgment of the Court of Appeal, the certificate not having been sent down; but even presuming that to be the judgment, it did not affect the question before the Court, which was, whether the money, at the time of taking out the summons, did or did not belong to the plaintiff, and whether the defendant being indemnified was any defence to the action, or afforded a valid reason for the defendant refusing to pay over the money.—Mr. H. Smythies deposed that he was clerk to Mr. Smythies, the plaintiff's solicitor. Witness delivered a writ of *ca. sa.* to the defendant, and defendant told him that he had arrested Mr. Jones; that he paid him the amount of the execution, and intimated that it was £95. The plaintiff forwarded an order, and it was tendered to the defendant, who showed witness the money.—Mr. Macassey, after pointing out in what manner he considered the plaintiff had

ailed to sustain his case, adverted at some length to the opening statement of Mr. Smythies, and suggested that this Court should respect the proceedings of another Court. It was monstrous to say that, while there was an application pending in the Supreme Court, this Court should be asked to do what would directly defeat the object of the application.—Mr. Smythies, the plaintiff's solicitor, was examined by Mr. Macassey. He gave evidence respecting the arguing of the case at the Supreme Court, and also respecting the judgment given.—Mr. Orbell was also briefly examined.—The Magistrate said the case was one which required to be carefully considered, and it was probable that, by giving judgment at once, matters would be more complicated than they were at the present time. It had come to his knowledge that there were proceedings pending in the Supreme Court that he should take notice of. He would consider the whole bearings of the case, and give judgment on that day week.

WEDNESDAY, 11TH NOVEMBER.

Orbell v. Jones.

The Magistrate gave judgment in this case. He said that he had reserved his decision to take into consideration the point as to whether the case trenched upon the province of the Supreme Court. He could come to no other decision than that there was nothing before him to stop the jurisdiction of his Court. He would therefore give judgment for the plaintiff for £95 17s. 7d., together with costs. Upon the application of Mr. Macassey, execution was stayed to give time for appeal.

This is the exhibit, marked with the letter "D," referred to in the annexed affidavit of James Macassey, sworn before me, at Dunedin, this 8th day of May, 1872.

HENRY HOWORTH,

A Solicitor of the Supreme Court of New Zealand.

E.

In the Supreme Court of New Zealand, Otago and Southland District.

Between HENRY SMYTHIES, Plaintiff; and ALFRED AUGUSTUS CATAMORE, Defendant.

DECLARATION.

THE plaintiff says that on the eleventh day of November, in the year of our Lord one thousand eight hundred and sixty-eight, Frank Alfred Orbell, in the Resident Magistrate's Court of the District of Dunedin, recovered against the defendant ninety-five pounds seventeen shillings and sixpence, together with one pound ten shillings for his costs of suit, whereof the defendant was convicted. That after the said judgment, and whilst the amount thereby recovered and every part thereof remained unsatisfied, the said Frank Alfred Orbell, by deed bearing date the thirteenth day of November, one thousand eight hundred and sixty-eight, for valuable consideration assigned the said judgment and the sum thereby recovered unto the plaintiff, and the plaintiff and the said Frank Alfred Orbell have not nor hath either of them obtained any execution or satisfaction of the said judgment. And the same, together with interest thereon after the rate of eight per cent. per annum, is still due and unsatisfied: wherefore the plaintiff claims to recover the sum of one hundred and ten pounds.

This is the exhibit marked with the letter "E," referred to in the annexed affidavit of James Macassey, sworn before me at Dunedin, this 8th day of May, 1872.

HENRY HOWORTH,

A Solicitor of the Supreme Court of New Zealand.

PLEAS.

The twentieth day of June, in the year of our Lord one thousand eight hundred and seventy.

THE defendant, by James Macassey, his solicitor, says,—

1. That he denies all the material allegations in the declaration contained.
2. And for a further plea to the said declaration, the defendant saith,—

That after the said Frank Alfred Orbell, in the declaration mentioned, had recovered the said sum of ninety-five pounds seventeen shillings and sevenpence against the said defendant in the Resident Magistrate's Court at Dunedin, as in the declaration mentioned, it was made to appear to this honorable Court, and this honorable Court adjudged and determined, that the Resident Magistrate's Court in the declaration mentioned had no jurisdiction to pronounce or enforce its judgment for the recovery of the said sum of ninety-five pounds seventeen shillings and sevenpence so awarded as aforesaid to the said Frank Alfred Orbell against the said defendant.

