

C. L. Cham.]

McMASSER V. BEATIE, ET AL.

[C. L. Cham.]

dence; and discovery from utter strangers to the matter *sub judice* is altogether unknown to the law. A *subpœna duces tecum* presupposes knowledge of the existence of a particular document, and ability to specify and define the document. Here it was not known or proved that there were any telegrams which could or would ultimately be made evidence in the cause. There was no more than an expectation that something might turn up. But in a suit between A and B no Court has jurisdiction to call upon C, a mere stranger to the parties, to discover all papers in his possession, for the purpose of seeing whether by chance he has some document relating to the matter in issue.

Clear as we take the case to be against applications of this sort, and much as we welcome the decision of the judge refusing this particular one, we believe that in the trial of at least one election petition—that at Coventry—some use of telegrams not altogether unlike to that desired by counsel for the petitioners at Taunton was allowed. We have not the material for an exact account of what was done on that occasion, but probably the cases are distinguishable. At any rate we may take it that for the future the judges will follow the precedent established by Mr. Justice Grove.—*Law Journal*.

CANADA REPORTS.

ONTARIO.

COMMON LAW CHAMBERS.

(Reported by Mr. H. J. Scott, B.A., Student-at-Law.)

McMASSER V. BEATTIE.

Defence for time—Striking out false plea—34 Vict. cap. 12, sec. 8.

Held, that a plea pleaded merely for time, and admitted in a proceeding in the cause to be false in fact, will be struck out under 34 Vict. cap. 12, sec. 8, and leave given to sign final judgment.

This was an action on a promissory note, plea—payment. After issue joined, plaintiff examined defendant, under sec. 29 of Administration of Justice Act, 1873, when defendant admitted that he had not paid the note, and that the defence was put in only to gain time. An application to strike out the plea and all subsequent proceedings, under sec. 8 of 34 Vict. cap. 12, and enter final judgment, was granted.

[March 7, 1874.—MR. DALTON.]

This suit was on a promissory note, and the plea payment. The plaintiff joined issue on this plea, and then, under the Administration of Justice

Act, obtained an order to examine one of the defendants. At the examination this defendant swore that the note had not been paid—that the defence was merely put in for time—and that he had given instructions to his attorney to put in this same defence for the other two defendants.

Under these circumstances the plaintiff obtained a summons to strike out the plea, and set aside all subsequent proceedings, with costs against the defendants, on the ground that the plea was for the purpose of delay.

D. B. Read, Q. C., showed cause. The Courts had no jurisdiction before the Administration of Justice Act to entertain an application of this sort, and that Act does not give them jurisdiction. There is no rule of law requiring pleadings to be verified by affidavit, except in cases of abatement, and allowing this application would be equivalent to introducing such a rule. The Courts have continually held that they will not try the truth of pleadings by affidavits on chamber applications: *Smith v Blackwell*, 4 Bing., 512; *Nutt v Rush*, 4 Exch., 490; *Levy v Raiton*, 14 Q. B. N. S., 418; *Rawstorm v Gandell*, 15 M. & W., 304; *Phillips v Clagett*, 11 M. & W., 84; also *Archbold's Q. B. Practice*, pp. 292–297, and *Gibson v Winter*, 2 N. & M., 737. Section 8 of 34 Vict. cap. 12, under which this application is made, was intended only for the case provided for in the former part of the section; that, namely, of several pleas being pleaded; and the whole section should be read and construed together. Even if meant to apply to the case of a single plea, in this case the plaintiff having joined issue, and thus having admitted the plea to be a good one, cannot now come in and try to set it aside. As to the intention of the Administration of Justice Act in giving power to examine, the 24th, 25th, and 29th sections must be read together, and from them it is very evident that the examination is to have reference only to matters to come into question at the trial of the cause. If the Legislature did not mean this, why did it give the power to examine only after issue joined? It will be a fraud on the statute, if it is turned to this use. The effect will be to do away with defences for time; and although it may be a question whether this would not be a good thing, still the Court ought not to do so without the express direction of the Legislature, as it will create a very great change in the practice of the Court.

J. K. Kerr, contra.—The plea is a fraud upon the Court, and ought not to be allowed to stand. Under the Common Law Procedure Act, sec.