as the plaintiff had given no evidence of malice he must be nonsuited. The plaintiff's counsel desired leave to call more witnesses. Lord Tenterden, C. J., "You have closed your case and Sir J Scarlet had begun to address the jury, if you had any more evidence to offer you should have adduced it before you had closed your case. I cannot receive it now." The plaintiff's counsel said the strict rule has been very much relaxed. The Chief Justice, "Perhaps too much, as I am sorry to say a great many other rules have been." The plaintiff was nonsuited.

Abbot v. *Parsons*, 7 Bing. 563.—When the judge was summing up, and not before, the counsel for the plaintiff objected that the evidence did not support the particular item of set-off The jury found for the defendant. The plaintiff moved for a new trial. It was opposed because the objection should have been taken while the witness was in the box, and it was too late when the judge was summing up.

The court so determined, Mr. Justice *Park* adding, because then the evidence might have been admitted or rejected as the case required.

In *Middleton* v. *Barned*, 4 Exch. 241, *Parke*, B., says, "We never interfere in the case of a judge at the trial who has or has not allowed a witness to be re-called, after the party has closed his case, unless it be perfectly clear that the judge has wrongly exercised his discretion." See also *Adams* v *Bankart*, 5 Tyr, 425. A nonsuit may lie on the opening speech of counsel, but I apprehend the judge might allow some misstatement to be corrected and the case to proceed, the same as the court may grant a new trial upon its being shewn that if the case had gone to the jury sufficient facts could be shewn. *Edger* v. *Knapp*, 5 M. & G. 753.

Field v. *Woods*, 7 A. & E. 114—The plaintiff produced the draft declared on and it was read. The objection was that it was post-dated, and was not stamped. The defendant on opening his case proposed to shew these objections, but it was held he should have specially pleaded these facts. The court overruled the decision of the judge and granted a new trial; part of the decision turned upon the effect of this draft having been read in evidence at the trial.

Channell on this point in shewing cause said, if the objection is directed against the reading of the document at all, the answer is that the defendant should have interposed when it was put in and stopped the reading. That was not done in a case some time ago where the counsel had suffered an objectionable document to be read and a motion was afterwards made for a new trial, the counsel stating that his omission to object at the proper moment was accidental, the court refused a rule to shew cause.

Littledale, J, says, the practice has been lately that if a document was once read an objection should not be taken to it afterwards, but that has been when the defect appeared on the document itself, but here the objection arose on matter extrinsic, and the judge could do nothing in the first instance but admit the document subject to an objection to be raised afterwards by proof.

Holland v. *Reeves*, 7 C. & P. 36, *Follett*, S. G., in his cross-examination of the plaintiff's witness put a letter into the witness' hand and asked him to read it.

Erle.—If the Solicitor-General is going to read this letter as his evidence, he ought to have it read now, that I may re-examine upon it.

Follett, Solicitor-General.—I am not bound to put it in till after I have addresed the jury.

Alderson, B.—I cannot compel the Solicitor-General to put in a letter which is a part of his evidence till he has addressed the jury.

A return to a mandamus must be received by the court, and when received and filed it then becomes a record. Every return is ambulatory, and in the breast of the person to whom the writ is directed till it is filed. *Rex.* v. *Holmes*, 3 Bur. 1641.

Faith v. *McIntyre*, (7 C. & P. 44) When the plaintiff's counsel proved a letter by the defendant's witness, which he read in his address to the jury, a reply to it was not allowed, but the letter was directed to be put in. The ordinary course of proceeding where documentary evidence is produced is to prove it, then if the judge decide that it is sufficiently proved it is received by the court, which is evidenced by being filed and endorsed accordingly, and then strictly it should be read by the officer or clerk of the court, until then it is not fully entitled to stand as evidence. See *Doe. dem. Gilbert* v. *Ross* 7 M. & W. 114

It frequently happens, however, that a document, although proved and received by the court, is not filed, or not read from inadvertence on the part of the side producing it, or because both sides have taken it as if it had been read and was fully before the court. Until such document is read to the jury it cannot however be properly considered as evidence, any more than what a witness can prove can be taken as evidence until he has declared it openly; the reading in the one case is analogous to the declaration in the other case. There is this difference however between them, that the document after it is proved can be taken up and read at any time and perhaps at a more convenient time, but this course might be highly inconvenient to witnesses.

A document not read by the plaintiff as a part of his case before he has closed is just the same as omitting inadvertently to ask some particular question of a witness before the witness has been allowed to leave the box—an inadvertence which may be remedied by the judge in his discretion—and perhaps an inadvertence which should the more readily be permitted to be cured, because it is very much the practice not to read such documents in any formal manner, unless expressly required to be so read by the other side.

But the strict practice is that such documents should have been filed or received by the court, and should have been read to the jury to constitute them fully as evidence for the plaintiff; and although the Chief Justice had the right to admit them afterwards if he chose to exercise the right in the plaintiff's favour, he did not do so, but he, with the consent of the parties, reserved the question for us to say whether according to the strict practice the plaintiff could insist that such documents were properly in evidence, or could, after his case was closed, insist on their being read to the jury, and I am of opinion that according to the strict practice such documents were not in evidence when the plaintiff's case had been closed, and that the plaintiff could not insist upon their being admitted afterwards.

The case may have been one, and I believe was one, which in the opinion of the learned Chief Justice fully called for the strict practice, and with which I am not disposed to interfere.

The rule will therefore be made absolute for a nonsuit.

Per cur.—Rule absolute.

COMMON LAW CHAMBERS.

(*Reported by* ROBERT A. HARRISON, ESQ., *Barrister-at-Law*)

SCOTT v. THE GRAND TRUNK RAILWAY COMPANY OF CANADA.

The phrase "costs in the cause" generally means the costs only of the party who is successful in the cause. But where the phrase was used in an award, as follows, "We also order and award that the plaintiff and defendants shall each pay half the costs of the cause, and that the defendants shall pay all the costs of the reference and award, our costs of which reference and award as arbitrators we assess at the sum of $201 50," it was *held* that the words "costs in the cause" meant the whole costs both of plaintiff and defendants. Also *held* that arbitrators fees may be referred to the Master for taxation.

[Chambers, Jan. 23, 1864.]

This was an application to review the Master's taxation of costs to the plaintiff, and to direct that the costs of the plaintiff and defendants in the cause should be taxed and thrown together, and that one half of such costs should be borne by plaintiff and the other half by defendants; and further to direct the Master to consider if the charges made by the arbitrators for their services be reasonable, and to decide if they are reasonable, on such evidence as may be brought before him.

The costs were taxed under an award which, so far as material on the question of costs, was in the following form: "We also order and award that the plaintiff and defendants shall each pay half the costs of the cause, and that the defendants shall pay all the costs of the reference and award, our costs of which reference and award as arbitrators we assess at the sum of two hundred and one dollars and fifty cents."

The Master allowed plaintiff half of his own costs of the cause, but refused to tax the arbitrators' charges.