

C. L. Cham.] METCALF V. DAVIS.—WORDEN V. DATE, &C.—MARSH V. SWEENEY. [N. B. Rep.

Monkman, in reply: The Act contemplated the cause being at issue with the particular defendant sought to be examined. The plaintiff could not say that he had a good cause of action against Campbell on the merits, for the action as regarded him was ended. Unless the plaintiff could make such an affidavit he could not obtain the order to examine.

MR. DALTON—I think the summons should be discharged. The point fixed by the Legislature after which the order may be obtained is merely a matter of procedure, and is meant to prevent the plaintiff from "fishing" in order to frame his next pleading. I do not think the Act intends to restrict the plaintiff to the examination of a party who actively defends the suit. It does not expressly provide, nor even intimate, that the cause should be at issue with the defendant sought to be examined. If the defendant's contention were well founded a defendant might collude with a co-defendant and allow judgment to go against him by default, thus evading discovery, while at the same time he might be the only person in possession of the facts of the case. As the case is a new one the costs will be costs in the cause to the plaintiff.

Summons discharged.

METCALFE V. DAVIS ET AL.

Writ for service within jurisdiction.—Amendment.

[December 23, 1875.—Mr. Dalton.]

A writ for service within the jurisdiction was served on two of the defendants at a place out of the jurisdiction. An application was made to set aside the service on the ground of this irregularity.

Brough showed cause.

Osler contra.

MR. DALTON refused to make the order asked for, as the plaintiff had not been in fault, the domicile of the defendants being within the jurisdiction; but he gave leave to issue, *nunc pro tunc*, a concurrent writ for service out of the jurisdiction, amendment of the copies served to be made in accordance therewith. Costs to be costs in the cause.

WORDEN V. DATE PATENT STEEL CO.

Common Counts.—Amendment of particulars.

[December 28, 1875.—Mr. Dalton.]

In this case plaintiff delivered particulars under the common counts, the last two items

of which were for salary from March 1875 to March 1876, and from March 1876 to March 1877 respectively. A summons was taken out to amend the particulars, the ground taken being that under the common counts a claim could not be made for wages not yet due.

J. B. Read showed cause.

Mr. Scott, Robinson and O'Brien contra.

MR DALTON held that the particulars were incorrect and that the defendants were entitled to have them amended. An order was therefore made to amend the particulars by striking out the last two items and inserting in their place a claim for salary from March 1875 to the time when this suit commenced. Costs to be costs in the cause.

NEW BRUNSWICK.

SUPREME COURT.

MARSH, ASSIGNEE OF MCGUINNESS, AN INSOLVENT V. SWEENEY ET AL.

Insolvent Act of 1869—Fraudulent preference—Transfer of property by debtor unable to meet his engagements to creditor in payment—Assignee.

A transfer of goods by a party afterwards becoming insolvent to a creditor in payment of his claim is a fraudulent preference and void, if the necessary result of the transfer is to cause the debtor to close up his business and prevent him from paying his other creditors; and the words of the Insolvent Act, "in contemplation of insolvency," do not necessarily mean contemplation of an assignment under the Act. When an official assignee becomes the assignee of the creditors in case there should be any defect in election, he may rely on his position of assignee by operation of law.

[2 PUGSLEY REP. 454,—Feb. 1875.]

McGuinness, being a trader and indebted to various persons, made an assignment under the Insolvent Act of 1869 to John L. Marsh, Esq., Official Assignee for York County, on the 23rd of May, 1873. On the 24th of February preceding, the defendants' clerk called upon him at his place of business and required either immediate payment of his indebtedness to the defendants, or a return of the goods—a quantity of boots and shoes which he had purchased of the defendants on credit. McGuinness then informed the clerk that he could not pay defendants, and that if they took the goods he would have to close his business. The defendants' clerk took the goods, consisting of all the boots and shoes in his store, and a few days after McGuinness was obliged to close his business. Beside the goods taken by the defendants,