

ONTARIO REPORTS.

QUEEN'S BENCH.

(Reported by C. ROBINSON, Esq., Q. C., Reporter to the Court.)

IN RE BURROWES.

Division Court—Prohibition—Estoppel—Entitling of affidavits—Adjournment by Division Court Judge of hearing of cause to Chambers—Reading of written judgment by Clerk—Examination of parties under oath.

In an application for a prohibition against the Judge of a Division Court, for an alleged acting without jurisdiction in a cause before him in that Court, the affidavits upon which the rule *nisi* was granted were entitled, "In the matter of a certain cause in the First Division Court of the Counties of L. & A., in which E. A. M. is plaintiff, and B. D. is defendant." Held, following *Hargreaves v. Hayes*, 5 E. & B. 272, that the entitling of the affidavits in this way was unobjectionable.

A Judge of the Division Court may, under the 86th section of the Division Court Act, adjourn the hearing of a cause from a regular sitting of the Court to his Chambers within the territorial limits of the division, and such adjournment of the hearing of the cause is in effect, if not objected to by the parties, an adjournment of the Court to hear that cause.

Where a Judge of the Division Court, at the close of the hearing of a cause before him, announced that he would take time to consider, and deliver judgment at his Chambers on a subsequent day, without naming an hour, and before that day sent a written judgment to the Clerk of the Court, who read it in his office to the agents of both parties on that day:

Held, a sufficient delivery of a written judgment within section 106 of the Division Court Act.

A Judge of the Division Court may, under section 102 of the Division Court Act, examine under oath plaintiff or defendant in any cause before him in that Court, although the demand exceed eight dollars.

Held, also, that an applicant for a prohibition against a Judge of the Division Court for excess of jurisdiction, who has appeared at the trial, cross-examined witnesses, argued the case before the Judge, and taken no exception, at the time, to the jurisdiction, is precluded by his own act from objecting to the jurisdiction after judgment entered and execution issued in the Court below.

Diamond obtained a rule *nisi* calling on J. J. Burrowes, Esq., Judge of the County Court of the County of Lennox and Addington, and Ezra A. Mallory, plaintiff in a certain cause in the First Division Court of the said County against Barnabas Diamond, to shew cause why a writ of prohibition should not issue directed to the said Judge and the said Ezra A. Mallory, prohibiting any further steps being taken for the enforcement of the judgment pronounced in the same cause, or the execution issued thereon, on the following grounds.

1. That the Judge exceeded his jurisdiction in hearing and determining the said cause, by adjourning the same from open Court to his Chambers to a subsequent day, and, before that day arrived, making a further adjournment to another day, on which latter day he heard evidence in the cause at his Chambers, which he had no power to do.

2. That the Judge exceeded his jurisdiction in pronouncing and delivering his judgment out of open Court, at the Clerk's office, without having first in open Court fixed a day and hour for pronouncing and delivering such judgment.

3. That the said Judge called plaintiff as a witness in his own behalf in said cause, wherein the claim or demand exceeded eight dollars.

4. That the written judgment so delivered did not fix any day on which defendant was ordered to pay the amount thereof, and was otherwise irregular, illegal and incapable of being enforced.

5. That said judgment was never duly pronounced and delivered, and the said Judge was *functus officio* when he did pronounce and deliver the same.

6. And on grounds disclosed in affidavits and papers filed.

The facts appearing from the affidavits filed were to the following effect: A summons was issued in the suit on 22nd February last, out of the First Division Court of the County of Lennox and Addington, in favor of Ezra A. Mallory against Barnabas Diamond, commanding the latter to appear at the sittings of the said Court, to be holden at the Town Hall, Napanee, on Saturday, the 21st March, 1868. On the return of the summons the defendant appeared and the cause was called on for hearing on that day, when several witnesses were examined on behalf of the plaintiff, and the case, together with the Court, was adjourned to the next Monday, the 23rd of March. On Monday, the 23rd, the defendant attended when other witnesses were examined, and the Judge again adjourned the cause until the Friday following, viz., the 27th March, to be heard at the Judge's Chambers in the Court House, in Napanee, and not in the Town Hall. The object of that adjournment was to obtain the attendance of the said Mallory, whom the County Court Judge wished to examine. Mallory had been subpoenaed to attend the sittings of the Court of Oyer and Terminer at Kingston, and could not be present on the day mentioned, the 27th March, on which the Judge, on or about the 25th March, directed the hearing of the case to be further postponed to the 3rd of April, at his Chambers in the Court House, and notice was given of the time and place to defendant's agent, who informed the defendant thereof.

On Friday, the 3rd of April, Mallory, with his counsel, and Diamond, with his counsel, attended before the Judge at his Chambers, and the Judge called Mallory as a witness, and swore and examined him, and he was cross-examined on behalf of Diamond. After Mallory had been sworn, the Judge asked Diamond if he would be sworn in the cause, but he declined, saying that Mallory had stated the matters of the suit correctly. After Mallory had been sworn, Diamond's counsel argued the case for him, and Mallory's agent argued on the other side. The Judge said he wished to consult the authorities referred to, and proposed that he should give a written judgment on Tuesday, 7th April, to which both agents and parties assented.

The Judge made up his judgment, and enclosed it in a sealed envelope, with the papers, to the Clerk of the Court, in the usual way, before 7th April, and the judgment was exhibited by the Clerk to the parties and their agents on that day. The Judge had endorsed on the summons, before it was sent to the Clerk, "Judgment for the plaintiff for ninety-nine dollars and three cents and costs, to be paid on the 18th day of April, 1868. Tax as many witnesses as are sworn to in affidavit of disbursements."

J. J. BURROWES."

There was also a written judgment, giving the grounds of his decision *in extenso*, a copy of which was filed on this application.

One of the parties who acted as agent for Diamond, stated in his affidavit that on the 23rd of March the Judge expressed his intention to