The affidavits in answer stated that the Chancery suit and Butler's suit in the County Court were at an end The plaintiff's attorney denied "fraudulent concealment," and stated his belief that the object of obtaining the order to amend was not to defeat the other claims, but to cure an irregularity in his own judgment.

He also denied giving any instructions to the attorney who appeared for the defend · and said the defendant's attorney had assured him he made no such representation. He swore that an affidavit and exhibits attached thereto were produced on moving for and obtaining the summons: that all the proceedings in the suit were intended to be against the defendant as executrix: that the irregularities amended occurred through the mistake of a clerk, and were not discovered until a few days before the date of the order to amend.

The agent for the plaintiff's attorney, who obtained the summons and order to amend, denied "fraudulent concealment" on his part.

The plaintiff swore to the justice of the claim · which he had recovered judgment, denying any fraudulent intent or collusion between him and the defendant. He swore positively that the defendant was indebted to him as executrix, and that the action was commenced to recover that debt, and not for the purpose of defeating the rights or claims of the other creditors of the testator. He denied fraudulent concealment on his part.

Spencer shewed cause, and cited *Balfour* v. *Ellison*, 3 U. C. P. R. 30; *Farr* v. *Arderley*, 1 U. C. R. 337; *Jones* v. *Jones*, 1 D & R. 558; *Perrin* v. *Bowes*, 5 U. C. L. J. 138; *Ferguson* v. *Baird*, 10 U. C. C. P. 193; *Leigh* v. *Baker*, 3 Jur. N. S. 668.

S. Richards, *Q C*, in support of the rule cited *Purdie* v. *Watson*, 8 U. C. P. R. 23; *McGee* v. *Baird*, Ib. 9.

DRAPER, C. J., delivered the judgment of the court.

This rule is obtained by Peter Clark, Hugh Clark, James Beacheil and Thomas Bacon, represented to be judgment creditors of the defendant as executrix of her deceased husband Nathan Nicholls.

Neither of them shew or profess to have any interest in this cause, nor yet in the order and proceedings founded thereon, against which they move, except so far as they make the judgment against the defendant in her representative character regular, and so support the execution founded thereon. The plaintiff had obtained priority in judgment and execution, but discovering a mistake in the manner in which the judgment was entered, he applied for and got an order to amend, making it right in form as against the executrix, and consistent with the statement in the declaration. If the amendment is valid, and is sustained, the plaintiff retains his priority, and his judgment will be first satisfied. The defendants assume that but for the amendment their judgments, though entered at a later date than the plaintiff's, would be entitled to prior satisfaction out of the testator's estate.

It is objected that as strangers to this cause they have no right to be heard to object to the order and what followed upon it.

The first and second objections taken in the rule are that the amendments prejudice the rights of the creditors who have recovered judgments in the County Court, as well as those of the plaintiff in the Chancery suit. But these creditors have no right to be heard to prevent, and if not to prevent certainly not to annul, amendments in a suit between other parties, on the ground that without such amendments the plaintiff therein will fail in his suit against a debtor who owes all of them on different accounts. They can have no vested interest in mistakes or imperfections existing in his suit against their common debtor, though such mistakes or imperfections, being unremedied, will be fatal to his recovery.

If fraud or collusion between the plaintiff and defendant were alleged, as where the plaintiff was thereby enabled to obtain judgment for an unfounded demand, or other creditors are misled or delayed, the plaintiff taking some advantage thereby, or other creditors are influenced and induced to take or withhold particular proceedings, or to change their position unfavourably to the recovery of their just debts, there might be found a mode to prevent the success of such frauds, though perhaps not in this form. I refer to *Harrod* v. *Benton* (8 B. & C. 217) and *Martin* v. *Martin* (3 B. & Ad. 934).

But the only ground suggested (and that more in the affidavit than in the rule) beyond the necessity of the amendment for the plaintiff's interest, and the procuring the order to make it, is an alleged fraudulent concealment of the existence of the Chancery suit and the County Court suits. We do not find it asserted in the affidavits on which the rule *nisi* was granted that the plaintiff was aware of these different suits; but if he was, how did it become his duty to make their existence known, and if not his duty where is the fraud in withholding the information? The affidavits filed on shewing cause deny any fraudulent concealment, at least as explicitly as it is asserted on the other side, and as to the Chancery suit, they show it is settled. On any ground of fraud or collusion we think the case wholly fails, and that the applicants are prejudiced because the plaintiff's judgment and execution, as amended, is entitled to priority over theirs—the judgment being, as is sworn, for a *bonâ fide* debt—is no reason for our interference.

In *Purdie* v. *Watson* (3 P. R. 23), the Court of Common Pleas made a very similar amendment.

The other objections apply only to irregularities or informalities in the plaintiff's suit, such as a mere stranger to the cause has no right to interfere with.

We think the rule must be discharged.

We refer to *Perrin* v. *Bowes*, 5 U. C. L. J. 138; *Balfour* v. *Ellison*, 3 U.C. P. R. 30; *Farr* v. *Arderley*, 1 U. C.R. 337; *Jones* v. *Jones*, 1 D. & R. 558; *Ferguson* v. *Baird*, 10 U.C. C. P. 493.

KELLY v. HENDERSON.

Verdict subject to reference—Second verdict taken—Irregularity.

Where a verdict had been taken in 1860, subject to a reference, which was never proceeded with, and a second verdict was taken in 1863, *Held*, that the second verdict was irregular, while the first remained, and must be set aside with costs. [Q. B., T. T., 1863.]

In Easter Term, *Robert A. Harrison* obtained a rule *nisi* to set aside the verdict rendered for the plaintiff at the last assizes for the county of Hastings, for irregularity, with costs, on the following grounds:—1st. That in the year 1860, a verdict was taken subject to a reference, which verdict was in no manner disposed of at the time of the second trial in 1863. 2nd. That no proceeding was had in this cause for more than four terms next preceding the entry of the record in this cause in the year 1862, except a proceeding which was void, and no term's notice of intention to proceed was given before the entry of the said record. 3rd. That no notice of trial was ever given by the plaintiff or his attorney, or by any person on his behalf, to the defendant, or to any person on his behalf, for the last spring assizes for the county of Hastings, at which assizes the last mentioned verdict was rendered; or for a new trial, on grounds disclosed in affidavits and papers filed.

S. Richards, Q. C., shewed cause.

The affidavits on which this rule was granted established clearly that a verdict was rendered in this cause subject to a reference: that although the time for making the award was repeatedly enlarged by the arbitrator, and again extended by the written consent of the defendant, no award had ever been made. It did not even appear that the plaintiff obtained an appointment from the arbitrator to enter into the case. But the verdict still remained.

The affidavits filed for the plaintiff did not deny the foregoing facts; they only offered explanations for the delay, which to a great extent they attributed to defendant's repeated promises to settle, and they set forth that though no notice of trial was served personally on defendant or any one else for him, for the last spring assizes, this arose from no one being in defendant's office, and therefore the notice of trial was put under the door. But they made no allusion whatever to the assertion on the other side, that the verdict taken in this cause in 1860 had never been set aside.

DRAPER, C. J.—The authorities are conclusive on the question. Under the circumstances stated the second verdict is irregular while the first remains, unless the irregularity has been waived by both parties, which is not shewn here. *Hall* v. *Rouse* (6 Dowl. 656), *Evans* v. *Davies* (3 Dowl. 786), *Harrison* v. *Greenwood* (3 D. & L. 353), all sustain the defendant's contention.

Per Cur.—Rule absolute, with costs.