That on the twenty-fourth day of February, one thousand eight hundred and sixty-nine, the honorable Court, by a rule bearing date on that day, required Alfred Rowland Chetham Strode, Esquire, a Resident Magistrate for the District of Dunedin, in the declaration mentioned (being the Resident Magistrate who had awarded the said sum of ninety-five pounds seventeen shillings and sevenpence to the said Frank Alfred Orbell against the said defendant), and the said Frank Alfred Orbell to show cause why a writ of prohibition should not issue out of this Court prohibiting all further proceedings upon the plaint or summons of the said Frank Alfred Orbell against the said defendant for the recovery of the said sum of ninety-five pounds seventeen shillings and sevenpence; and the said rule having been duly served upon the said Alfred Rowland Chetham Strode and the said Frank Alfred Orbell, and notice thereof given to them, this Court did on the fifth day of March, one thousand eight hundred and sixty-nine, order and determine that the said rule of the twenty-fourth day of February, one thousand eight hundred and sixty-nine, should be made absolute, and a writ of prohibition issued out of this honorable Court prohibiting all further proceedings upon the said plaint or summons of the said Frank Alfred Orbell against the said defendant for the said sum of ninety-five pounds seventeen shillings and sevenpence; and the defendant also saith that in pursuance of the said rule of the fifth day of March, one thousand eight hundred and sixty-nine, a writ of prohibition (with the proper and necessary indorsements thereon) was on the eighth day of March, one thousand eight hundred and

sixty-nine, issued out of and under the seal of this honorable Court in the words and figures following:—

“Victoria, by the Grace of God, of the United Kingdom of Great Britain and Ireland, Queen, Defender of the Faith: To Alfred Rowland Chetham Strode, Esquire, a Resident Magistrate of the Colony of New Zealand for the District of Dunedin, and one of the Resident Magistrates of and for the Resident Magistrate’s Court held in Dunedin aforesaid, and Frank Alfred Orbell, of Puketapu, in the province aforesaid, farmer.—Whereas we have been informed, and given to understand, that the said Frank Alfred Orbell hath entered his plaint and recovered judgment thereon on the eleventh day of November last past against Alfred Augustus Catamore, of Dunedin, in the said province, Deputy Sheriff of the district of the province aforesaid, in the said Resident Magistrate’s Court, for the sum of ninety-five pounds seventeen shillings and sevenpence farthing, together with costs, for that the said Alfred Augustus Catamore had, as such Deputy Sheriff as aforesaid, received for the use of the said Frank Alfred Orbell from one John Jones in an action brought against him by the said Frank Alfred Orbell, in the said Supreme Court, the said sum of ninety-five pounds seventeen shillings and sevenpence farthing, under a writ of *capias ad satisfaciendum* issued out of the said Court, upon a judgment obtained in the said action by the said Frank Alfred Orbell against the said John Jones: And whereas we have been informed and given to understand, and it has been made to appear unto us, that the said Resident Magistrate’s Court had no jurisdiction to pronounce or enforce the said judgment so given as aforesaid in the said Resident Magistrate’s Court on the said eleventh day of November last past, for that, before the said judgment had been so given as aforesaid, the judgment obtained in the said Supreme Court by the said Frank Alfred Orbell against the said John Jones was reversed in due form of law by the Court of Appeal of New Zealand on the ninth day of November aforesaid, and the said judgment and the said writ of *capias ad satisfaciendum* thereupon were reversed, set aside, avoided, and made of no effect in law: Now, therefore, we do prohibit you the said Alfred Rowland Chetham Strode, and you the said Frank Alfred Orbell, from further proceeding in the said summons or plaint in the said Court, or upon the judgment obtained therein. Herein fail not at your peril.

“Witness his Honor Charles Dualey Robert Ward, Esquire, Judge of Our Supreme Court of New Zealand, at Dunedin aforesaid, this eighth day of March, A.D. 1869.”

That the said rule of the fifth day of March, one thousand eight hundred and sixty-nine, and the said writ of prohibition of the eighth day of March, one thousand eight hundred and sixty-nine, still remain in full force.

REPLICATION.—June 30th, 1870.

To the second plea the plaintiff says,—

1. That he denies all the material allegations therein contained.

2. And for a further replication to the said plea, the plaintiff says,—

That the rule of the twenty-fourth day of February, therein mentioned, was made after the execution by the said Frank Alfred Orbell of the deed in the declaration mentioned, and after the said Frank Alfred Orbell had parted with all his interest in the said judgment, and after the same had been assigned to the plaintiff, and after notice of the said deed had been given to the Clerk of the Resident Magistrate’s Court.

