to I intend to substitute another,'" I should say that his lordship has not held that an attempted reservation of right to substitute another bill for the one delivered would not be a ground for creating an exception. I cannot help thinking that *In re Chambers* in itself created a dangerous precedent It is, however, distinguishable from the case before me in the particulars that I have pointed out It is no matter of doubtful policy that a solicitor should be held to the bill that he has once delivered, unless he gets the leave of the Court to alter it. There can be no better authority than Lord Langdale upon questions of this nature; and in *Re Pender* he has explained the policy of the law, and the reason for it, very clearly I think that solicitors should not be allowed by any device or in any shape or way, to contravene the policy of the law. I shall of course be understood as not imputing any intentional impropriety to the solicitors in this case. I have reason to believe that they meant no wrong.

The order made by the learned Referee Chambers does not conclude the solicitors. It is made without prejudice to any application they may make for leave to deliver substituted bills of costs; the learned Referee only held that they could not as a matter of right, of their own notice without leave, substitute other bills for those delivered, and in that I think, for the reasons I have given, that he is right. As to the costs of this application, each party succeeds as to one point, I think there should be no costs.

DIVISION COURTS.

In the Third Division Court in the County of Elgin.

Oakes v. Morgan.

Nonsuit after payment of money into Court—Div. Ct. Rule 130—Impounding money for defendant's costs.

[St. Thomas, Aug. 19, 1873.—*Hughes, Co. J.*]

This was an action to recover an account claimed for work and labour. At the trial the plaintiff proved a special executory contract to serve defendant for a fixed period not performed on his part, but sought to recover as upon a *quantum valebat* for the time he had worked as plaintiff's hired servant. The defendant paid a specific sum into Court, less than plaintiff's claim. The plaintiff was, on his own evidence, nonsuited at the trial because he proved he had failed to perform his contract.

After the sitting, *E. Horton* (who acted as counsel at the trial) applied for an order to set aside the nonsuit, and for a new trial on the following grounds:—

1st That the payment by the defendant into Court was an admission that defendant was indebted to the plaintiff in at least that sum.

2nd. That the ordering a nonsuit when money had been paid into Court was unjust and unprecedented.

3rd. That the plaintiff was and is entitled under the circumstances to the amount paid into Court, and acknowledged to be due from defendant to him.

W. J. White, attorney for defendant, shewed cause, and cited the several authorities hereinafter referred to, contending that the nonsuit was right, and that the money paid into Court could not be taken out by the plaintiff, as the practice of a court of record permits, because the 130th General Rule of 1869 provides against that practice; that it is in fact to be retained by the clerk until the final result of the cause; that it may be impounded to abide the order of the judge who may order it to be applied in discharge of defendant's costs.

No one appeared to support the application.

Hughes, Co. J., delivered the following judgment:

The payment into Court was an admission that the defendant owed the plaintiff $8 and no more. The plaintiff proceeded with his claim for, and undertook to prove his right to recover more, in fact the whole of his demand, and would not accept the $8 in full; he, however, proved at the trial, he was not entitled to any sum whatever.

After payment of money into Court there may be a nonsuit in a court of record, and that this is sustained by precedent, there is abundance of authorities, if authorities are required. *Gutteridge* v *Smith* was the leading case on the subject, 2 H Bl 374; 2 Esp. 482. n. It was formerly held that after tender, plaintiff could not be nonsuited, but it is now settled that plaintiff may be nonsuited after a plea of tender: *Anderson* v. *Shaw*, 3 Bing 290 The 69th section of the Division Courts Act applies the principles of practice of the Superior Courts to the Division Courts in cases not otherwise provided for. The 130th Division Court Rule of 1869, makes the practice different with regard to plaintiff's right to take the money out of a Division Court, from that which is the practice in the Courts of Record. The rule provides that it is *not* to be paid out to the plaintiff until the final determination of the suit unless the judge shall otherwise order; the object of that rule is quite obvious; so that the grounds stated for setting aside the nonsuit herein are untenable. Besides this, I do not see how I could be expected to grant a new trial, when upon the plaintiff's own shewing the merits of the case are entirely against his right to recover any sum whatever, the application ought rather to have been for me to grant an order for the clerk to pay over (after deducting defendant's costs) the balance of the amount paid into Court, to the plaintiff.

The authority shewn by Mr. White, 2 Chit. Arch. Pr. (9 ed.) 1283, lays it down that the Court or a Judge, may, if the plaintiff fails in his action, and the money has not been taken out of Court by him, impound it to answer the defendant's costs.

I shall, therefore, order the application for a new trial to be discharged and the money paid into Court to be impounded to pay the defendant's costs; and after those costs are satisfied the balance to be paid to the plaintiff.