

Chan. Cham.]

JACKSON V. HARRIMAN—VENN V. CATTELL.

[Eng. Rep.]

MR. DALTON.—I think the proper order to make under the circumstances would be to refer the substituted bill to taxation, upon the attorney's undertaking to accept such sum as it may be taxed at, or the amount of the original bill, whichever may be the least. It would often be inequitable to compel attorneys to have incomplete or defective bills referred to taxation.

Order accordingly.

CHANCERY CHAMBERS.

(Reported by T. LANGTON, M.A., Barrister-at-Law.)

JACKSON V. HARRIMAN.

Changing reference—Evidence of preponderating convenience necessary—Practice.

Upon an application by a defendant to change a reference, upon the analogy of applications at Common Law to change venue, the balance of convenience in favor of the change must be great and obvious; must be made to appear upon the affidavit, and upon a consideration of the plaintiff's as well as the defendant's witnesses and costs.

[Chambers.—November 21, 1872.—Mr. Taylor.]

A bill had been filed for the settlement of partnership matters and a decree was pronounced directing an account to be taken, and the reference for that purpose was made to the Master at Toronto, as the place where the venue was laid.

The present application was made by *Mulock* to change the reference from Toronto to Barrie, upon the ground of preponderance of convenience. The affidavits upon which the application was founded, stated that the parties lived at Stayner, and it was believed that all the witnesses which would be called resided at or near Stayner, to which place Barrie was sixty miles nearer than Toronto, and although the same train carried them to both places, there would be longer time for their examination if held at Barrie, and they would be enabled to return home the same day.

Foster, contra, urged against the change that the material upon which the motion was founded did not shew a preponderance of convenience in the explicit manner required by the court. The affidavits should shew the reasons for belief that the witnesses to be called resided at Stayner: *Fisken v. Smith*, 2 Chy. Cham. 491. They should also show such preponderance by a consideration of the plaintiff's witnesses and costs as well as the defendant's: *Diamond v. Gray*, 5 C. L. J. N. S. 95; and this must be made to appear on the affidavits: *Tonks v. Fisher*, 2 Dowl. 22. It must also be great and obvious:

Durie v. Hopwood, 7 C. B. N. S. 835; *Helliwell v. Hobson*, 3 C. B. N. S. 761. There would be a working day, viz., from ten to four, for the examination if conducted at Toronto. The same train conveyed the witnesses to both places, and the difference in the fare was slight; besides, on the evidence the balance of convenience seemed in favor of Toronto, where the plaintiff's solicitor resided.

Mulock replied, that the reasons for calling certain witnesses could not be given till the plaintiff had called his witnesses and it was known what evidence was required; but from the partnership business having been carried on in Stayner, where the parties lived, it was sufficiently apparent the evidence must come from that place.

MR. TAYLOR, REFEREE IN CHAMBERS.—The analogy of applications at Common Law to change venue, seems to be followed here in motions to change venue or reference. Such being the case, I do not think the affidavits are sufficiently precise as to the witnesses to justify my making the order asked. Neither is there a case of preponderating convenience made out in favor of the change. I therefore must refuse the order with costs.

ENGLISH REPORTS.

ROLLS COURT.

VENN V. CATTELL.

Specific performance—Vendor and purchaser—Delay in delivery of abstract—Repudiation of contract by purchaser.

When a contract for sale is entered into by which it is stipulated that the abstract is to be delivered on a particular day, and it is not delivered within a reasonable time after that day, the purchaser is at liberty to repudiate the contract.

The conditions of sale under which a purchase was made provided that the abstract should be delivered within twenty-one days from the day of sale.

When seventy-eight days had expired without any abstract having been delivered, the purchaser gave notice that he declined to complete.

After one hundred and eighteen days had elapsed, abstracts of the title to some of the lots were delivered to the purchaser, and the abstract of the remaining lot was delivered a fortnight later, but was returned on the same day on which they were delivered.

On a bill to enforce specific performance of the contract Held that as the vendor had failed to deliver the abstracts within a reasonable time after the day named, he could not enforce the contract against the purchaser, and that the bill must be dismissed with costs.

[July 25, 1872.—27 L.T. N.S. 469.]