That the plaintiff had no notice of the said rule, and was not called upon to, nor did, show cause against the same, nor was he heard in answer thereto.

DEMURRER.

THE fifth day of July, in the year of our Lord one thousand eight hundred and seventy.

The defendant, by James Macassey, his solicitor, says, for a demurrer to the plaintiff’s second replication to the defendant’s second plea, that the said second replication is bad in substance.

The matters of law intended to be argued in support of this demurrer are,—

1. That the plaintiff cannot set up the alleged assignment against the adjudication and decision of this Court, declaring that the judgment assigned to the plaintiff was in a proceeding without and beyond the jurisdiction of the Resident Magistrate’s Court at Dunedin.

2. That the said replication does not aver that the defendant had any notice of the said assignment before the making of the rule for the said writ of prohibition, and before the issuing of the said writ.

NOTICE OF OBJECTIONS TO PLEA.

TAKE notice, that upon the arguments of the defendant’s demurrer herein, I shall object to the sufficiency in substance of the defendant’s second plea, upon the grounds following:—

1. The writ of prohibition contradicts itself, inasmuch as it shows a jurisdiction in the Resident Magistrate’s Court, and the reason assigned for non-jurisdiction is not sufficient to take it away.

2. The writ of prohibition is no answer to the declaration.

3. This action is not a proceeding upon the judgment within the meaning of the writ.

4. The writ is imperfect, for not including all persons having power to issue execution upon the judgment.

5. It is not alleged that the judgment of the Supreme Court was reversed before the defendant had levied.

6. It is not alleged that the steps required by the forty-first section of the Court of Appeal Act to supersede the execution were taken before the defendant had levied.

7. It is not alleged that the security required by the forty-second section of the said Act has ever been given.

HENRY SMYTHIES,
Plaintiff in Person.

18th July, 1870.

To the above-named defendant, and to James Macassey, Esq., his solicitor.

F.

SMYTHIES v. RUSSELL.

By virtue of this writ to me directed, I did, at Dunedin within my district, on the ninth day of November, one thousand eight hundred and sixty-nine, seize and take divers goods and chattels in the possession of and belonging to the within-named James Ure Russell. That on the tenth day of November aforesaid, while in possession of the said goods and chattels, I received from the said James Ure Russell notice, as the fact was, that on the ninth day of September, one thousand eight hundred and sixty-eight, and after the making of the rule of the twenty-first day of February, one thousand eight hundred and sixty-eight, in the said writ mentioned, he made a certain deed of arrangement for the benefit of his creditors in pursuance of Part XVIII. of "The Bankruptcy Act, 1867;" which deed was duly filed in the Supreme Court at Dunedin aforesaid, and gazetted in manner required by law. That on the fourteenth day of September aforesaid, the Supreme Court of New Zealand at Dunedin aforesaid, by order made on that day, declared the said deed of arrangement to have been completely executed. That such order was drawn up on the said tenth day of November, one thousand eight hundred and sixty-nine, and notice thereof given to me as aforesaid by the said James Ure Russell; and the said order being in full force, and no leave or order having been obtained from the said Supreme Court or any Judge thereof by the within-named Henry Smythies to issue the within writ of *fiery facias*, I, for the reasons aforesaid, withdrew and directed my bailiffs to withdraw from possession of the said goods and chattels. The following is a true copy of the order of the fourteenth day of September, one thousand eight hundred and sixty-eight, hereinbefore mentioned and referred to:—

In the Supreme Court of New Zealand, Otago and Southland District.

In the matter of the Deed of Arrangement of and between James Ure Russell, of Dunedin, Master Mariner, and his Creditors, dated the ninth day of September, one thousand eight hundred and sixty-eight, made under the provisions of "The Bankruptcy Act, 1867."

On Monday, the fourteenth day of September, one thousand eight hundred and sixty-eight.

UPON reading the said deed filed herein on the said ninth day of September, one thousand eight hundred and sixty-eight, and notice of the filing thereof gazetted in the *Otago Daily Times* of the same day, and upon reading the list of the creditors and statement of the property of the said James Ure Russell, and affidavit thereto annexed, filed herein upon the said ninth day of September, one thousand eight hundred and sixty-eight, and notice of the said James Ure Russell's application to this honorable Court for a declaration by the said Court of the complete execution of the said deed pursuant to the said Act gazetted in the *Otago Daily Times* on the said ninth day of September, one thousand eight hundred and sixty-eight, and upon reading the joint and several affidavits of the said James Ure Russell, David Ure Amalders, Henry Rudd, and John Stamper, filed herein on the twelfth day of September aforesaid in support of the said application, and upon hearing the application of the said James Ure Russell to the Court for this purpose this day made, this Court doth declare the complete execution of the said deed according to the provisions of the said Act.

