

Com. Law Cham.]

DIAMOND V. GRAY—LOWE V. MORRICE.

[Com. Law Cham.]

the defendant stated that in order to establish a set off which he had pleaded it would be necessary to unravel accounts of eighteen years' standing: that he had sixty witnesses to examine, all of whom resided in the county to which he sought to remove the case, and that the additional expenses of trying it where the venue was laid would be more than £2,000, which he was wholly unable to bear. Tindal, J., here says, "The plaintiff's right in a transitory action to lay the venue where he pleases is undoubted; and before we deprive him of it we must be clearly satisfied that justice cannot be done between the parties unless we do so." From *Johnson v. Berrisford*, 2 C. & M. 222, it would seem to be necessary to shew that the defendant has a defence: and from *Helliwell v. Hobson*, 3 C. B. N. S. 761, it would seem, unless the case is imperfectly reported, that the defendant applying to change the venue upon ground of convenience must shew that the convenience greatly preponderates in his favor, and that for that purpose he should give some evidence of the number of the plaintiff's witnesses so as to shew that the probable expense to him, for in that case the rule was refused, although the defendant swore the additional expense of his own witnesses, if the trial should take place in the county where the venue was laid, would be £80 more than in the county to which he wished to change it, although there were no affidavits by plaintiff showing the number of his witnesses. Crowder, J., says, "The plaintiff had a right to lay his venue when he chose, and it is not shewn what witnesses he may have. I therefore do not think the defendants have made out any case to entitle them to a rule. It should at least be made to appear that the convenience greatly preponderates in defendants' favor."

A preponderance of convenience greatly in favor of a defendant can scarcely be made to appear unless the cost and convenience to the plaintiff is taken into consideration, and if he abstains from producing any affidavit how can it be said to be made to appear? It would seem therefore that in order to institute some comparison it is incumbent upon a defendant to suggest at least what number of witnesses the plaintiff is likely to have to call, and where they reside; and this is done in some of the cases reported, while in others there is an avowal that the general cost of trial at the one place would be much greater than at the other.

In the case before me, there is an affidavit filed both on behalf of the defendant and the plaintiff, and forming what opinion I can upon them, the balance of convenience appears to me to preponderate in favor of letting the venue remain where it is, which appears more convenient, taking into consideration the convenience of all parties. The summons will therefore be discharged, costs to be plaintiff's costs in the cause.

Order accordingly.

LOWE V. MORRICE.

Costs—Consent to verdict—Rule silent as to costs.

Verdict for defendant—Rule for new trial unless defendant should consent to verdict for plaintiff for nominal damages, no reference being made as to costs. The defendant consented, and plaintiff asked for the costs of the rule. Held that plaintiff was entitled to the costs of the application for new trial and the rule granted thereon.

[Chambers March 9th 1869.]

This was an action on a bond, three breaches being assigned. The plaintiff recovered on the first breach, defendant on the second and third. The plaintiff moved in term for a new trial because of misdirection as to the second and third breaches. The court said the rule would be made absolute, unless the defendant, who had in fact paid the claims under these two last breaches, but who was not in strict law entitled to get the benefit of the payment by plea, should consent to a verdict being entered on these breaches for the plaintiff with nominal damages. The defendant consented to this and the rule was drawn up accordingly.

The Master declined to allow to the plaintiff the costs of the application in term and the rule finally granted thereon.

Against this decision of the Master the plaintiff appealed, and a summons was taken out to revise the taxation by allowing to the plaintiff the plaintiff's costs of moving the rule nisi for a new trial, and of the argument thereof, and of the rule absolute granted to enter a verdict for the plaintiff in this cause, as in said rule absolute mentioned, or such of the costs of said proceedings as the presiding judge should think fit.

Harrison, Q. C. shewed cause, citing *Marshall* on costs 153; *Wilson v. L. & Y. R. W. Co.*, 9 B. N. S. 647; *Patterson v. Corporation of Grey*, 18 U. C. Q. B. 189.

Jno. B. Read contra, cited *Robertson v. Liddell*, 110 East 416; *Jackson v. Hallam* 2 B. & Al. 317; *Delisser v. Towne* 1 Q. B. 333; *Stewart v. Mathieson*, 10 U. C. L. J. 245.

ADAM WILSON, J.—I entertained on the argument, before the cases were cited, a strong opinion against the application. The authorities referred to for the plaintiff show that in such a case the consent given in term that the verdict should be entered for the plaintiff should be considered as having been given at the trial, and the plaintiff having succeeded should get the costs of the rule.

Perhaps the better way of putting it is, that the consent of term has put an end to the cause; the result is that the defendant has failed; the plaintiff has succeeded in the cause and therefore gets the costs of the cause, and the costs of the application in term are part of the costs of the cause, for by and through such proceedings the cause has been successfully terminated for the plaintiff.

This is a matter of practice which when once settled should be followed, and it is I think settled by the decision before mentioned. It is not an unreasonable view to take as between the parties, for the defendant has confessed himself entirely as the wrong. Such is not the conclusion at which I should have arrived without the precedents already mentioned.

The order will therefore be granted for a revision but without costs.

Order accordingly