

C. L. Cham.]

LEEMING V. MARSHALL—COCKBURN V. RATHBUN ET AL.

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grant unqualified relief? No matter through what forms that court would act, that is a matter of the practice of the court merely, if in the result it would give unconditional relief, and a court of law has in the particular case equal means of testing the truth, then the matter affords a defence at law.

I refer particularly to *Wood v. Dwaris*, 11 Ex. 493, and I cite a portion of the marginal note to that case:—"Where a plaintiff sues on a written contract, and the defendant pleads as a defence matters which he is in Equity precluded from setting up, by a term of the contract not stated in the written instrument, a court of law may, under the C. L. P. Act, give equitable relief without the instrument being first reformed." And I particularly cite *Collett v. Morrison*, 9 Hare 162, where a term of the agreement was left out of a life policy, and Vice-Chancellor Turner decided the case upon the footing of the agreement, and not of the policy, without putting the parties to reform the policy.

Now, what is the case here? The conveyance was made some years ago; the plaintiffs have had full possession of, and title to, all they bargained for; the consideration has been paid; the plaintiffs have nothing they can justly seek from the defendant. What remains is that the defendant should be relieved from a claim now unjustly made, arising from a mistake in drawing the deed.

That, I think, a court of law can grant, and therefore I think this plea good.

LEEMING V. MARSHALL.

Affidavit—Interlineation.

An interlineation in an affidavit, not noted by the commission, does not necessarily avoid it.

[Chambers, November 1, 1870.—*Mr. Dalton.*]

J. B. Read applied to set aside the copy of declaration served, and all subsequent proceedings, for irregularity, with costs, on the ground that at the time of service no declaration had been filed in the office from whence the writ was issued.

One of the affidavits on which the summons was obtained, put in to show that no declaration had been filed, had these words interlined without being noted by the commission: "At which office the writ in this cause was issued."

McDonald showed cause and objected to the above affidavit on the ground, that the interlineation was material, and was not initiated by the Commissioner, as required by the practice: *In re Fagan*, 5 C. B. 436.

J. B. Read, contra.

MR. DALTON.—The order must be made as asked, to set aside copy of declaration served, with costs.

The practice referred to in *In re Fagan*, 5 C. B., has not prevailed in this country: *Lyster v. Boulton*, 5 U. C. Q. B. 632.

Order accordingly.

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Declaration before appearance.

An attorney who should have entered an appearance for defendants on 22nd did not do so until 25th. On the 24th the plaintiff filed and served declaration. The defendants, by the same attorney, then applied to set aside the copy and serve of declaration on the ground that at the time of declaring no appearance had been entered, but

Held that as the attorney had authority to act as such the service could not be set aside.

[Chambers, Nov. 1, 1870, *Mr. Dalton.*]

The summons in this case was to set aside the service of the declaration, or the copy and the service, or one or both, and the notice to plead served on the agents of the defendant's attorney, or as attorney for defendant, Hugo B. Rathbun, with costs, as irregular, on the ground that no appearance was entered on behalf of the defendants, the said attorney, at the time of such service, and also on the ground that neither the writ of summons, or judges order, nor affidavit pursuant to the 56th sec. of the C. L. P. Act was filed, with a copy of the said declaration filed, and on the ground that the plaintiff had no authority to serve the said attorney or his agents as attorney for the defendants, and on further grounds disclosed in affidavits and papers filed.

The only affidavit filed was the affidavit of the defendant's attorney himself, sworn on the 26th October, wherein he stated that he was the attorney of the defendants in the cause; that on the 13th October, the summons was personally served on the defendant Edward Rathbun, by the Sheriff of Hastings, and that he the attorney on that same day, accepted service of the summons for the defendant Hugo, the writ not being specially endorsed; that on the 24th of October the declaration and notice to plead were served on deponent's Toronto agents, as he was advised by letter, enclosing the declaration, received by him on the 25th; that no appearance was entered for either of the two defendants until the 25th of October, when deponent caused an appearance to be entered for both defendants; that when the said declaration was served on the agents (the 24th) there was no appearance entered for the defendants, or either of them, by deponent, as their attorney.

Osler shewed cause.

Lauder, contra.

MR. DALTON.—As to the bearing of these facts upon the present application, it is to be observed that the declaration itself and the filing of it are not attacked by the summons; it is the copy and service that are sought to be set aside. The summons assumes, therefore, the declaration itself and the filing to be regular. Whether they are so or not, I have not to enquire.

Is the service, then, on *Mr. Holden* good as to both defendants?

The appearance was due by both defendants on the 22nd of October. *Mr. Holden*, it is evident, was then attorney in fact for both defendants—in truth, there is no objection that he was not such attorney—but the objection is that he had not entered an appearance when the declaration was filed and served. As respects the defendant Hugo, for whom he accepted service on