By the Court.

(I.S.)

ALFRED A. CATAMORE,
Registrar.

In the Supreme Court of New Zealand, Otago and Southland District.

In the matter of "The Law Practitioners Act Amendment Act, 1871;" and in the matter of HENRY SMYTHIES, at present of Naseby, in the Province of Otago, Gentleman; and in the matter of the Petition of the said Henry Smythies, under the said "Law Practitioners Act Amendment Act, 1871."

I, HENRY HOWORTH, of Dunedin, in the Province of Otago and Colony of New Zealand, a Barrister and Solicitor of the Supreme Court of New Zealand, and a Member of the Council of the New Zealand Law Society, make oath and say:—

1. That I have read the petition of the above-named Henry Smythies, presented to their Honors Sir George Alfred Arney, Chief Justice, and the other Judges of the Supreme Court of New Zealand, when assembled in Dunedin.

2. That, with respect to the statement in the said petition, "Your petitioner is a member of the profession in England, and there exists no impediment to his practising there upon renewing his certificate in the usual way," I say that when I was in England, in the month of June, one thousand eight hundred and sixty-six, I searched the Rolls of Attorneys at the offices of the Law Society of England, and found that Mr. Smythies' name was on the Rolls, but on inquiring of the Secretary (whose name I do not at present recollect) if any objection existed to Mr. Smythies practising in England, he the said Secretary then referred to another book of record, and found that the said Henry Smythies had been convicted of forgery; and he further informed me that the practice of the Law Society was not to take any action in the matter until such convicted person applied for his certificate, —then it was the invariable practice of the Society to instruct counsel to move that he be struck off the Rolls; and I also inquired of the said Secretary if he knew of any circumstances in Mr. Smythies' favour, or if there was any record of any making an exception in his case, and he said he knew of no exceptional circumstances in his case, and there was no record of any.

3. That with respect to the statements contained in another paragraph of the said petition, "And a verdict of guilty was recorded on the second count for uttering;" and also in another paragraph, "In stating the facts of this case, your petitioner has been obliged to make out a case of not guilty upon the charge of forgery," I say that I have seen an office copy of the record of the conviction of the said Henry Smythies for forgery and uttering, and it therein appears that the said Henry Smythies was found guilty of forgery as well as of uttering; and in the report of the case in Vol. II., Carrington.

and Kerwan's Reports, page 878, it appears that in the Exchequer Chamber judgment was given for the Crown on the first count.

HENRY HOWORTH.

Sworn at Wellington, in the Colony of New Zealand this
fourteenth day of May, one thousand eight hundred and
seventy-two. Before me,

A. DE B. BRANDON,
A Solicitor of the Supreme Court of New Zealand.

In the Supreme Court of New Zealand.

In the matter of "The Law Practitioners Act Amendment Act, 1871;" and in the matter of
HENRY SMYTHIES, one of the Barristers and Solicitors of this Honorable Court.

I, HENRY SMYTHIES, the above-named petitioner, make oath, and, in reply to the affidavit sworn by James Macassey and filed herein, say,—

1. As to the allegations in clause 4. That Clements, therein named, was the lessee of a booth at the Tradesmen's Races, and the actions were brought to recover damages from the defendants for severally intruding upon the course and selling liquor, in opposition to the lessee, without the leave of the Stewards; that I was requested by the Stewards to take up the case, not only for the protection of their lessee, but also to try the right of stewards of races to grant a monopoly of the right to sell liquor at races for the benefit of the race fund; that upon the decision of the Resident Magistrate being given against the plaintiff, he instructed me to appeal to the Supreme Court, and to the best of my recollection two of the Stewards joined in the bond; that upon the appeal being dismissed, the said Clements instructed me to take the case to the Court of Appeal, and I, knowing that a similar practice of letting booths had been universally adopted upon every racecourse since races were introduced, believed that such an act was not illegal, and therefore advised Clements to proceed; that after notice of appeal was given I heard that Clements wished to withdraw from the case, and I thereupon wrote the letter mentioned in the said clause. Clements thereupon came to my office, and, in the presence of my clerk, Harry Waddington Smythies, told me that he had no idea of withdrawing from the case, and instructed me to proceed, and, to the best of my memory and belief, paid me some money on account of costs. No assignment was made. Had Clements withdrawn I should have consulted the Stewards and acted upon their instructions. I did not mention this in the letter, because the Stewards did not wish to appear in the matter, nor to give any encouragement to Clements to withdraw. I was told by the Registrar that the letter written by me to Clements was not ordered to be impounded, but to be handed to him as Official Assignee. No proceedings were ever taken against me in the matter.

