

C. L. Cham.]

CORRIGAN V. DOYLE.—FOUNTAIN V. MCSWEEN.

[C. L. Cham.]

1. That the writ of summons and affidavit of service were not filed before the declaration, and that the affidavit of service now attached to the writ, is not marked or filed by the clerk, nor is it stamped according to the statute.

2. That no notice to plead is endorsed on the declaration filed, or filed therewith.

3. That the declaration was not served as of the day on which it bears date, and the declaration served is not a copy of the declaration filed.

4. That the issue book does not contain, or is not a copy of the declaration filed or served, and on the grounds disclosed in affidavits, and papers filed, and why in the meantime all proceedings should not be stayed.

W. Sidney Smith, shewed cause.

C. W. Paterson, contra.

HAGARTY, J.—The summons is to set aside the interlocutory judgment, issue book and notice of assessment, &c., on alleged irregularities.

As to the writ of summons, affidavit and other earlier proceedings, I think it is too late to object to them, and the motion is not directed to set aside anything prior to the judgment.

The chief objection to the judgment is that there is no notice to plead endorsed on the declaration filed therewith. Section 56 of C. L. P. Act says, "plaintiff may file a declaration endorsed with a notice to plead in eight days, and in default of a plea, may sign judgment by default at the expiration of the time to plead so endorsed."

If this stood alone, it would almost seem that a defendant is bound to plead merely on the filing of notice. But Rule 132 directs that a copy of declaration shall be served on defendant. Section 91 of the Act says, "the time for pleading shall be eight days, and a notice requiring defendant to plead in eight days, otherwise judgment, may be endorsed on the copy of the declaration served, or be delivered separately." By section 92 a notice requiring the opposite party to plead, &c., within eight days, otherwise judgment, shall be sufficient without any rule or other demand, and such notice may be delivered separately, or be endorsed in any pleading which the other party is required to answer.

Reading those sections and the rule of court together, I am not prepared to hold that the mere omission to endorse a notice to plead on the declaration filed, must necessarily defeat the plaintiff's right to sign judgment after duly serving a copy of the declaration with such notice endorsed.

Perhaps the fair way to read clause 56, by the light of the subsequent clauses and rule, is, that "the plaintiff may file and serve a declaration endorsed with a notice to plead in eight days, and in default of a plea may sign judgment by default at the expiration of the time to plead so endorsed." This would appear the most natural construction so as to give full weight to clause 92, "such notice may be delivered separately or be endorsed on any pleading which the other party is required to answer."

Under section 56, it might be endorsed on the pleading which defendant is required to answer. Under section 92, it may also be delivered separately.

It seems to me the objection fails.

FOUNTAIN V. MCSWEEN.

Appearance—Infant—Prochein amy.

An appearance entered by attorney for an infant defendant (no *prochein amy* having been appointed) is a nullity, not an irregularity. Interlocutory judgment cannot be signed till after *prochein amy* appointed.

[Chambers, March 21, 1868.]

This was an action brought by the plaintiff against an infant defendant, who entered an appearance by attorney and not by *prochein amy*. Declaration was filed and served with notice to plead. No plea being filed, judgment was entered for want of a plea on the 15th of March, 1868.

On the 13th of March, 1868 after declaration served and before judgment entered, a notice was served on the plaintiff's attorney stating that the defendant was an infant and that an application would be made to appoint a *prochein amy*. And on the same day a summons for further time to plead was obtained from the judge of the County Court, which was however discharged upon which judgment was signed and notice of assessment served and accepted for the Walkerton assizes.

On the 16th March 1868 a summons was taken out to set aside the appearance, declaration, the judgment entered in this suit and all subsequent proceedings, with costs, on grounds disclosed in affidavits and papers filed.

It was contended on the part of the plaintiff that the appearance &c., were irregularities and that the grounds ought to have been disclosed in the summons; and that the taking out of the summons for further time to plead and the acceptance of notice of assessment acted as waivers of the notice. That the application was too late on account of the defendants laches, in this, that the application should have been made immediately after discovery that the appearance was irregular.

For the defendant it was argued that the appearance, &c., were nullities and, as such, that the grounds for setting them aside need not be set forth in the summons, and that there is no waiver of a nullity. That it was incumbent on the plaintiff, when the mistake was discovered, to apply to have it set aside.

HAGARTY, J.—It seems to me that the appearance entered for the infant defendant by attorney is a nullity, and if judgment be entered by plaintiff, error in fact will lie. I also think, contrary to my first impression, that defendant can be heard to move to set aside the proceedings, and that he will not be left necessarily to his writ of error. In *Oliver v. Woodroffe* 4 M. & W. 650, a cognovit and appearance entered for defendant were set aside on his motion on grounds of infancy. The plaintiff here could have applied to set aside this appearance with costs as irregular, and, at least after notice of the infancy of plaintiff, still proceed. I think the proceedings may be moved against.

The latest case that I have seen is *Carr v. Cooper*, 1 B. & S. 230, where defendant, an infant, appeared by attorney, and plaintiff after verdict signed judgment, and defendant brought error in fact. The plaintiff applied to amend all the proceedings in error. The Court refused the relief asked, but set aside all the proceedings subsequent to appearance and ordered defendant