during the reference, and on payment of what might appear due, and costs, further proceedings to be stayed, defendant to have leave to dispute any retainer charged in the bills.

There were eight bills—No. 8 was delivered in January, 1854, when defendant paid £100, leaving a balance of £35 1s. 4d. The other bills were delivered in January, 1859. No objection was made to the bills till January, 1860, when defendant paid £25, saying that was enough. Defendant swore then that plaintiff claimed only £5 additional; this plaintiff however denied, but admitted the receipt of £25. Plaintiff asserted that as to the balance defendant promised to make all right.

Plaintiff had written on 4th August, 1859, requesting a settlement. To this letter there was no answer. He wrote on 9th July, 1861, demanding payment or threatening suit. The suit was brought in August, 1861.

The pleas were,—never indebted—payment—and set off.

The following cases were referred to during the argument:—*Cook* v. *Gillard*, 1 E. & B., 26; *The Queen* v *Eastwood*, 6 Ib., 285; *Read et al.* v. *Cotton*, 6 U. C. J. L., 114; *Robinson* v. *Powell*, 5 M. & W., 479.

DRAPER, C. J.—Considering the lapse of time that the last bills were delivered in January, 1859, that there were several applications to pay; that a payment was made in January, 1860; that an action was commenced in August, 1861, and no application to refer made until this month, I think in accordance with the decision of Hagarty J., in *Read et al.* v. *Cotton*, 6 U. C. L. J., 114, this summons must be discharged.

Summons discharged.

WORTHINGTON v. THOMAS PEDEN AND JOHN PEDEN.

Attachment of debts—Money accruing due on Mortgage—Assignment of Mortgage between order to attach and order to pay—Effect thereof.

On 30th July, 1859, garnishee executed a mortgage to secure the payment of £200 to the judgment debtor, by six equal annual instalments of £33 6s 8d each. About a month after the date of the mortgage, garnishee paid to the judment debtor £50 on account of the mortgage. An order was obtained at the instance of plaintiff, before the first instalment fell due, attaching all debts due or accruing due from the garnishee to the judgment debtor, and this on 29th June, 1860, was followed by an order that the garnishee should pay to plaintiff £34 11s 8d. in the following manner:—£16 13s 4d. on 30th July, 1861, and £17 18s. 4d on 30th July, 1862. An application was afterwards made to set aside these orders upon a suggestion that the mortgage had been assigned; but it appearing that the assignment, if any, was made after the attaching order had been served, the application failed.

(Nov. 16, 1861.)

On 29th June, 1860, Logie, County Court Judge, made an order, founded upon an order of McLean, J., made in this cause, that the garnishee should pay to plaintiff £34 11s. 8d., in the following manner:—£16 13s. 4d. on the 30th July, 1861, and £17 18s. 4d. on 30th July, 1862, and in default of payment execution was to issue against garnishee.

The only affidavit referred to in this order was one made by garnishee, who swore that on 30th July, 1859, he executed a mortgage to secure the payment of £200 to the defendant, by six equal annual instalments. That about a month after the date of the mortgage he paid him £50 on account. That the balance remained unpaid, which, as it fell due he was willing to pay to the person lawfully entitled. If £50 were paid nothing would be due until 30th July, 1861, and then only £16 13s. 4d., which was precisely what the judge ordered.

On the 29th October, 1861 Draper, C. J., granted a summons to shew cause why the attaching order, of McLean, J., and the order of the County Court Judge should not be rescinded and the writ of execution against the garnishee's goods set aside, on the ground that the debt had been assigned before the same became due from the garnishee to the defendant on the mortgage, or to the plaintiff by the order, and because the defendant was not served with a copy of the attaching order and summons to appear before the County Court Judge, and because the order was not served on the garnishee until the 12th October, 1861, and therefore must be treated as abandoned or void, not having been drawn up or served within proper time, according the practice, or why the order should not be varied under the circumstances appearing.

Two affidavits were filed, on which this summons was granted; they shewed that the garnishee appeared before the County Court Judge, filing the affidavit already stated. That neither the garnishee nor his attorney then knew, as they have since learned, that the defendant had not been served with the attaching order and summons, and that no person appeared before the County Court Judge on behalf of the defendant.

The garnishee further swore that he had since been notified, (not stating when), and led to believe that the defendant duly assigned the mortgage to one Edward Carter, before the second instalment became due, and that Carter had not any notice of the garnishee summons or order that part of the second instalment was due at the time he made his affidavit, and he apprehended the assignee would take proceedings against him for it; that the plaintiff had issued a writ of execution against his goods, and the sheriff had seized them.

In reply, affidavits were filed suggesting that the assignment was fraudulent, and that the judgment debtor had the control of the mortgage, and that the assignment had never been registered.

DRAPER, C. J.—The debt was properly attached, for all that appears, inasmuch as the attaching order was taken out and served before the first instalment became due.

The garnishee had no ground for disputing it, beyond the payment of the £50 which as was conceded to him, satisfied the first instalment and part of the second.

If the debt was properly attached it was bound in the garnishee's hands, though he was not bound to pay it over to the judgment creditor until served with the order to pay, but he could not pay it to any one else, neither to the defendant, the original mortgagee, nor to any assignee, after the attaching order.

The judgment debtor, the defendant, is, according to the garnishee's last affidavit, residing in Hamilton. If he never was served with the attaching order his affidavit of that fact might have been procured. In the absence of proof to the contrary, I think the presumption is, that as he or his attorney was served. No such objection was raised against the order to pay over.

Then there is no direct proof that the mortgage has been in fact assigned, though if assigned after the attaching order was made and served on the garnishee, the assignment would not avail.

I see no ground to interfere with either the attaching order or the order to pay, least of all with the former, which, according to *Kersch* v. *Coates*, 18 C. B. 757, must be sustained.

Summons discharged with costs.

CHANCERY.

(*Reported by* ALEXANDER GRANT, ESQ., *Barrister-at-Law*)

ATTORNEY-GENERAL v. HILL.

Crown patent—Mistake

Where the provincial government had appropriated and patented as a glebe, a lot which had been previously occupied and improved, and upon which the patent fee had been paid by the occupier, and not returned by the government, the patent was set aside as having issued in error and mistake, but under the circumstances, without costs.

The facts are set forth in the judgment.

Mr. Mowatt, Q. C. and *Mr. Blake*, for relator.

Mr. G. D. Boulton, for defendant.

ESTEN, V. C.—This is an information by the Attorney-General, at the relation of Mr. McKellar, for the purpose of annulling a patent, as issued in error and mistake, by which lot No. 19, in the 9th concession of Vaugham, was appropriated as a glebe, parcel of the rectory, of which the defendant Hill is the incumbent. The other defendants are the Lord Bishop of Toronto as the ordinary, and the Church Diocesan Society as the patrons of the living. The error and mistake under which it is alleged that this patent issued, was, that the government at the time of issuing it, thought the lot in question was vacant, whereas it had been and was then occupied and improved. The report of the case of *Martin* v. *Kennedy*, decided in this court, was agreed to be admiited in evidence of the points there "decided, ruled and set out," and certain evidence taken before a committee of the House of Assembly, on the petition of Martin McKinnon, the occupant of the lot, was also agreed to be received; to which were added some affidavits, filed in support of the present motion, and the answer of the defendants, which, this being a motion for a decree, is of course to be treated as an affidavit. From these data it is abun-