2. As to the allegations in clauses 5, 6, and 7. Recognizances not having been entered into, the plaintiff was entitled to execution, and a *ca. sa.* was sued out, because it was believed that the Sheriff would not sell under a *fi. fa.*, and had I not done so I might have rendered myself liable to negligence. Upon payment of the amount of the levy to the Sheriff the money became the property of the plaintiff and subject to a lien for my costs, of which I gave the Sheriff notice; and the money ought to have been paid over by him, leaving the defendant to the consequence of his own neglect, and to look to the plaintiff upon the reversal of the judgment. I believe that I am still entitled to the said money.

3. As to the allegations in clause 9. I do not recollect all the circumstances of this case; but I know that the said deed contained no release, and I therefore proceeded upon a judgment then long outstanding, the said Russell having then lately come into considerable property, the result of proceedings taken by me upon his behalf. It appeared to me, upon the construction of the Bankrupt Act, that, under the circumstances, leave to issue execution was not necessary. I sued the Sheriff because I believed, and still believe, that he acted partially in the matter, and under indemnity from Russell.

4. As to the allegations in clause 9. Under the instructions of the said Russell I brought an action against George Elliott Barton for malicious prosecution, and recovered five hundred pounds damages. Before execution could be taken out Mr. Barton left the colony. Henry Howorth, Mr. Barton's partner, negotiated with Russell behind my back and paid to him the amount of the damages, and took a release for the costs. I had previously served Mr. Howorth with notice of lien. Upon my applying to Russell for my costs he became insolent and swore that he had no assets, and I have never received from him one shilling on account thereof. Upon the return of the said George Elliott Barton to the colony, after the said matter had been so settled as aforesaid, I took the proceedings mentioned to try my right upon the lien of which I had given notice. The said Alfred William Smith acted under indemnity, and, I think, did not appear. Mr. Barton and Mr. Howorth were made parties to the rule. Upon discharging the rule, the Court refused to allow Mr. Howorth his costs, for the reason that had I applied sooner the rule would probably have been made absolute against him.

5. I know nothing about the matter mentioned in clause 11.

6. When Mr. Macassey commenced to prosecute me I was anxious to ascertain the cause, and, among other things, I looked up all the cases in which I had been concerned against him, and found them to be thirteen; and, to the best of my memory and belief, that in eleven of them I was successful, one I lost, and one was then unsettled, but was afterwards compromised by his clients paying to my client £500.

7. In reply to the affidavit sworn by Bryan Cecil Haggitt and filed herein, I say that the solicitors of Dunedin know that James Macassey takes a great personal interest in this prosecution; and I verily believe that most of them are afraid to act in opposition to him in the matter. That some of the solicitors have expressed themselves as friendly disposed towards me, but compelled to appear hostile for the fear aforesaid. That one of the principal solicitors in Dunedin sent me a message, previous to my coming up to the Court of Appeal, to the effect that he had been compelled to sign a petition against me, but that I might draw upon him for any funds that I might require for the purpose of prosecuting my case. That with regard to the inhabitants of Otago, other than solicitors, to the best of my knowledge and belief they are nearly unanimous in favour of my being restored to practice; and upon one occasion upwards of seven hundred, and upon another eight hundred and fifty,

signed a petition in favour of my restoration wholly without my interference, and a large majority of the House of Representatives, including three practising barristers, voted for a Bill for that purpose.

8. In reply to the affidavit sworn by Henry Howorth and filed herein, I say that the paper writing marked "K," exhibited to me at the time of swearing this my affidavit, is a true copy of a declaration made by John Jones Cleave, of the Inner Temple, barrister-at-law, and which declaration was laid before the Judges in support of my petition presented in the year one thousand eight hundred and sixty-four, and afterwards, together with the other papers, laid before the House of Representatives and there lost. That I have inquired at the Attorney-General's office, where the said papers were deposited and kept, and from which department I received back most of the other papers, and I was told that the said declaration could not be found.

H. SMYTHIES.

Sworn at Wellington, this sixteenth day of May, one thousand eight hundred and seventy-two. Before me,

ALEX. S. ALLAN,
Registrar.

By Authority: GEORGE DIDSBUXY, Government Printer, Wellington.—1876.

Price 9d.]

